IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

v. CASE NO. 81,941

HARRY K. SINGLETARY, JR.
Secretary, Florida Department
of Corrections,

Appellee[s].

_____/

RESPONSE TO ORDER TO SHOW CAUSE AND RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS AND EXTRAORDINARY RELIEF

COMES NOW the respondent, Harry K. Singletary, Secretary, Florida Department of Corrections, by and through the undersigned Assistant Attorney General, and hereby files this response to the Order to Show Cause entered by this Court on July 6, 1993, and would show unto this Honorable Court:

I.

Procedural History

The petitioner, Cary Michael Lambrix, was charged by indictment filed on March 29, 1983, with two counts of first degree murder. 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, Twentieth Judicial

Circuit, in and for Glades County, Florida. After deliberations, the jury found Lambrix guilty as charged on both counts of the indictment on February 27, 1984 (R 2553).[1] Following the penalty phase of the trial, a 10 - 2 majority of the jury recommended the death penalty as to Count I (as to Aleisha 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).

An appeal was taken to the Supreme Court of Florida and an opinion filed on September 25, 1986, this Honorable Court affirmed the judgement 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.
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> ISSUE II. THE TRIAL COURT ERRED IN EXCUSING JUROR MARY HILL FOR CAUSE IN VIOLATION OF THE WITHERSPOON AND CHANDLER STANDARDS.

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[1] References to the original record on appeal used in case no. 65,203 which eventually led to the opinion cited at Lambrix v. State, 494 So. 2d 1143 (Fla. 1986), will be made by the symbol "R" followed by the appropriate page number. Other references to specific items cited herein are self-explanatory.

ISSUE III. THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, FRANCIS SMITH, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §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, Lambrix filed a pro se petition for writ of habeas corpus with the Supreme Court of Florida. The state filed its response thereto on or about November 20, 1987. Subsequently, the Supreme Court of Florida permitted the office of the capital collateral representative to appear on behalf of Lambrix and to file a supplement to the pro se habeas petition. The issues raised by Lambrix in the habeas proceeding were 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 HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM II: CRITICAL STAGES OF THE PROCEEDING AGAINST MR. LAMBRIX WERE CONDUCTED IN HIS

ABSENCE, IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 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 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.
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> 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 WHICH HE WAS NEVER CONVICTED.
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> CLAIMS 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.
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> 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 Supreme Court of Florida denied the habeas corpus petition on August 18, 1988. Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988).

A request by Lambrix for clemency was apparently denied when then-Governor Bob Martinez signed the death warrant in Lambrix's case on September 27, 1988. On or about October 27, 1988, Lambrix filed an emergency motion to vacate judgment and sentence pursuant to *Rule 3.850, Florida Rules of Criminal Procedure*, and a consolidated emergency application for stay of execution and special request to amend. The issues raised by Lambrix in his 3.850 motion were as follows:

> 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.

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.

CLAIM III. 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.

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 CIRCUMSTANCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

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 THE 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 RIGHT 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 OVER BROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVER BROADLY 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 OVER BROAD MANNER AND APPLIED THAT AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVER BROADLY 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 O'Friday, Circuit Judge, summarily denied the 3.850 motion and application for stay. A rehearing was denied on November 21, 1988. An appeal was taken to the Supreme Court of Florida from the denial of the Rule 3.850 motion. The Supreme Court of Florida entered a temporary stay in order to consider the appeal of Lambrix. After oral argument was presented to the court, this Honorable Court on November 30, 1988, affirmed the denial of the 3.850 motion and declined to extend the temporary stay of execution. Lambrix v. State, 534 So. 2d 1151 (Fla. 1988). In so doing, this Court specifically found, "Lambrix's motion asserted a number of claims. However, his appeal addresses only two issues, both of which are related to his consumption of alcohol."

Immediately thereafter, Lambrix filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Florida, Fort Lauderdale Division. The Honorable William J. Zloch, District Judge, entered a stay of execution.

During the pendency of the federal habeas corpus proceedings, Lambrix filed a pro se petition for writ of habeas corpus in the state circuit court. That court denied the

petition, which had alleged ineffective assistance of collateral counsel, and the Supreme Court of Florida affirmed the denial. Lambrix v. State, 559 So. 2d 1137 (Fla. 1990).

In federal court, the district judge permitted Lambrix to amend his petition and, thereafter, and extensive evidentiary hearing was conducted, said hearing commencing on Monday, August 12, 1991, and concluding on Tuesday, August 20, 1991. In a lengthy order filed on May 12, 1992, the district court denied the petition for writ of habeas corpus. The district court denied the issuance of a certificate of probable cause. Lambrix filed a motion to extend the time for filing his notice of appeal by one day, and that motion was granted. The United States Court of Appeals for the Eleventh Circuit granted a certificate of probable cause on September 1, 1992. Lambrix submitted his brief and in examining the contents thereof, counsel for respondent observed that a claim was raised predicated upon Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Inasmuch as the Espinosa decision was rendered on June 29, 1992, whereas the final order of the district court in the instant case was entered on May 12, 1992 (thereby predating the Espinosa decision), the State of Florida filed a motion to hold proceedings in abeyance to permit petitioner Lambrix, if he so desired to raise the Espinosa claim the first time in state courts.[2] The instant habeas corpus petition follows per the directions to Lambrix by the Eleventh Circuit Court of Appeals.

II.

Jurisdiction

The respondent does not contest the jurisdiction of this Honorable Court to entertain a habeas corpus petition. However, to the extent that petitioner Lambrix is exceeding the scope of the remand as permitted by the Eleventh Circuit Court of Appeals and to the extent that petitioner is advancing claims which either were or could have been raised in prior collateral proceedings or at trial, your respondent asserts that such claim are not cognizable in these proceedings. In the instant habeas petition, petitioner gratuitously asserts that appellate counsel was ineffective for failing to raise particular issues on direct appeal.[3] In McCrae v. Wainwright, 539 So. 2d 868 (Fla. 1983), this Court held that [h]abeas corpus should not be used as a vehicle for presenting issues that should have been raised at trial and on appeal", citing Hargrave v. Wainwright, 388 So. 2d

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[2] The state's motion filed in the Eleventh Circuit is attached hereto as appendix "A". It is the granting of this motion which formed the predicate for the remand to the state courts and the consequent filing of the instant habeas corpus petition.

[3] Your respondent will identify these issues in the body of this response. Nevertheless, it is advisable to set forth the basic premise that these issues are not cognizable on habeas review at the outset in an effort to give guidance to this Court's review of all issues presented.

1021 (Fla. 1980) and State ex rel Copeland v. Mayo, 87 So. 2d 501 (1956). In McCrae, this Court specifically opined:

> . . . Allegations of ineffective assistance of appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. (text at 870)

Indeed, this type of admonishment has been consistently followed by this Honorable Court and this Court has specifically admonished collateral counsel that "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or were waived at trial or which could have, should have, or have been, raised in Rule 3.850 proceedings." White v. Dugger, 511 So. 2d 554 (Fla. 1987), citing Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987), and Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). Thus, to the extent that petitioner is asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Honorable Court should decline to do so.

III.

Preliminary Statement

The instant case is before this Honorable Court for a very limited reason. As this Court is well aware, this capital case has progressed through all levels of state court and has, after denial of a writ of habeas corpus by the United States District Court, made its way to the United States Court of Appeals for the Eleventh Circuit. In his preliminary statement, petitioner

contends that the Eleventh Circuit is seeking a merits ruling from this Honorable Court on Lambrix's Espinosa claim. Your respondent submits, however, that the Eleventh Circuit remanded this case so that the state courts can make the first ruling as a matter of comity on the Espinosa claim. Attached hereto as Appendix A is a copy of the motion filed by your respondent in the Eleventh Circuit Court of Appeals. The reason the state moved for abeyance of the federal proceedings was to permit this Court to review this matter which arose by virtue of the Espinosa decision, a decision which post dated the order entered by the district judge in the Southern District of Florida. Your respondent believed that it was in the interest of justice and finality to afford this Honorable Court the opportunity to rule upon the Espinosa claim thereby putting Mr. Lambrix in the same position as other capital defendants.

The instant case is unique insofar as treatment of various issues was given by this Honorable Court upon collateral review. Although many claims raised by Lambrix in his rule 3.850 motion were, under the clear precedent established by this Court, procedurally barred, no express reliance upon this Court's procedural rules was set forth in this Court's opinion cited at Lambrix v. State, 534 So. 2d 1151 (Fla. 1988). Your respondent respectfully requests this Honorable Court to take judicial notice of the brief of appellee filed in case no. 73,348, especially pages 12 - 14 thereof which sets forth a denomination of all issues which were clearly procedurally barred. Even

though this Honorable Court in its opinion clearly stated that the matter before it was an appeal from the denial of a 3.850 motion, the district judge ruled that this Court was merely acting upon Lambrix's motion for stay and, therefore, where this Court only reached two issues, the district judge determined that such action by this Court was insufficient to invoke the procedural bar rule. See petitioner's appendix 1, pages 4 - 15. In the instant habeas petition, therefore your respondents respectfully submit that this Honorable Court should clearly and unequivocally apply its procedural rules to Lambrix as it does with all other capital defendants similarly situated. As will be discussed immediately below, the Espinosa claim, the only claim upon which the Eleventh Circuit Court of Appeals is holding its proceedings in abeyance pending resolution in the state courts, is clearly procedurally barred and this Honorable Court should clearly and unequivocally apply that bar.

IV.

Response in Opposition to Claims Raised by Petitioner

CLAIM I

THE ALLEGED UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES.

Petitioner contends that he should be resentenced because the jury instructions on the heinous, atrocious, or cruel; the cold, calculated and premeditated; and the pecuniary gain aggravating factors are unconstitutionally vague based upon the decision in Espinosa v. Florida, 505 U.S. ____, 112 S.Ct. 2926,

120 L.Ed.2d 854 (1992). In Espinosa, a challenge was made to the Florida jury instruction on the heinous, atrocious, or cruel aggravating factor by claiming that it was unconstitutionally vague. The United States Supreme Court decided that it was unconstitutionally vague and further held that in a state where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. The court rejected this Honorable Court's decision in Smalley v. State, 546 So. 2d 720 (Fla. 1989), wherein this Court held that the jury is not the sentencer for Eighth Amendment purposes in Florida. The Smalley decision comports with the clear expression of Florida law as exemplified by Combs v. State, 525 So. 2d 853 (Fla. 1988), wherein the majority of this Court clearly held that the jury in Florida is only advisory and the trial judge is the sentencer for Eighth Amendment purposes. Rather than accepting this Court's interpretation of Florida law, the United States Supreme Court conducted its own examination of Florida case law and determined that since a Florida trial court is required to pay deference to a jury sentencing recommendation and the trial court must give great weight to that recommendation, Florida has essentially split the weighing process in two. Therefore, the court held that by giving great weight to the jury recommendation, the trial court indirectly weighed an invalid aggravating factor that presumably the jury found. In Espinosa, the court concluded that if a weighing state decides to place capital sentencing authority in

two actors rather than one, neither actor must be permitted to weigh an invalid aggravating circumstance. Based upon Espinosa, petitioner now seeks habeas relief in this Court pursuant to the direction of the Eleventh Circuit Court of Appeals.

A. Procedural Default:

Your respondent respectfully submits that this Honorable Court should, in this case and all cases similarly situated on both direct and collateral review, clearly and expressly apply procedural bars. In the instant case, defense counsel at trial did make a request that the jury be instructed on the Dixon standards which had been upheld in Proffitt v. Florida, 428 U.S. 42 (1976) (R 1342 - 1344, 1346). However, the record is silent as to any motion or other request by defense counsel for additional instruction due to the purported unconstitutional vagueness of the standard instructions. Thus, it is not unreasonable to assert that the specific objection now relied upon was never offered at trial and, hence, the purported unconstitutionality of the jury instructions were not properly preserved at trial. However, assuming arguendo that this matter was properly preserved at the trial level, it is beyond peradventure that this matter has not been properly preserved so as to warrant collateral relief. A procedural bar must be applied where a claim, although preserved at trial, is not raised on direct appeal. Thus, for example, in Rose v. State, 18 Fla. Law Weekly S 152 (Fla. March 11, 1993), with respect to a claim

arising under Espinosa v. Florida:

> . . . It should be noted, however, that while Rose objected to the applicability of these aggravating factors, he made no objection to the wording of the instructions. Further, Rose made no argument concerning the wording of these instructions on direct appeal. Thus, his claim is now procedurally barred. (citation omitted; emphasis supplied)

Also, in James v. State, 615 So. 2d 668 (Fla. 1993), this Court determined that the Espinosa claim could be reached collaterally where in addition to requesting an expanded instruction, the defendant therein argued on appeal the constitutionality of the jury instructions. In the instant case, however, no claim has been made, even collaterally[4] pertaining to the allegedly improper jury instructions. The failure to raise this issue on direct appeal precludes collateral relief in these proceedings.

Your respondent respectfully urges this Honorable Court to continue to force its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. James v. State, supra (Grimes, J., dissenting) ("The public can have no confidence in the law if court proceedings which have become final are subject to being reopened each time an appellate court makes a new ruling."); Cf.

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[4] As asserted to the Eleventh Circuit Court of Appeals, petitioner never "fairly presented" a claim concerning improper jury instructions to the state courts. See Motion to Hold Proceedings in Abeyance at pages 2 - 4 and especially note 1, attached herewith in the appendix.

Johnson v. State, 536 So. 2d 1009 (1988) (the credibility of the criminal justice system depends upon both fairness and finality). In Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas court should reach the merits:

> Faced with a common problem, we adopt the common solution: A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.

The court added in footnote 12:

> . . . Additionally, the dissent's fear, post, p 11 - 12 and n. 6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: A state rule in a 1 - line proforma order can easily write that "relief was denied for reasons of procedural default."

Thus, in the instant case, where it is absolutely clear that no appellate argument was advanced pertaining to the alleged unconstitutional vagueness of the instructions on aggravating factors, this Honorable Court should hold that there is a clear procedural bar in unambiguous terms so as to foreclose the possibility that endless litigation will ensue. The United States Supreme Court has ruled that this Honorable Court's procedural bars are to be given credence in the context of the claim raised by petitioner dealing with the purported unconstitutionality of our aggravating factors. See Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

Where the decision in Sochor makes it clear that claims such as presented herein are not fundamental in nature and thus, that they are in fact subject to a procedural bar, your respondent respectfully submits that this Honorable Court should, based upon the clear failure to raise the issue on direct appeal, apply the procedural bar that is in existence in this case.

B. Collateral Non-application of Espinosa

Your respondent submits that the Espinosa decision should not be applied retroactively to petitioner's case or to those who are similarly situated. Your respondent recognizes that, pursuant to Witt v. State, 387 So. 2d 922 (Fla. 1980), decisions by the United States Supreme Court may be entitled to retroactive application on a collateral attack. In order to qualify for such application, a decision must represent a fundamental and constitutional change in law which casts serious doubts on the veracity or integrity of the original proceeding. Witt, 387 So. 2d at 929. Espinosa, does not so qualify. For purposes of retroactivity analysis, your respondent, while acknowledging that the legal principles at issue in Espinosa, i.e., the holdings of Maynard v. Cartwright and Godfrey v. Georgia, 446 U.S. 420 (1980), do not constitute "new law"[5] , notes that the manner in

[5] It has been held by the United States Supreme Court in Stringer v Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), that the holdings in Maynard v. Cartwright, and Godfrey v. Georgia are not new law. However, these decisions deal with the vagueness of the aggravating factor itself and not with the validity of the jury instructions as given in Florida. Your respondent submits that in Florida we do not have the question of the alleged vagueness of our aggravating factors per se. Rather,

which such had been applied to the Florida capital sentencing structure could surely not have been predicted prior to June 29, 1992 (the date Espinosa was rendered by the United States Supreme Court). See Teague v. Lane, 489 U.S. 288 (1989). Under all of the circumstances, your respondent contends that retroactive application of Espinosa would not be applicable in this cause, given the fact that Lambrix's conviction and sentence have been final since 1986.

Your respondent further notes that even if Espinosa was regarded as "new law", Lambrix cannot take advantage of its holding for at least two reasons. The last time that this Court recognized a change in law and applied such retroactively in a capital case under Witt was Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), in which this Court held that Booth v. Maryland, 482 U.S. 496 (1987), was entitled to retroactive application.[6] Any reliance by Lambrix upon Jackson would be misplaced. In Jackson, this Court awarded relief because the defendant had interposed

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Espinosa deals instead with the failure to adequately define an aggravating factor to a jury which is a component part of the sentencing process in Florida. Attacks upon the constitutionality of the heinous, atrocious, or cruel aggravating factor in Florida have always been rejected by the United States Supreme Court. See e.g., Proffitt v. Florida, 428 U.S. 42 (1976). Thus, the holdings of Maynard and Godfrey with respect to the vagueness of an aggravating factor per se are not at issue in Florida. Espinosa does not address this issue.

[6] As this Court is well aware, the United States Supreme Court subsequently overruled Booth in Payne v. Tennessee, 111 S.Ct. 2597 (1991).

contemporaneous objection to the argument in question at the time of trial, and had properly presented the claim on direct appeal receiving an adverse ruling on the merits. Sub judice, the defendant also failed to properly present the claim on direct appeal. It should be noted that this Court expressly refused to apply Booth retroactively in cases in which contemporaneous objection and a prior presentation on appeal had not occurred. See, e.g., Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989) (finding Booth claim procedurally barred on habeas corpus and distinguishing Jackson given lack of contemporaneous objection at time of trial); Clark v. Dugger, 559 So. 2d 192, 193 - 194 (Fla. 1990). It is indisputable that Lambrix did not raise an issue on appeal pertaining to the wording of the jury instructions.

Any comparison of Espinosa with Hitchcock v. Dugger, 481 U.S. 393 (1987), would be misplaced. In Espinosa claims presented to this Court, it is often contended that because Hitchcock emanates from the United States Supreme Court and it involves an error in Florida jury instructions, Espinosa and Hitchcock should be treated alike for purposes of retroactivity. This position is without merit. As discussed, Hitchcock did not represent this Court's most recent retroactive application of a precedent on collateral attack. In Jackson v. Dugger, supra, this Court concluded that Booth v. Maryland was entitled to such application, but limited to a class of defendants who could secure relief based upon Booth to those who had interposed contemporaneous objections at the time of trial. See also

Parker, supra; Clark, supra. The error in Booth and the alleged error in Espinosa seem to be similar, i.e., the jury being allowed to consider an improper factor in aggravation, either extraneous to the statute or improper defined. This similarity would seem to dictate that the two precedents should be treated alike for retroactivity purposes on collateral attack. Indeed, this Honorable Court in James v. Florida accorded Jackson treatment to an Espinosa claim where the defendant therein had both objected at trial and raised the claim on appeal. In the instant case, although Lambrix might contend that he properly preserved the matter at trial, it is indisputable that no claim was raised on direct appeal based on the improper wording of the instruction.

Conversely, the error in Hitchcock is an entirely different sort, involving a complete invalidity of the capital sentencing process due to the sentencer's failure to consider evidence in mitigation placed before it. Whereas an allegation of Hitchcock error casts obvious doubt upon the reliability of any prior proceedings, "Espinosa error," at most, impacts upon one of eleven statutory aggravating factors which, under the facts of a given case, may or may not have played a role of any importance. It must be remembered that respective roles of aggravating and mitigating circumstances are different. Those in aggravation are essentially limitations upon the sentencer's discretion, i.e., only those factors set forth in the statute can be considered in aggravation; mitigation, of course, is not similarly limited and

a sentencer's failure to fully appreciate that fact casts serious doubt upon the reliability of any sentence.

This Court has awarded relief based upon Hitchcock because, in many instances, it could not tell with any certainty what would have happened had the error not occurred. In contrast, in reviewing a claim of error under Espinosa, this Court, by looking to the record of the case, the sentencing order as well as this Court's comparable precedents, can in fact determine the effect that any allegedly vague jury instruction might have had. Thus, the decision in Espinosa should not be entitled to retroactive application.

C. Harmless Error:

Even if Espinosa was "new law", Lambrix could not secure relief because such a decision does not "cast serious doubt on the veracity or integrity of the original . . . proceeding." Witt, supra. The United States Supreme Court clearly held that an unconstitutionally vague jury instruction on aggravating circumstances can constitute harmless error. Clemmons v. Mississippi, 449 U.S. 738 (1990), the Court expressly held that nothing in the Constitution prevented a state appellate court from affirming a sentence of death after striking an aggravating circumstance which had been the product of an unconstitutionally vague jury instruction. The Court also suggested that a state appellate court could affirm the sentence on the basis that the result would have been the same had the jury instruction been properly defined before the jury. Likewise, in Stringer v.

Black, supra, the court held that in order for a state appellate court to affirm a death sentence after the sentencer had been instructed to consider an invalid factor, the court would have to determine what the sentencer would have done absent the factor. Further, in Sochor, the United States Supreme Court specifically held that in the context of this type of error this Court could affirm the death sentence upon an express finding of harmless error.

Indeed, this Honorable Court has already determined that harmless error analysis is applicable with respect to the claim presented by petitioner herein. In Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992), this Court determined that an attack upon the constitutionality of the heinous, atrocious, or cruel instructions to the jury was both procedurally barred and, in any event, any error was harmless beyond a reasonable doubt. See also, e.g., Occhicone v. Singletary, 18 Fla. Law Weekly S 235 (Fla. April 8, 1993); Slawson v. State, 18 Fla. Law Weekly S 209 (April 1, 1993). With respect to whether the error, if any, in the instant case was harmless beyond a reasonable doubt, the record clearly reveals that this is the case. With respect to the homicide of the female victim in this case, the jury returned a 10 - 2 recommendation to impose the death sentence. This Court found on direct appeal that Lambrix admitted killing both the male and female victims and he mentioned that he choked and stomped on the female victim. This Court also observed that the testimony indicated that the female victim "died from manual

strangulation after receiving two non-lethal blows." Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). In Sochor v. Florida, the United States Supreme Court observed that this Honorable Court has consistently held that the heinous, atrocious, or cruel aggravating factor is properly found if the defendant strangled a conscious victim. This is indeed true because the victim is certainly aware of his or her impending death. Thus, as in Slawson v. State, supra, and Thompson v. State, 18 Fla. Law Weekly S 210 (Fla. April 1, 1993), the murder of Aleisha Bryant was clearly heinous, atrocious, or cruel under any definition of those terms. Also considering the extent and severity of the aggravating factors in this case as compared to very little in mitigation, any error in improperly instructing the jury is harmless beyond a reasonable doubt.

D. Conclusion:

Inasmuch as no claim was ever advanced on appeal in this case as the purportedly vague jury instructions on any of the aggravating circumstances enumerated by petitioner, a clear procedural default has occurred which should be given credence by this Honorable Court in accordance with the well-developed precedent of this Court.

CLAIM II

THE PURPORTED UNCONSTITUTIONAL VAGUENESS OF THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR.

A. Procedural Default:

For the same reason as discussed above under Claim I, petitioner's claim that this Honorable Court has failed to constitutionally construct the especially heinous, atrocious, or cruel aggravating factor is procedurally barred. Petitioner never raised any claim pertaining to constitutional vagueness on direct appeal in this cause. The first time such a claim was raised was in the Rule 3.850 proceedings and the appeal therefrom to this Honorable Court. As discussed above, this Honorable Court did not discuss any of petitioner's claims in the 3.850 appeal save for two claims pertaining to intoxication. Thus, although it is abundantly clear that any claim predicated upon Maynard v. Cartwright was clearly procedurally barred based upon the well-established precedent of this Court, this Court failed in its opinion to expressly so state. In Occhicone v. State, supra, this Court observed that, "We could have, and probably should have, also said . . . that the claim was procedurally barred because of no objection at the trial court level." In much the same fashion, your respondent respectfully submits that this Honorable Court should have on collateral review specifically stated that Lambrix's Maynard was procedurally barred by virtue of the fact that no such claim was raised on direct appeal. In order to permit the federal courts to accord

the proper respect for this Court's rulings, a ruling of procedural bar must be expressly set forth. Thus, in cases such as the instant case wherein it is absolutely clear that a procedural bar should be applied, this Honorable Court should expressly rely upon that bar.

B. The Supreme Court of Florida has sufficiently defined the aggravating factor of "especially heinous, atrocious, or cruel" to withstand constitutional scrutiny. Even were this claim not procedurally barred, petitioner would be entitled to no relief. In State v. Dixon, 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943 (1974), this Honorable Court determined that the heinous, atrocious, or cruel aggravating factor applied to "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 consciousless or pitiless crime which is unnecessarily torturous to the victim." Id. at 9. In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court held that the Dixon standard provided sufficient guidance to permit application of the aggravating factor and a consequent sentence of death. Petitioner's contention that this Honorable Court has inconsistently applied the especially heinous, atrocious, or cruel aggravating factor is without merit particularly when applied to the facts of the instant case.

In Walton v. Arizona, 497 U.S. 639, 653 (1990), the Court observed:

> *Maynard v. Cartwright* and *Godfrey v. Georgia*, however, are distinguishable in two constitutionally significant respects. First, both *Maynard* and *Godfrey* the defendant was sentenced by a jury and the jury was instructed only in the bare terms of the relevant statute or in terms nearly as vague (citations omitted) Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence applying a limited definition of aggravating circumstances to the facts presented. (citations omitted)

In Lewis v. Jeffers, 497 U.S. 764, 779 (1990), the court summarized its decision in Walton as follows:

> Our decision in Walton thus makes clear that if the state had adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the state had applied that construction to the facts of the particular case, then "fundamental constitutional requirement" of "channeling and limiting . . ." the sentencer's discretion in imposing the death penalty, *Cartwright* 486 U.S. at 362, 100 L.Ed.2d 372, 108 S.Ct. 1853, has been satisfied. . . .

The State of Florida has adopted proper constitutional standards to narrow the application of the especially heinous, atrocious, or cruel aggravating factor. In Sochor v. Florida, supra, the Court held that its "review of Florida law indicates that the state's Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." Similarly, review of Florida law reveals that the especially

heinous, atrocious, or cruel aggravating factor is consistently found and applied when fear and anguish precedes a victim's death. Thus, where the facts of the instant case reveal that the defendant strangled a conscious victim, this Court properly applied its limiting construction of the especially heinous, atrocious, or cruel aggravating factor. Where the Eighth Amendment requirements were satisfied wherein the trial judge was given guidance by the Supreme Court of Florida's limiting construction, there is no constitutional error by applying the factor to the facts of the instant case.

CLAIM III

THE PURPORTED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Petitioner's claim that his appellate counsel was ineffective is clearly procedurally barred from these proceedings. Petitioner concedes that "Mr. Lambrix has previously presented a claim of ineffective assistance of counsel on appeal to this Court. That claim was rejected by this Court, Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988) . . ." (petition at page 52). A criminal defendant is not entitled to keep relitigating the same issue as previously brought before the court. Analogously, the court has held that an attempt to raise additional grounds of ineffectiveness are procedurally barred when there has been a prior litigated claim to that effect. Spaziano v. State, 545 So. 2d 843, 844 - 845 (Fla. 1989);

Aldridge v. State, 503 So. 2d 1257, 1258 (Fla. 1987) (defendant procedurally barred from raising successively an ineffective assistance of counsel claim based on different facts); Christopher v. State, 489 So. 2d 22, 24 - 25 (Fla. 1986) (same). Thus, to the extent that petitioner has raised new grounds or supports his previously alleged claims with new facts, he is not entitled to a "second bite of the apple" before this Honorable Court.

Even should this claim not be barred, petitioner would be entitled to no relief. Contrary to the assertions of petitioner, the failure to raise any issues pertaining to the aggravating factors found by the trial court was not a result of counsel's ignorance, but rather was a result of a considered examination of the facts of the case and the applicable law. Prior to preparing the brief for petitioner before this Honorable Court, appellate counsel, Ray LeGrande, consulted with trial counsel concerning what they felt to be the problem areas in the case (petitioner's appendix 2 at 15, 27, 28). Mr. LeGrande specifically recalled discussing potential penalty phase issues (petitioner's appendix 2 at 28). In addition, Mr. LeGrande consulted with Charlotte Holdman, who at the time was in charge of the clearing house which attempted to acquire representation for death sentenced inmates in Florida (petitioner's appendix 2 at 15). Additionally, Mr. LeGrande consulted a manual which had been prepared by the Public Defender's Association which dealt with death penalty practice (petitioner's appendix 2 at 29). Mr.

LeGrande also obtained a copy of sample briefs which had been prepared in prior death penalty cases before the Supreme Court of Florida. Contained within those sample brief were issues raised as to penalty phases (petitioner's appendix 2 at 16). Mr. LeGrande spent at least 75 hours preparing the brief for petitioner, with most of that time devoted to reading the transcript, research and writing (petitioner's appendix 2 at 19). Upon review of the transcript and specifically the penalty phase, Mr. LeGrande saw no specific errors (petitioner's appendix 2 at 20). With respect to these specific issues raised by petitioner collaterally as to the failure to raise issues concerning the three aggravating factors, Mr. LeGrande specifically testified that each of them (pecuniary gain; heinous, atrocious or cruel; and cold and calculated) were factually present in the case. Indeed, Mr. LeGrande stated that no issues were raised concerning these factors "based on a reading of the facts and my interpretation of the law relating to them" (petitioner's appendix 2 at 22)

"Counsel need not brief issues reasonably considered to be without merit." Alvord v. Wainwright, 775 F.2d 1282, 1291 (11th Cir. 1984). In the instant case, it can be demonstrated that counsel's choice of issues raised was certainly reasonable. This Honorable Court, in a unanimous opinion specifically approved the trial court's factual determination that all five aggravating factors were applicable. Lambrix v. State, 494 So. 2d 1143, 1148 (Fla. 1986). This determination was made after a careful review

of the record. Additionally, the matters now asserted as those that could have been made on direct appeal were presented to the Supreme Court of Florida in the previous habeas corpus petition filed in this Court. In another unanimous opinion, this Honorable Court opined that petitioner is not entitled to a new appeal based on the same types of claims as presently asserted herein. Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988). Inasmuch as the issues which petitioner believed should have been raised in the Florida Supreme Court have been found to be meritless in the prior habeas petition, appellate counsel cannot be found ineffective. Indeed, under Florida law "[t]he failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurable outside the range of professionally acceptable performance." Suarez v. Dugger, 527 So. 2d 190, 193 (Fla. 1988), citing Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986), cert. denied, 107 S.Ct. 2213 (1987). Thus, petitioner cannot show how he has been prejudiced by the purported ineffectiveness of trial counsel where this Honorable Court has previously determined that the issues which could have been raised had no merit. Thus, even if this Court could reach the appellate ineffectiveness claim for a second time, Lambrix would not be able to show that he has been deprived the effective assistance of counsel on appeal.

CLAIM IV

ALLEGED FAILURE TO PROVE PREMEDITATED MURDER AND CONSEQUENT APPELLATE COUNSEL INEFFECTIVENESS.

As his fourth and final claim, petitioner presents one which he knows is not cognizable in these proceeding. In his footnote eighteen at page 59, petitioner concedes that this is a claim unrelated to any upon which the Eleventh Circuit Court of Appeal remanded this case to the state courts. It is also undisputed that Mr. Lambrix has previously been afforded the opportunity to litigate a habeas corpus petition before this Honorable Court. The issue of premeditation was settled by the jury's verdict and the affirmance of this case by this Honorable Court in 1986. As set forth in the opinion of this Honorable Court on direct appeal, Lambrix v. State, 494 So. 2d 1143 (Fla. 1986), there was ample evidence for premeditation, including the statements made by Lambrix to Francis Smith, his girlfriend who was present during the time period of the homicides. Unsurprisingly, petitioner sees fit to present this Court with his "new" theory of the case pertaining to the alleged self-defense aspects of this case, aspects which are totally nonexistent. This theory was dreamed up by petitioner several years after the original trial. It is unnecessary for your respondent to burden this Court with all the time frames and factors involved with this newly-crafted theory which petitioner has attempted to perpetrate upon the federal courts. It is sufficient in this pleading to assert that this type of claim had to have been made before this time and, therefore, this Honorable Court should not hear it at this time.

Inasmuch as the sufficiency of the evidence has been shown to be acceptable to support the conviction obtained herein by virtue of this Court's prior review, and inasmuch as this type of claim could have been raised previously during the extended course of this litigation, this Honorable Court should reject this claim.

WHEREFORE, for the above and foregoing reasons, your respondent respectfully requests this Honorable Court to deny the petition for habeas corpus and extraordinary relief. This Honorable Court should expressly rely upon the clear procedural bars which exist in this case so as to foreclose the possibility that endless litigation will ensue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing by U.S. Regular Mail to Robert C. Josefsberg, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, and to Matthew Lawry & Steven Goldstein, VLRC, Inc., 805 North Gadsden Street, Tallahassee, Florida 32303-6313, this 20th day of July, 1993.

Robert J. Krauss
OF COUNSEL FOR RESPONDENT.