IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

v. Case No. 86,119

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The facts of this case are summarized in the initial opinion rendered by this Court in this cause as follows:

> On the evening of February 5, 1983, Lambrix and Frances Smith, his roommate, went to a tavern where they met Clarence Moore, a/k/a Lawrence Lamberson, and Aleisha Bryant. Late that evening, they all ventured to Lambrix' trailer to eat spaghetti. Shortly after their arrival, Lambrix and Moore went outside. Lambrix returned about twenty minutes later and requested Bryant to go outside with him. About forty-five minutes later Lambrix returned alone. Smith testified that Lambrix was carrying a tire tool and had blood on his person and clothing. Lambrix told Smith that he killed both Bryant and Moore. He mentioned that he choked and stomped on Bryant and hit Moore over the head. Smith and Lambrix proceeded to eat spaghetti, wash up and bury the two bodies behind the trailer. After burying the bodies, Lambrix and Smith went back to the trailer to wash up. They then took Moore's Cadillac and disposed of the tire tool and Lambrix' bloody shirt in a nearby stream.

Lambrix v. State, 494 So. 2d 1143, 1145 (Fla. 1986). Additional evidence against Lambrix included the testimony of Debra Hanzel, that Lambrix had admitted killing Moore and Bryant in order to get Moore's car (OR. 2445, 2449).[1]

The appellant's recitation of the case history reviews all of the prior proceedings in this case except for a *pro se* writ of habeas corpus, which Lambrix filed with the trial court in 1990. That petition alleged that Lambrix had received ineffective assistance of collateral counsel in regard to the initial motion for postconviction relief filed by the Office of Capital Collateral

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[1]References to the record on appeal from the judgments and sentences imposed in this case, Florida Supreme Court Case No. 65,203, will be cited by the designation "OR." followed by the applicable page number.

Representative (CCR). This Court affirmed the trial court's denial of relief. Lambrix v. State, 559 So. 2d 1137 (Fla. 1990). Without addressing the right to effective assistance of collateral counsel, this Court found that CCR had not been ineffective for failing to raise a claim of juror misconduct.

An evidentiary hearing was conducted in federal court on the appellant's petition for habeas relief. Depositions given by Lambrix's trial attorneys were admitted as substantive evidence in that proceeding and were attached as exhibits to the state's response to the 3.850 motion which is the subject of the instant appeal (R. 249-290, 291-355). The depositions were taken in June, 1990, and neither attorney indicated that Lambrix had ever expressed any desire to testify at either trial. Both attorneys verified that at the time of trial, Lambrix consistently maintained that he had nothing to do with the murders (R. 272, 307).

SUMMARY OF THE ARGUMENT

The trial court's summary denial of the appellant's second motion for postconviction relief was proper in all respects. The appellant did not allege below and has not alleged here any newly discovered facts to permit the filing of an untimely, successive motion. Even if the facts alleged to support the appellant's assertion that he can establish an exception to any procedural bar are taken as true, they do not compel consideration of his claims as a matter of law.

Any claim regarding a denial of the appellant's right to represent himself in collateral proceedings has been waived, since no issue relating to the trial court's denial of the appellant's "Motion to Dismiss Counsel" in December, 1987, had ever been brought to any court until the instant 3.850 motion was filed in October, 1994, despite a multitude of postconviction actions filed *pro se* and by counsel during the intervening time. The appellant did not have a constitutional right to effective assistance of collateral counsel, but even if such a right is assumed for the sake of argument, his present claims of ineffectiveness are both procedurally barred and without merit. The state actions asserted to excuse any procedural default were all considered and rejected previously, and were not applicable when the appellant failed to develop these claims in federal court. The appellant cannot establish actual innocence as to either first degree murder or the death penalty.

In addition, even if the merits of the appellant's 3.850 claims are considered, no relief is warranted. As found by the Eleventh Circuit Court of Appeals, his claims are refuted by the record and by the testimony elicited at the federal evidentiary hearing.

ARGUMENT

ISSUE I

WHETHER THE COURT BELOW ERRED IN DENYING MR. LAMBRIX'S CLAIMS SUMMARILY, WITHOUT HEARING ARGUMENT, HOLDING AN EVIDENTIARY HEARING, OR ATTACHING PORTIONS OF THE RECORD SUPPORTING SUMMARY DENIAL OF RELIEF.

The appellant initially challenges the trial court's summary denial of his motion for postconviction relief. Specifically, the appellant alleges that the court below should have conducted an evidentiary hearing to allow him the opportunity to establish an exception to any procedural bar. However, an evidentiary hearing was not necessary in this case because the appellant's factual allegations, even if true, would not permit a court to excuse the appellant's procedural default of these claims. Therefore, the appellant is not entitled to relief on this issue.

The appellant's brief cites Huff v. State, 622 So. 2d 982 (Fla. 1993), in a footnote, claiming that the trial court should have at least given him an opportunity to be heard before summarily denying his motion. The footnote asserts that the failure to hold even a non-evidentiary hearing violated due process and requires a remand. It should be noted that the appellant never cited Huff to the court below or requested the opportunity to argue his motion in a non-evidentiary forum, and therefore has not preserved any such claim for appellate review. If the appellant truly believes the failure to hold a hearing pursuant to Huff amounted to a fundamental constitutional violation, it is curious that he would relegate such a significant claim to a footnote. At any rate, Huff was not violated in the instant case, since Huff mandates the

holding of a hearing on an *initial* motion for postconviction relief, see 622 So. 2d at 983, whereas this case is an appeal from the denial of a *successive* motion.

The appellant cites Steinhorst v. State, 636 So. 2d 498 (Fla. 1994), and McGuffey v. State, 515 So. 2d 1057 (Fla. 4th DCA 1987), in support of his claim that an evidentiary hearing should have been held below. These cases are distinguishable as they involved factual allegations that the claims could not have been timely discovered with the exercise of due diligence. For example, in Steinhorst, the defense contended that relevant records indicating an alleged potential conflict on the part of the postconviction judge had been misplaced by the clerk's office; if true, any conflict could not have been discovered with due diligence, and would constitute newly discovered evidence entitling Steinhorst to consideration of an otherwise untimely and successive postconviction motion. If, on the other hand, the relevant records were reasonably available, Steinhorst's failure to move to recuse the judge would be deemed to waive the issue. Thus, an evidentiary hearing was necessary in order to establish whether the records had been misplaced or were available.

In the instant case, the appellant has not alleged any facts which were not known at the time of the initial 3.850 motion. Furthermore, no factual dispute exists to warrant an evidentiary hearing. The state does not contest that Lambrix previously filed a motion to dismiss CCR as his collateral counsel and attempted to represent himself, or that the trial judge denied this motion. The state does not contest that, if given the opportunity, Lambrix could present his prior collateral counsel to testify in a manner consistent with his affidavit below: that he was working on other active warrants at the time the initial 3.850 motion was prepared; that he does not believe his representation of Lambrix was constitutionally adequate; and that he would have presented the

claims now offered if he had been given more time to investigate and prepare the 3.850 motion. The state does not contest that this Court and the trial court both denied requests for additional investigative time when the initial 3.850 was prepared and argued. The state does not contest that, if given the opportunity, Lambrix would take the stand and testify in accordance with his affidavit below that he is an innocent man. Rather, the state's position is that, even if true, the appellant's allegations do not establish as a matter of law that he is now entitled to consideration of an otherwise untimely and successive motion for postconviction relief. Because it is only the legal conclusions and not the factual allegations of the 3.850 motion that are in dispute, no evidentiary hearing was required below.

In addition, the appellant alleges that the court below erred in denying the 3.850 claims on their merits, since it did not attach or cite portions of the record which conclusively establish that Lambrix is not entitled to relief.[2] It must be noted initially that the order denying the 3.850 did attach the state's response to the motion, which incorporated exhibits including testimony taken pursuant to the evidentiary hearing held in federal court on the appellant's ineffective assistance of counsel claims. Because such testimony and specific record citations are included as part of the record on appeal in this proceeding, the dictates of Hoffman v. State, 571 So. 2d 449 (Fla. 1990), requiring specific direction as to where in a record a postconviction claim is refuted, have been met in this case.

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[2]Of course, this claim need only be considered if this Court agrees that the court below should not have denied the motion on procedural grounds, since this aspect of the appellant's argument is directed to the trial court's denial of the 3.850 claims on the merits.

On these facts, the appellant has failed to demonstrate any error in the trial court's summary denial of his second motion for postconviction relief.

ISSUE II

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING RELIEF ON THE GROUNDS THAT THE RULE 3.850 MOTION WAS UNTIMELY AND SUCCESSIVE.

The appellant next challenges the trial court's finding that his motion was untimely and successive. The appellant presents four grounds which allegedly excuse the procedural bars applied below. For the reasons that follow, none of these arguments demonstrate any error in the summary denial of the appellant's postconviction motion.

A. Alleged deprivation of the appellant's right to represent himself

The appellant initially claims that he was unfairly denied the right to represent himself on his initial motion for postconviction relief, in violation of Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), and Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). He further argues that Durocher should be applied retroactively pursuant to Parker v. Dugger, 660 So. 2d 1386, 1388 (Fla. 1995) and Breedlove v. Singletary, 595 So. 2d 8, 11 (Fla. 1992). He claims that his remedy must be the opportunity to file a new, original motion for postconviction relief, citing Steinhorst, 636 So. 2d 500-501.

None of the authorities cited by the appellant warrant ignoring the clear procedural bar that defeats his claims. In Steinhorst, this Court recognized that a new postconviction proceeding may be authorized where the facts to support an alleged constitutional violation could not have been discovered with due diligence in order for a claim to have been timely asserted. The appellant

has not alleged any such facts in this case. The denial of his Motion to Dismiss Counsel occurred in December, 1987, and was obviously known to the appellant and his attorneys prior to the filing of the initial 3.850 motion (in October, 1988), as well as several proceedings in this Court. Although the appellant challenged the adequacy of his initial 3.850 proceeding in a *pro se* petition for habeas corpus filed in the trial court and appealed the denial of that petition to this Court, he never sought review of the denial of his motion to dismiss CCR. The appellant also spent seven years litigating various claims in federal court without ever alleging a violation of his right to represent himself.

A review of the history of this case reflects that there have been several occasions when the appellant has represented himself in different courts. He has never had a *pro se* pleading that was stricken, or that was refused filing. In fact, two *pro se* proceedings have been considered on their merits in this Court. See, Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988); Lambrix, 559 So. 2d at 1137. Thus, his current contention that "since Mr. Lambrix had been precluded from representing himself, there was no way for him to raise the issue" (Initial Brief of Appellant, p. 11) is mistaken. Furthermore, at the hearing on the motion to dismiss CCR as collateral counsel, Lambrix was advised by the trial judge that he could file any *pro se* pleadings in anticipation of the court's granting his motion to dismiss counsel (Initial Brief of Appellant, App. B, at T. 42), yet no *pro se* postconviction motion was ever filed.

The appellant's reliance on Parker and Breedlove is similarly unpersuasive. In those cases, postconviction motions were filed by the same attorneys that had represented the defendants at trial, and therefore could not raise issues relating to the performance of trial counsel. Under those unique circumstances, this Court has chosen to "overlook" any procedural default as to claims of

ineffective assistance of trial counsel. In the instant case, the appellant was represented at trial by Kinley Engalvson and Robert Jacobs; his initial 3.850 motion was filed by Billy Nolas of CCR. The initial 3.850 motion did allege that the appellant had been denied effective assistance of counsel on several grounds. The current 3.850 motion simply adds new factual bases, and in some respects reargues the old factual bases, to the appellant's prior ineffective assistance of counsel claim. Adding new issues to a previously raised and denied ineffective assistance of counsel claim is clearly prohibited. See, Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987).

To the extent that the appellant alleges CCR was ineffective for failing to argue error in the trial court's denial of his Motion to Dismiss Counsel in the appeal of the initial 3.850 motion, his argument is obviously without merit. First of all, the denial of the motion to dismiss counsel was not part of the initial 3.850 proceeding -- the motion was denied in December, 1987 and the initial 3.850 was filed in October, 1988. More importantly, the appellant is now asking this Court to apply Durocher retroactively, an argument which could not have been presented in 1988 since Durocher was not decided until 1993. Counsel cannot be deemed ineffective for failing to anticipate changes in the law. Henderson v. Singletary, 617 So. 2d 313, 317 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 1891, 123 L. Ed. 2d 507 (1993).

Finally, the appellant's assertion that consideration of his current 3.850 motion on its merits "merely places Mr. Lambrix in the same position that he would have been in the absence of the violation of his right to self-representation" (Initial Brief of Appellant, p. 10) is inaccurate. Had the appellant's motion to dismiss counsel been granted in 1987, he would have been required to file a *pro se* motion in accordance with the law in effect at that time. His current 3.850 is a

counsel-generated document which relies heavily on changes in the law favorable to the appellant that occurred well after any *pro se* motion could have been filed. In fact, Lambrix would have been disadvantaged had his motion to dismiss counsel been granted, since he has continued to file (and have considered) *pro se* proceedings in the trial court and in this Court, as well as having the benefit of CCR and, since 1989, his current volunteer counsel.

If the appellant is deemed to have suffered a violation of his constitutional right to represent himself, the remedy would be consideration of any *pro se* claims which he timely identified as wanting to include in his initial 3.850 motion. In his *pro se* petition for writ of habeas corpus, he identified one such claim -- an allegation of juror misconduct. In the appeal from the denial of that petition, this Court considered and rejected the merits of that claim. Lambrix, 559 So. 2d at 1138. Thus, to the extent any possible constitutional violation could be discerned on these facts, Lambrix has already been afforded his remedy, and no further relief was then or is now warranted.

B. Alleged deprivation of the appellant's right to effective assistance of collateral counsel in his initial motion for postconviction relief

The appellant's suggestion that the lack of effective assistance of collateral counsel may entitle a capital defendant to another opportunity to present claims which reasonably should have been presented in an initial motion for postconviction relief is not persuasive. There is clearly no constitutional right to collateral counsel, and therefore any alleged lack of effective assistance of counsel in postconviction proceedings cannot create any right to file a successive motion seeking postconviction relief. See, Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed.

2d 318, 330, n. 5 (1992); Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989). And, although Durocher, 623 So. 2d at 483, discussed the *statutory* right to collateral counsel for capital defendants, this Court also reiterated that the statute creating the Office of the Capital Collateral Representative "did not add anything to the substantive state-law or constitutional rights" of capital defendants. Id., at 483; Troedel v. State, 479 So. 2d 736, 737 (Fla. 1985).

The appellant's reliance on Spaziano v. State, 660 So. 2d 1363 (Fla. 1995), as securing the right to file successive postconviction motions if initial collateral counsel failed to provide constitutionally adequate representation is misplaced. Spaziano involved a highly unusual factual situation, in that an attorney that initially represented Spaziano through CCR had left CCR but wanted to continue his representation at state expense. In an attempt to accommodate Michael Mello, CCR and Spaziano, this Court ruled that CCR had primary responsibility for representation, but that Mello could continue as counsel with assistance from CCR. Mello was apparently not pleased with this decision and thereafter admitted that he would not abide by this Court's rulings or represent Spaziano at the evidentiary hearing. This Court accepted these admissions as an effective withdrawal from Spaziano's case. This Court's rejection of Mello's presumptuous "I'll do it my way but make the state pay" position should not be read as creating a constitutional right to effective assistance of collateral counsel.

Furthermore, the appellant's suggestion that a right to effective collateral counsel may arise from the due process clause in accordance with Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), has previously been rejected by the United States Supreme Court. In Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), the Court

refused to extend the due process holding of Evitts to situations where a state has opted to afford collateral postconviction counsel to indigent inmates. In doing so, the Court noted that Evitts rested on a constitutional right to appointed counsel that does not exist in state postconviction proceedings. 481 U.S. at 558.

> [T]he decision below rests on a premise that we are unwilling to accept -- that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position -- at trial and on first appeal as of right. In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders* [*v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)].

481 U.S. at 559. In Murray v. Giarratano, 492 U.S. at 7, 10, the Court confirmed that the holding of Finley is equally applicable in cases involving defendants sentenced to death. See also, Kennedy v. Herring, 54 F.3d 678, 684 (11th Cir. 1995) (in denying petitioner's allegation that insufficient state funding for collateral counsel constituted "cause" so as to preclude application of a procedural bar, the court noted "It makes no sense to say that the state need not provide counsel at all, but that if the state opts to provide counsel, the state must fund counsel adequately or face the possibility of excusing procedural defaults."); Campbell v. Wood, 18 F.3d 662, 676-678 (9th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

Assuming for the sake of argument that the right to file a successive motion for postconviction relief may arise if collateral counsel was initially inadequate, the defendant would

have the burden of establishing that collateral counsel was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See, Spaziano v. State, 545 So. 2d 843, 845 (Fla. 1989). This burden cannot be met in this case. In his first 3.850 motion, Lambrix raised numerous claims, which to this day he continues to litigate in state and federal court. He has made no attempt whatsoever to demonstrate that reasonably effective counsel at the time of the initial 3.850 motion would have presented the claims which he now seeks to raise, other than stating that the claims are meritorious and reasonably competent counsel would raise all potentially meritorious claims. The fact that collateral counsel now asserts that he would have raised these claims if he had been provided additional time cannot come close to establishing that he was ineffective for failing to raise them. See, Routly v. State, 590 So. 2d 397, 401, n. 4 (Fla. 1991) (noting that an attorney's admission that he was ineffective "is of little persuasion"); Kelley v. State, 569 So. 2d 754, 761 (Fla. 1990).

Furthermore, Lambrix cannot begin to establish how the failure to raise these issues in his initial 3.850 motion could have prejudiced him. He makes only one conclusory reference to the prejudice prong of the ineffectiveness standard his brief, claiming without explanation that "there is a reasonable likelihood that the claims set forth herein, which were not asserted by collateral counsel, would have resulted in relief in either state or federal court" (Initial Brief of Appellant, p. 19). This is a curious assertion given that the Eleventh Circuit has denied these claims *on their merits*. Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996).

Finally, a review of the specific claims raised refutes any suggestion that relief would have been forthcoming had these issues been included in the initial 3.850 motion. The merits of these claims are addressed in the remaining issues of this brief. It is noteworthy that two of the claims

(Issues IX and X herein) are arguments that should have been made in the direct appeal from Lambrix's convictions and sentences, and would have been deemed procedurally barred even if presented in the initial 3.850 motion. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994) (issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack). Another claim (Issue V herein) was previously rejected, on the merits, by this Court and the Eleventh Circuit. Lambrix v. State, 534 So. 2d 1151, 1153-1154 (Fla. 1988); Lambrix, 72 F.3d at 1504-1505. The Eleventh Circuit also denied the claims presented in Issue III, IV, VI and VII on their merits. 72 F.3d at 1503-1506, 1508. Issue VIII would not have compelled postconviction relief since, even if trial counsel had objected to additional jury instructions, it is clear from the history of this case that the objection would not have been pursued on appeal or, if pursued, would not have been successful. Lambrix, 641 So. 2d at 849. As all of the claims are without substantive merit, as will be shown, collateral counsel cannot be deemed ineffective for having failed to raise them earlier. Hildwin v. Dugger, 654 So. 2d 107, 111 (Fla. 1995) ("counsel cannot be deemed ineffective for failing to raise meritless claims"); Suarez v. Dugger, 527 So. 2d 190, 193 (Fla. 1988).

C. Allegation that any default was the result of state action

The appellant next argues that he is legally exempt from the procedural rules everyone else must comply with because the government allegedly interfered with his ability to argue these claims in the time period allowed by law. As will be demonstrated, however, none of the facts recited to support this point can compel the consideration of his claims.

Over seven years ago, the trial court denied a 3.850 motion filed by the appellant which raised fourteen claims and made a conclusory reference to "other claims" not fully presented. On appeal, this Court upheld the denial of the motion, *including* the denial of additional time to investigate and present other claims. Lambrix v. State, 534 So. 2d 1151 (Fla. 1988). Lambrix now alleges that he was denied a fair opportunity to present the nine claims raised in his current 3.850 motion due to the actions of various state officials -- including the denial of his right to self-representation; the lack of adequate funding for CCR; the Governor's policy of signing multiple death warrants; the failure to allow CCR adequate time to investigate and present claims; and this Court's treatment of his emergency motion for stay as a brief, which failed to argue many issues adequately.

This allegation is without merit. This Court was aware that counsel was working on several active warrants when it denied the appellant's request for additional time in the appeal from the denial of his first 3.850 motion (R. 247). Lambrix has offered no new facts or justification for the failure to raise these issues in a timely manner other than his collateral attorneys' representation that an excessive workload precluded them from rendering effective assistance. Since the "insufficient time" excuse was previously rejected, and no new facts have been offered to warrant reconsideration of that ruling, this claim must fail as well.

Furthermore, a lack of state funding is not an "external impediment" which will justify excusing a procedural default. Kennedy, 54 F.3d at 684. Even if it could, the appellant's allegation of prejudice to excuse the default asserts that he has demonstrated that he would have been entitled to relief from his convictions and sentences had the claims been presented in his

initial 3.850 motion. As already discussed and for the reasons outlined in the remaining issues in this brief, this assertion is without merit, and no prejudice can be discerned on these facts.

D. Allegation that the appellant is "actually innocent"

The appellant next alleges that the failure to consider his claims will result in a "fundamental miscarriage of justice" because he is "actually innocent" of first degree murder and of the death sentences. He suggests that since the state's evidence of premeditation was circumstantial, a judgment of acquittal would have been required had he been permitted to testify that he killed Moore in defense of Bryant, after seeing Moore attack Bryant. Ignoring for the moment that the appellant was telling his attorneys at the time that he did not kill either Moore or Bryant,[3] even if he had testified in the manner he now submits, the state's evidence was clearly sufficient to overcome this theory of defense. In addition to Frances Smith's testimony as to the appellant's actions on the night of the killings and his statements to her that he had killed them both, the state presented testimony that Lambrix told another witness that he committed the murders and had been motivated by his desire to get Moore's car (OR. 2210, 2211, 2213, 2445, 2449). Since the state presented evidence at trial of the appellant's actions and statements which would have directly refuted even his newly formulated theory of defense, the appellant cannot show that no reasonable juror would have convicted him of first degree murder, and he has not established actual innocence of the crime to set aside his conviction under the precepts of Schlup v. Delo, 513 U.S. ___, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

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[3]See, depositions of Kinley Engvalson, R. 272 and Robert Jacobs, R. 307.

Furthermore, in Schulp, the Court noted that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare," and must be supported by "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." 130 L. Ed. 2d at 834. The appellant has not identified any "new reliable evidence" to support his claim; he merely relies on his current version of the murders as being consistent with the evidence presented at trial. His assertion that no reasonable juror would have found him guilty if he had testified at trial, the trial court had instructed on the defense of voluntary intoxication, and the state's key witness had been adequately cross-examined is refuted by the testimony presented at trial.

The appellant's reliance on circumstantial evidence cases where this Court has deemed evidence to be insufficient to support a first degree murder conviction is not compelling. The "actual innocence" standard does not require the mere showing of a reasonable doubt; it demands evidence of such a nature that no reasonable juror would have convicted a defendant. Schlup, 130 L. Ed. 2d at 836. Even if a reasonable doubt were sufficient, however, the appellant cannot establish such doubt given the strength of the state's case against him, as outlined above. See, Cochran v. State, 547 So. 2d 928 (Fla. 1989) (jury not required to accept any theory on which the state has produced conflicting evidence). Therefore, the appellant has not offered a colorable claim of innocence warranting consideration of the merits of his claims.

The appellant also asserts actual innocence as to the death penalty because, if all of his arguments are accepted, there would only be one "weak" aggravating factor and "powerful" mitigation. Even if that were true, the existence of one aggravating factor is sufficient to defeat his claim of ineligibility for the death penalty. His reliance on DeAngelo v. State, 616 So. 2d 440

(Fla. 1993), and Songer v. State, 544 So. 2d 1010 (Fla. 1989), to support his claim of ineligibility is misplaced. Those cases involved death sentences that were reversed on proportionality grounds; they did not hold, as a matter of state law, that the facts of the instant double murder could never support a sentence of death. In fact, this Court has affirmed death sentences where only one aggravator was found, and more mitigation was found than in the instant case. See, Windom v. State, 656 So. 2d 432 (Fla. 1995); Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, ___ U.S. ___, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993); Arango v. State, 411 So. 2d 172 (Fla.), cert. denied, 457 U.S. 1140 (1982).

More importantly, his assertion that only one aggravating factor and powerful mitigation applies in this case is not true. The appellant's argument completely disregards the fact that the trial court found, and this Court affirmed, the aggravating factor of prior conviction of a violent felony based on the fact that he was convicted of both murders. Lambrix, 494 So. 2d at 1148. That aggravating factor was not challenged in his federal appeal and has not been disputed at all in his brief. In addition, the recent Eleventh Circuit opinion in this case specifically found adequate record support for all of the remaining aggravating factors. Lambrix, 72 F.3d at 1507.

The appellant has not satisfied the test of Sawyer v. Whitley, 505 U. S. ___, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992); under this decision, a defendant must show by clear and convincing evidence that but for a constitutional error no reasonable juror would have found him eligible for the death penalty. See also, Alderman v. Zant, 22 F.3d 1541 (11th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994); Johnson v. Singletary, 991 F.2d 663 (11th Cir. 1993); Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991), cert. denied,

___ U.S. ___, 113 S. Ct. 361, 121 L. Ed. 2d 274 (1992). Lambrix cannot satisfy this test because the trial judge found five aggravating factors as to Moore and four as to Bryant: heinous, atrocious or cruel; cold, calculated and premeditated; under sentence of imprisonment; prior violent felony conviction (based on the contemporaneous murders); and pecuniary gain (as to Moore only). Judicial opinions have repeatedly upheld the applicability of *all* these factors. Lambrix v. State, 494 So. 2d at 1148; Lambrix v. Singletary, 72 F.3d at 1508. Furthermore, Sawyer rejects any reliance on mitigation that was not presented at trial to establish actual innocence, even if such evidence was not introduced as a result of claimed constitutional error. 120 L. Ed. 2d at 285.

On these facts, it is obvious that the appellant's second motion for postconviction relief was properly denied on procedural grounds. Therefore, this Court should affirm the trial court's ruling on the motion and need not address the remaining issues presented in this appeal.

ISSUE III

WHETHER MR. LAMBRIX WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL'S ACTIONS DEPRIVED MR. LAMBRIX OF HIS RIGHT TO TESTIFY AT BOTH THE GUILT-INNOCENCE AND PENALTY PHASES OF THE TRIAL.

The appellant's next claim alleges that his trial attorneys were ineffective in depriving Lambrix of his right to testify in his own behalf. As already noted, this claim is procedurally barred since Lambrix's prior 3.850 motion included an allegation of ineffective assistance of trial counsel. Defendants are clearly not entitled to raise such claims in a piecemeal fashion, in successive postconviction motions. Jones v. State, 591 So. 2d 911, 913 (Fla. 1991). Where previous ineffective assistance of counsel claims have been presented and rejected, this Court consistently forbids the consideration of later claims of ineffectiveness based on new grounds or facts. Lambrix, 641 So. 2d at 848; Aldridge, 503 So. 2d at 1258. Clearly, the facts to support this claim were known to Lambrix and his attorneys at the time of the initial 3.850 motion, since the claim was identified in that motion (Initial Motion, p. 104).[4]

In addition, even if this claim is considered, Lambrix has failed to demonstrate that he is entitled to relief. Other than his self-serving affidavit, the only proof he offered below to support his allegation that he asserted his right to testify is one page from the transcript of an in-chambers discussion during his first trial, held on December 1, 1983. A review of the page preceding the

[4]The initial 3.850 motion is included in the record on appeal in Florida Supreme Court Case No. 73,348.

transcript excerpt offered with the appellant's motion clearly indicates that the reason Lambrix's attorneys were threatening to withdraw was because they believed that Lambrix was intending to commit perjury.[5] Clearly, an attorney's threat to withdraw under such circumstances does not amount to ineffective assistance of counsel. Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). A defendant's constitutional rights to testify and to present a defense do not include the right to present perjured testimony. See, United States v. Grayson, 438 U.S. 41, 54, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978).

None of the facts offered in support of this claim indicate that Lambrix timely asserted his right to take the stand and testify *truthfully* in his own defense. Even if one were to assume, however, that such an assertion was made, there is no reason to believe that Lambrix still desired to testify at the time of his February, 1984 retrial. It is, of course, this retrial that resulted in the judgments and sentences attacked in the instant motion. Having secured a hung jury after not testifying in his first trial, the failure to ever assert any desire to or intention of testifying at the second trial indicates that Lambrix approved of his attorneys' strategy against him testifying.

The appellant also asserts that trial counsel Kinley Engvalson would testify that Lambrix consistently expressed his desire to testify throughout his second trial (Initial Brief of Appellant, p. 32). In fact, the record cite to support this assertion, R. 24, reflects that the 3.850 motion alleged that Engvalson "will substantiate that Mr. Lambrix did specifically and consistently express his desire to testify in his own behalf." This allegation did not refer to any expressed desire during the second trial, as stated (with emphasis, no less) in the appellant's brief.

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[5]A copy of the transcript from the complete in-chambers discussion is attached hereto as Appendix A.

Furthermore, when Engvalson's testimony was taken in conjunction with the federal evidentiary hearing on his postconviction claims, Engvalson did not substantiate the claim that Mr. Lambrix ever expressed any desire to testify (R. 249-290).

As the Eleventh Circuit found regarding this issue:

> [T]here is simply no evidence in the record that Lambrix was coerced not to testify in his second trial. Two months is sufficient time for Lambrix and counsel to discuss a new trial strategy which would permit Lambrix to testify on his own behalf, or for Lambrix to request other counsel who would allow him to exercise this right. Without evidence that Lambrix was subject to continued coercion, we cannot assume that Lambrix's apparent acquiescence to a trial strategy in which he did not testify was anything but voluntary. ... Lambrix's claim that he was unaware of his right to testify is dubious considering the evidence that he has adduced concerning his attempt to assert that right in his first trial. Moreover, after receiving an evidentiary hearing on this issue before the district court, Lambrix adduced no evidence supporting his allegation that counsel failed to adequately inform him of the right to testify. Therefore, Lambrix has simply failed to show that some action or inaction by counsel deprived him of the "ability to choose whether or not to testify in his own behalf." [citing *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992)].

72 F.3d at 1509-1510. Although the appellant asserts that the Eleventh Circuit ruled on this issue "as originally advanced by CCR," (Initial Brief of Appellant, p. 40), that assertion is a blatant misrepresentation of fact. As the Eleventh Circuit expressly states, it considered this claim after Lambrix had been given the opportunity to develop it in the federal evidentiary hearing, when he was represented by current counsel and no warrant was in effect. Thus, he cannot rely on ineffective assistance of collateral counsel or the lack of time/during an active warrant excuses for failing to develop testimony to support this claim.

Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in Strickland, 466 U.S. at 687. First, the defendant must show that counsel's performance was deficient so as to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U. S. at 689. Second, there must be a showing of prejudice, that counsel's errors deprived the defendant of a fair trial whose result is reliable. The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993). A claim of ineffectiveness fails if either prong is not proven. In the instant case, Lambrix clearly failed to prove either prong.

In Strickland, the Court stressed that in assessing attorney performance, every effort must be made "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 691. When reviewed in this light, Lambrix's claim that counsel was deficient in failing to protect his right to testify is not persuasive. Lambrix has failed to offer any basis for a conclusion that competent counsel in 1983, four years prior to the United States Supreme Court's explicit recognition of a criminal defendant's right to testify in Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), would have more zealously protected his client's exercise of this right. In addition, given the overwhelming strength of the evidence implicating Lambrix and refuting his newly espoused and highly impeachable theory of innocence,

there is no possibility that the omission of testimony by Lambrix infected his trial with unreliability so as to prejudice him under Strickland.

Therefore, the claim that counsel was ineffective in allegedly depriving Lambrix of his right to testify in this case must be rejected both factually and legally. Denial of relief as to this issue is clearly mandated in this case.

ISSUE IV

WHETHER MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY COUNSEL'S FAILURE TO ADEQUATELY CROSS-EXAMINE AND IMPEACH KEY STATE WITNESSES.

The appellant's next challenge also alleges ineffective assistance of counsel, and argues the same ground to support the allegation as included in Claim VI of Lambrix's initial motion for postconviction relief (Initial Motion, p. 63). Since this claim had already been considered and rejected by the trial court and this Court previously affirmed that ruling, summary denial was mandated. State v. Stewart, 636 So. 2d 16, 17 (Fla. 1994) (trial court erred in granting stay and conducting further proceedings where claims were or should have been made previously); Zeigler v. State, 632 So. 2d 48, 51 (Fla. 1993), cert. denied, ___ U.S. ___, 115 S. Ct. 104, 130 L. Ed. 2d 52 (1994).

In addition, as noted in the state's response to the initial 3.850 motion, there is no basis for a finding of ineffective assistance of counsel due to counsel's cross-examination of state witnesses. As to key state witness Frances Smith, Lambrix faults his attorneys' failure to advise the trial court of the circumstances surrounding Smith's prior inconsistent statements, where she denied knowing Lambrix or having been with him in LaBelle, claiming that such circumstances would have refuted this Court's ruling in the direct appeal that admission of the statements would have opened the door to testimony that Lambrix was a fugitive. Under the appellant's theory, since the statements were not made at the time of Smith's arrest for aiding and abetting an escapee, they "had absolutely nothing to do with" her charge, despite the fact that she was still

in custody for this charge. However, it is clear that this Court and the trial court were aware of the circumstances of Smith's statements. In discussing the claim as it was presented in the direct appeal, this Court did not indicate that the statements were made at the time of Smith's arrest, but accurately noted the statements were made *during* her incarceration on the aiding and abetting charge. 494 So. 2d at 1147. Therefore, the appellant's suggestion that the statements were unrelated to that charge is unfounded.

Lambrix also claims Smith's statements should have been elicited, even if they "opened the door" and allowed the state to bring out the fact that he was an escaped fugitive at that time. According to the appellant, the decision to forego introduction of the statement and keep Lambrix's escapee status from the jury was "unreasonable" since this fact had been revealed in newspaper accounts of the case and consequently "the jury was already aware of Mr. Lambrix's alleged status as an 'escaped prisoner'" (Initial Brief of Appellant, p. 47).

To the contrary, nothing in the record reflects that any juror was aware of Lambrix's being a fugitive. The prospective jurors were questioned extensively about any knowledge of the case from outside sources, and many were not familiar with or could not recall any details from pretrial publicity (OR. 1471-77, 1522-23, 1545-46, 1581-82, 1600-01, 1611-12, 1630-31, 1665-66, 1683, 1698-99, 1705, 1715, 1722, 1739-40, 1748, 1760, 1769). Jurors admitted that they did not believe everything they read in the paper, and the overwhelming majority expressed no difficulty whatsoever in disregarding any extraneous information (OR. 1472-77, 1481, 1535, 1569, 1601, 1612, 1631, 1649, 1676, 1698-99, 1705, 1722). Furthermore, the jurors were admonished time and again that they could not consider anything other than the evidence presented at trial (OR. 1481, 1485, 1547, 1591, 1609, 1615, 1801, 1808-1809, 2542). Thus, even if some juror may

have possibly heard at some point that Lambrix was an escapee, this potential knowledge would not be nearly as prejudicial as hearing from the witness stand that Lambrix was a fugitive.

Furthermore, the appellant's reliance on Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), as presenting the "identical" error as alleged in this case is misplaced. In Smith, the state's star witness, and the only one to place Smith at the scene of the crime and identify him as a perpetrator, was a man that had initially given the police a statement voluntarily confessing to the murder and making no mention of Smith's participation. By the time of Smith's trial, the witness had struck a deal to testify against Smith in exchange for a life sentence. The jurors never heard that the witness had made a statement to the police, inconsistent with his trial testimony, indicating that he had been the principal actor in the killing of the victim. The instant case is clearly distinguishable. Frances Smith never made any statements indicating that she, and not Lambrix, had killed Moore and Bryant; she merely denied having known Lambrix at a time when she had a clear motive to lie because she was incarcerated for aiding him as a fugitive.

It is clearly not appropriate at this point to second guess trial counsel's decision to prohibit the jury from hearing direct evidence as to Lambrix's status as a fugitive. Strickland, 466 U.S. at 689. Even if such a review were appropriate, however, counsel's actions in keeping this obviously prejudicial information from the jury could not, under any circumstances, be deemed unreasonable.

The cross-examination of the other state witnesses is similarly not deficient in any respect. For example, Lambrix faults his attorney for not eliciting testimony in the cross-examination of Ron Council as to Council's opinion that Lambrix was intoxicated when Council saw him several hours before the murders. This suggestion has previously been made in conjunction with

Lambrix's federal claim that counsel was ineffective for failing to develop and present a defense of voluntary intoxication, which is repeated as Issue V in this appeal. The claim is without merit for the reasons expressed in the response to Issue V, at p. 28, *infra*.

Lambrix's identification of alleged deficiencies in his attorneys' cross-examinations is based on what is, at best, a skewed reading of the record. In addition, to the extent that he challenges cross-examination of state witnesses other than Frances Smith, it is difficult to imagine how any possible deficiency could have remotely affected the outcome of the trial, since Frances was clearly the key state witness and the primary focus of the state's case. Smith's testimony was also corroborated by Debra Hanzel's testimony that Lambrix admitted killing two people down in LaBelle (OR. 2445, 2449). Given these facts, no basis for a finding of ineffective assistance of counsel can be gleaned from this claim. Therefore, this Court should affirm the denial of relief as to this issue as well.

ISSUE V

WHETHER MR. LAMBRIX WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT A VOLUNTARY INTOXICATION DEFENSE.

The appellant's next issue presents an ineffective assistance of counsel claim which has previously been rejected by this Court, the trial court, a federal district court, and the Eleventh Circuit Court of Appeals. This Court specifically addressed this claim in its opinion affirming the trial court's denial of the initial 3.850 motion, expressly finding Lambrix had failed to meet his burden under Strickland. Lambrix, 534 So. 2d at 1154. Therefore, this issue demands summary rejection. Zeigler, 632 So. 2d at 51.

The consistent prior rejections of this claim were correct. In Strickland, the United States Supreme Court stated:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, ... on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated all together. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

466 U.S. at 691.

The federal district court that considered this claim in conjunction with Lambrix's petition for habeas corpus held an evidentiary hearing on the issue. Lambrix chose not to testify at the hearing, but the depositions of his trial counsel, Kinley Engvalson and Robert Jacobs, were admitted into evidence and were included as exhibits to the state's response to the 3.850 motion below. This evidence reflects that until two years after trial, in 1986, the only defense that Lambrix adamantly asserted to his trial attorneys was, "I didn't do it" (R. 272, 307). Mr. Engvalson stated that Lambrix's explanations to them were that victim Moore had given Lambrix his car to sell, and that Lambrix had no idea what happened thereafter. Lambrix's theory was that unknown drug dealers came to an airstrip behind the trailer and committed the homicides (R. 272). Engvalson explained that Lambrix's version of events was inconsistent with a voluntary intoxication defense:

> [I]n order to make a defense out of Lambrix was so drunk he didn't know what he was doing, as a guilt phase issue, Lambrix would have to have erratically changed everything he was telling us, and there was -- it was not a defense he gave us. There was no way, based upon what he was telling us, that that fit.

(R. 267; see also R. 343: "Well, if you are going to try to negate specific intent, that would indicate to me that you had some connection with the case"). Mr. Engvalson, who stated that he had met with Lambrix at least fifty times and shared responsibility for the guilt phase (R. 278, 286, 287), added that Lambrix denied being drunk at the time of the incidents:

> I don't recall any specific discussions with him regarding drinking. He never -- he never gave us a set of facts that supported it. He didn't say I was so drunk that night I didn't know what I was doing.

> As I think about it at this point, I believe I probably did go into that with him, and say is this possible? Could you have been so drunk that you just did it and didn't know it?
>
> Q. What did Lambrix say?
>
> A. No.

(R. 279).

Trial counsel did not rely upon a voluntary intoxication defense at trial, and never argued voluntary intoxication in opening or closing arguments. Instead, they proceeded with the "I didn't do it" defense by emphasizing lack of definitive physical evidence, lack of eyewitnesses, and alleged inconsistencies in Frances Smith's account. Counsel did elicit some testimony as to Lambrix's drinking on the night of the offenses through state witnesses, and sought a voluntary intoxication jury instruction because "we were relying on any possible defense that we had at that point" (R. 352; see also R. 287: "There was some testimony that he had been drinking, and Jacobs thought, let's try to get it in").

The performance of trial counsel, in maintaining Lambrix's defense of innocence and eliciting testimony of drinking without arguing that he "did it but was too drunk to know what he was doing," was not deficient in light of Lambrix's insistence that he was innocent and the inconsistency of this theory of defense with voluntary intoxication. Such performance has been held to be a sound tactical decision. Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988), cert. denied, 489 U.S. 1071, 1072 (1989); Wiley v. Wainwright, 793 F.2d 1190, 1194 (11th Cir. 1986). In Harich, the defendant claimed ineffective assistance of counsel, alleging that counsel failed to seek a jury instruction on voluntary intoxication and failed to seek an expert opinion on the impact of intoxication on Harich's ability to premeditate. 844 F.2d at 1470. The court noted

that, "Defense counsel faced a difficult dilemma. Harich admitted that he was with the victims that evening, yet insisted that he was innocent of any wrong doing. He also indicated that he was under the influence of the drugs and alcohol that evening. Armed with these tough facts, defense counsel adopted the primary defensive strategy of asserting factual innocence." Id. The court held that counsel's performance was *not* deficient:

> Petitioner suggests that defense counsel should have employed alternative defenses. *We believe that it was reasonable not to pursue alternative defenses beyond the length taken by counsel.* Harich testified that he was only "mildly drunk" and did not commit these crimes.
>
> > To suggest to the jury that Harich was so drunk that he could not have "intended" the consequences of these acts proved by strong evidence would have been totally contrary to and undermining of the position being taken by Harich himself. Although inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury.
> >
> > By handling the matter the way he did, defense counsel was able to inject the thought of diminished capacity (due to heavy drinking and marijuana) without totally rejecting the testimony of Harich.
>
> ... A competent attorney completely informed on the intoxication defense and faced with the defendant advocating his factual innocence could well have taken action identical to counsel in this case.

Harich, 844 F.2d at 1470-1471. In Wiley, the court held that where the defendant does not tell his counsel that he was intoxicated, the failure to pursue a voluntary intoxication defense does not render counsel's performance deficient:

> Under Florida law the intoxication defense to first degree murder is not available merely when the assailant has engaged in substantial drinking prior to the incident or is even intoxicated but only when the assailant is so intoxicated that he is unable to form an intent to kill. *Leon v. State*, 183 So. 2d 93 (Fla. App. 1966). There is no evidence that Edwards [trial counsel] unreasonably concluded that Wiley possessed the requisite intent. Petitioner did not initially mention his drinking to Edwards, nor did he, after Edwards inquired about possible drinking, ever say that he was so drunk that he did not know what he was doing.

Wiley, 793 F.2d at 1194.

Lambrix attempts to show there was evidence which could have been presented pertaining to an intoxication defense, in that family members and experts would have testified to his history of problems with alcohol and his alleged substance abuse. However, deficiency has not been established with respect to these allegations, since counsel can not be deemed deficient for failing to present inadmissible testimony. Under Florida law, a lay witness testifying about a defendant's mental capacity must have gained this personal knowledge in a time period reasonably proximate to the events giving rise to the prosecution. Garron v. State, 528 So. 2d 353, 357 (Fla. 1988). Lambrix's relatives could not testify concerning Lambrix's condition when the killings were committed. Thus, as this Court noted previously, this testimony would not have been admissible. Lambrix, 534 So. 2d at 1154.

Likewise, the expert testimony as to Lambrix's intoxication would depend on knowing how much Lambrix had drunk on the night of the offense. Id. At the federal evidentiary hearing, no evidence other than Lambrix's self-serving statements was presented on the quantity of alcohol consumed. Lambrix's statements were only procured through the testimony of the experts. However, expert mental status testimony based upon the self-serving statements of a defendant as to his intoxication is inadmissible. See, Holsworth v. State, 522 So. 2d 348, 352 (Fla. 1988); Cirack v. State, 201 So. 2d 706 (Fla. 1967).

As previously determined by this Court, there simply was no evidence that Lambrix was intoxicated when he committed these crimes. The only arguable evidence of intoxication presented at the evidentiary hearing was from Ron Council, a police officer who encountered Lambrix in Squeaky's Bar for approximately two to four seconds the evening of the murders (R. 365, 376-377). Council testified that Lambrix made two remarks which led Council to believe that Lambrix was intoxicated (R. 359, 361). On cross-examination, however, Council stated that he "assumed" that Lambrix was intoxicated based upon the fact that Lambrix was in a drinking establishment and was "loud" during the brief encounter (R. 368). Council did not observe any physical manifestations of the appellant's drinking, such as an odor of alcohol, glassy eyes, or slurred speech (R. 368-369).

Even Mr. Council's "assumption" that Lambrix was intoxicated was rebutted from several sources. First, Frances Smith, who was living with Lambrix at the time of the murders, stated that Lambrix was acting normally and "pretty much the same" as always on the night of the crimes (OR. 2202, 2301). Second, John Chezem, a neighbor who also knew Lambrix well, testified that he spoke to Lambrix within approximately one hour of the murders, and Lambrix

did not appear intoxicated but "acted normal to me" (OR. 2378). Third, Dr. Whitman stated, even after reviewing the voluminous background information now presented by collateral counsel, that Lambrix understood the nature and quality of his acts and appreciated the wrongfulness thereof (R. 405-406).

Even if Florida law would have required the giving of the voluntary intoxication instruction based on Council's opinion that Lambrix appeared intoxicated, the state could have cast serious doubt on that opinion. Therefore, the failure to elicit this testimony from Council or secure a voluntary intoxication instruction could not have possibly prejudiced Lambrix. If the instruction was not supported by competent evidence, there would be no reasonable probability that the jury would have accepted this defense.

Significantly, Lambrix's actions on the night of the offenses belie any intoxication defense. Lambrix first invited the victims to his house for dinner (OR. 2204). He then invited Moore outside to look at nonexistent plants (OR. 2205-06). About twenty minutes later, Lambrix returned and asked Bryant outside, stating that Moore wished to see her (OR. 2207). Lambrix prevented Frances Smith from accompanying them by telling Smith to stay and watch the spaghetti so that it would not burn (OR. 2209). Approximately forty-five minutes later, Lambrix returned, bloody, with a tire iron, announcing that both victims were dead (OR. 2209-10). He washed up, changed his shirt and ate spaghetti (OR. 2211-12).

Lambrix then secured Smith's cooperation by threatening to kill her (OR. 2213-14). He drove to a convenience store, purchased a flashlight, and stopped at a neighbor's on his way back to borrow a shovel (OR. 2214-16). He gave an explanation that the shovel was needed for a relative whose car had become stuck in a nearby rural road and that he had acquired the car that

he was driving from another relative (OR. 2377). Lambrix forced Smith to hold the flashlight while he decided on a grave site and dug the graves (OR. 2220-23). He removed jewelry from Moore's body, then drug the bodies to the graves, explaining the "horrible noise" from each body as air being expelled from the lungs (OR. 2221-22, 2226). He also explained that he had left Bryant face down in a pond in order to make sure that if she had not died after he choked her, then she would drown (OR. 2334). Lambrix carefully covered up the graves, stepping on them and covering them with leaves (OR. 2222-23, 2227). He then returned to the trailer, packed some belongings and drove several hours to his sister's house, stopping on the way to dispose of the murder weapon and his shirt by throwing them into the water under a nearby bridge (OR. 2229-32, 2243-44).

These actions are inconsistent with the now proffered defense of voluntary intoxication. Martin v. Maggio, 711 F.2d 1273, 1281-1282 (5th Cir. 1983) (intoxication defense repudiated by defendant's acts, demonstrating lucidity after homicides, including taking money from scene and disposing of gun), cert. denied, 469 U.S. 1028 (1984); Harich, 844 F.2d at 1471 (there was no reasonable probability jury would accept intoxication defense, "as the acts committed required a significant degree of physical and intellectual skills"). Finally, Lambrix's 1986 theory of "self-defense," which he is currently espousing, negates the lack of intent element of any intoxication defense. Wiley, 793 F.2d at 1194 ("Petitioner's full recollection of the events surrounding the shooting tended to demonstrate sufficient mental capacity to form the requisite intent. ... Furthermore, Wiley admitted at the evidentiary hearing that he intended to shoot Barlow (in self-defense), an admission that negates the lack of intent element of an intoxication defense. Edwards rendered effective assistance of counsel as to the intoxication defense.")

Thus, there simply is no evidence that Lambrix was intoxicated at the time of the offenses. Trial counsel adequately investigated and prepared for trial based upon their client's desires, and Lambrix cannot satisfy either the deficiency or the prejudice prong of the Strickland test. The denial of this claim must be affirmed.

ISSUE VI

WHETHER MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO CONDUCT JURY SELECTION IN A REASONABLY COMPETENT MANNER.

The appellant's next claim alleges ineffective assistance due to his attorney's performance during jury selection. This is also a claim which should have been raised in the initial 3.850 motion, and is clearly procedurally barred by the failure to raise it at that time. Zeigler, 632 So. 2d at 51.

In addition, the transcript of the trial in this case does not support the claim now asserted. As to the claim that counsel failed to adequately challenge and expose any alleged juror bias, the record reflects that Lambrix's trial attorneys extensively questioned all potential jurors as to their ability to be fair and impartial (OR. 1520-41, 1555-62, 1592-95, 1609-15, 1646-61, 1674-76, 1687-90, 1704-09, 1716-19, 1755-57, 1764-66, 1776-77). To the extent that collateral counsel is now able to identify some areas where he would have posed additional inquiries, counsel is merely engaging in the Monday morning quarterbacking clearly prohibited by Strickland.

Lambrix identifies three "potentially biased" jurors and alleges that they should have been challenged for cause or at least excused peremptorily. As to juror Snyder, the record reflects that he stated that he would keep an open mind through the trial and listen to the evidence presented, and he believed that he could apply the judge's law (OR. 1472, 1481). Snyder was questioned by defense counsel as to his ability to consider the alternative sentence of life with a 25 year

minimum mandatory on each count, as well as his ability to apply the presumption of innocence (OR. 1527-1528).

Lambrix also suggests that the fact that juror Winburn's stepson was a sheriff's deputy should have been a reason to excuse Winburn from the panel (OR. 1629). However, Winburn stated that he did not discuss police business with his stepson, and they had not discussed this case at all (OR. 1629). Winburn had no fixed opinions about the case, and stated that he could be fair and impartial (OR. 1629). The stepson, of course, was not a witness in the trial (OR. 1629). Defense counsel also asked Winburn about his relationship with his stepson, and Winburn stated that he would not give any more credibility to police witnesses than he would any other person (OR. 1649). Counsel also inquired as to Winburn's understanding of the state's burden of proof and the presumption of innocence (OR. 1651, 1657).

Juror Walsh is also identified as a juror that should have been excused due to her relationship with a sheriff's department employee (OR. 1469). Walsh stated that she and her roommate, a correctional officer, typically did not discuss pending cases, and her only knowledge of the case was from newspapers (OR. 1469-70, 1472, 1522). She did not have any fixed opinions as to the issues involved and stated she could put aside what she had read and did not believe everything she saw in the paper (OR. 1472). Again, the record reflects that defense counsel explored any impact that Walsh's relationship with her roommate might have on her ability to be fair, and Walsh noted that officers "are human just like everybody else" (OR. 1526).

Counsel cannot be deemed ineffective for failing to excuse jurors that have knowledge about the case, as long as the jurors indicate that they can lay aside any preconceptions and base their verdict on the evidence adduced at trial. White v. Singletary, 972 F.2d 1218, 1223 (11th

Cir. 1992), cert. denied, ___ U.S. ___, 115 S. Ct. 2008 (1993). Since all of the jurors discussed by the appellant so indicated, Lambrix is not entitled to relief due to their presence on his jury.

As to the suggestion that counsel should have preserved for appellate review the trial court's failure to strike veniremen Collins and Lanier for cause, the record reflects that both jurors stated that they could follow the judge's instructions, set aside any preconceived notions, and decide the case solely on the evidence heard (OR. 1535, 1632). Both also noted that if the state failed to prove its case beyond a reasonable doubt, they would find Lambrix not guilty, regardless of anything they had read or heard about the case (OR. 1536, 1648). Excusal for cause would not be warranted from these responses. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, ___ U.S. ___, 120 L. Ed. 2d 892 (1992). Therefore, counsel cannot be found to have been ineffective for failing to preserve this issue for appeal.

Similarly, the fact that counsel did not recognize that juror Hough had been a member of the venire from which the jury for Lambrix's first trial had been chosen does not justify a finding that counsel was ineffective. There has been no showing that any competent counsel would have been able to identity of all 225 people from the first venire which had been gathered over two months before the retrial commenced (Motion, App. 8).[6] In addition, although Lambrix continues to ascribe some level of juror misconduct to juror Hough for failing to volunteer that she had been present (although not questioned) in the first venire, this Court has explicitly rejected this suggestion. Lambrix, 559 So. 2d at 1138.

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[6]The appendices to the 3.850 motion filed below are currently being supplemented to the record on appeal.

On these facts, Lambrix has failed to establish that his attorneys were deficient in the jury selection stage of his trial. This Court must deny relief on this issue as well.

ISSUE VII

WHETHER TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AVAILABLE, COMPELLING MITIGATING EVIDENCE AND TO PROVIDE THE MENTAL HEALTH EXPERT WITH ANY RECORDS OR BACKGROUND INFORMATION DEPRIVED MR. LAMBRIX OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The appellant's next claim also alleges ineffective assistance of counsel, and has previously been rejected by this Court, the trial court, a federal district court, and the Eleventh Circuit Court of Appeals. Thus, the trial court was correct in summarily denying it. Zeigler, 632 So. 2d at 51.

Lambrix contends that "immensely powerful" mitigation existed in this case that was never investigated or presented by his trial counsel. Specifically, Lambrix claims that his trial attorneys failed to present testimony from family members and mental health experts as to Lambrix's alleged neglect and abuse as a child and, therefore, counsel allegedly rendered ineffective assistance at penalty phase. However, Lambrix has not demonstrated either deficient conduct or prejudice therefrom.

There is no absolute duty to present mitigating character evidence, only the obligation to conduct a reasonable investigation. Lightbourne v. Dugger, 829 F.2d 1012, 1025 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988). Although the failure to conduct *any* investigation of a defendant's background may fall outside the scope of reasonably competent counsel, a strategic decision to present less than all possible available mitigation evidence after a sufficient investigation will not support a finding of ineffectiveness. Id.

In the instant case, trial counsel extensively investigated Lambrix's background. Both trial attorneys and their investigator spoke to Lambrix's parents, brothers, sisters, and relatives, about "family history, any history that we felt of Mr. Lambrix that might be helpful in the penalty phase" (R. 301, 303, 334, 346). Mr. Jacobs, who had been a public defender since 1973 and had done "5 or 6" capital cases prior to the instant trial, spoke with the family members "at length" about Lambrix's background (R. 335, 336). Lambrix's ex-wife and child were also discussed (R. 329, 330). Jacobs stated that he knew that "a serious drinking problem," "school records" and "medical records" were all important and relevant in the penalty phase (R. 334, 335). Jacobs added that he had at least some medical records and Department of Corrections records indicating Lambrix had an alcohol problem (R. 313, 314, 334). Jacobs remembered some of the family members telling him about Lambrix's drinking (R. 320). He discussed alcoholism with Dr. Whitman (R. 315). Finally, Jacobs recalled that Dr. Whitman also "basically classified" Lambrix as an antisocial personality, which if brought up at the penalty phase, would hurt Lambrix (R. 329). Dr. Whitman had implied that an antisocial personality meant that Lambrix was "just mean" (R. 266, 329).

Following the extensive investigation related above, trial counsel chose to present less than all the information they had uncovered. At the penalty phase, they presented testimony from five members of Lambrix family: his sister Janet, his brothers Jeff and Donald, Jr., his father and his stepmother (OR. 2589-2624). Trial counsel portrayed Lambrix as a quiet, nonviolent, mild mannered, passive, helpful and loving individual who had been abandoned by his natural mother on the streets at an early age, had had to go to work and drop out of school at an early age, but had nevertheless returned and completed his G.E.D. and pursued biblical studies, and who had

enlisted in the Army and been honorably discharged after sustaining back and head injuries in an accident in the barracks (OR. 2589-2624; 2659-2661). Trial counsel further portrayed Lambrix as an individual whose problems with the law had started only after the head injuries sustained in the Army and had previously been limited only to a "bad check" and "traffic cases." Finally, in an attempt to maintain credibility with the jury in keeping with the theory of innocence presented at the guilt phase, each family member emphasized that they could not believe Lambrix had committed these crimes in view of his lack of any prior violence (OR. 2589-2624).

In Strickland, the United States Supreme Court emphasized that, in determining whether counsel's performance was constitutionally deficient, the challenged conduct must be evaluated from counsel's perspective at the time. 466 U.S. at 689. The focus of Lambrix's argument herein is that, after several years and undisclosed tactics, Lambrix's collateral attorneys have succeeded in having people sign affidavits indicating that they could think of something nice to say about Lambrix or outlining his childhood difficulties. Thus, the argument in this issue is premised on the claim that a more thorough and detailed presentation could have been made to his jury. However, that fact clearly does not establish that performance was deficient. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

Lambrix has failed to show that the strategy to present only favorable, positive penalty phase testimony about him was unreasonable. As in Spaziano v. Singletary, 36 F.3d 1028, 1041 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 911, 130 L. Ed. 2d 793 (1995), "[t]here is nothing in the record to indicate that [Lambrix's] present counsel are either more experienced or wiser than his trial counsel, but even if they were, the fact that they would have pursued a different strategy is not enough." If the best lawyers or even most good lawyers "could have

conducted a more thorough investigation that might have borne fruit," it does not mean that these attorneys' performance fell outside the wide range of reasonably effective assistance. Id..

Consideration of the merits of this claim led the Eleventh Circuit to conclude that the performance of Lambrix's trial attorneys was not deficient. 72 F.3d at 1504-1507. This conclusion was based on a review of the evidentiary hearing conducted in the federal district court. At the time of the hearing, the appellant was represented by his current counsel and was not under an active death warrant -- he clearly has no claim that he was precluded from fully developing this issue for review in the Eleventh Circuit. The finding that the appellant failed to satisfy even the first prong of the Strickland standard in this case should be adopted to defeat this claim.

A review of other cases supports the conclusion that no ineffective assistance of counsel has been shown on the facts of this case. For example, in White, 972 F.2d at 1218, trial counsel had spoken to family members, and presented five witnesses, including White's mother, uncle, and fiancé. The court held that this was clearly distinguished from cases showing a lack of any investigation. "A lawyer can almost always do something more in every case - the Constitution requires a good deal less than maximum performance." Id., at 1225.

Similarly, in Lightbourne, 829 F.2d at 1024, the defendant was the only witness at the penalty phase of his trial. He testified about his age, citizenship, lack of significant criminal record, children and education. At the hearing on his ineffective counsel claim, there were twenty-seven affidavits offered from his family and friends to demonstrate his impoverished childhood. Counsel was found to have been effective since most of the proffered evidence was cumulative to Lightbourne's own testimony. In rejecting the claim, the court noted that "It is

evident that an investigation was conducted and that counsel thereafter elected to put the petitioner on the stand." 829 F.2d at 1026.

In Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), cert. denied, 497 U.S. 1031, 1032 (1990), a reasonable penalty phase investigation was found based on counsel having interviewed Bertolotti's parents and having the parents complete a questionnaire. And in Ferguson v. State, 593 So. 2d 508 (Fla. 1992), the court noted that although the attorney had not exhausted all sources of information by obtaining school, medical, and court records, there was no deficient penalty phase performance as counsel had interviewed family members, presented the testimony of Ferguson's mother, and explored possible mental mitigation but made a tactical decision not to call the mental experts as witnesses.

Trial counsels' tactic at sentencing in introducing good character testimony and emotional appeal, as opposed to a history of alcohol and drug abuse (with the ensuing prior history of criminal conduct) and medical proof thereof, did not constitute deficient conduct. See, Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983) ("decision that good character testimony would be inconsistent with a mentally disturbed defense was perfectly reasonable. Although these two types of testimony need not be inconsistent, [counsel] could have reasonably determined that in this case a local jury would perceive them to be inconsistent. In short, counsel's tactical decision did not constitute ineffective assistance"), cert. denied, 467 U.S. 1219 (1984), quoting Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983); Harich, 844 F.2d at 1470 ("although inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury"); Bertolotti, 883 F.2d at 1519 ("penalty phase tactical theory was to portray Bertolotti as a normal

man from a happy and loving family whose life deserved to be spared; in light of the weakness of Bertolotti's psychiatric evidence [testimony from mental health experts that Bertolotti had a family history of schizophrenia and was insane at the time of the crime] this tact would continue to be a reasonable strategy"); Funchess v. Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985) (counsel not ineffective for failing to present background evidence of childhood abuse and "heavy but 'medicinal use of heroin'" in view of tactic of maintaining innocence), cert. denied, 475 U.S. 1031 (1986); Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990) (presentation of brief family testimony as to defendant's difficult childhood was not deficient conduct where counsel's assessment was that a deprived childhood would not have a beneficial impact on the local jury as many of the jurors from that region had had difficult lives, but had not turned to criminal conduct), cert. denied, ___ U.S. ___, 114 S. Ct. 121 (1991); Clark v. Dugger, 834 F.2d 1561, 1568 (11th Cir. 1987) (counsel's decision not to present some available mitigating evidence in order to control ensuing damaging evidence was not deficient but correct and virtually unchallengeable), cert. denied, 485 U.S. 982 (1988).

At the federal evidentiary hearing, in contrast to the above strategy, Lambrix presented testimony of his natural mother and two aunts who had not seen Lambrix since the age of six to the effect that his father and father's family had a history of abusing alcohol. Lambrix also presented testimony from his sisters Mary and Debra who stated that Lambrix abused alcohol and drugs from an early age. Although Lambrix now relies upon affidavits from these witnesses, as well as other affiants detailing his life history, trial counsel cannot be deficient for failing to present them in the penalty phase.

At the time of trial, Lambrix had stated that his mother "didn't want us and she's probably lying"[3] (Motion, App. 7, p. 3). He also denied having been subjected to physical or sexual abuse as a child (Motion, App. 7, p. 4). Lambrix's two sisters, who testified as to his history of drug and alcohol abuse, were by their own admission not available to testify at the time of trial. Debra was in Texas and incapable of helping anybody but herself from 1982 through 1987 (R. 460-461, 468-469). Mary had already been caught lying for Lambrix and did not wish to testify at all (R. 506-507, 512). See, Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir. 1987) (no deficient conduct is demonstrated when petitioner merely produces witnesses years after trial without demonstrating their availability at the time of trial), cert. denied, 485 U.S. 1014 (1988); Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985) (defendant's own statements as to the availability of family members are of utmost importance and counsel will not be found ineffective simply because years later the defendant claims that his own statements should have been disregarded), cert. denied, 483 U.S. 1013, 1026 (1987).

Lambrix also relies on a proffer by Dr. Sharon Maxwell, a mental health expert that allegedly would have testified about the difficulties Lambrix faced in his life (Motion, App. 18). A review of the proffer demonstrates that it is nothing more than a summary of reports from other family members and childhood acquaintances as to Lambrix's life history. In addition, the proffer does not establish that Maxwell would have been available at the time of trial. Thus, no claim of ineffective counsel can be gleaned from the proffer. See, Elledge, 823 F.2d at 1446.

In order to establish prejudice to demonstrate a sixth amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and find that the circumstances

did not warrant the death penalty. Strickland, 466 U.S. at 694. Strickland also counsels that, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697.

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present this evidence in light of the aggravated nature of the crime. The mitigation suggested in the instant case is much less compelling than that described in Buenoano, and this case is every bit as aggravated.

In light of the five aggravating circumstances presented in this brutal double homicide, and the background information that was presented at penalty phase, Lambrix has not demonstrated that the presentation of additional testimony as to his life struggles would have tipped the balance of aggravating and mitigating circumstances in his favor. Bertolotti, 883 F.2d at 1519; Lusk v. Dugger, 890 F.2d 332, 338-340 (11th Cir. 1989); Daugherty v. Dugger, 839 F.2d 1426, 1432 (11th Cir.), cert. denied, 488 U.S. 871 (1988).

Lambrix has not and cannot meet the standard required to prove that his attorneys were ineffective when the facts to support the aggravating factors are compared to the purported mitigation now argued by collateral counsel. Since he has failed to demonstrate either deficient

performance or prejudice resulting therefrom, this Court should affirm the denial of relief on this claim.

ISSUE VIII

WHETHER MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO OBJECT TO INSTRUCTIONS THAT ALLOWED THE JURY TO WEIGH UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES.

The appellant's next claim asserts that his trial counsel rendered constitutionally deficient performance in failing to object to the jury instructions defining the aggravating circumstances of "cold, calculated, and premeditated" and "pecuniary gain." This identical claim was previously rejected by this Court as procedurally barred. Lambrix, 641 So. 2d at 849. In addition, the appellant has failed to show that competent counsel trying the case in 1983 would have objected to these instructions. Although the cold, calculated and premeditated jury instruction has since been identified as constitutionally vague, that conclusion was not reached until this Court's decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994). At the time of Lambrix's trial, any possible deficiency with a jury instruction defining an aggravating circumstance was deemed inconsequential since the jury's role was not characterized as a "sentencer." See, Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).

Clearly, the failure to have anticipated the changes brought to Florida's death penalty sentencing scheme pursuant to Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), and thereafter applied to the cold, calculated and premeditated jury instruction in Jackson cannot be a basis for finding that counsel's performance was constitutionally deficient.

Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992) (failure to anticipate changes in the law does not establish deficiency).

As to the failure to object to the pecuniary gain instruction, no deficiency can be identified since in fact the instruction is clearly constitutionally adequate. There is no authority to support the assertion that the pecuniary gain instruction given to Lambrix's jury was unconstitutionally vague. The jury was advised that it could consider as an aggravating circumstance, if established by the evidence, that "the crime for which the Defendant is to be sentenced was committed for pecuniary gain" (OR. 2663). This instruction does not suffer the same constitutional defects identified in the heinous, atrocious or cruel, and cold, calculated and premeditated instructions. It uses ordinary words which are not subject to divergent meanings and clearly informs the jury that a desire for financial gain must have been a motivating factor in the murder.

Lambrix argues that the pecuniary gain instruction failed to provide sufficient guidance for the jury because it failed to inform the jury of the limiting constructions placed on the factor by this Court. However, the jury was instructed that it must determine the purpose for the murder. In Jackson, 648 So. 2d at 90, this Court noted that the Constitution does not require every construction of an aggravating factor to be incorporated into a jury instruction defining the factor. The pecuniary gain definition given to Lambrix's jury used ordinary words which are commonly understood, not subject to misinterpretation or arbitrary application. Thus, the jury was properly instructed as to this factor.

This Court has already determined in this case that appellate counsel was not ineffective for failing to challenge the adequacy of the heinous, atrocious or cruel aggravating factor (which was objected to by trial counsel), since the argument would have been rejected at the time of

Lambrix's appeal. Lambrix, 641 So. 2d at 849. This finding refutes the ineffective assistance of counsel argument now asserted as to the cold, calculated and pecuniary gain factors for several reasons. First, it is apparent that even if these instructions had been objected to at the time of trial, they would not have been challenged on appeal since the instruction which was preserved was not challenged. In addition, even if the challenge had been argued on appeal, it would have been rejected by this Court. Furthermore, because the facts of this case demonstrate the applicability of these factors even as limited by this Court's decisions, any possible error in the adequacy of these instructions would clearly be harmless beyond any reasonable doubt. Therefore, there is no possibility that the appellant was prejudiced from his attorneys' failure to object to these instructions.

Since there was no authority to support a challenge to these instructions at the time of trial, and any challenge that might have been made would not have been pursued or accepted on appeal, trial counsel may not now be found to have been ineffective for failing to object to the instructions. Therefore, Lambrix is not entitled to relief on this issue as well.

ISSUE IX

WHETHER THE TRIAL COURT ACTED ARBITRARILY IN FINDING AND WEIGHING THE PECUNIARY GAIN AGGRAVATING FACTOR.

The appellant's next claim is clearly procedurally barred as an issue that must have been raised on the direct appeal of the judgments and sentences imposed in this case, and therefore was properly rejected by the court below. Torres-Arboleda, 636 So. 2d at 1323. Significantly, the appellant does not even attempt to explain why this claim should be considered, and his arguments seeking an exception to the procedural rule prohibiting successive motions for postconviction relief do not apply to this claim.

In addition, this claim is specifically rejected by this Court's opinion in the direct appeal of Lambrix's judgments and sentences, explicitly noting that "After a careful review of the record, we agree with the trial judge and all of the parties involved that five aggravating circumstances apply to the murder of Moore and four aggravating circumstances apply to the murder of Bryant." Lambrix, 494 So. 2d at 1148. The Eleventh Circuit agreed that the record in this case adequately supports the pecuniary gain factor. 72 F.3d at 1508. Furthermore, this factor was clearly applicable since Lambrix told witnesses that the murders were motivated by his desire to get Moore's car (OR. 2449). Such an admission is inconsistent with the suggestion that the taking of the property from the victims was only an "afterthought" and supports the finding of the pecuniary gain aggravating circumstance. Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert.

denied, ___ U.S. ___, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, 502 U.S. 834 (1991).

Clearly, the trial court's denial of this claim must be affirmed.

ISSUE X

WHETHER THE TRIAL COURT FAILED TO CONDUCT AN INDEPENDENT EVALUATION OF THE MITIGATING EVIDENCE OFFERED BY MR. LAMBRIX, THEREBY DEPRIVING HIM OF HIS RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION.

The appellant's final claim alleges that the trial court failed to provide an individualized sentencing determination because the judge did not conduct an independent evaluation of the mitigating evidence. This claim is not subject to collateral review since it could have been raised in the initial direct appeal. Torres-Arboleda, 636 So. 2d at 1323. Furthermore, this Court's finding that the death sentences were properly imposed in this case again refutes the merits of this claim. Lambrix, 494 So. 2d at 1148.

The sentencing order in this case expressly found that no mitigating circumstances existed (OR. 1354-55). To the extent that Lambrix is claiming that the order failed to comply with Campbell v. State, 571 So. 2d 415 (Fla. 1990), it must be noted that Campbell was not decided until six years after Lambrix was tried and sentenced to death, and is not to be applied retroactively. Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991). Therefore, any alleged noncompliance cannot be used at this time to attack the sentencing order rendered below.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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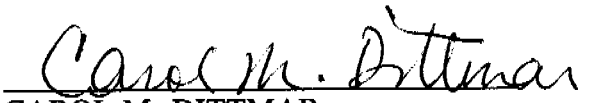
ATTORNEY GENERAL



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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 to Matthew Lawry, Volunteer Lawyers' Post-Conviction Defender Organization, Post Office Box 37039, Tallahassee, Florida, 32315, and Robert Josefsberg, Podhurst Orseck Josefsberg, City National Bank Building, 25 West Flagler Street, Suite 800, Miami, Florida, 33130, this 7th day of March, 1996.

COUNSEL FOR APPELLEE