

**IN THE SUPREME COURT OF FLORIDA**

**NO. SC02-1106**

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**ASKARI ABDULLAH MUHAMMAD,**

**Petitioner,**

**v.**

**MICHAEL W. MOORE,**  
**Secretary, Florida Department of Corrections,**

**Respondent.**

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**PETITION FOR WRIT OF HABEAS CORPUS**

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## **PRELIMINARY STATEMENT**

This is Askari Abdullah Muhammad's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution, that demonstrate Mr. Muhammad was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings which resulted in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

The record on appeal from Mr. Muhammad's trial is referred to as "R." followed by the appropriate page number.

The supplemental record on appeal from Mr. Muhammad's trial is referred to as "Supp. R." followed by the date of the hearing, the appropriate page number.

Mr. Muhammad's record on appeal from the circuit court's denial of his motion to vacate is referred to as "PCR1." followed by the appropriate page number.

The State's response brief in Mr. Muhammad's appeal of the court's denial of his motion to vacate is referred to as "3.850 Brief" followed by the appropriate page number. This brief is attached. See Attachment A.

The record from the evidentiary hearing is referred to as "PCR2." followed by the appropriate volume number, page number.

All other references will be self-explanatory or otherwise explained herein.

## **INTRODUCTION**

This petition presents significant errors which occurred at Mr. Muhammad's trial and sentencing but that were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, Mr. Muhammad was denied access to the prison law library and assistance of standby counsel.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Muhammad involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Muhammad.

"[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Muhammad's appeal.

Fitzpatrick, 490 So. 2d at 940.

Neglecting to raise such fundamental issues, 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). Had counsel presented these issues, Mr. Muhammad would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). Furthermore, fundamental error occurred that mandates relief. As this petition demonstrates, Mr. Muhammad is entitled to habeas relief.

### **REQUEST FOR ORAL ARGUMENT**

Due to the seriousness of the issues involved, Mr. Muhammad respectfully requests oral argument.

### **PROCEDURAL HISTORY**

Mr. Muhammad was charged with murder in the first degree, by indictment issued on October 24, 1980, in Bradford County, Florida (R. 1-2). This case was initially before The Honorable R.A. Green, Jr. However, prior to trial Judge Green recused himself and was replaced by Judge Wayne M. Carlisle (R. 66, 172). Mr. Muhammad proceeded to trial on May 24, 1982, with Stephen Bernstein as counsel but the court declared a mistrial on May 25, 1982 (R. 375). The next day Judge Carlisle recused himself, and Judge Chester B. Chance was assigned to the case

(R. 373, 386). A second trial before a jury commenced on October 19, 1982 with Mr. Muhammad proceeding pro se; the jury returned a verdict of guilty on October 26, 1982 (R. 1502). On November 4, 1982, the penalty phase of Mr. Muhammad's trial was conducted without a jury (R. 1517, 1525). Mr. Muhammad did not present any additional evidence in mitigation (R. 1542). On January 20, 1983, Judge Chance imposed a sentence of death (R. 1584-85). This Court affirmed both the conviction and sentence. See Muhammad v. State, 494 So. 2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

On February 23, 1989, Mr. Muhammad filed his motion to vacate judgment and sentence with special request for leave to amend and on April 24, 1989, Mr. Muhammad filed his consolidated motion for evidentiary hearing, supplement to, and in support of, motion for Rule 3.850 relief, and proffer in support of motion for evidentiary hearing and motion to vacate together with his appendix (PCR1. 201-1159). The State did not file a response. Nevertheless, on August 31, 1989, the trial court entered an order summarily denying relief on the consolidated motion to vacate judgment and sentence (PCR1. 1378-84). On September 14, 1989, Mr. Muhammad filed his motion for rehearing and on October 12, 1989, the trial court denied that motion (PCR1. 1619).

Mr. Muhammad appealed the circuit court's denial of postconviction relief.

On June 11, 1992, this Court ordered that an evidentiary hearing be held on Mr. Muhammad's claims that the State violated Brady v. Maryland, 373 U.S. 83 (1963). See Muhammad v. State, 603 So. 2d 488, 490 (1992).

An evidentiary hearing was held June 12 and June 13, 2000. On May 8, 2001, Judge Chance, who presided over Mr. Muhammad's trial in 1982, granted, in part, Mr. Muhammad's motion for post-conviction relief, finding "that the interests of justice require that a new sentencing hearing be held" (PCR2. 911).

Mr. Muhammad filed a Notice of Appeal on May 8, 2001, while the State filed a Notice of Appeal on May 18, 2001. On January 23, 2002, the State filed its initial brief/answer brief. Simultaneous with Mr. Muhammad's filing of the instant petition, he files his answer/cross-initial brief.

**JURISDICTION TO ENTERTAIN PETITION  
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the constitutionality of Mr. Muhammad's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So.

2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Muhammad's direct appeal. See Wilson, 474 So. 2d at 1163; 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 Mr. Muhammad 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 v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

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. This 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). The 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 this petition and the claims within, show, habeas corpus relief would be more than proper.

### **GROUND FOR HABEAS CORPUS RELIEF**

By his petition for a writ of habeas corpus, Mr. Muhammad asserts that his

capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

## CLAIM I

**MR. MUHAMMAD’S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE COURT INSTRUCTED MR. REPLOGLE THAT HE WAS NOT TO PROVIDE ASSISTANCE OF COUNSEL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.**

The Supreme Court has acknowledged that “a State may . . . appoint ‘stand-by counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that the termination of the defendant’s self-representation is necessary.” Faretta v. California, 422 U.S. 806, 834 n.46 (citing United States v. Dougherty, 473 F. 2d 1113, 1124-26 (D.C. Cir. 1972)). In the instant case, Mr. Muhammad requested to proceed pro se, contingent upon his receiving the assistance of standby counsel. In hearings before Judge Green and Judge Carlisle, Mr. Muhammad’s request was denied (R. 62, 23). Ultimately, Judge Chance granted Mr. Muhammad’s request and permitted Mr.

Muhammad to represent himself with the aid of standby counsel (R. 104, 389).<sup>1</sup> However, the court subsequently, and outside the record, instructed standby counsel not to communicate with Mr. Muhammad nor assist him in his defense (PCR2. Vol. 6, 159). Such instructions violated Mr. Muhammad's right to counsel, invalidated his waiver of counsel, and restricted his access to the court.

Although Mr. Muhammad believed that he would represent himself at trial with help from standby counsel available, such was not the case. Frederick Replogle, who was appointed as Mr. Muhammad's standby counsel, was not available to answer questions or assist Mr. Muhammad in any way. Mr. Replogle, described his role as "[s]tandby counsel directed to essentially have no contact with the defendant but to be present during the course of trial as standby counsel" (PCR2. Vol. 6, 159).

I was an Assistant Public Defender for the Eighth Judicial Circuit in and for Bradford County in 1982. On July 23, 1982, I was appointed as stand-by counsel for Askari Abdullah Muhammad a/k/a Thomas Knight.

Mr. Muhammad represented himself at his trial which commenced on October 19, 1982. **I did not consult**

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<sup>1</sup> Although Judge Chance initially appointed Mr. Bernstein as standby counsel, at Mr. Bernstein's request, prior to trial the court ordered the Office of the Public Defender to provide standby counsel to Mr. Muhammad (R. 1717). Frederick Replogle, an assistant public defender, acted as Mr. Muhammad's standby counsel during the trial (R. 497).

**with Mr. Muhammad prior to the trial or aid him in his defense in any way. I did not consult with Mr. Muhammad during the trial and remained in the back of the courtroom as an observer. In fact, I never even spoke with Mr. Muhammad.**

I have been asked to act as stand-by counsel in the past for defendants who are representing themselves. Generally, I have counseled with them during breaks in the trial in regard to various issues as they come up during the proceeding. In Mr. Muhammad's case I did not do this because **I had been ordered by Judge Chance not to consult with Mr. Muhammad. I had never heard of any other judge ever issuing such an order. It was clear to me that Mr. Muhammad needed my assistance. My hands, however, were tied.**

Since the judge ordered me not to consult with Mr. Muhammad, I did no preparation or investigation of the case. I was totally unaware of Mr. Muhammad's background and had no more than a general idea of the facts of the offense.

Assistant State Attorney Tom Elwell was very forceful and aggressive in his handling of the case and fully exploited his advantage against Mr. Muhammad as a pro se defendant.

(PCR1. 913-14) (emphasis added).<sup>2</sup>

The court's instructions to Mr. Replogle to not assist or aid Mr.

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<sup>2</sup> Mr. Replogle offered this explanation of his role in an affidavit; subsequently, during the evidentiary hearing, Mr. Replogle adopted the statements within the affidavit (PCR2. Vol. 6, 159).

Muhammad invalidated Mr. Muhammad's waiver of counsel. A waiver of counsel requires that the accused know, and the court ensures that he knows, the full ramifications of such a waiver. See Faretta, 422 U.S. at 836; Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065-67 (11th Cir. 1986); United States v. Fant, 890 F.2d 408, 409-10 (11th Cir. 1989). It is evident, and indisputable, that Mr. Muhammad's statements at four separate hearings demonstrate his belief that he, as a pro se defendant, would have the assistance of standby counsel. To later be deprived of such assistance negates his waiver of counsel.

The trial court ordered standby counsel not to consult with his pro se client. An order of this kind, made outside the record, without the knowledge of the pro se defendant, without notice, and without an opportunity to be heard, particularly considering the defendant's pro se counsel status, failed to accord the most minimal requirements of eighth and fourteenth amendment due process, see Fuentes v. Shevin, 407 U.S. 67 (1972), and, in a matter respecting counsel, those of the sixth and fourteenth amendments. See generally Geders v. U.S., 425 U.S. 80 (1983); McKaskle v. Wiggins, 465 U.S. 168, 174(1984) ("The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defense,' implies a right in the defendant to conduct his own defense, with

assistance at what, after all, is his, not counsel's trial.") (emphasis in original).

While it may not be inherent in the sixth amendment that a pro se defendant has a fundamental right to the assistance of counsel,<sup>3</sup> once the court appointed standby counsel to assist the defendant, a constitutionally protected right was created. Consistent with due process and the sixth amendment, the court could not then interfere with the exercise of that right by the defendant. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980).

This case is not the typical pro se case in which the defendant complains of the participation of counsel against his wishes. Rather, this case is the reverse: Mr. Muhammad was led, by the court, to believe that he was going to have the assistance of counsel he demanded (R. 87-88). However, cases assessing standby counsel's unsolicited participation have held that trial courts should allow standby counsel to participate even when the pro se defendant has not specifically

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<sup>3</sup> Mr. Muhammad does not concede that the constitution neglects to provide a right to standby counsel. In fact, Mr. Muhammad asserts that, as a capital defendant, he had a constitutionally protected right to the assistance of standby counsel. The United States Supreme Court has repeatedly recognized that defendants facing a death sentence have heightened rights due to the finality and severity of a death sentence. See, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Eddings v. Oklahoma, 455 U.S. 104 (1982). Sentencing a pro se defendant to death when he did not have the assistance of standby counsel, violates the Sixth, Eighth, and Fourteenth Amendments. See generally Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

requested such participation. See McKaskle, 465 U.S. at 176.

[N]o absolute bar on standby counsel's unsolicited participation is appropriate or intended. The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. These objectives can be achieved without categorically silencing standby counsel.

See id. at 176-77. Nonetheless, Mr. Muhammad's standby counsel was silenced despite Mr. Muhammad's repeated requests to have the assistance of standby counsel. The restrictions on standby counsel's role violated Mr. Muhammad's constitutional rights. See United States v. Cronin, 466 U.S. 648, 655-56 (1984).

When a pro se defendant demands and is granted the assistance of appointed standby counsel, not only is standby counsel not constitutionally objectionable, but the aid and assistance by standby counsel, to be used as the defendant sees fit, has then become unequivocally protected by the sixth and fourteenth amendments. Cf. McKaskle, 465 U.S. at 168; Faretta, 422 U.S. at 806; Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); Geders, 425 U.S. at 80. The court denied Mr. Muhammad his fundamental right to use his assisting counsel as he saw fit.

Mr. Muhammad's right to the assistance of counsel was denied when the trial court, outside the record, ordered standby counsel not to consult with his

client. See generally Geders, 425 U.S. at 80. Such error is prejudicial per se. See id. at 92; Perry v. Leeke, 109 S. Ct. 594, 599 (1989) (“A showing of prejudice is not an essential component of a violation of the rule announced in Geders.”); Crutchfield v. Wainwright, 803 F. 2d 1103, 1108 (11th Cir. 1986) (“[A]ny deprivation of assistance of counsel constitutes reversible error.”).

Nevertheless, Mr. Muhammad can demonstrate specific prejudice. See infra Claim II. Mr. Muhammad was absent during critical stages of his trial, particularly during his penalty phase. Although he had a right, as a defendant, to be present during these stages, he also had a separate right to be assisted by counsel at these stages. However, because Mr. Muhammad, as his own representative, was not present and Mr. Replogle was instructed not to assist Mr. Muhammad in any way, these instances amounted to improper ex parte communication between the court and the prosecutor. See infra Claim II.

Because the trial court’s instructions to Mr. Replogle were made outside of the record, appellate counsel could not have known the existence of this issue. Nevertheless, when raised in Mr. Muhammad’s postconviction proceedings, the circuit court stated that it was precluded from considering this claim, as it was “never raised on appeal” (PCR1. 1382). Consequently, Mr. Muhammad brings this claim in the instant petition.

## CLAIM II

**MR. MUHAMMAD WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM AND THE COURT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE, RESULTING IN THE DEPRIVATION OF MR. MUHAMMAD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.**

The proceedings against Mr. Muhammad, which resulted in his conviction and death sentence, failed to comport with constitutional guarantees and the procedures and protections within the Florida Rules of Criminal Procedure,<sup>4</sup> because Mr. Muhammad was absent during crucial stages of his trial. A criminal defendant's sixth and fourteenth amendment rights to be present at all critical stages

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<sup>4</sup> Rule 3.18(a), Fla. R. Crim. Pro., specifically mandates that a criminal defendant be present during the following stages of his prosecution: (1) at first appearance; (2) when a plea is made, unless a written plea of not guilty; (3) at any pre-trial conference, unless waived by Defendant in writing; (4) at the beginning of the trial during the examination, challenging, impaneling, and swearing of the jury; (5) at all proceedings before the court when the jury is present; (6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury; (7) at any view by the jury; (8) at the rendition of the verdict; (9) at the pronouncement of judgment and the imposition of sentence. See Fla. R. Crim. Pro. 3.18 (1981).

of the proceedings is a settled question. See, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.”) (citations omitted); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983).

Nonetheless, Mr. Muhammad was not present during every stage of the proceedings against him. The most significant instance of Mr. Muhammad’s absence occurred during his sentencing phase when the Court ordered Mr. Muhammad to be removed from the courtroom before pronouncing his penalty findings and ordering a presentence investigation.

**THE COURT:** Thank you. **Take the defendant out first**, the evidence and arguments of counsel, I find that the State has established at least several of the aggravating circumstances that are required by the law of the State of Florida with regard to the imposition of the death penalty beyond and to the exclusion of every reasonable doubt.

I have found that the defendant has elected not to present any evidence of testimony with regard to any mitigating circumstances. I have searched my mind and the record to find, during the course of the proceeding, that I cannot find that there are any mitigating circumstances. I have listened to the defendant's arguments through today and find that he has failed to mention, during his argument, any mitigating circumstances in this matter. On the other

hand, I believe that the Court's responsibility in a matter like this is a grave one and a responsibility that cannot be hastily entered into. As a result, I have requested a presentence investigation to be independently prepared for the Court to review to determine where there exists any basis for any mitigating circumstances in this case. At the conclusion of the presentence investigation and the filing of this Court, I will schedule a sentencing proceeding.

(R. 1572-73) (emphasis added).

Florida procedural rules require a defendant to be present during all stages of his proceedings, see Rule 3.18(a), Fla. R. Crim. Pro., and the Court has interpreted the rule to require the defendant's presence unless he has waived his presence by voluntarily absenting himself from the proceedings. See Akeem Muhammad v. State, 782 So. 2d 343, 352 (Fla. 2001). A waiver of presence will not be found unless the defendant is questioned about his understanding of the right to be present and the record affirmatively demonstrates a knowing waiver of the right to be present. See Peede v. State, 474 So. 2d 808, 811 (Fla. 1985). Mr. Muhammad was never questioned with regard to his understanding of his right to be present and no inquiry was made into whether he wished to waive that right. In fact, Mr. Muhammad did not waive his right to be present during the sentencing proceedings.

The prejudice to Mr. Muhammad's rights is evident. See Proffitt, 685 F.2d at 1260. During Mr. Muhammad's absence the trial court made critical findings, summarizing the arguments presented at the penalty proceeding. Mr. Muhammad was given no opportunity to address or rebut the statements by the trial court. He was not even aware that the proceedings had occurred in his absence, nor was he aware that a presentence investigation had been ordered.

Mr. Muhammad's case is akin to Proffitt, where the defendant was involuntarily absent from a hearing, held after the jury rendered its advisory sentence, at which a doctor testified regarding psychiatric reports that had been presented to the Court. See Proffitt, 685 F.2d at 1256-58. The State argued that Proffitt's absence was harmless, but the Eleventh Circuit Court of Appeals refused to "engage in speculation as to the possibility that [Proffitt's] presence would have made a difference." See id. at 1260 (citing Davis v. Alaska, 415 U.S. 308, 317 (1974)). Rather, the court explained that because Proffitt could have provided information which could have been used to impeach the doctor, the defendant's absence could not be deemed harmless, even though the defendant had not shown that the information would have changed the doctor's opinion. See Proffitt, 685 F.2d at 1260-61.

Likewise, during Mr. Muhammad's absence the trial court found that there

was no evidence to mitigate a death sentence. If Mr. Muhammad had been present, he could have directed the court's attention to earlier findings that he was suffering from a mental impairment, which affected his ability to waive the right to counsel.

In addition to Mr. Muhammad being removed from the courtroom during the proceedings, Mr. Muhammad's presence within the courtroom was also restricted. For security purposes, the trial court directed Mr. Muhammad to remain behind an imaginary line, parallel to the forward edge of counsel's table (R. 509). The limitations placed on Mr. Muhammad's presence in the courtroom precluded him from participating in side bar conferences. Exclusion from the side bars was prejudicial to Mr. Muhammad, especially when he was not present for a crucial side bar during the court's sentencing announcement:

**[The Court:]** The defendant having not offered any evidence with regard to mitigation, the Court ordered a Pre-Sentence Investigation and reviewed that at great length. The Court finds that there are no statutory mitigating circumstances.

It is therefore the reasoned judgment of this Court after weighing both the aggravating and mitigating circumstances, that the circumstances require the imposition of the penalty of death.

Therefore, the defendant having knowingly waived representation of attorney, the Court adjudicates the defendant guilty of murder in the first degree, and saying nothing sufficient, it is the sentence of this Court that the

defendant shall be put to death by electrocution.

Mr. Muhammad, you are advised that you have a right within the Florida Statutes to have the Supreme Court automatically review this proceeding. If you wish to be represented by counsel on appeal, the Court will appoint one to represent you.

We need the defendant fingerprinted.

**MR. HEBERT:** May we approach the Bench, Your Honor?<sup>5</sup>

**THE COURT:** Yes.

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(Side-bar conference between the Court, Mr. Hebert and Mr. Elwell without reporter)

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**THE COURT:** For the record, the State Attorney's Office indicates that although there are no statutory mitigating circumstances, the court also can consider other outside mitigating circumstances. The Court finds no other outside mitigating circumstances.

**MR. HEBERT:** Thank you, Your Honor.

(R. 1586-87) (emphasis added).

Because neither Mr. Muhammad nor the court reporter were present, it is

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<sup>5</sup> Kenneth Herbert and Thomas Elwell were the assistant state attorneys prosecuting this case.

impossible to fully determine the content of this ex parte conference. However, it is clear that the trial court had not previously considered nonstatutory mitigation until alerted by the State.<sup>6</sup> If Mr. Muhammad had been present at this bench conference, he could have directed the court to evidence of nonstatutory mitigation.

The deprivation of fundamental rights which occurred here is magnified by several factors: (1) Mr. Muhammad's pro se representation; (2) the court's order to standby counsel to not aid or consult with Mr. Muhammad; and (3) the lack of transcription of Mr. Muhammad's competency hearing.

Mr. Muhammad was deprived not only of his sixth and fourteenth amendment rights to be present at all critical stages of his trial, but also of his right to act as his own counsel. See Faretta v. California, 422 U.S. 806 (1975); McKaskle v. Wiggins, 465 U.S. 168 (1984); Dorman v. Wainwright, 798 F.2d 1358

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<sup>6</sup> As the record suggests, the court reached its decision as to Mr. Muhammad's sentence without considering nonstatutory mitigation; consequently, Mr. Muhammad's sentence was imposed in violation of his right to an individualized sentencing determination. See Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). In fact, the court stated that it had already prepared its judgment and order (R. 1586). The court's statement that no nonstatutory mitigation was found is not an adequate showing that the court, upon due deliberation, actually weighed and considered nonstatutory mitigating circumstances. The record contains nonstatutory mitigation which the court did not consider (R. 316-67; 669). This violated Parker v. Dugger, 498 U.S. 308, 321 (1990), which requires the individualized treatment of capital defendants in their penalty phase proceedings.

(11th Cir. 1986). Since Mr. Muhammad had invoked his right to self-representation, any decision regarding the litigation of his capital trial therefore could not be made without his presence or acquiescence,<sup>7</sup> yet this is exactly what happened when the Court made factual findings in the penalty phase while Mr. Muhammad was involuntarily absent from the courtroom.

That Mr. Replogle, “standby counsel” to Mr. Muhammad, had been directed to have no contact with Mr. Muhammad, he could not argue on behalf of the defendant at the sentencing hearing.

Since the judge ordered me not to consult with Mr. Muhammad, I did no preparation or investigation of the case. I was totally unaware of Mr. Muhammad's background and had no more than a general idea of the facts of the offense.

(PCR2. 914). Had the trial court not issued such instructions, Mr. Replogle could have rebutted the court’s conclusion that the record contained no mitigating evidence. He could have presented evidence that Mr. Muhammad suffered from mental illness (R. 316-67). However, as Mr. Replogle was not permitted to

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<sup>7</sup> Decisions to excuse two jurors and the manner for conducting voir dire of potential jurors were also made in Mr. Muhammad’s absence (R. 506, 508, Supp. R. 34). These decisions were exclusively within the province of counsel and thus could not validly have been made without the consent or acquiescence of pro se counsel (R. 34, 506, 508).

communicate with Mr. Muhammad and Mr. Muhammad had been removed from the courtroom, the court never heard evidence of mitigation.

Without argument from Mr. Muhammad, or at least Mr. Replogle, the trial court could not have known the extent or severity of Mr. Muhammad's mental illness. As this Court explained in its affirmance of Mr. Muhammad's conviction and sentence, the competency hearing in this case was unrecorded:<sup>8</sup>

May 20, 1982, Bernstein, the state attorney and  
Muhammad were present at a competency hearing at

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<sup>8</sup> Indeed, the failure to transcribe the competency hearing, rendered fair and adequate review of what transpired and proper determination of the competency and waiver issues in this case virtually impossible. See Griffin v. Illinois, 351 U.S. 12 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. Id. at 119; see also Entsminger v. Iowa, 386 U.S. 748 (1967) (holding that appellants are entitled to a complete and accurate record); Evitts v. Lucey, 105 S. Ct. 830 (1985); Gardner v. Florida, 430 U.S. 349, 361 (1977).

The Florida Supreme Court is required to review all death penalty cases "after certification by the sentencing court of the entire record." See Fla. Stat. sec. 921.141(4). Without the entire record of Mr. Muhammad's capital case, this Court was unable to perform an adequate review of his conviction and sentence. See Hardy v. United States, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (explaining that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the complete trial transcript").

Appellate counsel was ineffective for failing to raise such a fundamental issue as an unreliable and incomplete record on appeal. The State concedes that appellate counsel should have raised this issue in Mr. Muhammad's direct appeal (3.850 Brief, 12). The circuit court agreed (PCR1. 1380 ("Obviously this issue should have been addressed to the Florida Supreme Court.")).

Florida State Prison. The hearing was unrecorded, although the judge had requested a reporter when the hearing was set. The reconstructed record prepared by counsel's appellate counsel is sketchy but states that "[b]ased upon Mohammad's [sic] refusal to cooperate with Drs. Barnard and Carrera, and Dr. Amin's report, the court found Mohammad [sic] competent to stand trial. What argument defense counsel made in opposition to the court's order is unknown."

Muhammad v. State, 494 So. 2d 969, 971 (Fla. 1986). Judge Chance, who ultimately sentenced Mr. Muhammad to death, was not the judge who presided over the competency hearing, and thus did not have the benefit of a transcript of the hearing. As a result, he had no idea what evidence was presented nor what arguments were made.

Without a full transcript of the competency hearing and without giving Mr. Muhammad or his standby counsel an opportunity to cite mitigation evidence, the court sentenced Mr. Muhammad to death. Mr. Muhammad, in violation of his constitutional rights, was not present during critical stages of the capital proceedings against him, specifically during crucial times in his penalty phase. See Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964) ("Where there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a conviction cannot stand."). As the circuit court has noted, appellate counsel could, and should, have directed the Court's attention to Mr.

Muhammad's absence from crucial stages of the trial (PCR1. 1381). Appellate counsel's actions were unreasonable and deprived Mr. Muhammad of a reliable appeal.

### CLAIM III

**MR. MUHAMMAD WAS DENIED MEANINGFUL ACCESS TO THE COURTS AND A FAIR OPPORTUNITY TO PRESENT HIS DEFENSES AT TRIAL WHEN THE STATE OF FLORIDA FAILED TO FULFILL ITS AFFIRMATIVE OBLIGATION TO PROVIDE A LAW LIBRARY WITH WHICH MR. MUHAMMAD COULD PREPARE DEFENSES; THIS FAILURE VIOLATED MR. MUHAMMAD'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.**

On June 15, 1982, four months before Mr. Muhammad's trial, Judge Chance granted Mr. Muhammad's motion to proceed pro se and conduct his own defense at trial (R. 389). Mr. Muhammad then filed pleadings to effectuate his sixth amendment right to conduct his own defense. For example, on July 15, 1982, Mr. Muhammad filed a "Motion to Use Law Library" (R. 392), requesting that his right, under the Florida Constitution, to "meaningful access to this Court" be effectuated by allowing him to conduct research at the Florida State Prison library. Mr.

Muhammad strenuously argued that the Court instruct FSP to permit Mr.

Muhammad to have direct, physical access to the library:<sup>9</sup>

I believe that due to my being confined under the rules and regulations of Florida State Prison, I believe that my right to due process of the law rises above the policies at Florida State Prison in the instance of this case. I believe the officials at Florida State Prison, they do in fact have a legitimate, penal, logical objective in maintaining the security and order of that prison. However, I do not believe this interest held by the prison officials in any way is to detract from the cherished rights that the defendant is given under the law concerning the matter of whether his life is to be taken or whether his life is not to be taken. I submit to this Court that if a defendant is to lose his life, that defendant is to be given every conceivable opportunity under the law to retain that life.

(R. 1691-92).

The law states that we have certain rights under the law. I concede certain rights and privileges are curtailed due to the fact of incarceration, but I submit to this Court, the deprivation of the use of a law library by the defendant in this case is not one of those rights that is to be curtailed or denied to the defendant in this case.

(R. 1697). Because of the gravity of this issue, Mr. Muhammad also requested that the trial court hold a hearing on FSP's policies and his access to the law library, or lack thereof (R. 1641). However, Mr. Muhammad's motion for access to the

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<sup>9</sup> "I request that I be allowed to use the law library at night from 1:00 a.m. to 3:00 a.m. I believe the time is more suitable because of minimum movement in the prison" (R. 1688).

library was denied, (R. 1714, 414), and no hearing was held on the issue.

As a result of the instant offense, FSP refused to allow Mr. Muhammad in persona access to the FSP law library and instead required him to submit requests to the librarian, who would attempt to locate the legal authority requested (R. 1687-88). Requiring that research be conducted by a prison official was a substantial breach of confidentiality, as Mr. Muhammad was bound to disclose his case preparation and plan in order to have any access to library materials. Exposing Mr. Muhammad's defense strategy violated his sixth and fourteenth amendment rights. This was especially egregious considering the human instincts of retribution within FSP for the homicide of their fellow correctional officer;<sup>10</sup> Mr. Muhammad had no

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<sup>10</sup> Mr. Muhammad also explained to the court that although in theory FSP's policies may be interpreted to provide some access to the library materials, in practice that is not the case:

Now, it is the experience of this defendant, Your Honor, to request material from that law library and that law librarian to say to the defendant it does not have the requested material. On different occasions I have requested needed material and I have not been given that material. I do not want some person to conduct the research for me. I want to conduct my own research because I know the portion of the law I believe to be relevant better than any person at Florida State Prison could ever know.

(R. 1691).

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alternative but to obtain research materials from FSP officials, in essence party opponents. As a result of the prejudice against him, the promise that Mr. Muhammad's constitutional right of access to the law library would be allowed by proxy was hollow. See Straub v. Monge, 815 F.2d 1467, 1469 (11th Cir. 1987) (stating that prison policies and regulations are invalid if they unjustifiably obstruct an inmate's right of access to courts).

It is axiomatic that a lawyer defending his first death case would be incompetent if he undertook defense of a capital murder case without first researching the law. See, e.g., Tillery v. United States, 419 A.2d 970, 976 (D.C. 1980) (finding an attorney's use of an improper legal standard constitutes per se gross negligence). It was even more vital for Mr. Muhammad, as a pro se litigant, to have the opportunity to conduct legal research. Additionally, the need for research at the trial level is "far greater" than the need for research at the appellate level. See Bounds v. Smith, 430 U.S. 817, 828 (1977).

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Your Honor, the State has represented to this Court that the defendant may request materials on a daily basis and receive those materials. Your Honor, I submit to this Court that is not an accurate reflection of the policy of Florida State Prison regarding the use of the law library by certain confined inmates in my status, nor is it the practice.

(R. 1693-94).

In Bounds, the Supreme Court held “that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” See id. at 817-18. Though Mr. Muhammad had requested both access and legal assistance, he received neither.<sup>11</sup> Failure to provide prisoners with legal authority or assistance by which they may address important constitutional rights has consistently been found to violate access to the courts. See Ex Parte Hull, 312 U.S. 546 (1941). Moreover, such denials have been found to run afoul of equal protection and due process. Burns v. Ohio, 360 U.S. 252 (1959); Wolff v. McDonnell, 418 U.S. 539, 556 (1974):

[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners . . . retain right of access to the courts. . . . Prisoners may also claim the protections of the Due

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<sup>11</sup> The prejudicial effects of Mr. Muhammad’s restricted access to the library are exacerbated by the court’s refusal to permit standby counsel to assist Mr. Muhammad. See generally State of Connecticut v. Fernandez, 758 A.2d 842 (2000), cert. denied, 532 U.S. 913 (2001) (holding that a pro se defendant’s right of access to the courts can be satisfied by either access to a law library or access to legal information through standby counsel).

Process Clause. They may not be deprived of life, liberty, or property without due process of law.

(citations omitted); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 353, 355 (1963) (holding that the canons of equal protection and due process are violated when one’s financial status dictates whether he will have representation for an appeal); Johnson v. Avery, 393 U.S. 483 (1969) (stating that the right of access is grounded in due process and is fundamental to the federal constitutional scheme).

While the State may argue that research by a Department of Corrections’ surrogate was sufficient and necessary given that agency’s security concerns regarding Mr. Muhammad, case law states that any restrictions on access, whether it be on a nondiscriminatory basis or not, violates due process. See Straub, 815 F.2d at 1469 (“The state may not bar access to the courts no matter what form it utilizes.”); Douglas, 372 U.S. at 355; see also “Access to the Courts,” 26 Kansas L.R. 636 (1978) (explaining that because the due process right of access is secured by the fourteenth amendment, it does not depend on the largess of the state for its viability).

In addition, the Court stated in Bounds that “‘meaningful access’ to the courts is the touchstone. . . . [O]ur decisions have consistently required States to

shoulder affirmative obligations to assure all prisoners meaningful access to the courts.” Bounds, 430 U.S. at 823-24 (emphasis added). Although FSP may have had a law library with sufficient resources, the limitations imposed on Mr. Muhammad precluded meaningful access.

The court’s failure to inform Mr. Muhammad that upon relinquishing his right to counsel he would be banned from use of the library and thereby disenfranchised of his right to meaningful access invalidated Mr. Muhammad’s waiver of counsel. Despite Mr. Muhammad’s proper preservation of this issue, appellate counsel failed to raise it. The circuit court and the State agree that appellate counsel should have raised this claim on Mr. Muhammad’s direct appeal (3.850 brief, 60; PCR1. 1380).

#### CLAIM IV

**THE TRIAL COURT'S FAILURE TO GRANT MR. MUHAMMAD'S MOTIONS FOR CHANGE OF VENUE AND FOR INDIVIDUAL, SEQUESTERED VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.**

Under state and federal constitutional law, a defendant is entitled to a fair

trial by an impartial jury who will render its verdict based on the evidence and argument presented in court without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717, 722 (1961) (“[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.”) (citations omitted) ; Rideau v. Louisiana, 373 U.S. 723 (1963); Groppi v. Wisconsin, 400 U.S. 505 (1971); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1986); Coleman v. Kemp, 778 F.2d 1487, 1489 (11th Cir. 1986) (“[T]he Fourteenth Amendment's due process clause . . . safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, 'indifferent' jurors.”); Foster v. State, 778 So. 2d 906, 912 (Fla. 2001); Singer v. State, 109 So. 2d 7, 15 (Fla. 1959).

Mr. Muhammad was deprived of his right to an impartial jury when the trial judge denied his motions for change of venue and for individual voir dire, despite the existence of overwhelmingly abundant pretrial publicity and despite the venire's prejudicial exposure to the facts of the alleged offense. These issues were preserved by specific, timely motions and objections presented to the trial court by Mr. Muhammad's counsel and by Mr. Muhammad acting as his own counsel. As the State and the circuit court have explained, these claims could and should have

been raised on direct appeal (3.850 brief, 87-88; PCR1. 1382).

Mr. Muhammad filed a Motion for a Change of Venue on February 5, 1981, explaining that the case had been well publicized, especially in Bradford County where multiple correctional institutions are located, including Florida State Prison<sup>12</sup> (R. 163-64). The motion further alleged that the notoriety of the case had greatly increased since the governor signed a death warrant on Mr. Muhammad on January 29, 1981 (R. 164). However, the motion was denied and the trial occurred in Bradford County (Supp. R., 10/11/82 hearing, 23; R. 281). Appellate counsel failed to raise this issue on appeal despite the fact that the court erred in denying the motion for a change of venue.

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997). When a defendant raises the partiality of the venire, the court must assess the extent and nature of the pretrial publicity and the difficulty in selecting a jury. See Foster, 788 So. 2d at 912.

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<sup>12</sup> This Motion was accompanied by the affidavits of Priscilla A. Tanner and J.J. Wolbert, Jr. who state that the publicity in the case had been extensive (R. 159-62).

Although “the mere existence of some pretrial publicity does not necessarily lead to an inference of partiality,” “there are instances in which a trial court must grant a change of venue.” Foster, 788 So. 2d at 913, 914. To determine the appropriateness of moving the trial, the court must examine the context of the publicity in numerous circumstances including the temporal proximity of the publicity, crime, and trial; the court must also consider the size of the community. See Foster, 788 So. 2d at 913 (citing Rolling, 695 So. 2d at 285).

Jury selection in Mr. Muhammad’s trial occurred on October 19 and October 20, 1982 (R. 498). Although this was two years after the offense,<sup>13</sup> prior proceedings against Mr. Muhammad for this same offense had ended in a mistrial just three months previously; the recent mistrial made the task of securing an impartial and untainted jury impossible.

In some cases, the passage of time between the offense and the trial results in “a sufficient change in the nature or amount of the publicity” to the extent that “the feelings of revulsion that create prejudice [pass].” Coleman v. Kemp, 778 F.2d at 1541 (citing Patton v. Yount, 467 U.S. 1025 (1984)). However, the mistrial in this case actually renewed media publicity and in the months prior to the trial, Mr.

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<sup>13</sup> The offense at hand was alleged to have occurred on October 12, 1980.

Muhammad's case received extensive news coverage. Those venirepersons who had not – by the time of the first trial – been exposed to the extensive pretrial publicity, or who may have forgotten what they had heard at that time of the offense, were certainly exposed to the publicity generated by the first trial.

In addition to the prejudicial time of the news publicity, the size of Bradford County, where the trial was held and the jurors selected, also supported Mr. Muhammad's motion for a change of venue. Although a motion for change of venue is generally within the discretion of the trial court, see Davis v. State, 461 So. 2d 67, 69 (Fla. 1984), where a “community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result,” the Court is obligated to grant the motion. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979).

Virtually every member of Mr. Muhammad's venire had been exposed to the pretrial publicity of his case. For instance, almost all potential jurors had read or heard about the case in the local news media and/or discussed it with friends, neighbors or family (R. 506, 611, 636, 661, 702, 709, 710, 711, 714, 715, 716, 718, 771, 772, 776, 780, 790, 855, 925, 927, 928, 933, 950, 952, 953, 954, 959). Many of the prospective jurors had been inside the prison (R. 525, 526, 527, 618, 619, 620, 731, 813, 837, 865, 873, 910, 948, 949, 956).

Some prospective jurors had even worked at Florida State Prison (R. 709, 710, 711, 732, 837, 873, 926, 946), or had family that worked at Florida State Prison (R. 900). Others worked in other prisons in the community or had friends or relatives working in these prisons<sup>14</sup> (R. 534, 534A, 549, 555, 589, 716, 718, 731, 773, 777, 780, 804, 813, 855, 927, 952, 968, 789, 801, 813). Moreover, one of the jurors who actually served on the jury which decided Mr. Muhammad's guilt was admonished not to discuss the case with her husband who, as an employee of Lawtey prison, was familiar with Mr. Muhammad's case (R. 950, 952, 954, 968). Cf. Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983) (explaining that the defendant need not show actual bias when juror prejudice is presumed).

Many prospective jurors knew the facts or were friendly with witnesses who would testify (R. 517, 519, 520, 545, 57, 578, 583, 584, 720, 722, 773, 803, 828, 931, 932). Several of the prospective jurors knew court officials, including the assistant state attorney and the bailiff (R. 541, 542, 547, 612, 742, 854, 872, 942,

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<sup>14</sup> Prospective juror Mabel S. Green summarized the nature of the community and its relationship with the prison system:

**Q.** Do you have any close friends who are employed by the Department of Corrections?  
**A.** I think everybody that lives in Bradford County does.

(R. 789).

943). Additionally, one of the potential jurors had served previously for the trial of a murder at FSP (R. 899).

The pervasive nature of the pretrial publicity of the offense and arrest, combined with the small, close-knit nature of the community, resulted in an atmosphere in which it was virtually impossible to obtain a jury untainted by prejudicial extra-judicial information. See Manning, 378 So. 2d at 276-77.

As in this case, when the inherently prejudicial nature of the publicity to which the community had been exposed is extreme, the voir dire examination of prospective jurors is deemed incapable of curing the impact of that publicity, and due process requires a change of venue without regard to voir dire. See Foster, 788 So. 2d at 914 (“Certain communities may be so small and the residents so close and personally connected to each other that a particular defendant could not get a fair trial in that community in a highly publicized case.”); Rideau, 373 U.S. at 726-27; Groppi, 400 U.S. at 511 (“[T]he exclusion of prospective jurors infected with the prejudice of the community from which they come . . . is not always adequate to effectuate the constitutional guarantee.”); Oliver v. State, 250 So. 2d 888, 890 (Fla. 1971) (finding that the “voir dire process cannot cure” the effects of all prejudicial publicity).

The trial court erred by failing to grant Mr. Muhammad’s motion for a

change of venue,<sup>15</sup> while appellate counsel erred by failing to raise this claim on appeal. Consequently, this Court affirmed Mr. Muhammad's conviction, despite that a biased jury rendered the verdict.

Although Mr Muhammad attempted to secure his right to a fair and unbiased jury by moving for a change of venue, he also tried to use the voir dire process to eliminate any partial jurors. However, even if the effect of the prejudicial

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<sup>15</sup> The court's error was exacerbated when the court neglected to remove over 100 uniformed DOC officials from the courtroom. See Woods v. State, 490 So. 2d 24 (Fla. 1986).

Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised by the venue and the deep public interest in the trial. . . . [T]he trial judge abused his discretion in not requiring the removal of the uniformed corrections offices, and that in the interest of justice a new trial should be granted.

Id. at 28 (Shaw, J., dissenting).

Because the court permitted 100 uniformed correctional officers to remain in the courtroom, Mr. Muhammad stated, on the record, that he was intimidated and overwhelmed by their presence, as he assumed the jury would be (R. 1522, 1524). As a result of these circumstances, Mr. Muhammad waived his right to a jury in the penalty phase (R. 1526).

The State and the circuit court agree that appellate counsel should have presented arguments regarding the uniformed officers and their effect on Mr. Muhammad's jury waiver (3.850 Brief, 83 (PCR1. 1380), 86).

pretrial publicity in Mr. Muhammad's case could have been ameliorated by the voir dire process, it was not and could not have been corrected without individual and sequestered voir dire.

Mr. Muhammad recognized the inadequacy of group voir dire under the instant circumstances and moved for individual and sequestered voir dire (R. 75-82). However, the trial court denied this motion (Supp. R., 10/11/82 hearing, 36). Despite proper preservation by Mr. Muhammad, appellate counsel failed to alert this Court to the trial court's erroneous denial of individual and sequestered voir dire. Omitting this claim was unreasonable, as the error which occurred directly violated Mr. Muhammad's due process rights to be tried by a fair and impartial jury. See generally Patton v. Yount, 467 U.S. 1025 (1985); Irvin v. Dowd, 366 U.S. 717 (1961); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

In order to protect the sixth and fourteenth amendment rights of the accused in a case where there has been extensive and prejudicial pretrial publicity, it may be imperative to question potential jurors on an individual basis "to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the voir dire when other members disclose prior knowledge of prejudicial information."

Nebraska Press Association v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, Marshall, Stevens, JJ., concurring). To protect these concerns, Mr. Muhammad's venirepersons should have been individually questioned because of the great publicity to which they had been exposed.

In his motion for individual voir dire, Mr. Muhammad's counsel explained the publicity:

The instant case has generated enormous amounts of publicity. Television, radio, and the print media spent huge amounts of time, money and space covering the so-called "Death Row Killing and Prison Civil Rights lawsuit." The publicity generated by that experience has been uniformly negative.

(R. 80).

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The instant case has aroused the passions of the entire community due to the motive behind the crime and the violent circumstances surrounding the crime. Media coverage of the "Florida State Prison lawsuit" was extensive and, inasmuch as it was impossible to do otherwise, created a strongly negative impression in the community concerning those individuals who may be concerned.

With the extensive media coverage in mind and the knowledge that the impression created in the minds of individual members of the community is probably highly negative, special measures should be taken to ensure that the jury will be without bias. By allowing for an individual examination of the potential jurors, the court would

provide a reasonable assurance that prejudice would be discovered if present.

(R. 82). As in Mr. Muhammad's case, where pretrial publicity is "sufficiently prejudicial and inflammatory" and "saturat[es] the community where the trial [is] held," prejudice is presumed. See Rideau, 373 U.S. at 726-27; Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Under such circumstances, due process requires the trial court to grant a change of venue, see Rideau, 373 U.S. at 726, or, at a minimum, individual and sequestered voir dire. When there is a probability that potential jurors have been exposed to prejudicial pretrial publicity, the "preferred approach" in Florida is for trial courts to "conduct individual and sequestered voir dire of prospective jurors." Kessler v. State, 752 So. 2d 545, 550 (Fla. 1999) (reversing conviction "because the trial court failed to allow adequate screening of jurors concerning pretrial publicity") (quoting Bolin v. State, 736 So. 2d 1160, 1165 (Fla. 1999)). Still, Mr. Muhammad was not permitted to individually question prospective jurors about their knowledge of the alleged offense and the prior proceedings.

Because only group voir dire was permitted by the trial court, Mr. Muhammad could not gather essential information without infecting the entire venire

and undermining the voir dire process itself.<sup>16</sup> Given such a choice, voir dire questioning was nowhere as thorough as this case required.

In the event that potential jurors expanded on their knowledge of the case, because the entire venire was present during voir dire, they were all exposed to the highly prejudicial extra-judicial information when those jurors related their knowledge of the case. For example, the following exchange occurred between the court and a prospective juror, Randall Davis, who was employed by Lawtey:

**Q.** You don't know anything about either past or – did you form any opinions about that as you heard it other than was that a special event to you or anything like that?

**A.** As far as opinions, you have to form your own, you

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<sup>16</sup> The court recognized the possibility of a prospective juror tainting the panel with prejudicial responses and instructed the venirepersons to limit their responses:

In an effort to try to find juror or potential jurors or who do not have previous information with this case, so I am going to ask you initially certain questions about your knowledge about the case. If in fact you do know something about this case or heard something about it, when I ask you the questions, if you will just answer "yes" or "no" and try not to offer any more information than the "yes" or "no" and that obviously if you told me everything you knew about the case the other three people sitting would also know what you know.

(R. 853).

know, if you're told a man was killed. The man was locked up at the time. You have to figure he was guilty, but it happened, not knowing the circumstances.

**Q.** A lot of people sometimes – a lot of people are arrested and we have trials. My concern is that is there anything about that conversation or information you received that would make you suspect that the defendant is guilty in this case?

**A.** That he's charged with?

**Q.** Yes.

**A.** Yes it would. The information that I had heard at the time that he was locked up at the time in a cell. I don't know, you know, if he did that then, I would have to assume he was guilty of what he was assumed to be done.

(R. 781-82). Other prospective jurors heard Mr. Davis's opinion that Mr. Muhammad had to be guilty, as he was incarcerated at the time of the offense. At this point, Mr. Muhammad renewed his request for individual voir dire, but the court erroneously denied his motion (R. 785). Furthermore, at one point during the jury selection, the State expressed concern over the possibility of a prospective juror's responses tainting the panel and requested that the court question her outside the presence of the others (R. 953). The court agreed (R. 953-54) but only after the prospective juror had already expressed her feelings on the case:

**Q.** Mrs. Dobbins, when you read about that case or this

case, I'm sorry, what was your reaction?

A. I felt real sorry for the family of the man.

Q. Did you know them?

A. No, I did not know them. I thought it was a sad, sad thing.

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A. [W]hen you hear about things like that you put yourself in that position. If this happened to me, I know how I would feel.

(R. 950-51). Other potential jurors heard this and likely began to consider themselves in the place of the victim and his family. Consequently, Mr. Muhammad's jury was selected from a venire exposed to prejudicial information during the voir dire process.

By denying Mr. Muhammad's request for individual voir dire as well as his motion for a change of venue, the trial court refused Mr. Muhammad his right to a fair and impartial jury. "The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case." Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985). As such, this Court must grant Mr. Muhammad habeas relief.

## CLAIM V

**MR. MUHAMMAD WAS INDICTED BY A BIASED GRAND JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.**

The fifth amendment requires that an indictment be issued by a legally constituted and unbiased grand jury. Costello v. United States, 350 U.S. 359, 408 (1956); United States v. DiBernardo, 552 F. Supp. 1315, 1328 (S.D. Fla. 1982) (“The right to indictment by an unbiased grand jury is guaranteed by the Fifth Amendment.”). However, the grand jury that indicted Mr. Muhammad was biased and partial. As this claim was properly preserved before the trial court, appellate counsel should have raised it on direct appeal.

Mr. Muhammad was charged with the homicide of a correctional officer at Florida State Prison in Bradford County, Florida. Four days after the offense occurred, the Bradford County grand jury returned an indictment charging Mr. Muhammad with first degree murder (R. 1605).

Before Mr. Muhammad’s arraignment, his initial attorney filed several motions challenging the composition and proceedings of the grand jury, including a Motion to Produce the Records Pertaining to the Composition and Appointment of

Foreman of the Bradford County Grand Jury (R. 24), a Motion to Voir Dire Grand Jurors (R. 26), and a Motion to Compel the Production of Testimony Before the Grand Jury (R. 29). At Mr. Muhammad's arraignment, the trial court found the motions to be timely filed (R. 1613), and set them for hearing (R. 1603). However, such a hearing was never held, and the motions were denied July 7, 1981, nunc pro tunc as of June 2, 1981 (R. 259-261).

Mr. Muhammad also filed a Motion to Abate the indictment on March 27, 1981 (R. 226). As grounds for that motion, counsel explained that of the eighteen grand jurors, fourteen had either worked for the Department of Corrections or had relatives that had been employed by the prison system:

[A]t the time the said Grand Jurors' name were drawn from the jury box, and at the time they were served with summons to appear for jury duty, and at all times thereafter, several of their number were employed by the Department of Corrections or had been employed by the Department of Corrections, or had close relatives who were employed by the Department of Corrections, as follows:

Edward Lawrence Davis – Currently employed at the Butler Transfer Unit at R.M.C., employed as a CO-I for the past 6.5 years.

Harold Isom Colston – Currently works at UCI has been a medical technician for the past 7 years there.

Hilton Clader Coleman – He has been working at the

Lawtey Correctional Institution since July, 1977.

Past Employment:

John Allen Goolsby – He worked personally at "Raiford" for two years, approximately 17 years ago.

Sue Jackson Tilley – She personally worked as a bookkeeper at UCI for 2 years, approximately 17 years ago. She also currently has a sister-in law and brother-in-law working at UCI.

Julius Dwight Eunice – He worked as a CO-I at Lawtey Correctional Institution during 1977-1978.

Close Relatives

Marjorie Ellen Packham – Her daughter-in-law's father worked at FSP and recently retired from there.

Michael Gilhooly – His wife currently works at UCI as an accountant clerk.

Roxann Jackson – Her cousin's wife currently works at Lawtey Correctional Institute.

Louise L. Griffis – Her son was a correctional officer at "Raiford" during the spring term of this Grand Jury.

James Paul Thornton – His brother was a correctional officer at "Raiford" 7 years ago, and currently he has several cousins at several of the Division of Corrections institutions throughout the State.

Ruth Perry Paladino – Her husband worked at "Raiford" in 1976.

Glory E. Jackson – She currently has a step-daughter and cousin-in-law working at FSP or UCI

Ross Chandler – His brother worked at “Raiford” 3 years ago and his niece works there now.

It is very possible and even probable that the above mentioned jurors had a state of mind which may have prevented them from acting impartially and without prejudice to the substantial rights of Thomas Knight.

(R. 226-28). Mr. Muhammad requested the fourteen grand jurors be disqualified

(R. 228). No hearing was held on this motion, and it was denied July 7, 1981, nunc pro tunc as of June 2, 1981.

Presentation of Mr. Muhammad’s case to the grand jury described above violated his fifth and fourteenth amendment rights. See Costello, 350 U.S. at 408. A grand jury composed of Department of Corrections employees and relatives of corrections employees can hardly be considered an unbiased judge of charges regarding the homicide of a corrections officer.

As a result of the trial court’s denial of Mr. Muhammad’s motions challenging the grand jury and the indictment, Mr. Muhammad was denied his fifth, sixth, eighth and fourteenth amendment rights. As the State and the circuit court have stated, appellate counsel could and should have raised this issue on appeal (3.850 brief, 59, 89; PCR1. 1380). The failure to raise this issue deprived Mr.

Muhammad of the representation by appellate counsel to which he is entitled.

**CONCLUSION AND RELIEF SOUGHT**

For all the reasons discussed herein, Mr. Muhammad respectfully urges this Court to grant habeas corpus relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite M950, 444 Brickell Avenue, Miami, Florida 33313, counsel of record on this 13<sup>TH</sup> day of May, 2002.

**CERTIFICATE OF TYPE SIZE AND STYLE**

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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