IN THE SUPREME COURT OF FLORIDA

CASE NO. 73348

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

EMERGENCY MOTION:
CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT (SCHEDULED FOR NOVEMBER 30, 1988, 7:00 A.M.)

APPELLANT'S EMERGENCY MOTION FOR STAY OF EXECUTION ON APPEAL OF THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF

CARY MICHAEL LAMBRIX, a condemned capital inmate against whom a death warrant has been signed and whose execution is presently scheduled for Wednesday, November 30, 1988, at 7:00 a.m., herein respectfully moves the Court for an order granting a stay of execution pending the proper, judicious filing and disposition of his appeal from the denial of his motion for Fla. R. Crim. P. 3.850 relief by the circuit court. In light of the substance and complexity of the claims involved, the stakes at issue and the untenable circumstances under which Mr. Lambrix's counsel has been forced to litigate this action, Mr. Lambrix also herein respectfully requests that the Court allow a proper, orderly, and reasonable schedule for the filing of briefs. In support thereof, Mr. Lambrix, through counsel, states as follows:

I. PROCEDURAL HISTORY

1. Mr. Lambrix filed a motion for post-conviction relief pursuant to Rule 3.850 in the circuit court. In conjunction with that motion, Mr. Lambrix also requested that the court stay his execution pending an evidentiary hearing and the full and fair disposition of his Rule 3.850 action. Mr. Lambrix also filed a supplement to his Rule 3.850 motion and an Appendix

supporting his requests for an evidentiary hearing, a stay of execution, and Rule 3.850 relief. The Circuit Court denied Mr. Lambrix's application for a stay of execution as well as the Rule 3.850 motion and supplement. The Rule 3.850 motion was denied, in its entirety, on the merits.[1] A Motion for Rehearing was timely filed and denied by the Circuit Court. Notice of Appeal was timely filed thus conferring jurisdiction on this Court. Although the lower court declined to conduct the requested evidentiary hearing, the Record on Appeal from the denial of Mr. Lambrix's Rule 3.850 motion[2] should be extensive -- it should reflect, inter alia, Mr. Lambrix's Rule 3.850 motion and supplement, Mr. Lambrix's three-volume Appendix, the State's response and motion to dismiss, the transcript of the non-evidentiary hearing before the lower court, Mr. Lambrix's motion for rehearing, and the Circuit Court's orders denying Rule 3.850 relief and denying rehearing.

2. At the time the instant motion is being prepared, undersigned counsel has not been provided with the transcript of the hearing on the Rule 3.850 motion, nor the Record on Appeal.

II. THE LOWER COURT ERRED

3. The lower court found Mr. Lambrix's claims to be without merit, and denied an evidentiary hearing, without

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[1]The circuit court denied the Appellee's procedural default arguments and ruled on the merits of every claim.

[2]By this date the entire record should have been delivered to this Court. Counsel would note that the Circuit Court Clerk's Office had indicated that it would have difficulties preparing the record -- including the transcript of the non-evidentiary hearing held on Mr. Lambrix's motion to vacate and stay application before the lower court -- over the Thanksgiving Holiday weekend. Should the full record not be before this Court at the time that the instant application is filed, Mr. Lambrix respectfully urges that the Court enter a stay of execution in order to afford Mr. Lambrix the right to have the full record reviewed by the Court. Undersigned counsel has not been provided with the Circuit Court record on appeal and has not been given access to a transcript of the hearing on the Rule 3.850 motion.

indicating whether (and why) the motion failed to state valid claims for Rule 3.850 relief (it does), without any explanation as to whether (and why) the files and records conclusively showed that Mr. Lambrix is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Lambrix is entitled to no relief (the record supports Mr. Lambrix's claims). In this regard the lower court erred. This Court's standards governing the adjudication and disposition of motions for Rule 3.850 relief have been long-settled: where as here a Rule 3.850 motion presents facially valid claims for post-conviction relief,[3] see Squires v. State, 513 So. 2d 139 (Fla. 1987), as Mr. Lambrix's does, the motion cannot be summarily denied unless the files and records conclusively show that the defendant is entitled to no relief, see Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984); Groover v. State, 486 So. 2d 15 (Fla. 1986);[4] in such instances, the trial court must attach those portions of the files and records conclusively showing that the defendant is entitled to no relief. Id.[5] In Mr. Lambrix's case, however, the lower court failed to follow the standards foreclosing summary disposition of Rule 3.850 motions presenting valid claims for relief,[6] and failed to conduct an

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[3]Mr. Lambrix's motion and supplement (appended hereto), and the appendices proffered in support thereof, clearly did present valid evidentiary claims for Rule 3.850 relief. See Att. A; Att. B.

[4]The files and records not only fail to disclose that Mr. Lambrix is entitled to no relief, but in fact support Mr. Lambrix's claims: counsel here ineffectively failed to investigate, develop, and present what even the record reflects to be counsel's theory of defense at Mr. Lambrix's inital trial proceedings.

[5]Nothing was attached here. Nor could anything be: there is absolutely nothing in the record rebutting Mr. Lambrix's claims of, inter alia, ineffective assistance of counsel.

[6]Since Mr. Lambrix's motion was denied without an evidentiary hearing, Mr. Lambrix's allegations must be taken as true at this juncture. See Blackledge v. Allison, 431 U.S. 63 (1977).

evidentiary hearing in order to properly resolve the contested issues of fact presented in this action. See Lemon, supra; Squires, supra; O'Callaghan, supra. Rather, the lower court denied Mr. Lambrix's motion by employing a unique standard of its own:

> State's Motion to Dismiss Defendant's Motion to Vacate and for Stay of Execution, while possibly available to movant in most, if not all, points, is none-the-less denied in view of the nature of the ultimate decisions(s) [sic] from which relief is sought.
>
> I have carefully read the transcript; I have carefully read, and listened to argument thereto, the motions before me, and exhibits; I have searched and pondered the ultimate result my decision might beget.
>
> State argues that Defendant's 3.850 Motion is not properly available to him, that prior decisions by the Supreme Court of Florida have decided most, and that others are not, as a matter clearly of law, now available; as related in paragraph 1, I recognize merit in much of that Motion, but deny it.
>
> Defendant's 3.850 Motion
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> A thread of argument common to many of Defendant's arguments in support of the 3.850 Motion is that this is his first such motion, his first time before the appellate escalator system outside direct appeal . . . that obviously and certainly some appellate panel is going to grant him relief, going to require further evidentiary proceedings or even re-trial, . . . "so why not go ahead and do it now?"
>
> . . . my only response to this argument is that, as a Trial Court, I can not substitute my experience and judgment for that of the appellate, any more than the appellate is supposed to for that of the trial forum.
>
> The commentary by Defense on Pages 2 and 3, as to Governor's warrant, do not seem involved here in a direct way . . . e.g., Defendant's two year filing period was not interrupted. I have, in every way possible, placed myself to view the allegations of ineffective counsel at the trial proceedings [including the illuminating views from Parker, Johnson, Peede, Lambrix v. Dugger, 529 So. 2d 1110, 1112 (Fla. 1988)].
>
> I know the import of Defendant's words that he can show the wrongfulness of his convictions and sentences . . . but these are words of conclusion, boot-strapped and unsupported by real fact.

> The Courts need a sympathetic awareness of the time factor in the management of their dockets . . . that dockets belong to all parties, and management thereof is not the sole decision of any one participant. Here it weighs most heavily against Defendant but I do not find that he has been, nor that that he is now, so deprived and 'skewed' thereby that a stay of execution is necessary, nor entitled. "Orderly" access does not portend 'leisurely' nor 'squeaking wheel' access.
>
> To comply with Defendant's present demands for trial decisions in behalf of defendant here would, indeed, be a most unfortunate abuse of the role and responsibilities inherently invested in trial counsel! I might not always agree (as with Mr. Bailey's decision to put Patty Hearst on the stand) but to adopt Defendant's arguments here would, in effect, suggest and require that no litigation would ever come to a conclusion.
>
> My studied analysis leads me to the conclusion that, in total context, and fairness, there is sound reason to suggest, and I so find and conclude, that there is sound reason, in fact, law and logic, that Defendant is entitled to no relief. Squires v. State, 513 So. 2d 138 (Fla. 1987).
>
> DONE AND ORDERED this 18th day of November, 1988.

Circuit Court Order Denying Motion to Vacate and Stay of Execution, State v. Lambrix.

4. The lower court erred. Mr. Lambrix presented valid claims for Rule 3.850 relief -- no one asked the lower court to "substitute" its judgment for that of an appellate court; Mr. Lambrix asked only that his claims be properly assessed and that evidentiary resolution be provided pursuant to the process established under Rule 3.850. See Lemon, supra. In fact, Parker, Johnson, and Peede, circuit court cases discussed in Mr. Lambrix's motion in which stays of execution were granted and proper evidentiary hearings conducted, cited by the lower court, show exactly how these proceedings should be handled under the applicable principles of law. The lower court, however, failed to follow those principles. The lower court was asked to apply established standards and to conduct an evidentiary hearing on Mr. Lambrix's factual claims; it declined to do so. In this, the

lower court erred, for Mr. Lambrix's factual proffers established the need for an evidentiary hearing. Those proffers included:

> At your request I interviewed your client Michael Cary Lambrix on November 1, 1988 at the Florida State Prison and have reviewed the following documents.
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> 1. The Affidavit of Consuelo Lambrix.
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> 2. The Affidavit of Elena Diane Lambrix.
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> 3. The Affidavit of Charles A. Lambrix.
>
> 4. The Affidavit of Jeffrey Dean Lambrix.
>
> 5. Various background materials that were supplied by your office which include trial transcripts, transcripts of proceedings and various medical files on Michael Cary Lambrix.
>
> Among the factors that I considered in arriving at my opinions include but are not limited to the following:
>
> 1. Michael Lambrix is a product of Chemically Dependent family.
>
> 2. Michael Lambrix began drinking alcohol at the age of 11 or 12.
>
> 3. Michael Lambrix drinking of alcohol quickly preceded to drinking on a daily basis.
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> 4. Michael Lambrix began missing school in order to drink alcohol.
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> 5. Michael Lambrix began using marijuana at the age of 13.
>
> 6. Michael Lambrix quickly began using marijuana on a regular basis.
>
> 7. Michael Lambrix began using various other addictive drugs at the age of 15 to 20 years old. These included PCP, Amphetamines, Qualudes, and Cocaine.
>
> 8. As a direct result of Michael Lambrix alcohol and drug intake he began developing various life problems which included a number of automobile an bicycle accidents, a number of fights, disruption of his marriage and various relationships, psychiatric illness which included depression and a suicide attempt along with visual hallucinations, a great deal of job difficulties and a great many legal problems which included DUI's, aggravated battery, bad

checks, wreckless driving and a number of traffic tickets.

9. As a direct result of Michae [sic] Lambrix polydrug intake he developed blackouts at the age of 15 along with changes in tolerance and withdrawal syndromes.

10. The day prior to the incident in which Michael Lambrix is charged he drank alcohol throughout the whole day which included numerous cans of beer and a quart of rum.

11. Two weeks prior to the incident in which Michael Lambrix is charged he drank alcohol heavily throughout that two week period.

12. On the day of the incident in which Michael Lambrix is charged his drinking escalated, he drank continuously from approximately noon and his drinking included approximately one case of beer, multiple mixed drinks and a half to 3/4 of a quart of rum.

Although a thorough review of the above captioned documents in addition to my evaluation of Michael Lambrix it is my expert medical opinion that:

1. Michael Lambrix suffers from the Disease of Chemical Dependency. He is polydrug addicted.

2. That Michael Lambrix Disease of Chemcial [sic] Dependency is in an advanced stage.

3. As a direct result of Michael Lambrix advanced Chemical Dependency he often experiences blackouts, depressions, visual hallucinations and withdrawal syndromes.

4. the day of and the days preceding the incident in which Michael Lambrix is charged he consumed a tremendous amount of alcohol.

5. The amount of alcohol that Michael Lambrix consumed on the day of and days preceding the incident in which he was charged would, within a reasonable degree of medical probability, produce metabolic encephalopathy along with decrease judgment, perception and insight and a decrease in cognitive ability.

6. The amount of alcohol that Michael Lambrix consumed on the day of and the days preceding the incident would, within a reasonable degree of medical probability, have caused him to be mentally impaired.

7. As a direct result of Michael Lambrix decreased cognitive ability and mental impairment along with his diminished capacity to perceive, form logical and rational judgments and develop insight at the time of the incident in which eh was charged he, therefore, within a reasonable degree of medical probability, lacked the ability to form specific intent.

These opinions are based within a reasonable degree of medical probability.

(App. 1 to Motion to Vacate).

1. My name is Consuelo Lambrix, and I am Cary Michael Lambrix's step-mother. I married Cary's father when Cary was six, and raised him from that time on.

2. Cary was one of the nicest, gentlest boys you could imagine when he was growing up. He always got along well with the other children in the family, but I was the person in the family that he felt the closest to when he was a boy. When Cary was seven years old he used to sleep on the floor near my bed. He always wanted to be near me, especially in the evening.

3. When Cary was growing up he would always just "go with the crowd," rather than thinking of and doing things on his own. His brothers and sisters could lead him around by the nose, even the younger ones. His brother Donald would tell Cary to throw rocks through the window of my next door neighbor's house and Cary would go and do it, and take the blame for it too, even though it was Donald who had been the instigator. Cary never did things like that on his own when he was a boy.

4. Cary never really got into trouble until after he married Kathy. It was around that time that he really began drinking and sometimes he'd drink everyday.

5. Although Cary was a gentle, even-tempered, quiet boy, he would become unpredictable when he had been drinking. He would get jumpy and short-tempered. When he was drunk, he would be arrogant and boisterous, and his moods would change quickly.

6. Cary was always kind of a loner when he was growing up. He seemed completely happy just to keep to himself. Until Cary was fifteen he had an imaginary friend named Frank. Frank used to sit next to Cary at the dinner table and have a place set for him. when Cary got older and started drinking, though, he started going around with people more, and doing crazy things to impress them, things he never would have done before.

7. Cary would not listen to reason when he was drinking. He couldn't handle alcohol. A couple of beers was all that it took. I remember on one occasion when Cary was coming over to our house and he had been drinking. There was a fire in the field next to the house and Cary thought that by driving over the fire with his car, that he could put the fire out. His father and I were not able to reason with him. Fortunately, the fire department got there and put the fire out before Cary hurt himself.

8. I was concerned about Cary's drinking because at one time his father drank too much. His father finally quit after having two strokes. I told Cary to be careful or he would become an alcoholic. He got angry at me and told me that he could handle it. That he was in control of his drinking.

9. Cary would have blackouts when he drank and would not know what he had done the night before. His wife, Kathy, told me about him waking up and not having any idea of what he had done the night before.

10. Cary got involved with alcoholics anonymous when he went to prison for the first time, and got himself straightened out for a while. I would go visit him at the work release center, and he seemed as level-headed and nice as he was when he was a boy. When he left there, though, he started drinking again, a lot, and would be drunk a good deal of the time.

11. Cary's lawyer asked me to testify at Cary's trial, and I did. He never really discussed my testimony with me, but just told me that I should talk about Cary's character and then put me on the witness stand and asked me some questions. He didn't ask me anything about Cary's drinking, or tell me that that could have been important. If I had been asked or if I'd known it was important, I would have gladly testified about Cary's drinking problems.

(App. 2 of the Motion to Vacate).

1. My name is Elena Diane Lambrix and I am 19 years old. Cary Lambrix is my brother.

2. I was about thirteen when my brother moved away from home. Even though I was much younger then him, I remember that Cary was a real pushover with his friends and family. Just about anyone that know Cary could get him to do anything they wanted. Someone would suggest something, like cutting school, and Cary would go along with it.

3. Cary had an unusual habit of telling an imaginary friend where he was going. It was like the person existed for Cary. He would also go outside and play in the weeds. I heard him talking to the weeds as though they could answer.

4. Alcohol has always been a problem for my family. My dad use to drink a lot and finally quit. As Cary got older, he drank more and more. He could drink a lot and finally quit. As Cary got older, he drank more and more. He could drink one beer and get drunk. When he had been drinking, he would act different. He would be loud and yell a lot, something he never did when he was sober. Any little thing would anger him and set him off when he was drunk. When he was sober, though, he'd be quiet and even-tempered as he had always been.

5. Cary's lawyer never asked me about Cary's drinking or anything else. I would have told Cary's lawyer about it if I had known that he could use it to help Cary.

(App. 3 of the Motion to Vacate).

1. My name is Charles A. Lambrix and I am 25 years old. Cary Michael Lambrix is my older brother.

2. Our father, Donald Lambrix, Sr., like to drink a lot. He'd get real depressed when he was drinking and start talking about the pals he was with when he was stationed in Korea. My dad stopped drinking a couple of years ago, after he had his second stroke.

3. Cary takes after our father as far as drinking goes. He used to drink an awful lot, and would act completely different when he drank. Cary is normally a quiet, shy person who keeps to himself, except when he drinks. When Cary gets drunk, he gets real outgoing, talking and joking and bragging like he'd never do when he was sober.

4. Cary was a cheap drunk: it wouldn't take him but five or six beers for him to start showing off and cutting the fool, doing wild things that he never would have done when he was sober. He would get so weird when he was drunk that a lot of people didn't even like to be around him when he was that way. He was just a whole different person.

5. I talked to Cary's lawyers before his trial, but they never asked me anything about his drinking problem or the way he

would act when he'd been drinking. If they had asked me, I would have told them everything I knew, and would have gladly testified at Cary's trial. I had no idea that any of this would help Cary.

(App. 4 of the Motion to Vacate).

1. My name is Jeffrey Dean Lambrix and I am thirty years old. Cary Michael Lambrix is my younger brother.

2. IN 1966, my father got divorced from my natural mother. After that my father began drinking a lot. My stepmother, Consuelo Lambrix, was always worried about his drinking, and would warn him that he drank too much.

3. I am afraid that Cary inherited our father's drinking problem. Although Cary was always a quiet kid, almost afraid of his own shadow, when he starts drinking he gets completely different. He becomes a braggart and a big mouth, gets real loud and boisterous, and is frankly real hard to be around when he's drunk. Although he was normally quiet and reserved, when he was drinking he would never shut up -- you couldn't get a word in edgewise when he was like that. I was annoyed by Cary when he was drunk, and did not like to be around him then.

4. It didn't take much for Cary to get drunk -- less than a six pack -- and for a while he was drinking almost every day, all day. After he married Kathy, he would start drinking whenever they had problems at home, which, after a while, was almost all the time.

5. It was common knowledge among family members that Cary would do crazy things when he had been drinking, things that he wouldn't do when he was sober. Once when he was driving down the road at 60 mph, after having been drinking most of the day, he opened his car door wide open and pretended that he was going to jump out of the car. Another time Cary was sitting in the middle in the front seat when somebody told him that he shouldn't be drinking in the car; Cary climbed over the passenger, out of the passenger window, and out onto the hood of the car to drink the beer, while the car was traveling down the road at 50 mph or so.

6. At the time of Cary's second trial his attorney asked me to testify about Cary's character. He never discussed my testimony with me before I testified,

> but just got me up in front of the jury and let me go. He never asked me anything about Cary's drinking problems, and I didn't know that they could be important. If he had asked, or if I'd know it could be important, I would have testified as I am doing here today.

(App. 5 of the Motion to Vacate).

5. These factual proffers, and those provided in Mr. Lambrix's Rule 3.850 motion, established the need for an evidentiary hearing in this action with regard to Mr. Lambrix's trial and penalty phase ineffective assistance of counsel claims. See Motion to Vacate, Claims I and II. The files and records by no means showed that Mr. Lambrix was entitled to no relief. See O'Callaghan, supra; Lemon, supra. As the Rule 3.850 motion expalined, counsel's assistance at trial was prejudicially deficient:

> CLAIM I
>
> MR. LAMBRIX WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEYS' FAILURE TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE IN SUPPORT OF A VOLUNTARY INTOXICATION DEFENSE.
>
> All other allegations contained in the instant motion are incorporated herein by specific reference.
>
> 1. Trial counsel's only discernible defense strategy was to attempt to establish that Mr. Lambrix had been drinking excessively on the night of the offense. To this end, counsel elicited through cross-examination of State's witnesses the facts that Mr. Lambrix had spent the entire evening proceeding the offense drinking in several different bars (see R. 2294), ingesting both beer and mixed drinks (R. 2201), that he had purchased a bottle of liquor before leaving the last bar, and continued to drink (R. 2204), and that Mr. Lambrix acted as if he was "high" (R. 2300).
>
> 2. At the guilt-innocence phase charge conference, counsel requested that the jury be instructed with regard to the defense of voluntary intoxication (R. 2470). The Court denied the requested instructions, holding that the evidence was insufficient to support such an instruction (R. 2470-71). As a result, the jury was not instructed with

respect to the only discernible defense presented on behalf of Mr. Lambrix.

3. Voluntary intoxication is a valid defense to specific intent offenses such as first-degree murder: Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Bell v. State, 394 So.2d 979 (Fla. 1981); State ex rel. Goepel v. Kelly. 68 So.2d 351 (Fla. 1953). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981). Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985) (emphasis added). That voluntary intoxication is a defense to specific intent crimes is not a novel principle. See Garner v. State, 28 Fla. 113, 9 So. 835 (Fla. 1891). The standard governing a defendant's right to a jury instruction in this regard is also settled: Any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner, supra; Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982).

4. The Florida Supreme Court's citation to Mellins in Gardner, supra, is a good starting point. There, the defendant testified she was not intoxicated:

> At the charge conference defense counsel requested an instruction on the defense of intoxication. The request was denied because of appellant's testimony to the effect that she had not been intoxicated. Conviction and this appeal followed.
>
> Appellant takes the position that there was some evidence of intoxication so that she was entitled to an instruction on this theory of defense.
>
> Appellee counters by pointing out that while inconsistent defenses are permissible this is so only so long as proof of one does not disprove the other. In addition, appellee maintains that even if there was error in this regard it was harmless because defense counsel "fully and completely argued the

meaning of intent and intoxication." Therefore, the jury had an opportunity to consider the effect of intoxication in this context so that the failure to instruct could not have "injuriously affected the substantial rights of the appellant" citing Paulk v. State, 376 So.2d 1213, 1214 (Fla. 3d DCA 1979).

There were no scientific tests made to determine whether appellant was intoxicated at the time of the alleged offense. There could therefore be no empirical evidence of intoxication. The only evidence on this issue was the testimony of the police officers. We have concluded in a previous case, however, that evidence elicited solely in the cross-examination of the state's witnesses may be sufficient to give rise to a duty to instruct on a defense suggested by that testimony. To hold otherwise would seriously jeopardize the right of the accused to refrain from testifying. Weaver v. State, 370 So.2d 1189 (Fla. 4th DCA 1979).

Voluntary intoxication is a defense to the crime of battery on a police officer, Russell v. State, 373 So.2d 97 (FLa. 2d DCA 1979), as in other crimes requiring a specific intent. Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979). Where intent is a requisite element of the offense charged and there is some evidence to support this defense, the question is one for the jury to resolve under appropriate instructions on the law. Frazee v. State, 320 So.2d 462 (Fla. 2d DCA 1975).

The law is very clear that the court, if timely requested, as here, must give instructions on legal issues for which there exists a foundation in the evidence. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976).

It is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction. The jury is admonished to take the law from the court's instructions, not from argument of counsel. It must be assumed that this admonition is generally followed. For this reason the error may not be considered harmless.

Mellins, 395 So. 2d at 1208-10 (emphasis added).

5. There was ample evidence relating to Mr. Lambrix's intoxication and its effect on his ability to form a specific intent available to trial counsel. As discussed below, Mr. Lambrix suffered from a longstanding dependence on and addiction to alcohol. Numerous people could have testified to his problems with alcohol, to his alcoholic blackouts, and to his loss of controls after the ingestion of small amounts of alcohol. Records regarding Mr. Lambrix, never obtained by counsel, reflected as much. Members of Mr. Lambrix's family, many of whom trial counsel had contacted, could have and would have testified that Mr. Lambrix had a significant history of alcoholism, and that his personality would undergo marked change, with a correspondent loss of normal behavioral controls, after he drank even small amounts of alcohol. Their testimony would have proved (and will prove) that the amount of alcohol ingestion already apparent from the record would have been sufficient to render Mr. Lambrix intoxicated. Family members also indicate a family history of alcoholism, particularly with reference to Mr. Lambrix's father. In this regard:

> That alcoholism is familial is beyond dispute; various studies of alcoholic groups reveal that up to 50 percent of their fathers, 30 percent of their brothers, 6 percent of their mothers, and 3 percent of their sisters are also alcoholic.

Kaplan and Sadock, Textbook of Forensic Psychiatry IV, p. 416. As their testimony will also demonstrate, however, trial counsel made no attempt to develop this information.

6. Records relating to Mr. Lambrix's previous incarceration are rife with references to his ongoing dependence on and addiction to alcohol. For example, a psychological screening report from 1982 (DOC records) indicate that Mr. Lambrix has substance abuse and dependence. It states: "He drinks steadily and heavily with legal problems following." On 1984, a psychological screening report again indicated that he began use of marijuana at age 12 with a variety of other substance at age fifteen and went beyond an addiction to heavy alcohol use. He is described as "dependent on drugs and alcohol." A PSI indicates that he admits to being a heavy drinker and "does not remember a day when he didn't drink." Moreover, Glades County jail records indicate that he was regularly medicated with Sinequan while awaiting trial, a drug recommended for use in patients with "depression and/or anxiety associated with alcoholism." Physician's Desk Reference, 1988, p. 1782. These records would have independently corroborated the testimony

which could have been elicited from his family in this regard. Again, although this evidence was easily available to trial counsel, no efforts were made to develop and present it in support of a compelling involuntary intoxication defense which counsel himself ineffectively attempted to assert.

7. Even more compelling evidence relating to Mr. Lambrix's dependence on and addiction to alcohol, and his intoxication at the time of the offense was known to trial counsel prior to trial, but was inexplicably ignored by trial counsel. Dr. Whitman, M.D., was appointed prior to trial, pursuant to a defense motion to evaluate Mr. Lambrix to determine his competency to stand trial and his sanity (or lack thereof) at the time of the offense (See R. 277). Dr. Whitman reported to defense counsel at that time, and would testify now, that Mr. Lambrix suffered from substance abuse disorder, and that alcohol abuse played a significant part in the offense. Trial counsel's failure to use Dr. Whitman to support their asserted defense of voluntary intoxication is simply inexplicable, and patently ineffective.

8. Mr. Lambrix will present at an evidentiary hearing the conclusions and opinions resulting from current expert evaluations (e.g., by experts in additionology). These accounts will confirm the conclusions of Dr. Whitman at the time of trial, and show that Mr. Lambrix suffered from the primary disease of chemical dependency, the result of which was his uncontrolled and excessive abuse of alcohol. Moreover, this expert testimony will demonstrate that the amount of alcohol which the record confirms was ingested by Mr. Lambrix on the night of the offense was sufficient to render him intoxicated, that he was in fact intoxicated, and that as a result he was incapable of forming the specific intent necessary to a conviction of first-degree murder. Again, this testimony was available to and could have been presented at trial, had not trial counsel acted unreasonably. Again, his failure in this regard was patently ineffective.

9. Florida courts have consistently held that voluntary intoxication defenses must be pursued by competent counsel if there is evidence of intoxication, even under circumstances in which trial counsel explains in post-conviction proceedings that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). See also Presley v. State, 389 So. 2d 1385 (Fla. 2d DCA 1980); Price v. State, No. BH-155 (Fla. 1st DCA Feb. 20, 1986). The key question is whether the

record reflects any evidence of voluntary intoxication. Gardner, supra; Mellins, supra; Parker v. State, 471 So. 2d 1352 (Fla. 2d DCA 1985); Heathcoat v. State, 430 So. 2d 945 (Fla. 2d DCA), aff'd, 442 So. 2d 955 (Fla. 1983). Even when (1) the evidence arises from cross-examination of state's witnesses, (2) the evidence is not supported by empirical evidence, (3) the defendant does not testify, or does and denies intoxication, or (4) where the defense is proffered as an alternative theory of defense, an instruction is required. Pope v. State, 458 So. 2d 327 (Fla. 1st DCA 1984); Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983); Mellins; Price; Gardner, supra. Here, as the discussion above demonstrates, the available evidence was more than sufficient to require an instruction under the applicable standards. Trial counsel requested such an instruction, but unreasonably failed to introduce amply available evidence in support of that defense, evidence which would have required the court to give the requested instruction.

10. The stringent requirements pursuant to which the denial of voluntary intoxication instructions are to be analyzed were established, in part, because intoxication is an issue particularly suited for juror or fact-finder resolution. A defendant's right to fact-finder resolution on this issue is ironclad:

> It is axiomatic that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such an instruction, and the trial court may not weigh the evidence in determining whether the instruction is appropriate. Smith v. State, 424 So.2d 726 (Fla. 1982). The evidence evidence need not be "convincing to the trial court," before the instruction can be submitted to the jury. Edwards, at 359, as it suffices that the defense is "suggested" by the testimony. Mellins at 1209.
>
> "'However disdainfully the trial Judge may have felt about the merits of such defense from a factual standpoint, however even we may feel about it, is beside the point.'" Laythe v. State, 330 So.2d 113, 114 (Fla. 3d DCA 1976).
>
> The testimony in the instant case concerning the degree of appellant's state of intoxication might have been conflicting, but it certainly constituted evidence of intoxication sufficient to go to the jury as an issue of fact. Consequently, the trial court erred in failing to instruct the jury on

the defense of voluntary intoxication.

Pope, 458 So. 2d at 329. See also Frazee v. State, 320 So. 2d 412 (Fla. 3d DCA 1975)("the resolution of such question is solely for the trier of the facts"). Here, as the discussion above indicates, the available evidence of intoxication was compelling, and more than sufficient to require fact-finder resolution through court instruction. This compelling evidence, however, never made it to the jury, because trial counsel acted unreasonably.

11. Trial counsel clearly recognized that intoxication was a viable defense in Mr. Lambrix's case -- it was in fact the only discernible defense presented by counsel. Counsel requested that the jury be instructed with regard to this defense. Counsel completely failed, however, to introduce the ample and available evidence supporting this defense. The evidence discussed herein was easily accessible to counsel, and could have been developed through even the most rudimentary of investigative steps. Trial counsel's failure to develop and present this evidence can thus be attributable only to a complete lack of adequate investigation and preparation.

12. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 106 S. Ct. 2574, 2588-89 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)(failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984)(failure to present additional character witnesses was not the result of a strategic decision made after a reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972)(refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

13. Mr. Lambrix's court-appointed

counsel failed in this duty. The wealth of significant evidence which was available and which should have been presented in support of the asserted intoxication defense never got to the court. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Nealy v. Cabana, supra; Kimmelman v. Morrison, supra. Trial counsel's failure in this regard was prejudicially ineffective -- had he presented the amply available evidence in support of his asserted voluntary intoxication defense, Mr. Lambrix's jury would have been instructed with regard to the defense of involuntary intoxication. Had the jury been so instructed, there is a reasonable probability that the jury would have returned a verdict of second-degree murder.

14. Mr. Lambrix has thus established what Strickland requires: counsel acted unreasonably, and Mr. Lambrix was prejudiced. He is thus entitled, at a minimum, to a stay of execution and an evidentiary hearing, at which he will conclusively prove his entitlement to relief.

Motion to Vacate, Claim I (Att. A).[7]

6. Counsel's performance at the penalty phase was prejudicially deficient, see O'Callaghan, supra, as well:

CLAIM II

MR. LAMBRIX WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BY HIS ATTORNEYS' UNREASONABLE FAILURE TO INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE ESTABLISHING COMPELLING STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

All other allegations contained in the instant motion are incorporated herein by specific reference.

1. As discussed at length in the preceding claim, there was ample evidence available relating to Mr. Lambrix's long-standing dependence on, addiction to, and abuse of alcohol, and his intoxication at the time of the offense. All of this evidence, of course, would have been compellingly

[7]The motion and supplement are appended hereto for the Court's convenience.

mitigating. None of it, however, was investigated, developed, or presented at sentencing by trial counsel. As discussed below, trial counsel's failure in this regard was prejudicially ineffective.

2. As discussed in Claim I, supra, Mr. Lambrix's family members could have testified, and will do so now, with regard to Mr. Lambrix's history of alcohol abuse, including episodic blackouts and loss of control, the dramatic effect of alcohol on his personality and behavior, and the frequency of his intoxication. Many of these family members testified at the sentencing phase of Mr. Lambrix's trial: none of them, however, were asked about any of the matters discussed herein.

3. Records and other background materials which could have confirmed Mr. Lambrix's history of alcohol abuse were also easily available to trial counsel. For example, prison records relating to Mr. Lambrix's prior incarceration are rife with references to his long-standing substance abuse, and his frequent treatment for alcohol and substance abuse-related problems. See Claim I, supra. Again, these records were easily accessible to trial counsel, but no effort was made to investigate and obtain them.

4. Trial counsel did request appointment of a mental health expert prior to trial, for purposes of determining Mr. Lambrix's sanity at the time of the offense and competency to stand trial (see R. 277). As that expert (Dr. Whitman, M.D.) will now explain, he was never properly asked by trial counsel to evaluate for and determine the existence of mitigating factors. As Dr. Whitman will also testify, however, despite the limited mandate given him by trial counsel, his conclusion was that Mr. Lambrix suffered from substance abuse disorder. Counsel ignored this compelling evidence.

5. All of this evidence would have established compelling, classically recognized nonstatutory mitigating factors. See, e.g., Holsworth v. State, No. 67,973, slip op. at 9, 10 (Fla. Feb. 18, 1988)("history of drug and alcohol problems" properly considered by jury in mitigation); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(jury override improper due in part to defendant's history of "drinking problems" and alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime); Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988)("Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol [on] the night of the murder. . . . The jurors should have been allowed to consider these factors

in mitigation"); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987)(Florida Supreme Court has "held improper an override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder,' along with 'stronger' evidence of a drug abuse problem"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug dependence may mitigate sentence); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1987), cert. denied, 107 S. Ct. 314 (1987)("history of drug abuse" one factor rendering jury override improper); Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986) (alcoholism and organic brain syndrome); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985)(history of drug abuse among factors rendering jury override improper); Hargrave v. Dugger, 832 F.2d at 1534 (vacating death sentence because nonstatutory mitigating evidence, including evidence of a "history of drug abuse," was excluded from consideration by sentencer); Foster v. State, 518 So. 2d 901, 902 n.2 (Fla. 1988)("some" evidence of alcohol use). None of this evidence was presented and considered by Mr. Lambrix's sentencers, however, because trial counsel unreasonably failed to investigate and prepare.

6. Mr. Lambrix is being evaluated by a certified addictionologist, a medical doctor specializing in substance and alcoholic abuse and related problems. What is clear, and what will be established at an evidentiary hearing, is that Mr. Lambrix at the time of the offense suffered from chemical dependency, the result of which was his uncontrolled and excessive abuse of alcohol, a conclusion verified by all background materials and collateral data. Moreover, given Mr. Lambrix's condition and history, even that amount of alcohol which the record confirms Mr. Lambrix ingested on the evening of the offense was sufficient to render him intoxicated. Mr. Lambrix was in fact intoxicated at the time of the offense. Because of his state of intoxication, he was at the time under extreme mental and emotional distress and was substantially impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Cf. Fla. Stat. 921.141(6)(b), (f). This type of expert evidence was also easily available to trial counsel at the time of sentencing, had he conducted any meaningful investigation.

7. As the evidence discussed above demonstrates, Mr. Lambrix was alcohol intoxicated at the time of the offense. The psychological symptoms of alcohol intoxication include "mood liability, disinhibiting of sexual and aggressive impulses, irritability and lacquacity. The

maladaptive behavioral effects include fighting, impaired judgment, interference with social or occupational functioning, or failure to meet responsibilities" Kaplan and Sadock, Comprehensive Textbook of Psychiatry, 4th Ed., p. 407.

8. Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

9. The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, see State v. Michael, No. 70,658 (Fla. Sup. Ct., September 22, 1988), object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, ___ U.S. ___, 85 L.Ed.2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (1984), cert denied, ____ U.S. ____, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these constitutional standards. See King v. Strickland, supra; Tyler v. Kemp, supra; Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1985); see also O'Callaghan v. State, 486 So. 2d 1454 (Fla. 19840; Douglas v. Wainwright, supra; Thomas v. Kemp, supra, 796 F.2d at 1325. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that

> information, a jury cannot make the life/death decision in a rational and individualized manner.

Id. at 743 (citations omitted). Mr. Lambrix is entitled to the same relief.

10. Mr. Lambrix's case is also similar to O'Callaghan v. State, supra, 461 So. 2d at 1354-55. There, the Florida Supreme Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present mental health mitigating evidence. 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing. Mr. Lambrix's counsel's performance reflected similar fundamental flaws, and Mr. Lambrix is similarly entitled to full and fair Rule 3.850 evidentiary resolution in the trial court.

11. Mr. Lambrix's claims are also similar to those presented in State v. Michael, supra. There, the Florida Supreme Court affirmed the Circuit Court's grant of Rule 3.850 sentencing relief, stating:

> In regards to the sentencing phase, . . . the court found that counsel should have obtained, but did not, the experts' opinions on the applicability of the statutory mental mitigating factors. According to the court, even though counsel correctly decided there was no insanity defense to pursue, counsel admitted he was on notice of Michael's disturbed condition. The court found the failure to pursue this line of investigation so unreasonable as to constitute substandard representation, the first prong of the Strickland test. The inability to guage the effect of this omission undermined the court's confidence in the outcome of the penalty proceeding. Therefore, the court decided that the second prong of the Strickland test, prejudice, had also been established and granted Michael a new sentencing proceeding. The court held the other instances of alleged ineffectiveness of counsel's assistance and of the psychiatric experts' assistance moot because a new sentencing hearing would be conducted.
>
> On Appeal the state claims that the court erred in finding counsel ineffective during the sentencing phase. Michael, on the other hand, urges affirmance of the trial court's order. He also cross-appeals and reargues the issues presented to that court in support of his position.

> The trial court based its decision on competent substantial evidence, and the state has presented nothing to convince us to disturb the court's findings. Henderson v. Dugger, 522 So.2d 835 (Fla. 1988); Martin v. State, 515 So.2d 189 (Fla. 1987); Stewart v. State, 481 So.2d 1210 (Fla. 1985); Demps v. State, 562 So.2d 1074 (Fla. 1984). Therefore, we affirm the trial court's vacating Michael's death sentence . . .
>
> 12. Despite the recognize importance of mental health related mitigated evidence, see Michael, supra; O'Callaghan, supra, Mr. Lambrix's trial counsel conducted a wholly inadequate penalty phase investigation. Although he was aware of Mr. Lambrix's alcohol abuse on the night of the offense, and in fact had attempted to present a defense based on intoxication at the guilt phase, see Claim I, supra, counsel apparently conducted no investigation into the critical mitigation issues implicated by Mr. Lambrix's intoxication. Although counsel was aware of the importance of mental health professional assistance, and had in fact procured the appointment of a qualified mental health practitioner prior to trial, he completely failed to ask that expert to investigate intoxication and related issues and the existence of statutory and nonstatutory mitigating evidence. Had counsel conducted any reasonable penalty phase investigation, a wealth of substantial statutory and nonstatutory mitigating evidence would have been provided to Mr. Lambrix's sentencing judge and jury. Given the opportunity to which he is entitled, Mr. Lambrix will conclusively demonstrate at an evidentiary hearing that a plethora of statutory and nonstatutory mitigating evidence was available at the time of sentencing, and that trial counsel unreasonably and ineffectively failed to investigate, develop, and present that easily available evidence.
>
> 13. In Mr. Lambrix's case, a wealth of significant evidence which was available and which should have been presented never got to the court. In this case, a stay of execution, a full and fair evidentiary hearing, see O'Callaghan, supra, and, thereafter, Rule 3.850 relief are proper.

Motion to Vacate, Claim II (Att. A).

7. The lower court erred. The files and records by no means conclusively showed that Mr. Lambrix was entitled to no relief. Lemon v. State. An evidentiary hearing was warranted, and this Court should now order one.

III. MR. LAMBRIX'S EXECUTION SHOULD BE STAYED

8. Time constraints have made it impossible for undersigned counsel to properly brief Mr. Lambrix's claims.[8] Counsel has, however, in the preceding section of this motion, discussed one of the most glaring errors in the lower court's order. The lower court's errors went beyond that, and the need for a stay of execution in this case is clear. This motion and its attachments demonstrate that a stay of execution, proper and professionally responsible briefing, and reasoned appellate resolution are necessary in this case, and the discussion presented above demonstrates that an evidentiary hearing was warranted, and that the lower court erred. Mr. Lambrix's Motion to Vacate and Supplement are appended hereto, and his Appendix should be included in the record before the Court. Mr. Lambrix's claims are far from frivolous. On the basis of the claims presented and facts proffered therein, and the discussion presented herein, Mr. Lambrix urges that his execution be stayed, that he be provided a reasonable opportunity to brief the issues, and that reasoned and judicious appellate review be provided.

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[8]As the Court is aware, counsel represents Amos King, another capital litigant scheduled to be executed on the same date as Mr. Lambrix. CCR also must file two actions under Rule 3.851 on this same date, State v. Glock; State v. Johnston, and counsel has been required to assist in those. Under these circumstances, it has been impossible for undersigned counsel to properly brief and professionally present Mr. Lambrix's claims herein. This motion has been drafter, however, in order to demonstrate that a stay of execution, proper briefing and proper appellate resolution, are necessary in this action. See, e.g., Marek v. State, Florida Supreme Court (November, 1988)(granting stay of execution and allowing the parties to properly brief and present the issues).

WHEREFORE, Cary Michael Lambrix, through counsel, respectfully urges that the Court enter a stay of execution and allow him a reasonable opportunity to properly brief his claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL/HAND DELIVERY to Robert Krauss, Assistant Attorney General, Department of the Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, Florida 33602, this 28th day of November, 1988.

_____
Attorney