IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

vs.

Case No. 74,452

RICHARD L. DUGGER,

Appellee.

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

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: 238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

COUNSEL FOR APPELLEE

/sas

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PRELIMINARY STATEMENT

This is an appeal from the denial of a petition for writ of habeas corpus filed in the Twentieth Judicial Circuit, in and for Glades County, Florida. Appellant, CARY MICHAEL LAMBRIX, has filed the instant appeal pro se. There is one (1) volume of record on appeal. The record will be referenced by the symbol "R" followed by the appropriate page number.

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 11.** THE TRIAL COURT ERRED IN EXCUSING JUROR MARY HILL FOR CAUSE IN VIOLATION OF THE **WITHERSPOON** AND **CHANDLER** STANDARDS.
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> **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.
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> **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 11: 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 111: 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. Duqqer, 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 was in effect from noon on Tuesday, November 29, 1988, until noon on Tuesday, December 6, 1988, with the execution 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. In his 3.850 motion, the defendant raised the following claims:

> **CLAIM I:** MR. LAMBRIX WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY THIS ATTORNEYS' FAILURE TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE IN SUPPORT OF A VOLUNTARY INTOXICATION DEFENSE.
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> **CLAIM 11:** 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.
>
> **CLAIM 111:** MR. LAMBRIX'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED BY THE PRESENTATION TO AND CONSIDERATION BY THE SENTENCING COURT OF CONSTITUTIONALLY IMPERMISSIBLE "VICTIM IMPACT" EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
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> **CLAIM IV:** THE SENTENCING JURY WAS INSTRUCTED IN SUCH A MANNER AS TO LEAD THEM TO BELIEVE THAT MR. LAMBRIX'S AGE AND ANY OTHER ASPECT OF HIS CHARACTER OR RECORD OR ANY OTHER CIRCUMSTANCE OF THE OFFENSE COULD BE CONSIDERED AS AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
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> **CLAIM V:** MR. LAMBRIX WAS DEPRIVED OF HIS RIGHTS TO A TRIAL BEFORE A FAIR AND IMPARTIAL JURY AND HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY TRIAL COUNSEL'S FAILURE TO EFFECTIVELY RENEW, SUPPLEMENT, AND LITIGATE A MOTION FOR CHANGE OF VENUE OF MR. LAMBRIX'S SECOND GLADES COUNTY TRIAL.

CLAIM VI: MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY TRIAL COUNSEL'S FAILURE TO ADEQUATELY CROSS EXAMINE AND IMPEACH KEY STATE WITNESSES.

CLAIM VII: MATERIAL, EXCULPATORY EVIDENCE WAS WITHHELD FROM THE DEFENSE IN VIOLATION OF BRADY **V. MARYLAND, 373** U.S. **83 (1967)** AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VIII: THE TRIAL COUNSEL INEFFECTIVELY FAILED TO SECURE MR. LAMBRIX'S PRESENCE AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM, RESULTING IN THE DEPRIVATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM IX: THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM X: THE STATE'S COMMENTS AND THE ERRONEOUS JURY INSTRUCTIONS THAT A VERDICT OF LIFE MUST BE AGREED TO BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. LAMBRIX'S DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI: THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. LAMBRIX OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII: THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL'' IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF **MAYNARD V. CARTWRIGHT, 108** S.CT. **1853** (1988), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII: THE FLORIDA SUPREME COURT HAS INTERPRETED "COLD, CALCULATED, AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THAT AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIV: THE TRIAL COURT'S ACTIONS AND CONDUCT IN MR. LAMBRIX'S FIRST JURY TRIAL COERCED THE JURY INTO A DEADLOCK IN THEIR DELIBERATIONS, THEREBY PROMPTING THE COURT TO DECLARE A MISTRIAL, AND MR. LAMBRIX'S SECOND TRIAL ON THE SAME CHARGES THUS VIOLATED CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY, AS WELL AS THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

On November **18, 1988,** the Honorable Elmer Θ. 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.**

An appeal was taken to the Florida Supreme Court from the denial of the defendant's Rule **3.850** motion. Oral argument was held and on November **30, 1988,** the Florida Supreme Court affirmed the order denying the motion for post-conviction relief. Lambrix v. State, 534 So.2d 1151 (Fla. **1988).**

Thereafter, the defendant filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida on or about December 1, **1988.** That petition is presently pending before the federal court.

On or about December **29, 1988,** appellant filed a petition for writ of habeas corpus with the state trial court, the Honorable Elmer Θ. Friday, Jr., Circuit Judge, Twentieth Judicial

Circuit, alleging that collateral counsel was ineffective in its representation of petitioner. That petition was denied by the court and on June 26, 1989, the trial court denied a motion for rehearing on the petition for writ of habeas corpus (R 69).

On or about July 7, 1989, appellant filed a notice of appeal. That appeal follows.

STATEMENT OF THE FACTS

In his petition for a writ of habeas corpus, appellant essentially set forth one issue, to wit: The effectiveness of collateral counsel pertaining to the omission of an issue concerning one of the jurors who was empaneled in this cause. Appellant was originally tried for the two first degree murders in November - December, 1983. At that time, a potential juror, Maxine Hough, was a part of the venire but was dismissed prior to the jury being sworn. Thus, Ms. Hough did not participate as a juror in the first trial of this cause. In February, 1984, following a mistrial due to a "hung jury", a second trial was commenced and Ms. Hough was again part of the venire panel. Ms. Hough was asked by the state whether she had any prior jury experience to which Ms. Hough replied "No" (A.R. 1725-1726).[1]

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[1] References to the record of the appellate proceedings held in this cause subsequent to the two convictions for first degree murder will be referred to by the symbol A.R. followed by the appropriate page number. That record is used in appea number 65,203, Lambrix v. State, 494 So.2d 1143 (Fla. 1986).

Ms. Hough further advised that there was nothing that might affect her service as a juror in the case (A.R. **1754).**

The only other facts which are germaine to the instant habeas petition are historical facts. Namely, the office of the capital collateral representative was appointed to represent appellant and filed a **3.850** motion which contained **14** issues. Additionally, at a hearing concerning appellant's request to have CCR removed as counsel from his case, Larry Spalding testified that CCR had investigated the alleged juror misconduct claim (concerning Ms. Hough) and determined that the issue had no merit. Attached herewith is a copy of the transcript of those motion proceedings conducted before Magistrate Ann E. Vitunac on March **28, 1989.**

SUMMARY OF THE ARGUMENT

There is no right under the United States Constitution to have counsel appointed to represent a capital defendant in collateral proceedings. Thus, a claim of ineffective assistance of collateral counsel cannot be maintained. Even if a claim of ineffective collateral representation could be maintained, the facts of the instant case show that the claim omitted by CCR was without merit and, therefore, collateral counsel could not have been ineffective.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS WHICH ALLEGED THAT COLLATERAL COUNSEL WAS INEFFECTIVE.

In his brief, appellant has set forth two issues but, for the sake of clarity and brevity, your appellee will address both in this one point. The two issues raised by appellant both concern the effectiveness of collateral counsel and the alleged prejudice suffered by appellant.

At the outset, your appellee denies that there is a right to collateral counsel arising under the Constitution of the United States so as to invoke the guarantees of the Sixth Amendment cases defining "effectiveness" of counsel. See **Pennsylvania v. Finley, 481 U.S. 551, 107** S.Ct. **1990, 95** L.Ed.2d **539 (1987).**

Your appellee is not unmindful of this Court's opinion in **Spalding v. Dugger,** 526 So.2d **71** (Fla. **1988),** wherein this Court, in dicta, recognized that under **Florida Statute** 827.702 a capital defendant has a right to effective legal representation by the capital collateral representative in all collateral relief proceedings. This Court's reasoning was partly premised upon the decision of **Giarratano** v. **Murray, 847** F.2d **1118** (4th Cir. **1988),** wherein the Fourth Circuit Court of Appeals determined that the states are absolutely obligated to provide counsel for capital defendants in collateral relief proceedings. However, the United States Supreme Court has recently overturned the decision of the

Fourth Circuit and in **Murray v. Giarratano**, 492 U.S. __, 109 S.Ct. __, 106 L.Ed.2d 1 (1989), the Court reaffirmed the principle that capital defendants are not entitled to representation in collateral proceedings. However, the State of Florida has provided that counsel be appointed for an indigent capital defendant. **Florida Statute §27.7001, et seq.** This enabling legislation does not mean, however, that a capital defendant has the right to raise an independent claim concerning the purported ineffectiveness of his capital collateral representative. Rather, as set forth in **Florida Statute** 827.7001, is the intent of the legislature that counsel be appointed in order that collateral legal proceedings may be timely commenced and that judgments may be regarded with the finality to which they are entitled. This legislative intent is similar to the conclusion reached by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report (Powell Commission)[2] wherein it is recognized that there is no federal claim of ineffective assistance of collateral counsel. The capital collateral representative enabling legislation thus provides indigent defendants with an attorney to pursue collateral proceedings and does not create an independent right to claim that that attorney is ineffective. Claims of ineffective assistance of counsel arise out of the Sixth Amendment of the United States Constitution which provides that

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[2] A copy of which is attached herewith as part of the appendix.

counsel is to be appointed in all criminal matters. **3.850** and attendant legal proceedings are matters which are civil in nature, and not criminal. There is no cognizable claim of ineffective assistance of collateral counsel.

However, assuming arguendo that appellant had the right to have effective assistance of collateral counsel, the instant habeas petition was properly denied by the trial court. In his petition, appellant equated the role of collateral counsel with the role played by appellate counsel in the appellate process. Even if this analogy were to be in effect, and the state does not so concede inasmuch as a criminal defendant is entitled to an appeal as a matter of right, an analysis of applicable case law indicates that appellant's point must fail. A defense attorney who is assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by defendant. The issues to be raised are a matter of professional judgment. **Jones V. Barnes, 463 U.S. 745, 103** S.Ct. **3308, 77** L.Ed.2d **987 (1983).** In the six-Justice majority opinion authored by Chief Justice Burger, the Court held:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.
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> * * *
>
> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting

> the most promising issues for review. (77 L.Ed.2d at 994).

Considering the quantity (14 issues) and quality of the issues raised by collateral counsel in appellant's 3.850 motion, it is lucricous to contend that collateral counsel was ineffective for failing to raise the issue now asserted by appellant in his pro se habeas petition.

Also in the context of appellate counsel ineffectiveness, this Honorable Court in **Suarez v. Dugger**, 527 So.2d 190 (Fla. 1988), held that "[t]he failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance", citing **Card v. State**, 497 So.2d 1169, 1177 (Fla. 1986), **cert. denied**, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987). Appellant's contention is that juror Maxine Hough would have been excluded for cause had she responded to voir dire inquiries "truthfully". As set forth in the statement of the facts, Ms. Hough was asked whether she had any prior jury experience. A reasonable interpretation of this question would be to assume that the question called for a response as to whether or not that venireperson had ever set on a jury. Merely because Ms. Hough may have been called as a potential juror during the first trial of this cause does not necessitate the conclusion that she had any prior jury experience. Therefore, Ms. Hough did not answer the question untruthfully. Even had Ms. Hough stated that she had been called to serve during the first

trial, such a response does not necessitate a challenge for cause. The key question concerning juror participation is whether that juror is able to follow the law and render a just and fair verdict. **Wainwright v. Witt**, 469 **U.S.** 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). There is no allegation in the habeas petition that Ms. Hough was not able to follow the law and render a just and fair verdict. Therefore, the petition failed to allege facts upon which relief may be granted. Thus, inasmuch as the underlining issue is without merit, collateral counsel cannot be ineffective for failing to raise same. This issue was not ignored by collateral counsel. Rather, the claim was investigated and it was determined that the issue had no merit. See pages 26-27 of the transcript of the motion proceedings attached herewith. As aforementioned, counsel does not have a duty to raise every non-frivolous issue.

In any event, another reason exists to compel the conclusion that collateral counsel was not ineffective for failing to raise the claim now asserted by appellant. It is clear that the claim discussed by appellant is based upon record material and, therefore, the failure to raise an issue appearing of record on direct appeal would preclude collateral review. See, e.g., **Blanco v. State**, 507 So.2d 1377 (Fla. 1987). Collateral counsel could not be held ineffective for failing to raise an issue which is clearly procedurally barred and thus not cognizable in Rule 3.850 proceedings.

Once again, your appellee submits that there is no cognizable claim of ineffective assistance of collateral counsel but, notwithstanding that position, appellant in the instant case failed to show how his collateral counsel was ineffective.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the order of the trial court denying the habeas petition filed by appellant should be affirmed by this Honorable Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: **238538**
1313 Tampa Street, Suite **804**
Park Trammell Building
Tampa, Florida **33602**
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CARY MICHAEL LAMBRIX, DOC# **482053**, Florida State Prison P. **O.** Box **747**, Starke, Florida **32091**, this 19th day of October, **1989**.

OF COUNSEL FOR APPELLEE