IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

v.

CASE NO. 86,119

STATE OF FLORIDA,

Appellee

On Appeal from the
Twentieth Judicial Circuit of Florida

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1
Course of Proceedings 1
Disposition in the Court Below 4

SUMMARY OF ARGUMENT 5

ARGUMENT I
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 6

ARGUMENT II
THE COURT BELOW ERRED IN SUMMARILY DENYING RELIEF ON THE GROUNDS THAT THE RULE 3.850 MOTION WAS UNTIMELY AND SUCCESSIVE 8

A. Because Mr. Lambrix was Deprived of His Right to Represent Himself in the Proceedings on the Initial Motion, the Instant Motion Was not Untimely or Successive 8

B. No Procedural Bar Applies Because Mr. Lambrix was Deprived of His Right to the Effective Assistance of Collateral Counsel in the Initial Rule 3.850 Proceeding 13

1. Mr. Lambrix Had a Right to the Effective Assistance of Collateral Counsel 13

2. Mr. Lambrix's Collateral Counsel Provided Ineffective 15

C. No Procedural Bar Can be Applied Where Any Default Was the Result of State Action 20

D. Because Mr. Lambrix Is Actually Innocent, Enforcement of Any Default Rule Would Result in a Fundamental Miscarriage of Justice 21

1. Mr. Lambrix is Actually Innocent of First-Degree Murder 23

2. Mr. Lambrix is Ineligible for the Death Penalty 28

ARGUMENT III
MR. LAMBRIX WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE COUNSEL'S ACTIONS DEPRIVED MR. LAMBRIX OF HIS RIGHT TO TESTIFY AT BOTH THE GUILT-INNOCENCE AND PENALTY PHASES OF THE TRIAL . . 31

ARGUMENT IV
MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY COUNSEL'S FAILURE TO ADEQUATELY CROSS-EXAMINE AND IMPEACH KEY STATE WITNESSES 41

A. Trial Counsel Failed to Impeach Frances Smith with Prior Inconsistent Statements 43

B. Trial Counsel Failed to Cross-Examine Deputy Sheriff Ronald Council Concerning Mr. Lambrix's Degree of Intoxication and Failed to Effectively Cross-Examine Other Witnesses 48

ARGUMENT V
MR. LAMBRIX WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT A VOLUNTARY INTOXICATION DEFENSE 50

ARGUMENT VI
MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO CONDUCT JURY SELECTION IN A REASONABLY COMPETENT MANNER 55

ARGUMENT VII
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 . . . 60

ARGUMENT VIII
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 . . . 64

ARGUMENT IX
THE TRIAL COURT ACTED ARBITRARILY IN FINDING AND WEIGHING THE PECUNIARY GAIN AGGRAVATING FACTOR 69

ARGUMENT X
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 70

CONCLUSION 75

TABLE OF CITATIONS

FEDERAL CASES

Barclay v. Florida, 463 U.S. 939 (1983) 28

Chapman v. California, 386 U.S. 18 (1967) 67

Coleman v. Thompson, 111 S. Ct. 2546 (1991) 21

Davis v. Alaska, 415 U.S. 308 (1974) 41

Dennis v. United States, 339 U.S. 162 (1950) 55

Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986) . . . 12

Douglas v. Alabama, 380 U.S. 415 (1965) 41

Dugger v. Adams, 489 U.S. 401 (1989) 22

Eddings v. Oklahoma, 455 U.S. 104 (1982) 73

Engle v. Isaac, 456 U.S. 107 (1982) 22

Espinosa v. Florida, 112 S. Ct. 2926,
120 L. Ed. 2d 854 (1992) 3, 18, 64

Evitts v. Lucey, 469 U.S. 387 (1985) 14

Faretta v. California, 422 U.S. 806 (1975) 8, 9, 10, 33

Ford v. Wainwright, 477 U.S. 399 (1986) 14

Gregg v. Georgia, 428 U.S. 153 (1976) 73

Hitchcock v. Dugger, 481 U.S. 393 (1987) 73

Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) . . . 23

Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985) 55

Kentucky v. Stincer, 482 U.S. 730 (1987) 41

Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch
(S.D. Fla., May 12, 1992) 20

Lambrix v. Singletary, No. 92-4539 (11th Cir.,
Jan. 3, 1996) 34, 35, 40

McCleskey v. Zant, 111 S. Ct. 1454 (1991) 19

Murray v. Carrier, 477 U.S. 478 (1986) . . . . . . passim

Nichols v. Butler, 953 F.2d 1550 (11th Cir. 1992) . . 34, 35, 36

Olden v. Kentucky, 488 U.S. 227 (1988) 42

Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989) . . . 12, 13

Oses v. Massachusetts, 775 F. Supp. 443 (D. Mass. 1991) . . 13

Parker v. Dugger, 498 U.S. 308 (1991) 74

Rock v. Arkansas, 483 U.S. 44 (1987) 32, 33, 35

Sawyer v. Whitley, 505 U.S. ___, 120 L. Ed. 2d 269 (1992) . . 23

Schlup v. Delo, 513 U.S. ___, 130 L. Ed. 2d 808 (1995). . 22, 51

Smith v. Illinois, 390 U.S. 129 (1968) 42

Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986) . 42, 46, 50

Sochor v. Florida, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) . 69

Strickland v. Washington, 466 U.S. 668 (1984) . . . . passim

Stringer v. Black, 112 S. Ct. 1130 (1992) 67

United States v. Columbo, 869 F.2d 149 (2d Cir. 1989) . . . 58

United States v. Cronic, 466 U.S. 648 (1984) 17, 50

United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984) . . 58

United States v. Scott, 909 F.2d 488 (11th Cir. 1990) . . 33, 34

United States v. Teague, 953 F.2d 1525 (11th Cir.) cert. denied, 113 S. Ct. 127 (1992) 33, 35

Wainwright v. Sykes, 433 U.S. 72 (1977) 21

Zant v. Stephens, 462 U.S. 862 (1983) 73

STATE CASES

Barwick v. State, 660 So. 2d 685 (Fla. 1995) 24

Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993) . . . 65

Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992) . . . 8, 12

Campbell v. State, 571 So. 2d 415 (Fla. 1990) . . . 71, 74, 75

Chaky v. State, 651 So. 2d 1169 (Fla. 1995) 30

Cherry v. State, 659 So. 2d 1069 (Fla. 1995) 4, 32

Davis v. State, 90 So. 2d 629 (Fla. 1956) 25

DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) 29, 68

Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993) . . . 33, 38, 60

Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993) . . 8, 10

Gardner v. State, 484 So. 2d 91 (Fla. 1985) 37, 51

Gill v. State, 632 So. 2d 660 (Fla. 2d DCA 1994) . . . 33, 35

Hallman v. State, 560 So. 2d 223 (Fla. 1990) 68

Hamblen v. State, 527 So. 2d 800 (Fla. 1988) 9

Hamilton v. State, 547 So. 2d 630 (Fla. 1989) 56

Hardwick v. State, 521 So. 2d 1071 (Fla.), cert. denied, 488 U.S. 871 (1988) 65

Heiney v. State, 447 So. 2d 210 (Fla. 1984) 37

Heiney v. State, 620 So. 2d 171 (Fla. 1993) 60

Hitchcock v. State, 614 So. 2d 483 (Fla. 1993) 69

Hoffman v. State, 571 So. 2d 449 (Fla. 1990) 7

Holland v. State, 503 So. 2d 1250 (Fla. 1987) 13

Huff v. State, 622 So. 2d 982 (Fla. 1993) 7

Jackson v. State, 575 So. 2d 181 (Fla. 1991) 27, 36

Jackson v. State, 648 So. 2d 85 (Fla. 1994) 64, 65

James v. State, 615 So. 2d 668 (Fla. 1993) . . . 18, 65, 67

Jones v. State, 642 So. 2d 121 (Fla. 5th DCA 1994) . . . 14

Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986) 51

Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988) 2

Lambrix v. Dugger, 559 So. 2d 1137 (Fla. 1990) 59

Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994) . . 3, 64, 65

Lambrix v. State, 494 So. 2d 1143 (Fla. 1986) . . . 1, 43, 44

Lambrix v. State, 534 So. 2d 1151 (Fla. 1988) . . 2, 19, 53, 60

Lemon v. State, 498 So. 2d 923 (Fla. 1986) 6, 7, 20

McArthur v. State, 351 So. 2d 972 (Fla. 1977) 36, 37

McGuffey v. State, 515 So. 2d 1057 (Fla. 4th DCA 1987) . 5, 7, 21

Minnis v. Jackson, 330 So. 2d 847 (Fla. 3d DCA 1976) . . . 58

Mitchell v. State, 458 So. 2d 819 (Fla. 1st DCA 1984) . . . 58

Montgomery v. State, 615 So. 2d 226 (Fla. 5th DCA 1993) . 4, 32

Mungin v. State, No. 81,358 (Fla., Sept. 7, 1995) . . . 26, 36

Nibert v. State, 574 So. 2d 1059 (Fla. 1990) 71, 75

Omelus v. State, 584 So. 2d 563 (Fla. 1991) 69

Parker v. Dugger, 660 So. 2d 1386 (Fla. 1995) 5, 8, 20

Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981) 65

Rembert v. State, 445 So. 2d 337 (Fla. 1984) 30

Rogers v. State, 511 So. 2d 526 (Fla. 1987) 29, 71

Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989) 65, 69, 70

Simmons v. State, 419 So. 2d 316 (Fla. 1982) 66, 70

Songer v. State, 544 So. 2d 1010 (Fla. 1989) 29, 68

Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988) 14

Spaziano v. State, 660 So. 2d 1363 (Fla. 1995) . . . 14, 17

State v. Gunsby, No. 84,977 (Fla. Jan. 11, 1996) 60

State v. Oisorio, 657 So. 2d 4 (Fla. 3d DCA 1995) 33

State v. Oisorio, 657 So. 2d 5 (Fla. 3d DCA 1995) 35

State v. Young, 626 So. 2d 655 (Fla. 1993) 10

Steinhorst v. State, 636 So. 2d 498 (Fla. 1994) . . . 5, 7, 10, 13

<u>Stevens v. State</u>, 552 So. 2d 1082 (Fla. 1992) 60

<u>Tedder v. State</u>, 322 So. 2d 908 (Fla. 1975) 68

<u>Terry v. State</u>, No. 83,002 (Fla. Jan. 4, 1996) 26, 36

<u>Trotter v. State</u>, 576 So. 2d 691 (Fla. 1991) 58

<u>In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases</u>, 431 So. 2d 594 (Fla.), <u>modified</u>, 431 So. 2d 599 (Fla. 1981) 25

<u>Williams v. State</u>, 565 So. 2d 838 (Fla. 1st DCA 1990) 25

<u>Williams v. State</u>, 601 So. 2d 596 (Fla. 1st DCA 1992) 33

<u>Williams v. State</u>, 638 So. 2d 976 (Fla. 4th DCA 1994) . . 56, 57

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lambrix's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Lambrix's claims.

Citations in this brief shall be as follows: The record on direct appeal will be referred to as "R. ___." The record on appeal from the denial of the first Rule 3.850 motion will be referred to as "PR. ___." The record from the court below in the instant action will be cited as "ROA ___." "T." followed by a date refers to the transcript of Mr. Lambrix's first trial. "App." followed by a number refers to the Appendix to the Rule 3.850 motion. "App." followed by a letter refers to the Appendix to this brief. All other references will be self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE

Course of Proceedings

This is an appeal of the summary denial of Cary Michael Lambrix's motion to vacate his convictions and death sentence, pursuant to Fla. R. Crim. P. 3.850.

Mr. Lambrix was indicted on two counts of first degree murder on March 29, 1983. His first trial before a Glades County jury ended with the declaration of a mistrial on December 17, 1983, when the jury failed to reach a verdict after deliberating for some eleven hours. His second trial commenced on February 20, 1984. The retrial jury found Mr. Lambrix guilty on both counts of the indictment on February 24, 1984.

The penalty phase of Mr. Lambrix's trial was held on February 27, 1984. Family members provided limited testimony concerning his good character and conduct as a child. Mr. Lambrix did not testify at either the guilt or penalty phases of the trial. A majority of the jury recommended death with regard to both convictions. On March 22, 1984, the circuit court imposed two sentences of death.

Mr. Lambrix appealed his convictions and sentences of death to this Court, which upheld both convictions and sentences. Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). No issues as to the propriety of the death sentences were briefed or argued.

On September 29, 1987, Mr. Lambrix filed a pro se petition for writ of habeas corpus in this Court, alleging ineffective assistance of appellate counsel. Mr. Lambrix also filed numerous pro se motions with the circuit court seeking to dismiss the Capital Collateral Representative (CCR) as his counsel on the

grounds that CCR was, and would be, incapable of providing effective representation. On December 9, 1987, Judge Elmer Friday denied Mr. Lambrix's pro se motions, finding that Mr. Lambrix was legally mandated to accept representation by CCR counsel. App. A. CCR supplemented Mr. Lambrix's pro se habeas petition, and on August 18, 1988, this Court denied relief. Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988).

On September 28, 1988, then-Governor Bob Martinez signed a death warrant against Mr. Lambrix, scheduling his execution for November 30, 1988. On October 27, 1988, Mr. Lambrix filed a Rule 3.850 motion in circuit court. In the motion, Mr. Lambrix's CCR counsel stated that they were unable to effectively prepare and litigate his case under the circumstances of multiple death warrants, and requested additional time to allow them to represent him effectively. PR. 10-12, (3.850 Motion at 10-12). The circuit court summarily denied relief. Mr. Lambrix then sought an emergency stay of execution from this Court, which denied relief by a vote of 4-3. Lambrix v. State, 534 So. 2d 1151 (Fla. 1988).

While still under death warrant, Mr. Lambrix filed his first and only federal habeas corpus petition in the United States District Court for the Southern District of Florida on November 30, 1988. The court stayed the execution pending review. Several months later, Mr. Lambrix moved the federal courts for removal of CCR as his counsel, and requested substitute counsel. Following a hearing, on May 1, 1989, the court granted CCR's motion to withdraw and the court appointed replacement counsel.

In August, 1991, the District Court provided Mr. Lambrix with an evidentiary hearing limited to specific issues. On May 12, 1992, the court denied all relief requested, and Mr. Lambrix appealed to the Eleventh Circuit. In February, 1993, the State of Florida filed a motion with the Eleventh Circuit Court of Appeals, requesting a stay of proceedings to allow Mr. Lambrix to return to the state courts for exhaustion of an issue brought pursuant to Espinosa v. Florida, 112 S. Ct 2926 (1992). On March 3, 1993, the Eleventh Circuit granted the State's motion, directing Mr. Lambrix to return to state court to litigate any claims under Espinosa. Mr. Lambrix filed a petition for writ of habeas corpus in this Court, which was denied on June 16, 1994. Lambrix v. Singletary, 641 So.2d 847 (Fla. 1994).

On September 29, 1994, Mr. Lambrix moved the Eleventh Circuit to hold further proceedings on his federal appeal in abeyance to permit him to file and receive review of a Rule 3.850 motion in the state trial court. He proceeded to file his Rule 3.850 motion, which is the subject of the instant appeal, on October 7, 1994. On October 17, 1994, the Eleventh Circuit denied his motion to hold proceedings in abeyance. On January 3, 1996, the Eleventh Circuit denied relief. A petition for rehearing will be filed shortly.

On November 3, 1994, the court below ordered the State to respond to Mr. Lambrix's Rule 3.850 motion. After an extension was agreed to, the State filed its response on February 22, 1995. Without permitting any reply by Mr. Lambrix or taking any argument,

Chief Judge Thomas S. Reese of the Twentieth Judicial Circuit denied the Rule 3.850 motion, and this appeal followed.

Disposition in the Court Below

The court below ruled that the Rule 3.850 motion was untimely and that Mr. Lambrix had failed to show that he was entitled to any of the exceptions to Rule 3.850's time limitations. ROA 524. The court also found without specifying that some of the claims raised in the Rule 3.850 motion were successive and others were abusive. Id. Finally, without stating any reasoning or attaching any portions of the record, the court below found that the "claims raised in the motion are without substantive merit in addition to being procedurally barred." ROA 524-25. The court below did not make any factual findings, and stated its legal conclusions in a terse and entirely conclusory fashion.

Given the nature of the disposition of the case in the court below, the relevant facts in this case relate primarily to whether Mr. Lambrix is entitled to one or more exceptions to the procedural bar found by the court below. Those facts were alleged in the Rule 3.850 motion and must be accepted as true in this Court. Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995) (allegations stating prima facie case require hearing); Montgomery v. State, 615 So.2d 226 (Fla. 5th DCA 1993) (allegations must be accepted as true unless conclusively rebutted). The facts are numerous and complex, and for that reason they are discussed in the body of the brief as they relate to the claims presented.

SUMMARY OF ARGUMENT

The court below summarily denied relief on all of Mr. Lambrix's claims on the grounds that they were procedurally barred as untimely and successive or abusive. ROA 524. Mr. Lambrix pled below and can establish, when given the opportunity, four separate and sufficient bases for excusing any procedural bar. Because Mr. Lambrix set forth legally sufficient grounds to overcome any procedural default, the court below erred in failing at a minimum to hold an evidentiary hearing to determine whether he had established an exception to the procedural bar. See, e.g., Steinhorst v. State, 636 So.2d 498, 500-501 (Fla. 1994); McGuffey v. State, 515 So.2d 1057 (Fla. 4th DCA 1987).

Because the court below simply denied the merits of Mr. Lambrix's claims and failed to attach or even cite any portions of the record to support its denial of relief, it never appropriately addressed the merits of Mr. Lambrix's claims, and this case should be remanded in order for the trial court to make the initial evaluation of his claims on the merits. See Parker v. Dugger, 660 So. 2d 1386, 1389 (Fla. 1995).

Should this Court nevertheless proceed to the merits, it is clear that Mr. Lambrix has alleged facts establishing violations of his constitutional rights, and that nothing in the record conclusively refutes those allegations. The alleged violations include the violation of his fundamental right to testify in his own defense; the violation of his right to the effective assistance of trial counsel as a result of the failure to adequately cross-

examine key state witnesses, failure to investigate and present a voluntary intoxication defense, failure to conduct voir dire competently, failure to investigate and present mitigating evidence, and failure to object to unconstitutionally vague instructions on aggravating circumstances; the trial court's erroneous and arbitrary finding of the pecuniary gain aggravating factor; and the trial court's failure to conduct an adequate and independent evaluation of the mitigation presented by Mr. Lambrix. Because the "files and records in [this] case" do not "conclusively show that [Mr. Lambrix] is entitled to no relief," this Court should remand the case for an evidentiary hearing on the merits of his claims. Lemon v. State, 498 So. 2d 923 (Fla. 1986).

ARGUMENT I

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 Rule 3.850 motion alleged critical facts not presented at Mr. Lambrix's trial and sentencing. It also alleged facts establishing four grounds for excusing any procedural bar. The court below summarily denied relief on all of Mr. Lambrix's claims on the grounds that they were procedurally barred as untimely and successive or abusive. ROA 524. In so ruling, the court rejected without discussion the facts and argument set forth in Mr. Lambrix's motion demonstrating that no procedural bar should be applied. The court below summarily denied all claims without holding an evidentiary hearing, although one had been requested,

and indeed without holding a hearing of any kind, or allowing any reply on the part of Mr. Lambrix.[1]

Because Mr. Lambrix set forth legally sufficient grounds to overcome any procedural default, the court below erred in failing at a minimum to hold an evidentiary hearing to determine whether he had established an exception to the procedural bar. See, e.g., Steinhorst v. State, 636 So.2d 498, 500-501 (Fla. 1994); (remanding for hearing on whether conflict could previously have been discovered by use of due diligence); McGuffey v. State, 515 So.2d 1057 (Fla. 4th DCA 1987) (hearing required where motion alleges facts bringing motion within exception to time limitation). On the merits, because the "files and records in [this] case" do not "conclusively show that [Mr. Lambrix] is entitled to no relief," this Court should remand the case for an evidentiary hearing. Lemon v. State, 498 So.2d 923 (Fla. 1986).

The court below discussed the merits of Mr. Lambrix's claims in only the most cursory fashion. In contravention of Rule 3.850 and Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990), the court failed to attach or even cite any portions of the record to support a finding that the record conclusively established that Mr. Lambrix was not entitled to relief. Because it failed to do so, it never appropriately addressed the merits of Mr. Lambrix's claims, and this case should be remanded in order for the trial court to make

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[1]Under Huff v. State, 622 So.2d 982, 983 (Fla. 1993), the court below was required to give Mr. Lambrix an opportunity to be heard before denying his motion. The court's failure to do so violated due process and requires that this case be remanded.

the initial evaluation of his claims on the merits. Parker v. Dugger, 660 So. 2d 1386, 1389 (Fla. 1995).

ARGUMENT II

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

A. Because Mr. Lambrix was Deprived of His Right to Represent Himself in the Proceedings on the Initial Motion, the Instant Motion Was not Untimely or Successive

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court recognized that competent defendants have the right to waive counsel and represent themselves, if they choose. In Durocher v. Singletary, 623 So.2d 482 (Fla. 1993), this Court held that the Faretta right applies to waiver of the statutory right to collateral counsel established by § 27.7001, et seq., Fla. Stat. The right established in Durocher was clearly violated in the proceedings on Mr. Lambrix's first Rule 3.850 motion. Under the unique circumstances of this case, Durocher should be retroactively applied and this Court should "overlook" any procedural default because of the Durocher violation. Parker v. Dugger, 660 So.2d 1386, 1388 (Fla. 1995) (overlooking procedural default on second Rule 3.850 motion with regard to ineffective assistance claims where trial counsel filed first Rule 3.850 motion); Breedlove v. Singletary, 595 So.2d 8, 11 (Fla. 1992) (same).

There can be no question that Mr. Lambrix's rights under Faretta and Durocher were violated in the proceedings on the initial Rule 3.850 motion. In October 1987, Mr. Lambrix moved the circuit court to remove CCR as his counsel and to permit him to

represent himself. In support of the motion, Mr. Lambrix asserted that CCR was unable to provide effective and adequate representation, given their caseload and numerous warrants; that he was competent; and that he was willing and able to represent himself. On December 9, 1987, the circuit court held a hearing on Mr. Lambrix's motion. Mr. Lambrix appeared at the hearing and argued that CCR could not provide effective representation. CCR also appeared and argued that § 27.7001, et seq., Fla. Stat., mandate that all death-sentenced Florida prisoners be represented by an attorney in Rule 3.850 proceedings (an argument rejected by this Court in Durocher). App. B.

The circuit court issued its ruling that same day. It noted that Mr. Lambrix had argued that CCR was unable to provide him competent assistance:

> In sum, the Defendant contends that the office of Capital Collateral Representative's ... caseload is so great that they are unable to render him the service and respect that his cause is entitled to, and that his welfare is jeopardized by their being his appellate counsel.

App. A. The court denied Mr. Lambrix's motion to dismiss CCR, holding that Faretta does not apply to post-conviction proceedings and that § 27.7001, et seq., Fla. Stat., require that a death-sentenced inmate be represented by CCR or other counsel. Id. at 2. That holding was clearly directly contrary to this Court's decision in Durocher, in which this Court stated:

> Competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). If the right to representation can be waived at trial, we

see no reason why the statutory right to collateral counsel cannot also be waived.

Durocher, 623 So.2d at 483 (emphasis added). The circuit court's ruling clearly violated Mr. Lambrix's right to represent himself, which is guaranteed by the United States and Florida Constitutions, and this Court's ruling in Durocher.

The only effective remedy for this violation is to permit Mr. Lambrix to do now what he should have been permitted to do in 1987 -- to use the procedure provided by Rule 3.850 to raise in a new, original motion, any applicable claims of violations of his constitutional rights at trial. When Faretta is violated at trial, the remedy is a new trial. Faretta, 422 U.S. at 835-36; State v. Young, 626 So. 2d 655, 657 (Fla. 1993). By the same token, where as here Faretta and Durocher are violated in post-conviction proceedings, the remedy should be a new, original post-conviction proceeding. See Steinhorst v. State, 636 So.2d 498, 500-501 (Fla. 1994)(defendant may be entitled to new post-conviction proceeding).

Furthermore, the instant Rule 3.850 motion cannot be barred as untimely or successive since it 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. A State may not apply a procedural bar that was only created by the State's own action. See Murray v. Carrier, 477 U.S. 478, 488 (1986) (no procedural bar where "external impediments," including "'interference by officials' ... made compliance [with the procedural rule] impracticable"). There could be no clearer example of such an impediment to compliance with a rule than the

circuit court's order forbidding Mr. Lambrix to represent himself and requiring that CCR represent him.

In the court below, the State argued that Mr. Lambrix was required to raise the violation of his right to self-representation previously, apparently on the appeal of the denial of his initial Rule 3.850 motion. ROA 180, State's Response to Motion to Vacate Judgment and Sentences of Death, at 3. The State does not explain, however, just how Mr. Lambrix could have raised the issue in that proceeding. In the circuit court proceedings, CCR took the position that he had no right to self-representation and that Florida law mandated that CCR represent him. App. B. Once CCR had taken that position in the circuit court, it was effectively precluded from switching back and arguing on appeal that Mr. Lambrix did, after all, have the right to represent himself and therefore the case should be remanded to effectuate that right. And since Mr. Lambrix had been precluded from representing himself, there was no way for him to raise the issue, especially since the appeal was conducted under death warrant. Thus, the actions of the circuit court and of CCR were clearly "external impediments" that prevented Mr. Lambrix from further attempting to assert his right to self-representation. Murray v. Carrier, 477 U.S. at 478.

Because CCR was precluded from raising the Faretta issue on direct appeal of the denial of the initial Rule 3.850 motion, this case is similar to Parker and Breedlove, supra. In those cases, the defendant was represented by the same attorney at trial and during a first Rule 3.850 proceeding. Because that attorney was

unable to assert a claim of ineffective assistance, this Court chose to "overlook the procedural default" as it related to such claims. Breedlove, 595 So.2d at 11. Similarly, to the extent that any procedural default is otherwise applicable here, this Court should "overlook" the default for the claims Mr. Lambrix was precluded from raising as a result of the denial of his right of self-representation.

On the other hand, to the extent that this Court should find that there was a requirement that CCR raise the Faretta violation on appeal in order to preserve the issue (despite the fact that CCR had affirmatively argued below that no such right existed), then clearly CCR's failure to raise that issue was ineffective.[2] A violation of the right to self-representation is per se reversible error. Dorman v. Wainwright, 798 F.2d 1358, 1370 (11th Cir. 1986). Thus, failure to raise on appeal a Faretta violation that took place in trial court is clearly ineffective, as prejudice must be presumed. Orazio v. Dugger, 876 F.2d 1508, 1511 (11th Cir. 1989). Moreover, in subsequent proceedings raising the Faretta violation, the procedural default resulting from failure to raise the issue on direct appeal must be excused, since it resulted from the denial of the right to effective assistance of counsel on appeal. Id.

Furthermore, the denial of Mr. Lambrix's right to self-representation in the initial Rule 3.850 proceedings was clearly

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[2]Mr. Lambrix will demonstrate in Argument II, Infra, that he had a right to effective assistance of counsel by CCR. Here, he assumes arguendo the existence of such a right and demonstrates that the failure to raise the Faretta violation on appeal was deficient performance.

the denial of a fundamental due process right. Id. at 1512 (harmless error doctrine does not apply to Faretta violation); Oses v. Massachusetts, 775 F. Supp. 443 (D. Mass. 1991) (Faretta error is "structural defect" in trial that can never be harmless under Fulminante v. Arizona, 499 U.S. 279 (1991)). Like trials, Rule 3.850 proceedings are governed by due process. Steinhorst v. State, 636 So.2d at 501; Holland v. State, 503 So.2d 1250 (Fla. 1987). Where, as here, a fundamental violation of due process takes place in an initial Rule 3.850 proceeding, the defendant must be allowed another opportunity to seek relief in proceedings that protect fundamental due process rights. Steinhorst, supra. Application of a procedural bar in the instant proceeding would only serve to perpetuate the due process violation.

B. **No Procedural Bar Applies Because Mr. Lambrix was Deprived of His Right to the Effective Assistance of Collateral Counsel in the Initial Rule 3.850 Proceeding**

1. Mr. Lambrix Had a Right to the Effective Assistance of Collateral Counsel

Pursuant to § 27.7001 et seq., Florida Statutes, as a prisoner sentenced to death Mr. Lambrix had a right to the assistance of counsel. Section 27.702(1) provides:

> The capital collateral representative shall represent, without additional compensation, any person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to his indigency or determined by a state court to be indigent for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

By creating a right to counsel, the statute also creates a right to the effective assistance of such counsel, as this Court has recognized. Spaziano v. State, 660 So.2d 1363, 1370 (Fla. 1995) (collateral counsel who acknowledged lack of resources and experience to handle evidentiary hearing found to have effectively withdrawn; §27.702(1), Florida Statutes creates right to representation); Spalding v. Dugger, 526 So.2d 71 (Fla. 1988). See also Jones v. State, 642 So. 2d 121 (Fla. 5th DCA 1994) (prisoner for whom counsel was appointed in postconviction proceedings entitled to effective assistance).

This Court has thus recognized that death sentenced inmates have a state law statutory right to competent counsel. Failure to provide effective assistance to a particular death sentenced inmate violates that right and also violates due process. Section 27.702, as interpreted by this Court, creates an expectation protected by the due process clause, for it provides that a Florida capital defendant must receive the effective assistance of post-conviction counsel before he can be executed. See Ford v. Wainwright, 477 U.S. 399, 428-29 (1986) (O'Connor, J., concurring). Accordingly, it violates due process for the state to provide counsel that does not provide minimally effective representation. Evitts v. Lucey, 469 U.S. 387, 400-01 (1985) (once state provides appellate review procedure, it must provide effective appellate counsel). When post-conviction counsel fails to meet the minimal standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), it is as much a violation of the death sentenced inmate's statutory and

constitutional rights as is ineffective representation at trial or on direct appeal.

Moreover, in the instant case, the right to effective assistance also flows from the circuit court's action in denying Mr. Lambrix's request for self-representation. Here, the State of Florida denied Mr. Lambrix's request to be permitted to represent himself and forced him to accept representation by a State agency, CCR. In so doing, the State necessarily shouldered the responsibility of providing Mr. Lambrix effective representation. Otherwise, through the actions of various State actors, Mr. Lambrix could be deprived of meritorious claims for relief, and left with no recourse whatever. Indeed, if the ruling of the court below is not reversed, that will be exactly what has happened.

2. Mr. Lambrix's Collateral Counsel Provided Ineffective Assistance

Well before the initial Rule 3.850 motion was filed and litigated, Mr. Lambrix strenuously argued to the circuit court that CCR's caseload prevented it from representing him competently. Apps. A, B. When CCR actually filed Mr. Lambrix's Rule 3.850 motion, it did so under the time pressures of an active death warrant and of numerous other active warrants and other deadlines. In the motion, CCR elaborated on the facts and circumstances that rendered it unable to fully investigate, develop and present claims on Mr. Lambrix's behalf. At the time that the Rule 3.850 motion was filed, seven (7) death warrants had been signed during a four week period of time, and fourteen (14) warrants had been outstanding during the two preceding months. PR. 7.

CCR and Mr. Lambrix's attorney, Billy Nolas, explained why under these circumstances it was impossible for them to provide Mr. Lambrix with effective representation:

> [T]he scheduling of so many executions (all set during the same time period as Mr. Lambrix's) has ... made it virtually impossible for CCR to undertake any reasonable efforts on Mr. Lambrix's behalf during the pendency of the death warrant....
>
> Counsel in Mr. Lambrix's case is responsible for the litigation of this and three other death warrant cases, all with executions scheduled this month, and is assisting as necessary in the other under-warrant cases. Undersigned counsel was responsible for seven death warrant capital cases in September and early October. Counsel was responsible for three non-warrant evidentiary hearings in September, two in October, and is currently responsible for three of the five already scheduled for November. Additionally, counsel has been responsible for preparing and filing approximately twenty-five (25) substantive briefs and pleadings, conducting arguments in various courts, and undertaking efforts to investigate, research and prepare for a number of other capital proceedings during this period of time....

PR. 9-10. Counsel informed the court that, as a result, they were unable to provide effective representation:

> [T]he Governor's policy for issuing such unprecedented numbers of death warrants ... [has made] undersigned counsels' already difficult task virtually impossible. The goal of such actions cannot but be to assure that no capital inmate receive adequate representation, <u>for it is humanly impossible to represent anyone effectively under these circumstances</u>.

PR. 11-12.[3]

The facts asserted by Mr. Lambrix's CCR counsel in 1988 -- and alleged to be true by Mr. Lambrix in the current Rule 3.850 motion -- are similar in effect to those that led this Court, in <u>Spaziano</u>,

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[3]<u>See also</u> App. 35, Affidavit of Billy Nolas, regarding the circumstances of counsel's representation of Mr. Lambrix.

supra, to find that counsel had effectively withdrawn and was not competent to continue:

> In view of Mello's actions, ... we find that he has effectively withdrawn from representing Spaziano. Because Mello concededly has neither the resources nor the necessary trial experience, we find that he is not competent to continue this representation....
>
> * * *
>
> [W]e refuse to endorse or allow Mello's representation to continue when that representation would, admittedly, be less than adequate.

Spaziano v. State, supra, 660 So. 2d at 1369. Although CCR's representation of Mr. Lambrix was likewise "admittedly ... less that adequate" under the circumstances resulting from multiple death warrants and other conflicting obligations, CCR was nevertheless forced to prepare, file and litigate Mr. Lambrix's Rule 3.850 motion without having the opportunity to "fully and adequately investigate, prepare and present his case." PR. 1.

Where, as here, the circumstances of counsel's representation make it literally impossible for counsel to provide effective representation, then deficient performance is established, and prejudice may be presumed. United States v. Cronic, 466 U.S. 648 (1984). Moreover, contrary to the arguments made by the State below, Mr. Lambrix both pled and can establish, when given the opportunity, that collateral counsel's performance was deficient and that he suffered prejudice as a result, under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

Reasonably effective collateral counsel, given an adequate opportunity to investigate, could and would have raised the claims

and facts presented in the instant Rule 3.850 motion in the original motion. The merits of the claims are discussed in detail, infra. Mr. Lambrix alleged that competent collateral counsel would have raised these claims. For example, in Claim I of the 3.850 motion, Mr. Lambrix asserted that his trial counsel rendered ineffective assistance by depriving him of his right to testify at trial. He further alleged that his collateral counsel will testify that he would have raised the issue in the initial 3.850 motion if CCR had been given an adequate opportunity to investigate and present the claim. Rule 3.850 Motion, ROA 20; see also ROA 7, 41, 61. These allegations must be accepted as true given the lower court's summary denial of the Rule 3.850 motion. Cherry, supra; Montgomery, supra.

Reasonably competent collateral counsel representing a person sentenced to death investigate and raise all factual and legal claims that are valid or potentially valid, for obvious reasons. First, the law changes, and sometimes changes favorably to the defendant. In order to get the benefit of such changes, counsel must timely raise potentially valid claims, even claims that have been repeatedly rejected. For example, only defendants whose counsel objected to the invalid instruction on the "especially heinous" aggravating factor and timely raised the issue on appeal and in post-conviction proceedings are entitled to retroactive application of Espinosa v. Florida, 112 S. Ct. 2926 (1992), under this Court's rulings. See, e.g., James v. State, 615 So. 2d 668 (Fla. 1993). Second, state and federal rules governing successor

petitions make it very difficult to succeed in such cases, requiring that competent counsel raise all potentially meritorious issues in the first proceeding. Third, issues not raised in the initial proceeding may be deemed to have been waived as a result, even issues that did not appear meritorious to counsel at the time. See McCleskey v. Zant, 111 S. Ct. 1454 (1991). Consequently, competent collateral counsel raise all potentially meritorious issues at the first opportunity. As demonstrated infra, the issues presented here are all meritorious. Therefore, reasonably competent counsel would have raised them in the initial proceeding, had they been given an adequate opportunity to do so. Collateral counsel's failure to raise the claims presented here was deficient performance, albeit largely created by the actions of the State.

Mr. Lambrix was prejudiced by collateral counsel's deficient performance because 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. Moreover, Mr. Lambrix was also prejudiced by the fact that most of the claims that were raised in the initial 3.850 motion could not be briefed on direct appeal because of the limited time available to collateral counsel. On appeal, this Court then treated those claims as having been abandoned by collateral counsel, Lambrix v. State, 534 So.2d 1151 (Fla. 1988), although there was no precedent for such a ruling and although collateral counsel clearly had not intended to waive any of the claims raised

in the original 3.850 motion. App. 35; see Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch (S.D. Fla., May 12, 1992).

Mr. Lambrix's allegations establish, at a minimum, a prima facie violation of his right to the effective assistance of collateral counsel. The court below erred in summarily denying Mr. Lambrix's Rule 3.850 motion without holding a hearing to determine whether collateral counsel's failure to raise these claims was ineffective. Parker v. Dugger, 660 So. 2d 1386, 1389 (Fla. 1995); Lemon v. State, 498 So. 2d 923 (Fla. 1986).

C. No Procedural Bar Can be Applied Where Any Default Was the Result of State Action

As set forth above, any procedural default that took place was the result of numerous actions by the State that precluded Mr. Lambrix from raising all pertinent claims and all facts in support thereof in his initial Rule 3.850 motion. These State actions included, among others, the trial court's refusal to allow Mr. Lambrix to represent himself and insistence that CCR alone should represent him; the lack of adequate funding and support for CCR; then Governor Bob Martinez's policy of signing multiple death warrants; the failure of the trial court and this Court to stay Mr. Lambrix's execution to allow CCR adequate time and opportunity to investigate, develop and present his claims; and this Court's unprecedented treatment of Mr. Lambrix's emergency motion to stay execution with Rule 3.850 motion attached as a brief that failed to argue many of the issues on appeal adequately.

These actions violated Mr. Lambrix's right to due process in Rule 3.850 proceedings. They also constituted "objective factor[s]

external to the defense" that "impeded counsel's efforts to comply with the State's procedural rule" and "interference by officials" that "made compliance impracticable." Murray v. Carrier, 477 U.S. 478, 488 (1986). Where, as here, the failure of a defendant to comply with state procedural rules is the result of such State interference, there is cause for any default. Id.; Coleman v. Thompson, 111 S. Ct 2546 (1991); Wainwright v. Sykes, 433 U.S. 72 (1977). Prejudice is also established, as the arguments that follow demonstrate that in the absence of the external impediments to the presentation of the claims and facts set forth herein, Mr. Lambrix would have been entitled to relief both from his convictions and his death sentences. Where cause and prejudice are established, the default cannot be enforced against the defendant. Id. At a minimum, Mr. Lambrix should have been given the opportunity at an evidentiary hearing in the court below to demonstrate cause and prejudice for any default. See Montgomery v. State, 515 So. 2d 1057 (Fla. 4th DCA 1987) (hearing required on claimed exception to time limit). Because the court below summarily denied relief, this Court must remand the case for the holding of such a hearing.

D. **Because Mr. Lambrix Is Actually Innocent, Enforcement of Any Default Rule Would Result in a Fundamental Miscarriage of Justice**

The United States Supreme Court has consistently held that no procedural default may be enforced in post-conviction proceedings where failure to consider the defendant's claims would result in a "fundamental miscarriage of justice." Coleman v. Thompson, 111 S.

Ct. 2546, 2565 (1991); Murray v. Carrier, 477 U.S. 478, 495-96 (1986); Engle v. Isaac, 456 U.S. 107, 135 (1982). As the Court recently stated when addressing the "fundamental miscarriage of justice" standard in Schlup v. Delo, 513 U.S. ___, 130 L.Ed.2d 808 (1995), "The quintessential miscarriage of justice is the execution of a person who is entirely innocent." Id., 130 L.Ed.2d at 834 (collecting cases). This case threatens to result in just such a miscarriage of justice.

The Court has recognized two situations in which a claim of innocence requires that the defendant's claims be considered, regardless of any procedural bar. The first is one in which the alleged "constitutional violation has probably resulted in the conviction of one who is actually innocent" of the crime for which he was convicted. Murray v. Carrier, 477 U.S. at 496. As the Court made clear in Schlup, the Carrier standard requires only that the defendant show that it is "more likely than not that no reasonable juror" would have found the defendant guilty beyond a reasonable doubt. Schlup, 130 L.Ed.2d at 836. Moreover, the Court emphasized that it must be presumed that a "reasonable juror" would "consider fairly all of the evidence presented" and "conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt." Id. at 837.

The second kind of fundamental miscarriage of justice occurs when a defendant demonstrates that he "probably is 'actually innocent' of the [death] sentence." Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989). The Court first adopted a standard for determining

"innocence of death" in Sawyer v. Whitley, 505 U.S. ___, 120 L.Ed.2d 269 (1992), where the Court held that the defendant must show that absent the constitutional error, he would not have been "eligible for the death penalty under [Florida] law." Id., 120 L. Ed.2d at 285. See also Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (defendant must show that he was ineligible for the death penalty). In the instant case, Mr. Lambrix can and will meet both the Schlup and the Sawyer standards.

1. Mr. Lambrix is Actually Innocent of First-Degree Murder

As set forth in the Rule 3.850 motion and discussed in Arguments III through X, infra, numerous constitutional violations took place at Mr. Lambrix's trial. These violations not only deprived him of a fair trial but also deprived the jury of the opportunity to make an accurate and reliable determination as to his guilt or innocence of the charge of first-degree murder, particularly whether the State's theory was actually proved beyond a reasonable doubt.

The State's theory at trial was that Mr. Lambrix and his girl friend, Frances Smith, met the two victims (Lawrence Lamberson a/k/a Clarence Moore, and Aleisha Bryant) by chance at a bar, spent the evening drinking with them and went back to the trailer shared by Mr. Lambrix and Ms. Smith. According to the State, Mr. Lambrix then lured the victims out one at a time, beating Lamberson to death and strangling Bryant. The State's key witness was Frances Smith, who did not, however, witness the actual homicides. Thus, the State's theory of premeditated murder, which was repeatedly

argued and stressed to the jury, was not supported by any direct evidence but solely by inference and circumstantial evidence.

Perhaps the most significant and far-reaching of the constitutional violations at Mr. Lambrix's trial was the denial of his right to testify in his own defense. See Argument III, infra. Together, Mr. Lambrix's counsel and the trial court coerced Mr. Lambrix into not testifying. Had Mr. Lambrix not been prevented from testifying, he would have offered testimony that directly contradicted the State's theory of premeditated murder. Mr. Lambrix would have testified that Lamberson attacked Bryant and that in attempting to defend Bryant he struck Lamberson with a tire iron, killing him. App. 1, Affidavit of Cary Michael Lambrix. This testimony, which was consistent with the physical evidence, would have required first the judge and then the jury to determine whether the circumstantial evidence relied on by the State was adequate to exclude a "reasonable hypothesis of innocence" of first-degree murder based on Mr. Lambrix's own testimony.

Because the evidence of premeditation was circumstantial, the trial judge would have been required first to "determine there [was] competent evidence from which the jury could infer guilt to the exclusion of all other inferences." Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995). In the absence of such evidence, a judgment of acquittal is required. If there is competent evidence to support guilt, the case must go to the jury to decide whether the evidence excludes "all reasonable hypotheses of innocence." Id. at 695. As this Court has repeatedly held:

> It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-62 (Fla. 1956). When the case goes to the jury and the principal issue is whether the evidence is sufficient to support such a finding, the trial court in its discretion should instruct the jury on this law.[4] At a minimum, defense counsel would have been entitled to argue it to the jury. Williams v. State, 565 So.2d 838 (Fla. 1st DCA 1990).

In the instant case, a judgment of acquittal should have been granted if Mr. Lambrix had been permitted to exercise his right to testify. There was no direct evidence of premeditation, and the only circumstantial evidence was a mere inference -- inflated into a certainty by the State -- that Mr. Lambrix had taken the victims out and killed them one at a time. Even the evidence actually introduced at trial, however, was inconsistent with this inference, since Frances Smith's testimony indicated that there was no blood or sign of a struggle on Mr. Lambrix the first time that he

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[4]In 1981, this Court eliminated the requirement for a circumstantial evidence instruction, but provided that the instruction should be given by the trial court if "necessary under the peculiar facts of a specific case." In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 595 (Fla.), modified, 431 So.2d 599 (Fla. 1981).

returned to the trailer, R. 2303.[5] Accordingly, it was at least equally plausible to infer that Lamberson was alive when Mr. Lambrix first returned to the trailer. As a result, the evidence of premeditation was weaker, and the evidence consistent with other hypotheses was stronger, than in Mungin v. State, No. 81,358 (Fla., Sept. 7, 1995), where this Court recently held the evidence of premeditation insufficient.

In Mungin, the evidence of premeditation included the fact that the victim was shot once in the head at close range; the only injury was the gunshot wound; the defendant had procured the weapon in advance and used it before; and that the gun required a six-pound pull to fire. On the other hand, there was evidence consistent with a "spur of the moment" killing, including the absence of any statements that the defendant intended to kill the victim; the absence of any witnesses to the shooting; and the lack of any continuing attack on the victim. In these circumstances, this Court held that the evidence of premeditation was insufficient, and that the trial judge should have granted a judgment of acquittal as to premeditation.[6] Id., slip op. at 5-6; see also Terry v. State, No. 83,002, Slip op. at 20-21 (Fla. Jan.

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[5]The blows to Lamberson's head (the first killing, according to the State) would necessarily have caused bleeding. R. 741, 2093. There was no physical evidence of any injuries to Bryant that would have caused bleeding.

[6]In Mungin, this Court did find sufficient evidence of felony murder. Id. In the instant case, however, there was no evidence of felony murder and the State specifically conceded hat felony murder did not apply. R. 2499-2500.

4, 1996) (where circumstantial evidence tied defendant to robbery but no evidence how shooting occurred, insufficient evidence of premeditation); Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991).

Here, there was no evidence that Mr. Lambrix had procured the tire iron as a weapon in advance of the homicides. He had not known the victims prior to the night of the offense, and there was absolutely no statement or evidence of any prior intent to kill. Indeed, Frances Smith's testimony indicated that all four of the persons present were on good terms. R. 2205. Moreover, Mr. Lambrix could also have presented evidence of his intoxication on the night of the alleged crime. Mr. Lambrix himself would have related the amount of alcohol he consumed. App. 1. Glades County Deputy Sheriff Council -- a State witness at Mr. Lambrix's trial -- could and would have testified that in his opinion as a law enforcement officer, when he saw, confronted and spoke to Mr. Lambrix only hours prior to the time of death, Mr. Lambrix was intoxicated. App. 4, Affidavit of Ron Council; ROA 361 (testimony of Ronald Council). It is clear that had trial counsel presented Deputy Council's observations to the jury, the court would have been required to instruct the jury on the applicable law governing the defense of voluntary intoxication. See Argument V, infra. The evidence of voluntary intoxication would also have presented a reasonable hypothesis inconsistent with premeditation, and would have been consistent with Mr. Lambrix's testimony. In addition, the State's key witness, Frances Smith, had given numerous conflicting stories that were improperly kept from the jury. See

Argument IV, infra. Had this witness been subjected to adequate cross-examination the jury would have questioned her credibility and with it the State's case.

But for the constitutional violations established more fully in Arguments III-V, infra, the jury would have been presented with evidence that raised a reasonable hypothesis of innocence. Under Davis, Barwick, Terry and Mungin, supra, this evidence would have required that the trial court grant a judgment of acquittal as to premeditated murder, and therefore also as to first-degree murder. At a minimum, given the powerful nature of the excluded evidence and the fact that the jury at Mr. Lambrix's first trial could not reach a verdict, it is more likely than not that no reasonable juror would have found Mr. Lambrix guilty of premeditated murder beyond a reasonable doubt. Accordingly, under Schlup, supra, Mr. Lambrix has raised a colorable claim of innocence, requiring this Court to consider the merits of his claims regardless of any otherwise applicable state procedural bar.

2. Mr. Lambrix is Ineligible for the Death Penalty

Under Sawyer, supra, and Johnson, supra, a fundamental miscarriage of justice has taken place, requiring consideration of the merits of Mr. Lambrix's claims, because but for the alleged constitutional violations he would not have been eligible for the death sentence under Florida law. A defendant is ineligible for the death sentence under Florida law unless at least one of the statutory aggravating factors applies. Barclay v. Florida, 463 U.S. 939, 954 (1983). Moreover, under Florida law, when only one

aggravating factor is present and there is substantial mitigating evidence, the defendant is also ineligible for the death penalty. See, e.g., DeAngelo v. State, 616 So. 2d 440, 443-44 (Fla. 1993); Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989). But for the constitutional errors in the instant case, there would have been at best one weak aggravating factor and powerful mitigation. Accordingly, Mr. Lambrix would have been ineligible for the death penalty under Florida law. He has therefore raised a claim of fundamental miscarriage of justice under the Sawyer standard.

Five aggravating factors were presented to the jury: felony murder (robbery); financial gain; especially heinous, atrocious or cruel; cold, calculated and premeditated; and murder committed by a person under sentence of imprisonment. R. 2663. The trial court found that the murder was not committed during a robbery. R. 1354-55, 2701.[7] Of the remaining factors, Mr. Lambrix asserts that the trial court's instructions to the jury on the financial gain, "especially heinous" and "cold, calculated and premeditated" aggravating factors were unduly vague; counsel was ineffective for failing to object to the vague instructions; and the trial court acted arbitrarily in finding them. See Arguments IX and X, infra.[8]

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[7]The State also conceded that there was no evidence to show that either murder was committed during a robbery. R. 2648.

[8]In addition, the evidence of innocence at guilt phase also implicates the aggravating factors. For example, even assuming arguendo that there was sufficient evidence of premeditation to convict, the evidence discussed above clearly invalidates the "cold, calculated and premeditated" aggravating factor, which requires a heightened degree of premeditation. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987).

With only a single weak aggravating factor (under sentence of imprisonment) arguably present and powerful mitigating evidence (see Arguments VII and X, infra), Mr. Lambrix would have been ineligible for the death penalty. In the court below, the State argued that Mr. Lambrix could still have been sentenced to death. ROA 184-85, State's Response at 7-8. This argument ignores the fact that Mr. Lambrix's sentence of imprisonment consisted of an almost-expired term in work release on a bad check conviction. The issue, then, is whether, in light of the available mitigation, the sentencers could lawfully have imposed a sentence of death on Mr. Lambrix on the sole basis of the fact that he had previously been convicted of bouncing a single check. Under Florida law, a death sentence clearly would not have been lawful. Chaky v. State, 651 So.2d 1169, 1173 (Fla. 1995) (death sentence not allowed where only one weak aggravating factor); Rembert v. State, 445 So.2d 337, 340 (Fla. 1984) (felony murder the only aggravator).

Accordingly, Mr. Lambrix has presented colorable claims both that he is actually innocent of the charges of which he was convicted -- first-degree murder -- and of the death sentences imposed on him. Because he has presented such claims, Sawyer and Schlup require that this Court consider the merits of his claims, regardless of any procedural default.

ARGUMENT III

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

At opening argument before the jury, the State conceded that its entire case was based on the testimony of one key witness -- Frances Smith. The State described Smith as the "hub" of its case. R. 1825. Without Smith's testimony, the State had no case against Mr. Lambrix.

Through Ms. Smith's testimony, the State established that Mr. Lambrix was in the company of the victims immediately prior to their deaths. However, Ms. Smith admitted that she did not actually witness Mr. Lambrix commit any act of violence upon either victim, nor did she witness any indication of animosity between the victims and Mr. Lambrix at any time. R. 2205-10. In fact, her testimony was that when she last saw the victims with Mr. Lambrix shortly before their deaths occurred, Mr. Lambrix was laughing, "playing" and "teasing" with the alleged victims. R. 2205. Ms. Smith testified that she did not see what took place outside nor did she hear anything outside. R. 2209. Other than that, there was virtually no evidence to show how the victims died.

The only witness to the events that brought about the victims' death was Mr. Lambrix himself. However, at Mr. Lambrix's first trial, trial counsel approached the court concerning his desire to testify and both the court and counsel forced Mr. Lambrix to choose between exercising his right to testify and his right to the assistance of counsel. Counsel told the court that they would

withdraw if Mr. Lambrix testified, and the court warned Mr. Lambrix in no uncertain terms that if he insisted on testifying in his own behalf, the court would allow counsel to withdraw and Mr. Lambrix would be forced to represent himself. See App. 2.

Although the original trial ended in a mistrial when the jury was unable to reach a verdict, the case was set for retrial only two months later. At retrial, Mr. Lambrix was represented by the same counsel. As is supported by Mr. Lambrix's affidavit, see App. 1, and as trial counsel Kinley Engvalson would testify, Mr. Lambrix consistently expressed his desire to testify in his own behalf at and throughout his second trial. Mr. Engvalson would also testify that counsel never reviewed with Mr. Lambrix what his testimony would have been had he been allowed to take the stand. Rule 3.850 Motion, ROA 24.[9] Thus, trial counsel's actions both prior to and during the second trial forced Mr. Lambrix to choose between his right to counsel and his right to testify. Furthermore, throughout their representation, counsel failed to inform Mr. Lambrix that the right to testify is a fundamental right that must be personally waived by the defendant. These facts establish that Mr. Lambrix was deprived of effective assistance of counsel at and through his second trial.

In Rock v. Arkansas, 483 U.S. 44 (1987), the Supreme Court described the right to testify as "[e]ven more fundamental to a

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[9]On this appeal, this Court must accept the allegations as pled in the lower court to be true. See Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995); Montgomery v. State, 615 So. 2d 226 (Fla. 5th DCA 1993) (allegations must be accepted as true unless conclusively rebutted).

personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the [Sixth] Amendment....'" Id. at 52, quoting Faretta v. California, 422 U.S. 806, 819 (1975). This Court has acknowledged the existence of the fundamental right to testify, Deaton v. Dugger, 635 So.2d 4, 8 (Fla. 1993), but has not addressed in detail the showing required to establish a violation of that right. The Eleventh Circuit has, however, adopted a framework for addressing such claims that has been followed by the district courts of appeal. See, e.g., State v. Oisorio, 657 So. 2d 4 (Fla. 3d DCA 1995); Gill v. State, 632 So. 2d 660 (Fla. 2d DCA 1994); Williams v. State, 601 So. 2d 596 (Fla. 1st DCA 1992).

Under the Eleventh Circuit approach, a defendant may prove a violation of the right to testify in one of two ways. First, if the trial court itself "force[s] defendant to choose" between the right to counsel and the right to testify, then the defendant's fundamental right to testify has been violated. United States v. Scott, 909 F.2d 488, 493 (11th Cir. 1990). Second, in United States v. Teague, 953 F.2d 1525, 1534 (11th Cir.) (en banc) cert. denied, 113 S. Ct. 127 (1992), the court held that when the defendant claims that his right to testify was violated by defense counsel, the claim should be treated as an ineffective assistance of counsel claim. Where counsel threatens to withdraw from his representation of the defendant if the defendant takes the stand (or where counsel fails to inform the defendant that he has a fundamental right to testify and that the decision whether to

testify is the defendant's), and prejudice to the defendant results, counsel has rendered ineffective assistance. Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992) (en banc).

Here, Mr. Lambrix has established a violation of his rights by both the court and trial counsel. First, the trial court's threats and warnings to Mr. Lambrix were extremely coercive. The trial court informed Mr. Lambrix in no uncertain terms that if he testified the court would allow his counsel to withdraw and Mr. Lambrix would be forced to represent himself. See App. 2. That threat was never withdrawn by the court, nor did the court at either trial do anything to remedy its coercive effect. The facts presented herein demonstrate that Mr. Lambrix remained under the threat of withdrawal and forced self-representation throughout his second trial. Thus, throughout both trials, "the trial judge impermissibly forced [him] to choose between two constitutional rights: the right to testify and the right to counsel." United States v. Scott, 909 F.2d 488, 493 (11th Cir. 1990).

Second, trial counsel had stated unequivocally that if Mr. Lambrix took the stand to testify, they would withdraw. "It is beyond question that an attorney cannot threaten to withdraw during a trial in order to coerce the defendant to relinquish his fundamental right to testify." Lambrix v. Singletary, No. 92-4539, (11th Cir., Jan. 3, 1996), quoting Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992)(en banc). That is exactly what Mr. Lambrix's counsel threatened to do. There is nothing in the record to suggest that counsel ever thereafter explained to Mr. Lambrix

that he had a constitutional right to testify, that the decision whether or not to testify was his and his alone, or that counsel were ethically obligated not to withdraw from representation without taking steps to prevent such a withdrawal from prejudicing Mr. Lambrix. Id.; United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc). To the contrary, counsel never even discussed with Mr. Lambrix what testimony he could provide. ROA 24. Moreover, Mr. Lambrix's affidavit establishes that he consistently expressed a desire to testify; that counsel never explained to him his right to testify; and that at the conclusion of the State's case on retrial, counsel again told him they would withdraw if he testified. App. 1. When, as here, counsel forces the defendant to choose between the right to testify and the right to counsel, and when counsel coerces a defendant by threatening to withdraw during trial, it is clear that counsel's performance is deficient, since counsel is not "functioning as the 'counsel' guaranteed ... by the Sixth Amendment." Nichols, 953 F.2d at 1553.

Where counsel's ineffectiveness deprives a defendant of his right to testify, prejudice must be presumed. Gill v. State, 632 So. 2d 660, 661-62 (Fla. 2d DCA 1994).[10] If a showing of prejudice is required, however, it can easily be established.

> As the United States Supreme Court noted in Rock v. Arkansas, 483 U.S. 44, 52 ... (1987), "the most important witness for the defense in many criminal cases is the defendant himself." Further, in a case such as this where the question was not whether a crime was committed, but whether the defendant was the person who committed

[10]In State v. Oisorio, 657 So. 2d 5 (Fla. 3d DCA 1995), the court acknowledged but did not certify conflict with Gill.

> the crime, his testimony takes on even greater importance.

Nichols, 953 F.2d at 1553-54.

If Mr. Lambrix had been allowed to testify, there is much more than a reasonable probability that he would not have been convicted. As set forth in Argument II.D, supra, if Mr. Lambrix had been allowed to testify, the circumstantial evidence would have been insufficient to support a conviction in the face of his testimony. The testimony appellant would have provided, as set forth in Appendix 1, is entirely consistent with the other evidence at trial and would have established a "reasonable hypothesis of innocence" that would have precluded a conviction. McArthur v. State, 351 So. 2d 972, 976 n.12 (Fla. 1977). As stated above, Frances Smith admitted that she did not witness Mr. Lambrix commit any act of violence against either victim, nor did she see or hear anything outside. R. 2209. When she last saw Mr. Lambrix and the victims together, they were laughing, "playing" and "teasing" each other and there was no indication of animosity. R. 2205. Other than Frances's testimony, there was virtually no evidence to show how the victims died. Because Mr. Lambrix's testimony would have supported an alternative version of the events that was at least equally plausible as the State's theory of premeditated killings, this reasonable hypothesis of innocence would have made it impossible to find him guilty of premeditated murder. Terry v. State, No. 83,002 (Fla., Jan. 4, 1996); Mungin v. State, No. 81,358 (Fla., Sept. 7, 1995); Jackson v. State, 575 So.2d 181 (Fla. 1991).

Therefore, the prejudice resulting from counsel's deficient performance in failing to adequately protect Mr. Lambrix's fundamental right to testify is clear. As a result of counsel's ineffective assistance, Mr. Lambrix now stands wrongly convicted of two counts of premeditated murder. Had Mr. Lambrix testified, Mr. Lambrix would have been entitled to have the jury properly instructed on applicable case law, which in these circumstances should have included the following instruction:

> When a case is heard on circumstantial evidence, a special standard of sufficiency of evidence applies. This standard is: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."

Heiney v. State, 447 So.2d 210, 212 (Fla. 1984)(citations omitted), quoting McArthur v. State, 351 So.2d 972, 976 (Fla. 1977).

At a minimum, Mr. Lambrix's testimony would have established that there was insufficient evidence to find him guilty of premeditated murder. Moreover, his testimony and that of Deputy Ron Council would have supported a defense of voluntary intoxication. See App. 4. Given the testimony of the State's key witness, Frances Smith, that Mr. Lambrix had consumed a large quantity of alcohol and acted "high," R. 2201, 2290, 2300-01, and Deputy Council's readily available testimony that Mr. Lambrix was intoxicated, had Mr. Lambrix been allowed to testify, it is clear that he would have been entitled to a jury instruction on voluntary intoxication pursuant to Gardner v. State, 484 So. 2d 91 (Fla. 1985). Therefore, the deprivation of Mr. Lambrix's right to

testify unconstitutionally denied him the defense of voluntary intoxication.

Moreover, the coercion exercised by the court and trial counsel, as well as counsel's failure to inform Mr. Lambrix of his right to testify, also prevented Mr. Lambrix from exercising his right to testify at the penalty phase of the trial. This case is thus identical to that of Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993), where this Court ordered a new sentencing upon finding that trial counsel was ineffective in failing to explain to his client the importance of mitigation and his right to testify at sentencing concerning mitigation.

Had Mr. Lambrix not been prevented from testifying at penalty phase, he would have offered testimony that would have undermined the evidence in support of the pecuniary gain, "especially heinous" and "cold, calculated and premeditated" aggravating factors. See App. 1, para. 19. And Mr. Lambrix's testimony would have shown that the only remaining aggravating factor -- "under sentence of imprisonment" -- was based on a single bad check conviction. In addition, Mr. Lambrix's testimony would have established a wealth of mitigating factors, including his age of 22 at the time of the crime;[11] his intoxication at the time of the offense; the history of abuse that he suffered; his own and his family's history of drug and alcohol abuse and dependency; his honorable discharge due to an

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[11]Trial counsel failed to introduce evidence of Mr. Lambrix's age and thus was prevented from arguing that his youth was a mitigating factor. R. 2660.

injury; and other mitigation that would have significantly outweighed any applicable aggravation. See App. 1, para. 18.

Thus, a reasonable probability exists that had Mr. Lambrix not been deprived of his right to testify at the second trial, he would not have been convicted of first-degree murder, nor would he have been sentenced to death. This establishes that he was deprived of the effective assistance of counsel, Nichols, supra; Deaton, supra, and that these circumstances resulted in the conviction of a person who is actually innocent of premeditated murder, as well as innocent of the death sentence.

While a similar claim was presented in the original Rule 3.850 motion, this claim should not be found to be procedurally barred. In the original Rule 3.850 motion filed by CCR, this claim was one of the "other claims" that CCR specifically identified as ones for which they needed additional time to fully investigate, develop and present the facts. See PR. 104-05. The supporting facts were clearly available at the time through reasonably competent investigation but CCR simply could not conduct an adequate investigation under the circumstances. As set forth above, the trial court denied CCR's request for a stay and additional time to investigate and then summarily denied all relief, thus preventing any subsequent amendment. While Mr. Lambrix remained under death warrant, this Court upheld that summary denial without making any finding on CCR's claim of inability to fully present the facts, and Mr. Lambrix filed a federal habeas corpus petition.

Recently, the Eleventh Circuit ruled on the claim as originally advanced by CCR and recognized that if Mr. Lambrix was improperly deprived of his "fundamental right" to testify at his second trial, he would have been entitled to a new trial. See Lambrix v. Singletary, No. 92-4539, (11th Cir., Jan. 3, 1996). However, the court concluded that Mr. Lambrix had not established that the improper actions that unconstitutionally prevented him from testifying at his first trial continued into his second trial. What is clear from the Eleventh Circuit's opinion is that had CCR fully investigated, developed and presented the facts set forth here, Mr. Lambrix would have been granted a new trial. Thus, CCR's deficient performance (failing to investigate and present the facts contained herein) and the actual prejudice to Mr. Lambrix (had these facts been fully presented, Mr. Lambrix would have been granted a new trial) are both established.

The facts set forth above show exactly what the Eleventh Circuit stated was not established -- that, following the declaration of a mistrial due to a "hung jury," at Mr. Lambrix's subsequent retrial, Mr. Lambrix remained under continued coercion that deprived him of his right to testify, and that Mr. Lambrix's trial counsel continued to violate his right to effective assistance of counsel by failing to inform Mr. Lambrix of his right to testify at his retrial. In fact, the evidence presented establishes not only that Mr. Lambrix's trial counsel failed to inform him that the right to testify was a fundamental right that only he could waive, but also that trial counsel continued to lead

Mr. Lambrix to believe that the only way he could testify was if he gave up his right to counsel.

For these reasons, and for all of those set forth in Argument II, supra, this claim is not procedurally barred. On the merits, it is clear that Mr. Lambrix's fundamental right to testify was violated. That violation resulted in the wrongful conviction of a person who is actually innocent of premeditated murder, and also innocent of the death sentence. This case should be remanded for an evidentiary hearing and on proof of counsel's ineffectiveness Mr. Lambrix will be entitled to a new trial.

ARGUMENT IV

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

As with the preceding issue relating to the denial of Mr. Lambrix's right to testify in his own defense, a claim that trial counsel failed to adequately and effectively cross-examine and impeach key state witnesses was raised in the original Rule 3.850 action filed by CCR in October 1988. But as a direct result of CCR's inability and failure to adequately investigate, develop and present Mr. Lambrix's case, the facts contained herein were not presented as part of his initial Rule 3.850 motion.

The right to cross-examine hostile witnesses is designed to promote reliability in the criminal trial and is one of the primary interests protected by the confrontation clause of Amendment. Kentucky v. Stincer, 482 U.S. 730, 737 (1987); Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Douglas v. Alabama, 380 U.S. 415, 418

(1965). In Olden v. Kentucky, 488 U.S. 227 (1988), the Supreme Court reaffirmed that a defendant has a right to inquire into any matter which may throw doubt on a witness' credibility. The defendant must be afforded the opportunity to conduct meaningful cross-examination that places the witness in his proper setting and tests the weight and credibility of his testimony. Smith v. Illinois, 390 U.S. 129, 132 (1968).

Mr. Lambrix's ability to exercise the right to cross-examination was dependent on his receiving the effective assistance of trial counsel. In this case, where the convictions and sentences were based on wholly circumstantial evidence and the testimony of Frances Smith, the outcome was dependent on the credibility of her testimony. Without proper cross-examination the State's case went essentially unchallenged. The total failure of trial counsel to adequately cross-examine and impeach key state witnesses "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 689 (1984). Mr. Lambrix suffered prejudice as a result of trial counsel's deficient performance, since the failure to subject the prosecution's case to meaningful adversarial testing resulted in Mr. Lambrix being wrongly convicted and condemned to death. Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986) (failure to impeach key state witnesses with available evidence was ineffective assistance of counsel).

A. Trial Counsel Failed to Impeach Frances Smith with Prior Inconsistent Statements

The State acknowledged in its opening statement to the jury that Frances Smith's testimony was the "hub" of its case. R. 1825. Her credibility would make or break the State's case. Unknown to the jury, however, Ms. Smith gave numerous conflicting statements to police officers about whether she was with Mr. Lambrix, and even about whether she knew him at the time of the homicides. If these statements had been brought to the attention of the jury, they would have undermined her credibility as a witness and cast doubt on whether she had actually witnessed any of the events she related.

At trial, in cross-examining Ms. Smith, counsel attempted to question her about statements she made to police when apprehended driving the car owned by Lamberson. The trial court limited counsel's attempt to question Ms. Smith on these statements, ruling that if counsel continued the questioning, the State could bring out the fact that Ms. Smith was arrested for aiding and abetting the "escape" of Mr. Lambrix.[12] This restriction of cross-examination was the primary issue raised on direct appeal. In affirming the conviction, this Court found that no error occurred, as trial counsel was attempting to impeach the witness by way of a prior inconsistent statement without opening any doors that would be harmful to his case. See Lambrix v. State, 494 So. 2d 1143, 1148 (Fla. 1986). That is, had trial counsel impeached Ms. Smith

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[12]Mr. Lambrix was never tried or convicted of "escape."

with her prior statements, the State could have shown on redirect that the statements were given in connection with Ms. Smith's arrest for aiding and abetting Mr. Lambrix's "escape" from a work release center, revealing that Mr. Lambrix was a "fugitive". Id.

Unfortunately, counsel presented this issue both in trial court and on direct appeal to this Court in an entirely mistaken light. Trial counsel were apparently unaware that the statement counsel wanted to use to impeach Ms. Smith was not taken in conjunction with Ms. Smith's arrest for aiding and abetting Mr. Lambrix's alleged escape. Trial counsel completely failed to investigate the origin of each of Ms. Smith's statements. She gave numerous statements at the time of her arrest, on February 9, 1983. But her crucial statement was taken several days later and had no relationship to the arrest for aiding and abetting. Because of these facts, impeachment with the statement could not have opened any doors.

After Ms. Smith was arrested while driving Lamberson's car, several sheriff's deputies questioned her about her ties to Mr. Lambrix and about the vehicle itself. Ms. Smith gave conflicting stories to the police. Appendix 5. Suspecting that the car was stolen, the investigating officers informed Detective Mizell of the Grand Auto Theft Unit. He then traced the vehicle's ownership and contacted Lamberson's mother, Elaine Banner, in Key Largo, Florida, who advised him that the Hendry County Sheriff's Department was looking for the vehicle in connection with the missing person investigation on Aleisha Bryant.

As the police reports available to trial counsel indicate, Detective Mizell then went to the county jail specifically to question Ms. Smith regarding Lamberson's vehicle. The statement Ms. Smith gave Detective Mizell on February 12, 1983, had absolutely nothing to do with her arrest and incarceration on the aiding and abetting charge. Thus, the statement given to Detective Mizell could have been and would have been used to impeach Ms. Smith without opening any doors had trial counsel simply investigated the circumstances under which the statement was taken.

In the statement Ms. Smith gave Detective Mizell, she denied being with Mr. Lambrix at any time during the week the crimes occurred. Ms. Smith specifically said that she knew nothing about how Mr. Lambrix came to possess the vehicle belonging to Lamberson and that she was never in LaBelle with Mr. Lambrix. She further stated that she knew nothing of the victims. These statements were of course inconsistent with her trial testimony. Moreover, this statement alone would have shown that the week following the alleged murders, while Ms. Smith was in custody, she had the opportunity to advise the police of the alleged murders and was even specifically questioned about the whereabouts of the victims, but denied any knowledge. In her trial testimony, she portrayed herself as an honest person who did not come forward earlier because she was afraid of Mr. Lambrix. R. 2250. The police reports -- in which she denied any knowledge of Mr. Lambrix, the homicides or the victims, even when questioned while in police

custody and therefore out of any possible danger -- contradict her trial testimony and would have made her unworthy of belief.

Trial counsel obviously realized both the importance of Ms. Smith's credibility and the need to use her statements to discredit her. Counsel tried to get the statement into the record (R. 2319-25), but retreated when the State and the court threatened to admit evidence of Mr. Lambrix's status as a "fugitive" if Ms. Smith was impeached. Had counsel known of the circumstances in which the Mizell statement was taken, and then advised the court that the Mizell statement was not related to Ms. Smith's "aiding and abetting" arrest, but was taken in conjunction with the "missing person" investigation that evolved into the instant charges, it is clear that the trial court would have allowed the impeachment without opening any doors.

Trial counsel's inexcusable failure to properly investigate the origin and circumstances of this statement resulted in the failure to properly impeach the state's key witness with readily available evidence. This failure to adequately and effectively cross-examine Ms. Smith resulted in her testimony and thus the State's case going essentially unchallenged. This error is identical to that in Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986), where the failure to impeach key state witnesses with available evidence deprived the petitioner of effective assistance of counsel, mandating that the convictions be set aside.

Moreover, reasonably competent counsel would have opened the very doors at issue here. Impeaching Ms. Smith's credibility with

the numerous conflicting statements she gave to at least three different police officers[13] was of paramount importance to the defense, as trial counsel apparently realized. At the same time, voir dire examination had already established that virtually every juror on the panel had been exposed to pre-trial publicity relating to the case in the form of news stories that placed great weight on Mr. Lambrix's status as an "escaped prisoner" at the time the alleged murders took place.[14] Accordingly, there could not be any <u>reasonable</u> strategic decision not to impeach Ms. Smith through the use of the statements, because the value of impeaching her credibility significantly outweighed the risk of opening doors that were clearly already wide open.

If anything, in light of the fact that the jury was already aware of Mr. Lambrix's alleged status as an "escaped prisoner," reasonably competent counsel would have made a point of bringing out the fact that Mr. Lambrix did not "escape" from a prison, but had walked away from a work-release center just two weeks before he was due to be paroled for his only prior felony -- a bounced check.

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[13] In her statements, Ms. Smith first denied knowing Mr. Lambrix and then denied being with him in LaBelle at the time of the homicides. <u>See</u> App. 6.

[14] The community was so small that one venireperson, a local elementary teacher, noted that even her students discussed the case in the classroom. R. 1722. Several of the jurors who tried Mr. Lambrix's case expressed reservations about whether they could put aside the pretrial publicity to which they had been exposed, R. 1471-73, and one of the jurors who served on the jury had already formed the opinion, after reading extensive newspaper coverage of the offense, that the crime was senseless. R. 1522. Four of the jurors were related to or associated with members of the small town's only law enforcement agency.

In the instant case, Mr. Lambrix was tried in a small, rural community that was saturated with media reports and word of mouth concerning his status as an "escaped fugitive." Thus, there could be no reasonable strategy for allowing that false perception to go unchallenged, and counsel rendered ineffective assistance by not impeaching Frances Smith with her statements to the police.

B. **Trial Counsel Failed to Cross-Examine Deputy Sheriff Ronald Council Concerning Mr. Lambrix's Degree of Intoxication and Failed to Effectively Cross-Examine Other Witnesses**

At trial, State witness Deputy Sheriff Ronald Council testified that only a few hours prior to the time of the homicides, he saw and spoke to Mr. Lambrix at a local bar and that at that time Mr. Lambrix was in the company of the victims and key State witness Frances Smith. As established by Deputy Council's affidavit, on the night of the alleged murders and in fact only hours prior thereto, it was Deputy Council's observation and opinion as a law enforcement officer that Mr. Lambrix was intoxicated. App. 4; see also ROA 361 (evidentiary hearing testimony of Ronald Council). As also established by Deputy Council's affidavit and the record, at no time did trial counsel ever question Deputy Council as to whether Mr. Lambrix was intoxicated. Had trial counsel so questioned Deputy Council, he would have testified that on the night of the alleged murders, he considered Mr. Lambrix to be intoxicated. App. 4.

This readily available yet inexcusably ignored evidence was highly important. As the record shows, trial counsel attempted to develop a voluntary intoxication defense. ROA 352-53, Deposition

of Robert Jacobs. Counsel questioned Ms. Smith about the amount of alcohol consumed by Mr. Lambrix that night, establishing that he consumed a considerable amount. When questioned about whether Mr. Lambrix was intoxicated, however, Ms. Smith became vague and would only say that he acted "high" but that she "could never tell" if he was drunk or sober. R. 2300-01. As a result, the trial court ruled that the evidence was insufficient to support an instruction on voluntary intoxication.

For the reasons discussed in Argument V, infra, had trial counsel elicited from Deputy Council his belief that Mr. Lambrix was intoxicated, the court would have been required to instruct the jury on voluntary intoxication. And upon receiving that instruction, there is a reasonable probability that the jury would have given the testimony of Deputy Council -- a law enforcement officer trained to identify intoxication -- great weight and would have concluded that Mr. Lambrix was intoxicated and consequently lacked the intent necessary for a first-degree murder conviction. Mr. Lambrix has established both deficient performance and prejudice, and therefore is entitled to a new trial.

In considering the totality of counsel's performance, this Court should also consider Mr. Lambrix's claim in the original Rule 3.850 action relating to counsel's failure to adequately and effectively cross-examine state key corroborating witnesses, Debra Hanzel, Preston Branch and John Chezem. Mr. Lambrix submits that that claim was properly presented and he respectfully requests this Court to consider it with respect to the totality of counsel's

performance relating to the cross-examination of the key state witnesses. See PR. 63-70.

Given the numerous crucial deficiencies in counsel's cross-examination, it is clear that counsel entirely failed to subject the prosecution's case to meaningful adversarial testing and the resulting verdict becomes presumptively unreliable. Strickland, supra; Cronic, supra, 466 U.S. at 658-61. The deficient performance and resulting prejudice, which included taking away from Mr. Lambrix the opportunity to present a reasonable hypothesis of innocence, deprived Mr. Lambrix of his right to effective counsel. Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986). As in Smith, trial counsel's failure to conduct proper cross-examination resulted in the denial of counsel, requiring that this Court grant relief.

ARGUMENT V

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

A similar claim was presented in the original Rule 3.850 proceeding. But this Court should not summarily reject it as successive. Critical facts in support of this claim, including Deputy Council's belief that Mr. Lambrix was intoxicated, were not discovered by CCR because of its inability to conduct an adequate and competent investigation. Moreover, this Court should now examine trial counsel's performance in its entirety, particularly because this claim, and Mr. Lambrix's other arguments, implicate a fundamental miscarriage of justice. Unless relief is granted, a

man who is actually innocent of first-degree murder will be executed. Such a "quintessential miscarriage of justice," Schlup, 130 L.Ed.2d at 834, would be repugnant both to the United States and to the Florida Constitutions. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Given that fact, and the fact that Mr. Lambrix did not receive competent assistance from collateral counsel, this Court should consider the merits of this claim.

Under Florida law, voluntary intoxication is a defense to specific intent offenses such as first degree murder. Gardner v. State, 484 So. 2d 91, 92-93 (Fla. 1985). A defendant has a right to an instruction on the voluntary intoxication defense if there is any evidence of voluntary intoxication at the time of the alleged offense. Evidence that Mr. Lambrix was intoxicated at the time of the offense was available both from the State's key witness, Frances Smith, and from another State witness, Deputy Ronald Council. Trial counsel were sufficiently aware of this defense to request instructions on voluntary intoxication at both of Mr. Lambrix's trials. T. 12/8/83 at 7; R. 2470. Despite the fact that the trial court denied the requested instruction at the first trial for lack of evidence, counsel never attempted to develop or present any of the readily available evidence at the second trial. The inevitable result was that the instruction was once again denied at the second trial.

There was ample evidence available to trial counsel relating to Mr. Lambrix's intoxication and its effects on his ability to form specific intent. Friends and family have attested to Mr.

Lambrix's longstanding history of dependence on alcohol and drugs, and the similar histories of most members of his family. See, e.g., Apps. 13, 15, 16, 26, 27, 28, 29. After being provided with this and other available information, expert addictionologist Peter Macaluso, M.D., found that Mr. Lambrix is chemically dependent, is the product of a chemically dependent family, and that he has an organic brain syndrome and a diminished tolerance for the effects of alcohol. As a result of his impairments and the amount of alcohol he had consumed on the night of the offense, he lacked the ability to form specific intent. Similarly, expert psychiatrist Robert T.M. Phillips, M.D., found that Mr. Lambrix suffers from alcohol dependence, psychoactive substance abuse, and an organic mental disorder. Dr. Phillips also concluded that Cary Michael did not have the capacity to form specific intent.

Moreover, compelling evidence relating to Mr. Lambrix's dependence on and addiction to alcohol, and his intoxication at the time of the offense was in fact known to trial counsel prior to trial, but was inexplicably ignored. Pretrial psychiatrist William Whitman learned from Mr. Lambrix of his father's alcoholism, his own history of alcohol dependence from an early age, and his drinking on the day of the offense. Dr. Whitman arrived at an initial impression, based on the limited information he had been provided prior to trial, that Mr. Lambrix suffers from alcoholism and alcohol dependency. See App. 7.

In addition to all of this lay and expert testimony, direct evidence of Mr. Lambrix's intoxication on the night of the offense

was available to trial counsel. As discussed in Argument IV, supra, Deputy Sheriff Ron Council observed Mr. Lambrix, Frances Smith, and the two victims in a bar the night of the offense, and testified at trial. But trial counsel never asked Deputy Council whether Mr. Lambrix was drunk or sober. When he was asked, it was Mr. Council's opinion that Mr. Lambrix was intoxicated. App. 4. It was precisely such evidence of intoxication that this Court held was lacking from Mr. Lambrix's initial Rule 3.850 motion. Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988). Had CCR been able to provide competent representation, it would have found and presented this evidence, requiring remand for an evidentiary hearing.

This evidence shows that Mr. Lambrix was alcohol dependent, that he ingested enough alcohol on the night of the offense to render him intoxicated, that he was in fact intoxicated, and that as a result he was incapable of forming the specific intent necessary for a conviction of first degree murder. This evidence was available to counsel and could have been presented at trial, had trial counsel not acted unreasonably. In the court below, the State argued that counsel was relying on a defense of innocence, and that because innocence and intoxication are inconsistent defenses, counsel had no reason to investigate or present intoxication evidence. State's Response at 17-25, ROA 194-201. Unfortunately for the State, this theory is inconsistent with the record. Lead trial counsel Robert Jacobs testified clearly that counsel would have presented additional evidence in support of the voluntary intoxication defense, that counsel attempted to show

that Mr. Lambrix was drinking heavily, and that expert testimony regarding chronic chemical dependency would have been relevant to specific intent. Jacobs Deposition, ROA 316-38, 348, 352-53. There is no indication that counsel decided not to investigate for evidence of voluntary intoxication in the belief that such evidence would have been inconsistent with an innocence defense. Counsel's failure to investigate and present evidence in support of the voluntary intoxication defense was simply deficient performance.

Moreover, the readily available evidence was certainly sufficient to meet the standard required under Gardner, supra, for an instruction on the voluntary intoxication defense, particularly in conjunction with the testimony of key State witness Frances Smith that on the night of the offense, Mr. Lambrix was "taking turns drinking beer and mixed drinks," R. 2201, "drinking pretty good," R. 2290, that he "acted" high, and had previously stated that he was high. R. 2301.

Had trial counsel investigated, developed and presented the evidence that Mr. Lambrix was intoxicated, it is clear that the trial court would have been required to instruct the jury on the defense of voluntary intoxication. Had the jury been so instructed, there is a reasonable probability that they would have returned a verdict of not guilty or would have found Mr. Lambrix guilty of a lesser offense. Mr. Lambrix has established both prongs of Strickland v. Washington, 466 U.S. 668 (1984), and is entitled to relief.

ARGUMENT VI

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

Jury selection is a critical phase of any trial, particularly in a capital case. Properly conducted voir dire exposes bias and potential prejudice on the part of prospective jurors, enabling counsel to make challenges for cause and to exercise peremptory challenges intelligently. See Dennis v. United States, 339 U.S. 162, 171-72 (1950); Jordan v. Lippman, 763 F.2d 1265, 1279 (11th Cir. 1985); see generally ABA Standards for Criminal Justice, Standard 4-7.2. In the instant case, the voir dire conducted by trial counsel was woefully deficient. The most glaring deficiency was the failure to challenge biased jurors peremptorily or for causes. Counsel also failed to preserve for appeal the erroneous denial of cause challenges and failed to recognize and challenge a juror who had been in the venire for Mr. Lambrix's first trial, but who claimed not to have any prior experience as a juror.[15]

In order to insure that the defendant is tried by an impartial jury, defense counsel has a duty to expose potential bias on the part of jurors and then challenge biased jurors for cause and make intelligent use of peremptory challenges to the extent such cause challenges are denied. In the instant case, counsel failed either to expose or to use as the basis for peremptory and/or cause

[15]These issues should have been raised by CCR in Mr. Lambrix's first Rule 3.850 motion, but were not because CCR was unable to provide Mr. Lambrix competent post-conviction representation. Because CCR was prejudicially ineffective, this Court should now consider the merits of this claim.

challenges potential bias on the part of several jurors who sat on the jury that convicted Mr. Lambrix and sentenced him to death.

First, when questioned about his prior knowledge of the case, juror Snyder stated, "I usually think the police do their work right." When asked if he could keep an open mind despite his belief that the police usually arrest the right person, the most he could say was that he thought he would. R. 1471-72. Standing alone, those statements would have provided a basis for a challenge for cause. Excusal for cause is proper if there is a basis for reasonable doubt that the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the court's instructions. Hamilton v. State, 547 So.2d 630 (Fla. 1989); see Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994) (juror who had personal feelings favoring police but would try to be impartial should have been excused for cause). Juror Snyder's responses raised a reasonable doubt concerning his impartiality. Competent defense counsel would have explored juror Snyder's bias further, challenged him for cause and, if the cause challenge was denied, exercised a peremptory challenge.

Second, juror Winburn admitted during voir dire that he was the stepfather of Glades County Deputy Sheriff Allen Green. R. 1629. Deputy Green was a police officer in the small, rural community where Mr. Lambrix stood trial. He assisted in processing the crime scene and at the time of trial he was under active investigation by the FBI for allegedly assaulting and injuring Mr. Lambrix while Mr. Lambrix was in custody awaiting trial. Although

counsel knew of the pending investigation against juror Winburn's stepson, they did not question Mr. Winburn about it, nor did they take any other action to expose this obviously powerful source of potential bias. Reasonably competent counsel would have taken the appropriate measures to remove this juror from the panel.

Third, juror Walsh revealed that she was the roommate of a Glades County Sheriff's Department employee who worked at the small (two-cell) county jail where Mr. Lambrix was held while awaiting trial. R. 1526. Although she denied that fact would prejudice her, counsel never inquired further to discover whether she received any extrajudicial information concerning the case from her roommate or coworkers of her roommate. Considering that the trial took place in a small, close knit rural community, it was incumbent upon counsel to inquire further and, if appropriate, to exclude juror Walsh by cause or peremptory challenge if necessary.

The presence of a single biased juror on the panel that convicted Mr. Lambrix and sentenced him to death would deprive him of a fair trial. Here, as a result of counsel's failure to perform competently, Mr. Lambrix went to trial with <u>three</u> biased or potentially biased jurors. Had counsel simply challenged any of these three jurors for cause, the trial court would have been required to strike each of these three jurors from the panel. <u>Williams v. State</u>, 638 So. 2d at 978. Prejudice is clear.

Counsel's performance at voir dire was deficient in other respects that should be considered by this Court. The trial court denied cause challenges to two jurors, Collins and Lanier, who had

formed fixed opinions that Mr. Lambrix was guilty. R. 1531-35 (Collins); R. 1646-47, 1660-61 (Lanier). Counsel was forced to use peremptory challenges on both jurors. R. 1615, 1709. Counsel, however, failed to take the necessary steps to preserve the issue for appeal. See Trotter v. State, 576 So. 2d 691 (Fla. 1991). Moreover, juror Maxine Hough, who served at the retrial, was present during the voir dire prior to Mr. Lambrix' first trial. App. 2, T. 12/1/83, 13; Apps. 8, 9. At voir dire on Mr. Lambrix's retrial, Ms. Hough did not reveal those facts when questioned, R. 1725, 1754, although Ms. Hough had seen prospective jurors who admitted any knowledge of the previous trial excused for cause, R. 1512-13, 1595, and subsequently a prospective juror who had been on the venire at the first trial was excused. R. 1758. Her failure to reveal her presence at voir dire for the first trial raises a presumption that she was neither impartial nor honest, requiring a new trial. Minnis v. Jackson, 330 So.2d 847, 848 (Fla. 3d DCA 1976); United States v. Perkins, 748 F.2d 1519, 1531 (11th Cir. 1984); United States v. Columbo, 869 F.2d 149 (2d Cir. 1989); Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984).

Competent counsel would have made sure that they had available the venire list from the first trial, so that they could intelligently exercise cause challenges and if necessary peremptory challenges against members of that venire. Counsel's failure in this regard deprived Mr. Lambrix of the effective assistance of counsel to which he was entitled. Counsel's performance fell below an objective standard of reasonableness, and Mr. Lambrix was

prejudiced thereby. If counsel had performed adequately, Ms. Hough would have been excused for cause or Mr. Lambrix would have been in a position to challenge her peremptorily and preserve the issue for appeal.[16]

Mr. Lambrix was tried, convicted and sentenced to death by a jury that included jurors who could not put aside their predisposition against Mr. Lambrix, who were exposed to highly prejudicial information concerning him, who were under investigation for assaulting him, and who gave deceptive answers during voir dire. Mr. Lambrix was deprived of his fundamental sixth amendment right to be tried by a fair and impartial jury, and counsel's failure to ensure that he was tried by an impartial jury violated his equally fundamental right to the effective assistance of counsel. Retrial is required.

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[16]A similar claim was raised by Mr. Lambrix in a pro se habeas petition that this Court previously rejected. Lambrix v. Dugger, 559 So. 2d 1137 (Fla. 1990). It is restated here so that this Court can review counsel's performance in its entirety.

ARGUMENT VII

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

Under Strickland v. Washington, 466 U.S. 668, 694 (1984), an attorney is ineffective if he fails to provide reasonably competent representation and there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. As stated in Strickland, part of an attorney's responsibility is the duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. Where an attorney fails to use due diligence to discover and present available evidence, the attorney's performance is deficient and a new trial or sentencing proceeding will be required if the resulting prejudice is shown. State v. Gunsby, No. 84,977 (Fla. Jan. 11, 1996); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993); Heiney v. State, 620 So. 2d 171 (Fla. 1993); Stevens v. State, 552 So. 2d 1082 (Fla. 1992).

In the instant case, immensely powerful mitigating evidence would have been discovered had counsel used due diligence in seeking it out.[17] This evidence was available from numerous

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[17]A claim of ineffective assistance at penalty phase, largely confined to the failure to show Mr. Lambrix's history of alcoholism and intoxication at the offense, was presented in the original Rule 3.850 proceeding. By a 4-3 vote, this Court held that Mr. Lambrix had failed to show prejudice resulting from any deficiency in counsel's performance. Lambrix v. State, 534 So. 2d 1151, 1154 (1988). CCR's failure to discover and allege the (continued...)

sources. These included Cary Michael Lambrix's biological mother, Lorita Yeafoli, whom counsel <u>never</u> contacted. Ms. Yeafoli would have testified that Mr. Lambrix's father, Donald, was a violent alcoholic who abused her while she was pregnant with Cary, and thereafter attacked Cary viciously. App. 10. Her account would have been confirmed by her sisters, Virginia Brown and Ella Umland. Apps. 11, 12. As a result, Cary was slow to develop and withdrawn as a child. Apps. 10, 13.

Following the divorce of his parents, Donald attacked Lorita so violently that she was physically unable to keep Cary or her other children. Apps. 10, 13. After getting custody of the children, Donald hired a housekeeper named Consuela, whom he later married. Donald, Consuela and Cary's older brothers all habitually beat Cary. Apps. 13, 15, 16, 17.

Cary's sisters were sexually abused by Donald, and one of his brothers was sexually abused by Consuela. App. 15. Donald and Consuela allowed and encouraged a relationship between Cary and an older man named Charles who lived nearby. Charles paid Cary's parents for the opportunity to fondle and sexually abuse Cary. App. 18. Friends and neighbors also would have confirmed the

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[17](...continued)
facts presented here was a result of its own ineffectiveness, largely caused by the State through the Governor's warrant signing practices, the inadequate funding of CCR and the failure of the courts to grant stays to relieve the burden on CCR. Because CCR was unable to provide effective assistance, this Court should overlook any procedural bar. <u>See</u> Argument II, <u>supra</u>.

physical abuse of Cary, Donald's alcoholism, and the filth and disorder that reigned in the Lambrix household. Apps. 21-27.

Cary was exposed to alcohol abuse at an early age by his molester, Charles. App. 18. His father, his father's brothers, and his father's father were all alcoholics. Apps. 10, 12, 13, 15. The abuse and neglect he had suffered, as well as this genetic predisposition, all made Cary particularly vulnerable to abuse and dependence on alcohol and drugs. By his early teenage years, he was ingesting alcohol regularly, as well as mushroom tea, pills, and other drugs. People noticed that it took little alcohol for Cary to become intoxicated. Cary's dependencies intensified as the years passed. Apps. 13, 15, 16, 26, 27. Cary was not unique among his siblings in his addictions, or in other significant ways. None of the Lambrix children escaped substance dependencies, none graduated high school, almost none avoided involvement with the juvenile justice system, and almost all had children young and out of wedlock. The legacy of their upbringing proved universally destructive. Apps. 13, 15, 16, 28.

At the age of sixteen, Cary left home and joined the crew of a traveling carnival. He married a young woman named Kathy Jones, and they had a daughter, Niki. Niki had serious health problems and frequent seizures. Under the stress of lack of finances, Niki's medical condition, and their own dependence on drugs and alcohol, the marriage fell apart. During this period, Cary's alcohol dependence intensified and he became increasingly

despondent. He had several DUI convictions and was eventually sent to prison on a bad check charge. App. 18.

Shortly before the homicides for which Mr. Lambrix was sentenced to death took place, a police officer who observed Mr. Lambrix immediately recognized that Mr. Lambrix was intoxicated. App. 4. His intoxication intensified the impairment caused by organic mental disorders resulting from his long-standing dependency on drugs and alcohol. In addition, he suffered the effects of severe childhood deprivation, from battered child syndrome, and from a personality disorder characterized primarily by followership or dependency traits. These real and significant disabilities rendered him unable to form specific intent, and gave rise to myriad statutory and nonstatutory mitigating factors.

All of this mitigating information was readily available at trial through the use of due diligence and a minimally competent investigation, including contacting Mr. Lambrix's natural mother, interviewing all of his siblings in settings in which the primary abuser -- his father -- was absent, and through consultation with one or more mental health experts who were provided with accurate and reasonably complete background information. Counsel failed to discover it as a result of their failure to undertake even a minimally reasonable investigation.

This mitigation was extremely powerful, as it would have both humanized Mr. Lambrix, explained how he came to be dependent on drugs and alcohol, and explained how his dependence and intoxication at the time of the homicides impaired his mental

functioning. At the same time, it would have helped to rebut the "cold, calculated" and "especially heinous" aggravating factors. The very limited mitigation actually presented at trial did none of those things. Had counsel performed adequately, there would both have been more weight on the side of life and less on the side of death. Given these facts, this Court can have no confidence in the outcome of the sentencing proceeding. Resentencing is required.

ARGUMENT VIII

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

In the instant case, the trial court instructed the jury to consider five aggravating circumstances: that Mr. Lambrix was under sentence of imprisonment; that the murder was committed during a robbery; that the murder was committed for financial gain; that the crime was "especially wicked, evil, atrocious or cruel"; and that the crime was committed in a "cold, calculated and premeditated" manner. R. 2663. The jury instructions on the "especially heinous", "cold, calculated" and "financial gain" aggravating factors were unconstitutionally vague.[18] Espinosa v. Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992); Jackson v. State, 648 So. 2d 85 (Fla. 1994).

Although trial counsel preserved the jury instruction error with respect to the "especially heinous" aggravating factor, see Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994), they did not

[18]The State conceded that the murder was not committed during a robbery. R. 2648.

make or preserve any objection to the "cold, calculated" or "financial gain" instructions.[19] Trial counsel's failure to preserve the errors by either requesting a special instruction or making a specific objection waived the issues for purposes of appeal and rendered any post-conviction claims procedurally barred. Beltran-Lopez v. State, 626 So.2d 163, 164 (Fla. 1993); James v. State, 615 So.2d 668, 669 and n.3 (Fla. 1993); Lambrix, supra, 641 So.2d at 848.

The instructions given to the jury, after counsel failed to make a proper objection, were unconstitutionally vague. Jackson v. State, 648 So. 2d at 89-90 (CCP instruction vague). The financial gain aggravating factor instruction suffers from the same defects as does that on CCP. This Court has limited the financial gain aggravating factor to cases where there is proof beyond a reasonable doubt that the motive for the murder was pecuniary gain, not where some property of the victim was taken as an afterthought after the murder.[20] Moreover, where the evidence of a pecuniary motive is circumstantial, proof of the aggravator beyond a

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[19]Counsel challenged the vagueness of the "cold, calculated" aggravating factor by pretrial motions, R. 22, 24, 87-89, which the trial court denied. R. 1431-32. They did not request a special instruction on the aggravator, nor did they make a contemporaneous vagueness objection to the instruction. They did not make any objection to the vagueness of the instruction on the "financial gain" aggravator.

[20]See, e.g., Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981)(factor does not apply where car taken to facilitate escape); Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989); Hardwick v. State, 521 So.2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871 (1988).

reasonable doubt requires that the evidence be "inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). Because of the numerous decisions explaining the financial gain aggravating circumstance, the heightened proof required for it to apply, and the fact that the jury could not know that it does not apply where a victim's property is taken as an afterthought, a limiting instruction concerning the aggravator was constitutionally required under Jackson.

Counsel was ineffective for failing to make a proper objection to the instructions. Counsel were aware that the CCP aggravating factor was unconstitutionally vague, for they filed pretrial challenges to the aggravating factor. Counsel knew how to make a proper request for a specific instruction, as they showed by filing such a request with respect to the HAC instruction. R. 1342-44, 1346; Lambrix, supra. Failure to preserve the issue with respect to the CCP instruction, which was equally vague and equally unconstitutional, was deficient performance and prejudiced Mr. Lambrix by preventing the issue from being raised on direct appeal. Likewise, counsel objected to the State's argument that the financial gain aggravating factor applied based on actions and statements allegedly made by Mr. Lambrix after the offense. R. 2648. Although that objection demonstrated that counsel were aware of the significant likelihood of jury confusion concerning the aggravator, they made no objection to the instruction. In these circumstances, there was no reason for competent counsel to fail to

make an objection to the vagueness of the aggravators, and counsel's failure to object was deficient performance.

Mr. Lambrix was clearly prejudiced by counsel's failure to make a proper objection to the inadequate jury instructions. When a proper objection is made at trial and raised on appeal, relief will be granted either on direct appeal, see Jackson, supra, or in post-conviction proceedings. See James v. State, 615 So.2d 668 (Fla. 1993). The only situation in which relief would not be granted on a properly preserved claim of Espinosa/Jackson error would arise if the error were harmless beyond a reasonable doubt. Therefore, prejudice is established if there is a reasonable probability that the errors would not have been found harmless beyond a reasonable doubt.

In light of the entire record, it would be impossible for this Court to find beyond a reasonable doubt that the error in instructing the jury on the CCP and financial gain aggravators "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Under Espinosa, it must be presumed that the jury improperly weighed the invalid aggravating factors, "creat[ing] the risk that the jury ... treat[ed] [Mr. Lambrix] as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

Of the five aggravating factors on which the jury was instructed, four were invalid. The only arguably valid aggravating factor was that Mr. Lambrix was under a sentence of imprisonment.

The testimony revealed, however, that that sentence of imprisonment was a two-year sentence, which had nearly expired, on a bad check charge. R. 2582-3, 2587. For those reasons, the jury would have been entitled to consider that this aggravating factor was entitled to little weight. See Hallman v. State, 560 So.2d 223, 227 (Fla. 1990). Moreover, when only one valid aggravating circumstance is present, a death penalty is only rarely warranted. See, e.g., DeAngelo v. State, 616 So.2d 440, 443-44 (Fla. 1993); Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

Finally, in addressing each of these errors under a harmless error analysis this Court must also look at the entire record. While the trial court did not find any mitigation, the record in this case contains mitigating evidence that the jury could have relied on to recommend life and that led four jurors to vote for life with respect to the male victim. R. 1348. The jury was instructed on the statutory mitigating factor of no significant history of prior criminal activity. R. 2664. Mr. Lambrix's only prior conviction was a bad check charge. R. 2587. The jury was entitled to consider this as a significant mitigating factor, particularly in light of Mr. Lambrix's youth. There was also significant non-statutory mitigation. See Argument X, infra.

The statutory and non-statutory mitigating evidence presented to the jury is surely sufficient to support a jury's verdict of life under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Had the jury been properly instructed on the aggravating circumstances and voted for a life sentence, it is quite apparent that the trial

court could not have overridden that recommendation. See Omelus v. State, 584 So.2d 563 (Fla. 1991); Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

The instructions on the HAC, CCP robbery murder, and pecuniary gain aggravating circumstances violated Mr. Lambrix's rights under the Florida and United States Constitutions. Those errors were not harmless beyond a reasonable doubt. Competent counsel would have preserved all of those errors so that they could be raised on appeal and, if incorrectly rejected on appeal, in state and federal post-conviction proceedings. Here, trial counsel failed to preserve these multiple eighth amendment errors and Mr. Lambrix was prejudiced. A new sentencing proceeding before a properly instructed jury is required.

ARGUMENT IX

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

When the sentencer weighs an aggravating circumstance that is invalid because it does not apply as a matter of state law, the sentencer acts arbitrarily and the weighing process is tilted in favor of death. Sochor v. Florida, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). In the instant case, the pecuniary gain aggravating circumstance was invalid as a matter of state law. When the trial court considered and relied on that factor, it skewed the weighing process, requiring that Mr. Lambrix be resentenced.

In Scull v. State, 533 So.2d 1137 (Fla. 1988), this Court found that where the victim's car was taken to facilitate escape rather than as the primary motive for the murder, the pecuniary

gain aggravating factor did not apply. Id. at 1142. Here, as in Scull, there was no evidence that either victim was murdered for financial gain. Moreover, where the evidence of a pecuniary motive is circumstantial, proof of the aggravator beyond a reasonable doubt requires that the evidence be "inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). The evidence argued by the State in support of the aggravating circumstance, see R. 2648-49, was equally consistent with the taking of the victims' property as an afterthought and, where the victim's car was concerned, as a means of escape. There was no evidence of prior planning of the offense (Mr. Lambrix met the victims in a bar the night of the offense) and no direct evidence of any pecuniary motivation. On these facts, under Simmons and Peek the pecuniary gain aggravating factor did not apply as a matter of law.

Nevertheless, the trial court found and weighed the pecuniary gain aggravating circumstance, in clear violation of state law and the eighth amendment. The court's arbitrary action requires that a new sentencing proceeding be held in which this unsupported factor is not considered by the sentencers.

ARGUMENT X

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

Florida's death penalty statute requires written findings regarding the presence or absence of aggravating and mitigating

factors, and a weighing of those factors. § 921.141(3), Fla. Stat. In Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), this Court held that a trial court first must determine whether facts alleged in mitigation are supported by the evidence, then determine whether those facts actually reduce the degree of culpability for the crime, and then determine whether they are of sufficient weight to counterbalance the aggravation. See Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990) (trial court must expressly evaluate mitigation in sentencing order and weigh mitigation reasonably established by the evidence); see also Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Hill v. Singletary, TCA 90-40023-WS (N.D. Fla., Aug. 31, 1992) (Stafford, J.), (trial court's failure to find and weigh uncontroverted mitigation violated eighth amendment).

At penalty phase, Mr. Lambrix demonstrated the existence of at least six mitigating factors. They were: (1) that he came from a broken family;[21] (2) that he was a good, gentle, quiet boy who helped others;[22] (3) that he was non-violent;[23] (4) that he served

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[21]Cary Michael Lambrix's mother left the family when he was a young boy. She took Cary Michael's sisters with her to Colorado, leaving him and his brothers in foster homes. R. 2601-02. At one point, Cary Michael had been completely abandoned and was picked up wandering on the streets of San Francisco. R. 2610. From that point on, Cary Michael had no further contact with his natural mother.

[22]Cary Michael's family members told the jury and the court that he was a quiet, gentle and helpful boy who was active in the choir, as an altar boy, and as a Boy Scout. R. 2592, 2602, 2609, 2617. He was helpful to others, particularly his stepmother and an elderly neighbor. R. 2609-10, R. 2617. Although Mr. Lambrix had to drop out of school, he went to work at an early age to support himself and his family. Later on, he obtained his GED and attended Bible school. R. 2602, 2604.

in the Army, from which he was honorably discharged after suffering head and back injuries;[24] (5) that his personality changed after the head injury;[25] and (6) that he was under the influence of alcohol at the time of the offense.[26]

Evidence of all of these factors was compelling and uncontroverted. Yet, the trial court found no mitigating

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[23](...continued)
[23]All of Cary Michael's family agreed that one of his most striking personal characteristics was his non-violence. Not only did he not seek out fights or bully other people, he would back away from any physical confrontation rather than fight. R. 2593, 2605, 2611, 2617.

[24]Mr. Lambrix served his country in the Army. His service was cut short by a fall in which he suffered injuries to his head and back. R. 2593, 2603, 2618.

[25]Mr. Lambrix suffered a significant head injury while serving in the military. R. 2603, 2605, 2618. Mr. Lambrix's father testified that it was only after this head injury that Mr. Lambrix got in trouble on the bad check charge, which was his only prior felony. R. 2605-06.

[26]The evidence presented in the State's case at the guilt phase of trial demonstrated that Mr. Lambrix had consumed a substantial amount of alcohol the night of the offense. The State's star witness, Frances Smith, testified that she and Mr. Lambrix went to a bar the night of the offense, where they started drinking and met the victims by chance. R. 2190-91. The four of them spent the rest of the evening drinking at that bar and another bar. Mr. Lambrix was taking turns drinking beer and mixed drinks. R. 2201. At the second bar, they purchased a bottle of whisky before leaving sometime after midnight. R. 2204. Smith further testified that Mr. Lambrix was drinking "pretty good" and that he was "high" and "acted high." R. 520, 2196, 2300-01. Police officer Ron Council confirmed that when he went into the second bar about 10:30 p.m. the four were drinking, and that Mr. Lambrix confronted him and made loud comments to him, including "[H]ere comes the big law man with his big gun and his big badge." R. 2161, 2164-65. These comments supported the inference that Mr. Lambrix was already under the influence of alcohol, since it was not in the interest of Mr. Lambrix, who was absent without leave from a work release facility, to draw the attention of a law enforcement officer.

circumstances to exist. The court did so with no discussion of the mitigating evidence that was offered, simply stating, "The Court finds that there are no mitigating circumstances in this case." R. 1355. No reasoning was offered, and it is impossible to tell from the Order whether the court simply rejected that any mitigation had been established on some unstated basis or ruled that the evidence presented was not truly mitigating, also on some unstated basis.[27]

The trial court's failure to find uncontroverted mitigating factors was a fundamental error which renders the trial court's order imposing the death sentence lawless, and rendered meaningful review impossible. Imposition of the death penalty is constitutional only if the sentencer's discretion is properly guided, Gregg v. Georgia, 428 U.S. 153, 189 (1976), and only if the sentencer actually considers all mitigating evidence presented by the defendant. Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). By definition, a sentencing proceeding in which the sentencer does not follow the guidelines limiting its discretion and does not even consider the mitigation presented by the defendant is one in which the defendant has not received the "individualized determination on the basis of the character of the individual and the circumstances of the crime," Zant v. Stephens, 462 U.S. 862, 879 (1983), that is required by the

[27]CCR should have raised the failure of the trial court to comply with Rogers in Mr. Lambrix's initial Rule 3.850 proceeding. Its failure to do so was deficient performance that prejudiced Mr. Lambrix. Moreover, this Court must also consider the mitigation present in the record in determining whether the imposition of the death sentence in this case is a fundamental miscarriage of justice. See Arguments II and IV, supra.

Eighth Amendment. Moreover, where the trial court fails to make specific findings concerning every mitigating factor proposed by the defendant, this Court is prevented from carrying out its "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 498 U.S. 308, 321 (1991); Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990) (trial court must make findings concerning mitigation in order to facilitate meaningful appellate review). See also Hill v. Singletary, supra.

The trial court here failed to meet these constitutional requirements before sentencing Mr. Lambrix to death. Its discretion to impose the death sentence was completely unguided in that it failed to consider mitigating factors proposed by Mr. Lambrix and did not provide him with an "individualized determination" of whether he deserved a death sentence. Further, the trial court's failure to make findings with respect to the mitigating factors precluded meaningful appellate review.

These errors prejudiced Mr. Lambrix. As set forth above, Mr. Lambrix presented uncontroverted evidence of the following recognized mitigating circumstances: (1) that he came from a broken family; (2) that he has positive character traits; (3) non-violence; (4) military service with an honorable discharge; (5) head injuries that affected his character and behavior; and (6) the influence of alcohol at the time of the offense. When a defendant presents a reasonable amount of uncontroverted evidence of a mitigating circumstance, the trial court must find the mitigating

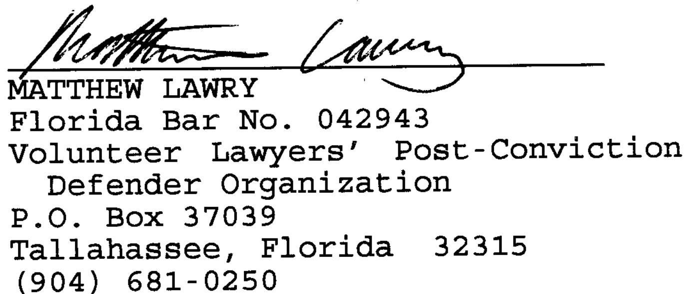
circumstance, Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Once a mitigating circumstance is found it must be accorded some weight. Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990).

It cannot be said beyond a reasonable doubt that Mr. Lambrix would not have received a life sentence, either at trial or on appeal, if the trial court had performed its constitutionally required role of considering the mitigation offered by Mr. Lambrix and making an individualized determination of the proper sentence. Mr. Lambrix is entitled to Rule 3.850 relief, including a new sentencing proceeding before a trial court that complies with the constitutional and statutory requirements set forth above.

CONCLUSION

For all of the foregoing reasons, Mr. Lambrix respectfully requests that he be granted a new trial and/or sentencing proceeding, or that this matter be reversed and remanded for an evidentiary hearing.

Respectfully submitted,



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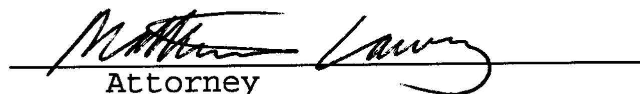
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant was delivered by U.S. Mail, first class postage prepaid, to: Carol Dittmar, Esq., Assistant Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, FL 33607, this 22th day of January, 1996.



Attorney