IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 73348
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR GLADES COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The defendant was charged by indictment filed on March 29, 1983, with two counts of first-degree murder (R 20). At arraignment, Lambrix pled not guilty.

Trial by jury commenced on November 29, 1983. That trial resulted in a mistrial on December 9, 1983, when the jury could not reach a unanimous verdict. A second jury trial was held before the Honorable Richard M. Stanley, Circuit Judge. After deliberations, the jury found the defendant guilty as charged on both counts of the indictment on February 27, 1984 (R 2553). Following the penalty phase of the trial, a 10-2 majority of the jury recommended the death penalty as to count I (as to Alicia Dawn Bryant), and an 8-4 majority of the jury recommended the death penalty as to count II (as to Clarence Edward Moore, a/k/a Lawrence Lamberson). On March 22, 1984, a sentencing proceeding was held before Judge Stanley and that same day the court entered its findings of fact in support of the two death sentences imposed (R 1354, 2691-2701).

On September 25, 1986, the Florida Supreme Court affirmed the judgment and sentences of death. Lambrix v. State, 494 So.2d 1143 (Fla. 1986). The issues raised by Lambrix in his direct appeal to the Florida Supreme Court are as follows:

> ISSUE I. THE TRIAL COURT ERRED IN UTILIZING A JURY SELECTION PROCESS WHICH DENIED THE DEFENDANT A TRIAL BY A JURY REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY AND WHICH CREATED A JURY THAT WAS CONVICTION PRONE.

ISSUE II. THE TRIAL COURT ERRED IN EXCUSING JUROR MARY HILL FOR CAUSE IN VIOLATION OF THE WITHERSPOON AND CHANDLER STANDARDS.

ISSUE III. THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, FRANCES SMITH, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

ISSUE IV. THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF A KEY STATE WITNESS, SPECIAL AGENT CONNIE SMITH.

ISSUE V. THE TRIAL COURT ERRED IN PERMITTING A MEDICAL EXAMINER, OVER DEFENDANT'S OBJECTION, TO TESTIFY AS AN EXPERT WITNESS CONCERNING A FACTUAL ISSUE RELATING TO BOTH DECEASED WHERE INSUFFICIENT PREDICATE WAS LAID, AND SPECIFICALLY UNDER SUCH CIRCUMSTANCES TO EXCLUDE "ACCIDENT" AS A CAUSE OF THE DEATH OF ALECIA DAWN BRYANT.

On or about November 2, 1987, the defendant filed a pro se petition for writ of habeas corpus with the Florida Supreme Court. The state filed its response thereto on or about November 20, 1987. Subsequently, the Florida Supreme Court permitted the Office of the Capital Collateral Representative to appear on behalf of the defendant and to file a supplement to the pro se habeas petition. The issues raised by Lambrix in the habeas proceeding are as follows:

CLAIM I: THE TRIAL COURT'S FAILURE TO GRANT MR. LAMBRIX'S MOTIONS FOR CHANGE OF VENUE AND FOR INDIVIDUAL VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, AND APPELLATE COUNSEL'S FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL DEPRIVED MR. LAMBRIX OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM II: CRITICAL STAGES OF THE PROCEEDINGS AGAINST MR. LAMBRIX WERE CONDUCTED IN HIS ABSENCE, IN VIOLATION OF FLA. R. CRIM. P. 3.180 AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

CLAIM III: THE TRIAL COURT'S EXCUSAL OF JURORS WITHOUT LEGAL CAUSE AND WITHOUT AFFORDING MR. LAMBRIX THE OPPORTUNITY TO EXAMINE THOSE JURORS OR OBJECT TO THEIR EXCUSAL VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

CLAIM IV: THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF FACT AND LAW TO PROVE MR. LAMBRIX'S GUILT OF PREMEDITATED MURDER BEYOND A REASONABLE DOUBT, AND APPELLATE COUNSEL'S FAILURE TO CHALLENGE THIS DEPRIVATION OF MR. LAMBRIX'S FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS ON DIRECT APPEAL WAS PREJUDICIALLY INEFFECTIVE.

CLAIM V: THE TRIAL COURT'S ADMISSION INTO EVIDENCE, OVER OBJECTION OF AN IRRELEVANT, MISLEADING, AND HIGHLY PREJUDICIAL LETTER PURPORTED (BUT NOT PROVEN) TO HAVE BEEN WRITTEN BY MR. LAMBRIX VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

CLAIM VI: THE TRIAL COURT'S DENIAL OF MR. LAMBRIX'S REQUEST TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION VIOLATED HIS FUNDAMENTAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS CLAIM DEPRIVED MR. LAMBRIX OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

CLAIM VII: THE TRIAL COURT'S DENIAL OF MR. LAMBRIX'S REQUEST TO INSTRUCT THE JURY ON THE APPLICABLE LAW REGARDING JUSTIFIABLE USE OF

FORCE VIOLATED MR. LAMBRIX'S FUNDAMENTAL CONSTITUTIONAL RIGHTS, AND APPELLATE COUNSEL'S UNREASONABLE FAILURE TO RAISE THIS CLAIM DEPRIVED MR. LAMBRIX OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VIII: THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF UNRELIABLE TESTIMONY REGARDING AN ALLEGED "ESCAPE" WITH WHICH MR. LAMBRIX HAD NEVER BEEN CHARGED AND FOR WHICH HE WAS NEVER CONVICTED.

CLAIM IX-XI: MR. LAMBRIX'S SENTENCES OF DEATH ARE UNRELIABLE, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO CHALLENGE THE PROPRIETY OF MR. LAMBRIX'S UNCONSTITUTIONALLY IMPOSED DEATH SENTENCES, IN VIOLATION OF MR. LAMBRIX'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XII: THE TRIAL COURT'S RESTRICTION OF DEFENSE COUNSEL'S CROSS-EXAMINATION OF KEY STATE WITNESSES DEPRIVED MR. LAMBRIX OF HIS RIGHT TO CONFRONT AND MEANINGFULLY CROSS-EXAMINE THE WITNESSES AGAINST HIM, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court denied the defendant's habeas corpus petition. Lambrix v. Dugger, 529 So.2d 1110 (Fla. 1988).

A request by Lambrix for clemency was apparently denied when Governor Bob Martinez signed a death warrant in Lambrix' case on September 27, 1988. The warrant is in effect from noon on Tuesday, November 29, 1988, until noon on Tuesday, December 6, 1988, with the execution presently scheduled for Wednesday, November 30, 1988, at 7:00 a.m.

On or about October 27, 1988, the defendant filed an emergency motion to vacate judgment and sentence pursuant to Rule

3.850, Fla. R. Crim. P., and a consolidated emergency application for stay of execution and special request to amend. On November 18, 1988, the Honorable Elmer O. Friday, Circuit Judge, summarily denied the 3.850 motion and denied the defendant's request for a stay. A motion for rehearing was denied on November 21, 1988.

STATEMENT OF THE FACTS

The State of Florida will rely on the Florida Supreme Court opinion (cited at Lambrix v. State, 494 So.2d 1143 (Fla. 1986)) for a statement of the facts:

> On the evening of February 5, 1983, Lambrix and Frances Smith, his roommate, went to a tavern where they met Clarence Moore, a/k/a Lawrence Lamberson, and Aleisha Bryant. Late that evening, they all ventured to Lambrix' trailer to eat spaghetti. Shortly after their arrival, Lambrix and Moore went outside. Lambrix returned about twenty minutes later and requested Bryant to go outside with him. About forty-five minutes later Lambrix returned alone. Smith testified that Lambrix was carrying a tire tool and had blood on his person and clothing. Lambrix told Smith that he killed both Bryant and Moore. He mentioned that he choked and stomped on Bryant and hit Moore over the head. Smith and Lambrix proceeded to eat spaghetti, wash up and bury the two bodies behind the trailer. After burying the bodies, Lambrix and Smith went back to the trailer to wash up. They then took Moore's Cadillac and disposed of the tire tool and Lambrix' bloody shirt in a nearby stream.
>
> On Wednesday, February 8, 1983, Smith was arrested on an unrelated charge. Smith stayed in jail until Friday. On the following Monday, Smith contacted law enforcement officers and advised them of the burial.
>
> A police investigation led to the discovery of the two buried bodies as well as

> the recovery of the tire iron and bloody shirt. A medical examiner testified that Moore died from multiple crushing blows to the head and Bryant died from manual strangulation. Additional evidence exists to support a finding that Lambrix committed the two murders in question.
>
> In accordance with the jury's recommendation, the trial judge imposed two sentences of death on appellant, finding five aggravating and no mitigating circumstances in regard to the murder of Moore and four aggravating and no mitigating circumstances in regard to the murder of Bryant . . . .

As observed in the Florida Supreme Court opinion, the jury recommended death sentences by 10-2 and 8-4 majorities. The trial court found five aggravating and no mitigating circumstances as to the murder of Moore, and four aggravating and no mitigating circumstances as to the murder of Bryant. The aggravating circumstances found by the trial court are as follows: (1) the capital felonies were committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of another capital felony; (3) the capital felony was committed for pecuniary gain (does not apply to the murder of Bryant); (4) the capital felonies were especially heinous, atrocious or cruel; and (5) the capital felonies were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

SUMMARY OF THE ARGUMENTS

As to the Argument in Opposition to Stay of Execution: The state submits that there is no reason for entering a stay of execution. The claims advanced by appellant have been litigated and summarily denied in the 3.850 forum and appellant is unable to show that any issue is likely to succeed on the merits.

As to the Argument as to Procedural Bars: Many issues raised on 3.850 by appellant were not cognizable on collateral review. Florida law is clear that issues which could have been, should have been, or were raised on direct appeal are unavailable for collateral review. See e.g. Blanco v. State, 507 So.2d 1377 (Fla. 1987). Specifically, the following claims raised in the 3.850 motion are barred by virtue of the fact that they were raised on direct appeal to this Honorable Court: III, VI, XII, XXIV. The following issues raised in the appellant's 3.850 motion were barred because they could have been and should have been raised on direct appeal: III, IV, V, IX, X, XI, XII, XIII, and XIV. Your appellee will not make reference to any of these claims below in our summary of the argument pertaining to the specific 3.850 issues. However, in the argument portion of this brief, your appellee has addressed each of the issues that was raised in the 3.850 motion.

As to the Argument as to Specific 3.850 Claims:

As to Issue I: The trial court correctly summarily denied appellant's first claim which alleged ineffective assistance of

trial counsel by virtue of the purported failure to adequately prepare and present an intoxication defense at the guilt phase of trial. The evidence adduced at trial indicated that the defendant was not intoxicated at a time proximate to the commission of the two murders. Thus, even had counsel presented expert testimony concerning appellant's alleged history of alcohol abuse, it is clear that there is no a reasonably probability that the outcome of the proceeding would have been different.

As to Issue II: An evidentiary hearing was not necessary as to appellant's claim that alcohol abuse could have been used as a mitigating circumstance where there was no reasonable probability that the outcome of the penalty proceeding would have been different. The five (and four) aggravating circumstances found in this case were significant and clearly outweighed any mitigating circumstances which can now be proposed by the defendant, especially where no mitigating factors were found by the trial court.

As to Issue VI: The trial court correctly summarily denied appellant's claim that trial counsel was ineffective for allegedly failing to adequately cross-examine and impeach certain state witnesses. The motion on its face conclusively shows that appellant is entitled to no relief. Even had defense counsel examined the state's witnesses as collateral counsel asserts he would have done, there is no showing that the results of the proceeding would have been different.

As to Issue VII: Appellant's Brady claim was properly rejected by the trial court on the face of the pleadings. Appellant cannot and did not demonstrate by allegation that the alleged Brady evidence was constitutionally material because the jury heard argument by defense counsel concerning the purported "deal". Even hearing about the deal did not diminish the weight of Frances Smith's testimony and, therefore, appellant could not show that had the purported "deal" been disclosed there was a reasonable probability that the result of the trial would have been different.

As to Issue VIII: Appellant's last claim of alleged ineffectiveness concerns the purported failure of trial counsel to secure the defendant's presence at several critical stages of the proceedings. This claim was correctly summarily denied where the Florida Supreme Court had previously addressed the merits of the underlying claims in the habeas proceedings conducted in this cause and found that the claims were without merit. Therefore, it is not possible for defense counsel to have been ineffective for failing to object where the underlying claims have been found to be without merit.

ARGUMENT IN OPPOSITION TO STAY OF EXECUTION

Although this Honorable Court has the power to grant a stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), rehearing denied, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983), the Court addressed the issue of stays of execution and said:

> . . . It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are not exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at 1100. The State of Florida submits that 3.850 proceedings, like the federal habeas proceedings discussed in Barefoot v. Estelle, are not vehicles to relitigate state trials. As will be demonstrated below, Lambrix is unable to show that any issue is likely to succeed on the merits. See O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982), and White v. Florida, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982).

In Autry v. Estelle, 464 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a

rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a 3.850 motion has been filed. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

ARGUMENT AS TO PROCEDURAL BARS

It has long been the law in this state that a defendant may not raise via a motion pursuant to Rule 3.850, Fla. R. Crim. P., claims which were raised or should have been raised on direct appeal. See e.g., Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); and Alvord v. State, 396 So.2d 194 (Fla. 1981). The purpose of motions pursuant to Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on a direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). For example, in Blanco v. State, 507 So.2d 1377, 1380 (Fla. 1987), the Supreme Court held the following issues had been procedurally barred because they either were or should have been presented on direct appeal:

> 1. Did the trial court err in permitting appellant to call witnesses against the advice of counsel;
>
> 2. Did the trial court conduct critical stages of the trial in the absence of appellant or an interpreter;
>
> 3. Did the trial court err in questioning appellant concerning the presentation of his defense;
>
> 4. Did the instructions to the jury unconstitutionally denigrate the jury's role in recommending life or death;
>
> 5. Did the trial court improperly instruct the jury on the number of jurors required to return a life recommendation;

> 6. Did the trial court improperly rely on the conviction for armed burglary as an aggravating factor;
>
> 7. Did the trial court improperly rely on a previous conviction for armed robbery as an aggravating factor; and
>
> 8. Did the prosecutor use inflammatory closing arguments.

These issues were not cognizable in post-conviction relief. As can be observed from the underlined issues above, Lambrix presents the same or similar types of issues to this Court and, as in Blanco, these claims should be summarily denied by this Court.

As aforestated, we have the same situation presented as in Blanco. In his motion for 3.850 relief, the defendant alleges 14 grounds for relief; of these issues, only issues 1, 2, 6, 7, and 8 are appropriate for a 3.850 proceeding. All other issues were raised or should have been raised on direct appeal. See, Blanco v. State, Id. The issues procedurally defaulted include:

> 3. A Booth v. Maryland claim (should have been raised on direct appeal);
>
> 4. Purportedly erroneous jury instructions which allegedly made mitigating circumstances aggravating circumstances (should have been raised on direct appeal);
>
> 5. Failure to renew motion for change of venue (should have been raised on direct appeal);
>
> 9. Failure of the trial court to find mitigating circumstances (should have been raised on direct appeal);

10. Instructions concerning the recommendation by a majority of the jury (should have been raised on direct appeal);

11. Instructions which allegedly shifted the burden of proof (should have been raised on direct appeal);

12. A Maynard v. Cartwright claim concerning the heinous, atrocious or cruel aggravating circumstance (should have been raised on direct appeal);

13. The finding of the cold, calculated and premeditated aggravating circumstance (should have been raised on direct appeal); and

14. Double jeopardy because of the mistrial in the first trial of this cause (should have been raised on direct appeal).

The issues discussed above which should have been or were raised on direct appeal were correctly summarily denied. Additionally, at the end of his pleading, the defendant injects "other claims" into these proceedings (defendant's Motion at p. 104-105). Obviously, the defendant has failed to allege facts sufficient even for the state to respond. These claims were properly summarily dismissed, especially in light of the fact that amendment was not proper herein because the two-year bar of Rule 3.850 is applicable.

ARGUMENT AS TO SPECIFIC 3.850 CLAIMS

The State of Florida will discuss the fourteen claims raised by the defendant in his 3.850 motion in the order presented by the defendant. However, before proceeding to do so, the state will set forth the basic principles of law relied upon with respect to claims of ineffective assistance of trial counsel. Lambrix has set forth four (4) claims which pertain to allegedly ineffective counsel (Issues I, II, VI, and VIII) and these principles discussed immediately below are applicable to all those claims.

As our courts have consistently pointed out since 1984, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 89 L.Ed.2d 674 (1984). In Blanco v. Wainwright, 507 So.2d at 1381, this Honorable Court said:

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

The defendant has failed to carry this heavy burden. Not only has he failed to show that trial counsel's conduct fell outside that wide range of reasonable professional assistance, but he has also failed to show that the results of the trial or penalty phase would have been different.

The state submits that when reviewing allegations of ineffective assistance of counsel, the general presumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the Sixth Amendment. Strickland v. Washington, supra. Furthermore, the defense is required to prove prejudice. Strickland v. Washington, supra. A defendant presenting a claim of ineffectiveness must sufficiently plead deficiency and prejudice. Hill v. Lockhart, 474 U.S. 52 (1985). The absence of sufficiently pleading deficiency or prejudice results in the claim be subject to dismissal. Hill v. Lockhart, Id. Absent a denial of counsel or counsel who entirely failed to subject the state's case to adversarial testing, there must be both a pleading of specific deficiency and a resulting prejudice. See United States v. Cronic, 466 U.S. 648 (1984). An examination of the entire transcript of the instant case reveals that Lambrix' counsel acted as advocates. Therefore, the claims of ineffective assistance of counsel were ripe for summary denial, and inasmuch as the face of the 3.850 motion conclusively showed that Lambrix was entitled to no relief, the trial court did not err.

ISSUE I

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR ALLEGEDLY FAILING TO ADEQUATELY PRESENT AN INTOXICATION DEFENSE AT GUILT PHASE.

As his first claim, the defendant asserts that he was deprived of the effective assistance of counsel at guilt phase with regard to an intoxication defense. He now collaterally asserts that had defense counsel presented certain evidence which was readily available at the time, there would have been a reasonable probability that the outcome of the proceeding would have been different in that the defendant might have been convicted of second-degree murder. This contention is wholly without merit and therefore, this claim can be summarily denied.

It is significant to note that the Florida Supreme Court, when considering this defendant's petition for writ of habeas corpus, specifically held that, "[The] evidence was not sufficient to show intoxication." Lambrix v. Dugger, 529 So.2d 1110, 1112 (Fla. 1988). Notwithstanding this express factual finding by our Supreme Court, the defendant now contends collaterally that had expert testimony been presented the jury would have necessarily found that the defendant did not have the specific intent to commit first-degree murder. This contention is speculative and unsupported by any reasonable hypothesis. For example, cases are legion which discuss the question of expert testimony with respect to the insanity defense. The defense now

asserted by the defendant, i.e., alcohol addiction, is directly analogous to an insanity defense in that the defendant in both defenses is attempting to show that he did not possess the specific intent necessary to support the commission of a specific intent crime. Therefore, the Florida Supreme Court's recent opinion in Garron v. State, 528 So.2d 353 (Fla. 1988), is particularly instructive. In Garron, at p. 357, the court held:

> A lay witness, testifying on his or her personal observation as to a defendant's sanity, must have gained this personal knowledge in a time period reasonably proximate to the events giving rise to the prosecution. Thus, the opinion testimony as to the appellant's sanity could only come from those whose personal observation took place either at the shooting or in close time proximity thereto.

See also State v. McMahon, 485 So.2d 884 (Fla. 2d DCA 1986), rev. denied, 492 So.2d 1333 (Fla. 1986). Most significantly, "Expert testimony, even when uncontradicted, is not conclusive on the issue of sanity and the trier of fact may find such testimony adequately rebutted by the observations of laymen." State ex rel. Bludworth v. Kapner, 394 So.2d 541, 543 (Fla. 4th DCA 1971) (emphasis added). The authorities immediately above cited stand for the proposition that expert testimony is certainly not conclusive on the question of sanity or alcoholism. Rather, as the decision in Garron makes clear, the observations of lay people proximate to the time of the commission of the offense for which the defendant is being tried, is most significant when determining whether or not the defendant exhibited and possessed

the necessary intent. Thus, in the instant case, even had the defense presented expert testimony concerning an alleged history of alcohol abuse, the express findings of the Supreme Court of Florida that the defendant was not intoxicated leads to the inescapable conclusion that there is no reasonable probability that the outcome of these proceedings would have been different. Cf. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc). None of the testimony elicited at trial indicated that the defendant was, in fact, intoxicated.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PRESENT TESTIMONY OF INTOXICATION AS MITIGATION OF THE TWO DEATH SENTENCES IMPOSED.

As his next claim of ineffectiveness, the defendant contends that defense counsel failed to adequately present expert and lay testimony concerning alcohol abuse so as to mitigate the two death sentences received. As in Strickland v. Washington where the defendant therein did not obtain an evidentiary hearing where it was not necessary, the defendant in the instant case is not entitled to an evidentiary hearing on this claim. In order to prevail, a defendant must show both a deficient performance and prejudice sufficient to show that there is a reasonable probability that the outcome of the proceeding would have been different. In the instant case, even without discussing the deficiency prong, it can be determined on the face of this record that the defendant has suffered no prejudice by the alleged ineffective omission of evidence of alcohol substance abuse at the penalty phase of trial. As this Court is well aware, five aggravating circumstances were found which pertained to the murder of Mr. Moore, and four aggravating circumstances were found with respect to the murder of Ms. Bryant. No mitigating circumstances were found! Hence, even if this evidence of alcohol abuse had been presented at the penalty phase, there is no reasonable probability that the outcome of the proceedings

would have been different. The aggravating factors were significant and clearly outweighed any mitigating circumstances which can now be proposed by the defendant.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM BROUGHT PURSUANT TO THE DECISION RENDERED IN BOOTH V. MARYLAND.

As his next claim raised in his motion to vacate judgment and sentence, the defendant alleges that the precepts of Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2427, 96 L.Ed.2d 440 (1987), were violated where the PSI contained reference to statements made by family members of the victims. The state submits that this claim is procedurally barred and this point was properly summarily dismissed.

The Florida Supreme Court has had the recent occasion to consider a claim under Booth as is now asserted. In Grossman v. State, 525 So.2d 833 (Fla. 1988), the court ordered that supplemental briefs be submitted concerning the Booth issue. The court noted that, "The state correctly points out that appellant made no objection, whereas in Booth there was an objection to such evidence." Grossman, 525 So.2d at 842. The state submits that in the instant case no objection was made as to the introduction of any of the "victim impact" evidence. In finding a procedural bar in Grossman, the court observed that victim impact is not one of the aggravating factors enumerated in our capital sentencing statute upon which a death sentence may be predicated, citing Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); and Riley v. State, 366 So.2d 19 (Fla. 1978). Thus, a criminal defendant should

object to evidence of a non-statutory aggravating factor and, consequently, the court held that in the absence of a timely objection to the use of "victim impact" evidence, a defendant is procedurally barred from claiming relief under Booth. On this basis alone, the defendant is entitled to no relief on this point. See also, Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987).

Even if this claim could be considered on its merits, it is clear that the defendant is entitled to no relief. In Booth v. Maryland, the United States Supreme Court noted that the State of Maryland statutorily required a pre-sentence report in all felony cases, including capital cases. That pre-sentence report had to include a "victim impact statement" describing the effect of the crime on the victim and his family. Booth v. Maryland, 96 L.Ed.2d at 445-446, n.2. Unlike the State of Maryland, the State of Florida has no statute which mandates consideration of "victim impact statements" as a proper aggravating factor. The court in Booth was concerned with a state's statute which required consideration of factors other than the defendant's record, characteristics, and circumstances of the crime committed. We are not concerned with such a state's statute sub judice. In the instant case, any statement contained in the PSI concerning the effect of the murder on the victim's family was merely surplusage and was not considered by the trial court when the court weighed valid aggravating factors enumerated in the statute with all mitigating evidence. Inasmuch as any "victim impact" statements

played no part in the weighing of aggravating and mitigating circumstances, the trial court did not improperly focus upon unacceptable aggravating factors. This claim was correctly summarily denied.

If the defendant now argues that the "tools" on which a Booth claim could be brought were unavailable earlier, this contention has been squarely addressed and rejected by the Florida Supreme Court in Grossman. Therefore, based upon the procedural default which has occurred in this case, this claim was properly summarily denied.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT JURY INSTRUCTIONS ALLEGEDLY COMPELLED THE JURY TO CONSIDER MITIGATING CIRCUMSTANCES AS AGGRAVATING CIRCUMSTANCES.

In this claim, the defendant speciously contends that the jury instructions during penalty phase compelled the jury to consider mitigating circumstances as aggravating circumstances. As aforementioned in this response, this claim should have been raised on direct appeal and the failure to do so precludes collateral consideration. In any event, even if this claim was available collaterally, it must fail.

The defendant points to a certain portion of the record included at R 2664 to support his absurd contention that certain mitigating circumstances were considered as aggravating factors. A plain reading of the jury instructions located on page 2664 compels the conclusion that an obvious clerical error in paragraphing and punctuation has occurred. The jury was read the standard jury instructions concerning those matters which should be considered in aggravation and in mitigation. The court reporter simply and mistakenly erred by not creating a new paragraph between the word "offense" and the word "each" on page 2664. No further comment is needed by the state as to this obvious clerical error which did not change the structure of the standard jury instructions. The jury was simply not misled by those instructions.

In his motion, the defendant relies upon the decision rendered by the Florida Supreme Court in Woods v. State, 531 So.2d 79 (Fla. 1988). Reliance on Woods is misplaced and, in actuality, supports the position of state concerning this claim. In Woods, the court held that the error such as made by the court reporter in the instant case is an "error [] in the transcript [which] could have been and should have been brought up on appeal. Thus, based on the clear procedural default in this case and, alternatively, based upon the fact that there was no error in the trial court's instructions to the jury, the defendant's claim IV must be summarily denied. Likewise, although defendant puts in one sentence in his motion concerning trial counsel's failure to object to this purported error, such a claim must also be summarily dismissed inasmuch as there is no error present to which defense counsel could have objected.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING VENUE WHICH HAD PREVIOUSLY BEEN RAISED AND DETERMINED ADVERSELY TO APPELLANT IN THE FLORIDA SUPREME COURT HABEAS PROCEEDINGS.

In this claim, the defendant raises an issue which clearly has been decided by the Florida Supreme Court and, therefore, the trial court could not disturb that ruling and this point was correctly summarily dismissed. In this claim, the defendant contends that trial counsel was ineffective for failing to renew, supplement and relitigate a motion for change of venue of Lambrix' second trial. It must be observed that the venue challenge was made before the Florida Supreme Court in the habeas proceedings had in this cause in addition to a challenge to the voir dire procedures undertaken by the trial court. As to this issue, the Florida Supreme Court specifically held that there was no abuse of the trial court's discretion and appellate counsel was not ineffective for failing to raise the issue. Significant in the habeas petition is the comment by collateral counsel that, "[t]hese issues were preserved by specific, timely motions and objections presented to the trial court by Mr. Lambrix' trial counsel; . . ." (Supplement to Petition for Habeas Corpus at p.6). Thus, it is apparent that whether or not counsel preserved the issue for appeal depends upon in which forum collateral counsel is litigating this claim. In the Florida Supreme Court counsel specifically alleged that these claims were preserved and

appellate counsel was ineffective for failing to discuss them. However, in the 3.850 forum, counsel now says that trial counsel was ineffective for failing to preserve these points. The defendant has chosen his forum, has had this claim litigated adversely to him, and cannot now come back into this Court and attempt to raise this issue in a different guise. Cf. Sireci v. State, 469 So.2d 119 (Fla. 1985) (couching a barred claim in terms of ineffective assistance of counsel will not revive such a claim).

Inasmuch as this issue was previously entertained and determined in the Florida Supreme Court, this claim is not properly before this Court at this time. This is true even if new facts are adduced in support of the previous claim. Cf. Sullivan v. State, 441 So.2d 609 (Fla. 1983). This claim was properly summarily denied by this Court.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE BY ALLEGEDLY FAILING TO ADEQUATELY CROSS-EXAMINE AND IMPEACH CERTAIN STATE WITNESSES.

As his next claim of ineffectiveness, the defendant contends that defense counsel inadequately cross-examined and impeached certain state witnesses. In actuality, the defendant is now, through the benefit of hindsight, opining that trial counsel could have asked different questions on cross-examination of the state witnesses which might have benefited the defendant. The matters now alleged in the 3.850 motion are insufficient to show that the defendant was afforded less than effective counsel. Even if the facts alleged in the motion are to be taken as true, and the state does not concede that they are, the allegations concerning this claim are insufficient to warrant either an evidentiary hearing or, ultimately, relief.

It is significant to observe that in his motion, the defendant relies on no case law to support his position. Indeed, this is because there are no cases which would support the defendant's allegation under this claim. The defendant does cite to the case of Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), but Smith does not support the defendant's position herein. In Smith, federal habeas relief was granted where trial counsel failed to use prior inconsistent statements made by the chief state witness, a Mr. Wesley Johnson. The Eleventh Circuit

held that Mr. Johnson's credibility was the central issue in the case. In the instant case, however, the central witness in the case was Frances Smith. There is no allegation, nor could there be, that defense counsel inadequately attempted to impeach and cross-examine her. Rather, collateral counsel now focuses upon other state witnesses who were merely corroborative of Ms. Smith's testimony. As the court held in the original Smith v. Wainwright, 741 F.2d 1248 (1984), the entire case of the state, with minor exceptions, was based on the testimony of Wesley Johnson as buttressed by Patricia Johnson's testimony during the state's rebuttal case. Therefore, the failure to adequately impeach the testimony of the key state witness warranted habeas relief. However, the instant case is materially different where there is no challenge as to defense counsel's treatment of the state's key witness. There simply has not been a showing, as a matter of law, that defense counsel in the instant case rendered ineffective assistance due to his cross-examination of witnesses.

In addition to the failure of the defendant to show how counsel was deficient concerning his cross-examination of state witnesses, it is equally clear that the defendant has failed to allege facts sufficient to show how he has been prejudiced by the alleged ineffectiveness of counsel. The state submits that even had defense counsel examined the state's witnesses as collateral counsel asserts he would have done, there is no showing that the results of the proceeding would have been different. This claim was properly summarily denied.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM BROUGHT PURSUANT TO THE DECISION RENDERED IN BRADY V. MARYLAND.

In this claim, the defendant urges that he is entitled to relief pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The basis for this claim is the assertion that the chief state witness, Frances Smith, allegedly made a "deal" which resulted in a pending aiding and abetting charge being dropped after Mr. Lambrix was convicted. Analysis of the pleading shows that it is deficient to establish any of the criteria for gaining relief, suppression, favorableness or materiality. See, United States v. Stewart, 820 F.2d 370, 374 (11th Cir. 1987); United States v. Bent-Santana, 774 F.2d 1545, 1551 (11th Cir. 1985).

What the defendant omits from his 3.850 motion is the fact that the aiding and abetting an escapee charge did not arise in Glades County, the county wherein Mr. Lambrix was tried. Rather, the charges were brought in Tampa, Hillsborough County, Florida. There simply was no "deal" with the Hillsborough State Attorney's Office which impacted upon the Glades County murder proceedings. The state queries as to what benefit the Hillsborough State Attorney's Office would have received from making a "deal" with Ms. Smith. In any event, even if a "deal" was struck, the defendant in the instant cause is still entitled to no relief.

Matter is not suppressed for Brady purposes if the defense had access to it. Halliwell v. Strickland, 747 F.2d 607 (11th Cir. 1984). In the instant case, defense counsel attempted to inject the possibility of a "deal" into his closing argument which effectively accomplished the same purpose as if there had been a deal. In the initial closing argument in guilt phase, defense counsel argued the following:

> None of those investigators gave her protective custody. State says they didn't give her any promises. They didn't say they wouldn't prosecute her. Yet, investigator Daniels sat there and said she was told through Jim Ottinger, her brother, who didn't testify for some reason, that she would not be prosecuted. He said she was informed that she would not be prosecuted if what she said was true. Of course, they were relying on her to be true to begin with. They aren't going to great lengths to find out whether what she said was true or not. (R 2481-2482)

Therefore, there are no facts pled which showed that the alleged material, i.e., that the alleged nondisclosure of the "deal" created a reasonable probability that had this information been disclosed, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Arango v. State, 497 So.2d 1161 (Fla. 1986). Here, the defendant cannot show the constitutional materiality of the alleged nondisclosed evidence because the jury heard argument by defense counsel concerning the purported deal. Even hearing about the deal did

not diminish the weight of Frances Smith's testimony. This claim was properly summarily denied.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE BY ALLEGEDLY FAILING TO SECURE APPELLANT'S PRESENCE AT CRITICAL STAGES OF TRIAL.

As his eighth claim for relief, the defendant contends that he was deprived the effective assistance of counsel by virtue of trial counsel's failure to secure the defendant's presence at several critical stages of the proceedings. This claim was correctly summarily denied for the reasons expressed below.

Of paramount significance is the fact that in the habeas petition filed with the Florida Supreme Court by Lambrix and as supplemented by present collateral counsel, the same claims were advanced as are in this point. This is especially significant inasmuch as the Florida Supreme Court chose to discuss the merits of this claim and the wording of the instant claim is substantially identical to the claims advanced in the habeas petition.

In its opinion denying habeas relief to the defendant, the Florida Supreme Court expressly found that there was no merit to the arguments now advanced. Therefore, it is not possible for defense counsel to have been ineffective where the underlying claim has been found to be without merit. This claim, therefore, was properly summarily denied.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE TRIAL COURT SHOULD HAVE FOUND MITIGATING CIRCUMSTANCES THAT ALLEGEDLY APPEAR IN THE RECORD.

As his ninth claim, the defendant contends that the trial court should have found mitigating circumstances that appear in the record. As aforementioned in this response, it is clear that this is the type of issue that must be raised on direct appeal and the failure to do so precludes collateral review. Alternatively, it is also clear that even if the merits could be reached in this claim relief would not be forthcoming. As our Florida Supreme Court held in Suarez v. State, 481 So.2d 1201 (Fla. 1985), "[t]he trial court is not obliged to find mitigating circumstances", citing Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 104 S.Ct. 202 (1983). Again, this claim was correctly summarily denied.

ISSUES X & XI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING TWO CLAIMS MADE BY APPELLANT PERTAINING TO THE JURY INSTRUCTIONS GIVEN AT THE PENALTY PHASE OF TRIAL.

In his tenth and eleventh claims, Lambrix makes two claims concerning the alleged impropriety of some of the jury instructions given in the penalty phase in this case. Capital defendant Frank Smith also attempted to raise these types of claims in his collateral proceedings. However, the Florida Supreme Court refused to address the merits of those arguments because they "could have been presented on appeal" and were not. Smith v. State, 457 So.2d 1380, 1381 (Fla. 1981). As in Smith, the defendant in the instant case attempts to first raise these points in a 3.850 motion. In Smith, the defendant raised as two of his claims:

> . . . (2) that the jury instructions given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; [and] (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; . . .

These are the same claims being made by Lambrix for the first time in his 3.850 motion. The Florida Supreme Court held that these claims were properly summarily denied as improper grounds for a Rule 3.850 motion where they could have been raised on direct appeal. Smith v. State, 457 So.2d at 1381. The same result should obtain in the instant case.

With respect to the purported burden shifting argument, it should be noted that the trial court correctly instructed the jury to give such weight to the mitigating evidence presented as they felt it should receive and that they should carefully weigh the evidence. With respect to the claim concerning the "majority" instructions, any claim about an instruction pertaining to a 6-6 tie must be deemed harmless in light of the 10-2 and 8-4 recommendations of death. Thus, even if this Court could consider the claims on the merit they would fail but, as asserted immediately above, these claims are undoubtedly procedurally defaulted thereby warranting summary denial.

ISSUE XII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM BROUGHT PURSUANT TO THE DECISION RENDERED IN MAYNARD V. CARTWRIGHT.

The defendant next claims that he is entitled to 3.850 relief based upon the United States Supreme Court's recent decision in Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The United States Supreme Court considered only the narrow question of whether Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor has been interpreted by the Oklahoma Court of Criminal Appeals in an unconstitutionally broad manner. This claim, as are many of the others raised herein, is procedurally barred. This claim is not so novel that it couldn't have been raised previously. See Dobbert v. State, 409 So.2d 1053 (Fla. 1982). Also, in Magill v. State, 428 So.2d 649 (Fla. 1983), the court observed that our "especially heinous, atrocious or cruel" aggravating circumstance has been upheld against constitutional attacks. The court specifically noted:

> [3-6] We have provided guidance for determining whether section 921.141(5)(h) is applicable. As was noted in **State v. Dixon**, 283 So.2d 1 (Fla. 1973):
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where

> the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. Since **Proffitt**, our application of the above reasoning has not rendered the statute unconstitutionally vague and overbroad.

Inasmuch as a claim based upon the purported unconstitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance has been available to capital defendants for many years, the failure to raise this claim previously results in a clear procedural bar.

The United States Supreme Court's granting of relief in Maynard v. Cartwright, supra, does not affect the Florida decisions. Relief in Maynard was based on the Oklahoma court's failure to define the terms heinous, atrocious and cruel. These terms have been defined in Florida. See State v. Dixon, supra. Moreover, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 254-256 (1976) upheld this aggravating circumstance in Florida against a vagueness attack and this was expressly noted in Maynard where the court compared Proffitt with Godfrey v. Georgia, 446 U.S. 420 (1980). This claim was properly summarily denied.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THIS HONORABLE COURT HAS INTERPRETED THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE IN AN UNCONSTITUTIONALLY OVERBROAD MANNER.

As his thirteenth claim for relief, the defendant makes an argument similar to that immediately above, that is, that the Florida Supreme Court has interpreted an aggravating circumstance in an unconstitutionally overbroad manner. In this claim, petitioner contends that the "cold, calculated and premeditated" aggravating circumstance is unconstitutionally overbroad generally and as applied to this case. For the reasons expressed below, this claim must be summarily denied.

As was the case with claim XII, this is an example of a claim which should have been and could have been raised on direct appeal, and the failure to do so absolutely precludes collateral review. Alternatively, it must be observed that the Florida Supreme Court in the direct appeal of this case had the occasion to comment on the aggravating circumstances found in this case. After reviewing the record, the Florida Supreme Court specifically stated that "We agree with the trial judge and all of the parties involved that five aggravating circumstances apply to the murder of Moore and four aggravating circumstances apply to the murder of Bryant." One of those aggravating circumstances found as to both murders was that the capital felonies were committed in a cold, calculated and premeditated manner without

any pretense of moral or legal justification. Lambrix v. State, 494 So.2d 1143, 1148 (Fla. 1986).

As an additional basis for summarily denying this claim, it must also be observed that the defendant attempted to raise this claim before the Florida Supreme Court in his habeas petition. It should also be noted that the claim now raised in the 3.850 motion is virtually identical to the argument set forth in the habeas petition. The Florida Supreme Court held that this claim was without merit. For any of the reasons set forth above, but primarily because of the procedural default which has occurred in this case, this claim was properly summarily denied.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S DOUBLE JEOPARDY CLAIM.

As his last claim for relief, the defendant contends that his second trial after a mistrial had been declared was a violation of his right to be free from double jeopardy. Again, this is an example of a claim which must be summarily denied because it was not raised on direct appeal. Double jeopardy questions are classic examples of issues which are evident in the record and therefore must be raised at the time of the direct appeal. The failure to do so absolutely precludes collateral review.

Alternatively, the state submits that this claim is wholly without merit. The defendant goes through certain colloquys between the court and jurors and opines that had the court not made certain comments, the jury would have returned a verdict for a lesser included offense. This contention is speculative at best and is unwarranted by the facts of this case. A review of all discussions between court and jury reveals that the court did nothing erroneous as a matter of law.

The defendant gratutiously asserts that defense counsel was ineffective for failure to object at the time the mistrial was declared or at the time of the second trial. However, the defendant also acknowledges that he, himself, made an objection at the start of the second trial. Inasmuch as the defendant was co-counsel in this cause, it cannot be said that this claim was

not adequately preserved for appellate review. Therefore, because the claim was adequately preserved, the failure to raise it absolutely precludes collateral review.