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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Appellant, CARY MICHAEL LAMBRIX, respectfully submits his reply brief on appeal of the denial of his motion to vacate conviction and sentence of death pursuant to Florida Rule of Criminal Procedure 3.850. In the interests of brevity, and in order to comply with the page limitation established by this Court, Mr. Lambrix will reply only to those arguments raised in the State's Answer Brief for which response and rebuttal are necessary and pertinent. With respect to all other issues, Mr. Lambrix relies on the arguments set forth in his Initial Brief.

INTRODUCTION

Because this appeal is from the denial of Mr. Lambrix's second 3.850 motion, many of the arguments presented to the court revolve around technical application of the procedural bar rules. This case, however, is not about technical rules. Mr. Lambrix shows here that he is innocent of premeditated murder. The facts presented here, under this Court's consistent law, would have precluded a conviction of first degree murder. Mr. Lambrix faces execution for a crime of which he is innocent.

Equally startling are the circumstances in which the first Rule 3.850 motion was prepared and litigated. The State went to extraordinary lengths to prevent Mr. Lambrix from making his own defense in those proceedings. The State created an agency to represent Mr. Lambrix and those like him who are indigent and condemned to death. The State then created circumstances that made it impossible for this agency to represent Mr. Lambrix effectively. When Mr. Lambrix realized that, he sought to represent himself so

that his voice could be heard before he was executed. The State, the trial court and CCR all agreed that Mr. Lambrix could not be heard, that he must be stifled. Then, as predicted, CCR was unable to effectively represent Mr. Lambrix.

As a result, Mr. Lambrix's claims and his voice have never been fully heard. The arguments presented here provide compelling legal and equitable reasons why this Court must allow Mr. Lambrix to be fully heard now.

ARGUMENT I

THE COURT BELOW ERRED IN SUMMARILY DENYING RELIEF

The State contends that the court below did not err in failing at a minimum to hold an evidentiary hearing to determine whether Mr. Lambrix could establish one or more exceptions to the procedural bar imposed by the court. The State's primary basis for this contention is that none of the facts supporting Mr. Lambrix's claimed exceptions are in dispute. The State thus apparently concedes that all of the facts alleged by Mr. Lambrix in support of those exceptions are true. These facts include, for example, that Mr. Lambrix consistently expressed his desire to testify at both trials, that counsel failed to review with him what his testimony would be if he took the stand, and that the testimony he would have provided would have at least exonerated him of first degree murder, see App. 1, establishing a claim of actual innocence. Similarly, those facts include that Mr. Lambrix asserted his right to represent himself in the circuit court prior to the previous Rule 3.850 motion, that the State and the Capital Collateral

Representative (CCR), opposed his motion and asserted that he was required to accept CCR as his counsel, that the trial court in fact ruled that he could not represent himself but must be represented by CCR, that he was thereby precluded from representing himself, and that CCR was unable to provide him with competent and effective representation when his initial Rule 3.850 motion was prepared and litigated under warrant. Alternatively, to the extent that the State does not intend to concede any of those or the other facts alleged in support of the exceptions to the procedural bar, then clearly an evidentiary hearing was required.

The State also attempts to distinguish Steinhorst v. State, 636 So. 2d 498 (Fla. 1994), and McGuffey v. State, 515 So. 2d 1057 (Fla. 4th DCA 1987), cited by Mr. Lambrix to support the requirement of an evidentiary hearing, on the grounds that those were due diligence cases. Answer Brief, at 5. This misses the point. First, Steinhorst and McGuffey stand for the general proposition that where there are facts in dispute concerning the applicability of a claimed exception to a procedural bar, an evidentiary hearing must be held. Steinhorst, 636 So. 2d at 500-01; McGuffey, 515 So. 2d at 1058. If the State does not concede the pertinent facts, they are in dispute and a hearing must be held. Second, the State's primary contention with respect to the denial of Mr. Lambrix's Faretta rights is that Mr. Lambrix did not act with due diligence to raise that denial in other proceedings or file further pro se pleadings. Answer Brief, at 9. The State does not argue that a violation of a defendant's rights under Faretta

and Durocher is not grounds for relief from a procedural bar, but rather that Mr. Lambrix did not use due diligence in pursuing those rights. Thus, this is a due diligence issue; Steinhorst and Montgomery are directly on point.

Because the trial court erred in summarily denying relief, this Court should either remand for a hearing on the merits or at a minimum remand for an evidentiary hearing concerning Mr. Lambrix's claimed exceptions to the procedural bar.

ARGUMENT II

MR. LAMBRIX IS ENTITLED TO CONSIDERATION OF THE MERITS OF HIS RULE 3.850 MOTION

A. Mr. Lambrix Was Deprived of His Right to Represent Himself in the Initial Rule 3.850 Motion and Was Then Deprived of His Right to the Effective Assistance of Collateral Counsel

There is no question that the trial court ruled that Section 27.7001, et seq., Florida Statutes, required that Mr. Lambrix be represented by CCR, and prohibited him from representing himself. There is also no question that that ruling violated Mr. Lambrix's right to represent himself, established by Faretta v. California, 422 U.S. 806 (1975). The State appears to argue primarily either that that violation did not prejudice Mr. Lambrix, or that he was not sufficiently diligent in pursuing the denial of his rights. Those contentions are unavailing.

The State's principal argument is that at various times Mr. Lambrix has filed or could have filed pro se pleadings in various courts challenging his conviction and sentence. Answer Brief, at 9. Factually, those contentions are erroneous in pertinent respects. The State's notion that the trial court told Mr. Lambrix

that he could file a pro se Rule 3.850 motion results from an obvious misreading of the transcript. Mr. Lambrix told the court that he wanted to "file a number of motions" relating to procedural matters, not that he was ready to file a Rule 3.850 motion. The court simply told Mr. Lambrix that he could go ahead and file "in anticipation of a ruling in your favor and [if] I did not rule in your favor, then they would be dead." Initial Brief, App. B, at T. 42. The court then proceeded to rule against Mr. Lambrix that same day. Initial Brief, App. A. This passage in fact makes clear both that the court never told Mr. Lambrix that he could file his own Rule 3.850 motion, and that when the court denied his request to represent himself it also ruled that it would not accept or consider a pro se Rule 3.850 motion or other pleading if he did file one.

The State's argument that Mr. Lambrix could have and was required to mitigate the violation of his rights by filing pro se pleadings is contrary to the law governing Faretta violations. The right protected by Faretta is not a right to bring particular issues to the court's attention (particularly in a context that virtually guarantees that the court will give them scant attention, as happens when a defendant represented by counsel files pro se pleadings). Rather, it is the fundamental, personal right of the defendant to "make a defense" -- to act as counsel and make all the crucial decisions otherwise made by counsel concerning what claims are raised, when and how. Exercise of that right gives the defendant control over decisions that in this case will literally

determine his fate.

> Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.

Faretta, 422 U.S. at 835. It is beyond question that Mr. Lambrix was deprived of those rights.

Even if Mr. Lambrix had been allowed to file pro se papers, then, that would have done nothing to remedy the Faretta violation. Nor is a defendant required to reassert the Faretta right once denied, Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989), nor to tell the court how he wants to handle the case in order to preserve the violation. The only real remedy for the violation is to permit a new trial, Faretta, 422 U.S. at 835-36, or in this case a new Rule 3.850 proceeding. That is the only way to vindicate Mr. Lambrix's Faretta right. It would be a strange jurisprudence that would deny Mr. Lambrix that right when he seeks to use it to obtain relief from his unconstitutional conviction and sentence, but that granted it only to Michael Durocher so that he could use it to waive all further appeals.

The State's contention that Mr. Lambrix should have added pro se claims to the initial Rule 3.850 motion also ignores the circumstances under which that motion was prepared and litigated, as set forth in Section II.B of the Initial Brief. The initial Rule 3.850 motion was prepared in great haste under the pressure of numerous simultaneous warrants and non-warrant proceedings. Mr. Lambrix did not actually receive his own copy of the motion until

that was ordered by the federal court in subsequent proceedings. As Mr. Lambrix has alleged and will be the subject of a civil trial, see Lambrix v. Singletary, 618 So. 2d 787 (Fla. 1st DCA 1993), at the time Florida State Prison confiscated most of his legal materials. And Mr. Lambrix was also sitting on death watch waiting to be executed. Thus, Mr. Lambrix had no adequate opportunity to review the pleadings, let alone file supplemental pro se pleadings (assuming such would have been accepted or considered by the court).

It is clear that the court, the State and CCR compelled Mr. Lambrix to be represented by CCR, despite the fact that he had unequivocally demanded his right to represent himself. It is also alleged -- and this Court must accept the allegation as true -- that CCR was unable to and did not provide Mr. Lambrix with competent and effective representation. So far as counsel's research has revealed, these circumstances are unique. Forcing counsel on a defendant facing execution -- and then making it impossible for that counsel to perform effectively -- makes a mockery of due process, reminiscent of the Faretta Court's discussion of the English Star Chamber. There, the Court noted that the Star Chamber was the only British tribunal

> that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding.... "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence."

Faretta, 422 U.S. at 821-23, quoting 1 J. Stephen, A History of the

Criminal Law of England, 341-342 (1883).

The State's response to these truly extraordinary and unique circumstances is, first, to argue that Mr. Lambrix had no direct federal constitutional right to effective representation in state post-conviction proceedings, relying principally on Pennsylvania v. Finley, 481 U.S. 551 (1987), and Murray v. Giarratano, 492 U.S. 7 (1989). The primary rights Mr. Lambrix relies on, however, are those created by section 27.7001, et seq., Fla. Stat. The State contends that the statutes create no right to effective representation, despite the contrary indications in Spaziano v. State, 660 So. 2d 1363, 1370 (Fla. 1995), and Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). However, even if this Court were to accept the State's arguments when applied to the ordinary case of representation by CCR, this is no ordinary case. Mr. Lambrix was deprived of all choice. Recognizing that CCR might be unable to represent him effectively, he sought to represent himself, but was compelled to be represented by CCR, which was in fact rendered ineffective by the Governor's warrant signing practices and the lack of adequate funding. On these facts, at a minimum this Court should consider the merits of Mr. Lambrix's current claims.

Nothing in Finley or Giarratano undercuts the necessity of applying Mr. Lambrix's claimed exception. In both decisions, the Court relied heavily on the adequacy under state law of the measures taken by the states to protect the defendants' rights. In Finley, the Court found that the defendant had received "exactly that to which she was entitled under state law...." Finley, 481

U.S. at 558. Similarly, in Giarratano, Justices Kennedy and O'Connor -- who provided the crucial votes in the Court's 5-4 majority -- relied heavily on the reasonableness of the measures adopted by the State to provide access to the courts for death row prisoners. Giarratano, 492 U.S. at 14 (Kennedy, J., concurring). Here, in contrast, the State undertook to provide effective counsel -- and forced Mr. Lambrix to be represented by that counsel -- but then failed to provide effective counsel. The State's actions and inactions thereby violated Mr. Lambrix's rights under section 27.702, Florida Statutes, the Florida Constitution, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

Finally, the State contends that none of this mattered, arguing that the claims raised now are duplicative and meritless. The merits of the claims -- to the extent that the merits should be addressed by this Court in the case's current posture, see Parker v. Dugger, 660 So. 2d 1386 (Fla. 1995) -- are addressed in the Initial Brief and in the body of this brief. Contrary to the State's arguments, the claims raised here were not raised in the initial Rule 3.850 motion. For example, the right to testify claim raised in the initial Rule 3.850 motion did not allege that counsel was ineffective for failing to preserve Mr. Lambrix's right to testify.[1] Similarly, while CCR raised a claim of ineffective assistance of counsel for failure to cross examine State witnesses

[1]For that reason, testimony by counsel with respect to their discussions (if any) with Mr. Lambrix concerning the substance of his testimony would not have been relevant to the claim as raised in the initial Rule 3.850 motion, exhausted in state court, and then presented in federal court.

(largely focused on State witness Debra Hanzel, who the State now argues for the first time was a key witness, after previously maintaining she was insignificant), it did not raise such a claim with respect to the cross examination of Frances Smith. Nor did it raise such a claim with respect to Deputy Council, for the simple reason that CCR -- like trial counsel -- never talked to Deputy Council and never discovered that he believed Mr. Lambrix was intoxicated. With respect to the other claims as well, while CCR may have raised related claims, it failed to include critical factual support and legal grounds for relief, as a direct result of the State's actions in precluding Mr. Lambrix from representing himself, overwhelming CCR with numerous simultaneous warrants over a period of months and years, and denying CCR adequate funding, staff and resources. As a result, this Court must at least consider the merits of the claims raised now by Mr. Lambrix.

B. Mr. Lambrix is Actually Innocent of First Degree Murder and of the Death Penalty

The State apparently concedes that a defendant who is actually innocent may obtain merits review of his claims upon a showing that satisfies the standard set forth in Schlup v. Delo, 130 L.Ed.2d 808 (1995), and that a defendant who is "innocent of the death penalty" may obtain merits review by satisfying the standard set forth in Sawyer v. Whitley, 120 L.Ed.2d 269 (1992). The State attempts without success to argue that Mr. Lambrix cannot meet either standard.

A consistent theme of the entire Answer Brief is that Mr. Lambrix's innocence claim is conclusively refuted by the testimony

of State witness Debra Hanzel. This is surprising, as at every stage of the litigation until now, the State has consistently maintained that the crucial witness was Frances Smith, and that Mr. Lambrix could not have been prejudiced by deficient performance in cross examining Hanzel because her testimony was relatively insignificant. Indeed, the district court accepted the State's argument, ruling that although the cross examination of Hanzel was "less than ideal," there was no prejudice because Smith was the key witness and the testimony of other witnesses was not critical to the outcome. Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch, Final Order at 31 (S.D. Fla., May 12, 1992).

Now, by contrast, Frances Smith has almost disappeared from the State's argument and the State relies on the repeated assertion that Hanzel testified that "Lambrix had admitted killing Moore and Bryant in order to get Moore's car." Answer Brief, at 1, 17. The State both mischaracterizes Hanzel's testimony and ignores the fact that crucial portions of it were impeached despite counsel's "less than ideal" cross examination of her. Hanzel testified to two conversations with Mr. Lambrix. At the time of the first conversation, State witness Preston Branch -- Hanzel's live-in boyfriend and Frances Smith's cousin -- was present. Hanzel testified that Mr. Lambrix said he had "killed two people and buried them." R. 2445. Hanzel's testimony on this point, however, was contradicted by that of Preston Branch, who testified that Mr. Lambrix in fact said only that there were "two dead bodies back there." R. 2418-19, 2421. Indeed, Hanzel's deposition testimony

was consistent with Branch's, R. 413; it was only at trial that she testified that Mr. Lambrix said he had killed two people.

The second conversation Hanzel testified to was allegedly a collect telephone call made to her by Mr. Lambrix after he had become a suspect in the murders. By that time, Hanzel had talked to the police and Frances Smith on numerous occasions and was cooperating with the police. Supposedly, Mr. Lambrix called her and allowed her to question him about the offense. When she asked him if he had killed the man for his car, he supposedly said, "That was part of the reason." R. 2449. This testimony, which was inherently unreliable and suspect, was further impeachable on the grounds that by that point, after initial resistance, Hanzel had decided that it was in her best interest to give the State whatever testimony it wanted. What the State most needed from Hanzel was some testimony as to the motive for the murders, since nothing in Smith's testimony established any motive. Thus, the testimony now relied on so heavily by the State was inherently suspect, impeachable and in critical part contradicted by Hanzel's own deposition testimony and the testimony of State witness Preston Branch.

Moreover, at best Hanzel's testimony would not establish premeditated murder. Neither she nor Frances Smith could provide any testimony as to the homicides themselves, and thus neither could refute Mr. Lambrix's account in which he denied premeditation. Had Mr. Lambrix been allowed to testify, he would have credibly denied that the telephone conversation with Hanzel

ever took place. Moreover, even Hanzel's testimony as to the telephone conversation did not establish premeditation beyond a reasonable doubt. The statement attributed to Mr. Lambrix by Hanzel is vague and ambiguous and certainly does not amount to an admission of premeditated murder. Thus, the State's case of premeditated murder continues to rest on nothing more than circumstantial evidence.

The State attempts to hide the weakness of its circumstantial evidence of premeditation by its heavy reliance on Hanzel's testimony. But the State makes no serious attempt to refute what Mr. Lambrix established in the Initial Brief -- that the case of premeditation is far weaker than those in several cases where this Court recently has found a failure to prove premeditation beyond a reasonable doubt. Initial Brief, at 24-28. Instead of addressing that argument, the State attempts to muddy the waters by misreading Schlup v. Delo, 130 L.Ed.2d 808 (1995), and Cochran v. State, 547 So. 2d 928 (Fla. 1989).

In Cochran, this Court held that there was sufficient evidence of premeditation because the defendant's account of an accidental shooting was inconsistent with physical evidence that the victim's body had been dragged off the road after she was shot. Id. at 930. Here, by contrast, there was no direct physical evidence of what took place, but Frances Smith's testimony concerning the sequence of events was far more consistent with Mr. Lambrix's account than with the State's manufactured theory that the victims were lured to their deaths one at a time. Initial Brief, at 25-26. With the

State's theory not supported by any actual evidence -- let alone any physical evidence -- it is clear that Cochran has no application. Rather, this case is like Terry, where this Court found that there was "simply an absence of evidence of premeditation. In fact, there is an absence of evidence of how the [killing] occurred." Terry v. State, No. 83,002, slip op. at 20 (Fla., Jan. 4, 1996). Here, too, there is no evidence of premeditation and no evidence of how the killings occurred, other than Mr. Lambrix's account.

When confronted by Mr. Lambrix's sworn affidavit, the evidence of voluntary intoxication and the available impeachment of Frances Smith and Hanzel, the State's case simply fails to prove premeditation beyond a reasonable doubt. Given that fact, this case clearly meets the Schlup standard, despite the State's argument to the contrary. What Schlup requires is a showing that "no reasonable juror would have found the defendant guilty." Schlup, 130 L.Ed.2d at 836. Whether a reasonable juror would have found the defendant guilty must be assessed, as Schlup makes clear, with reference to the governing legal standards:

> It is not the ... court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the ... court to make a probabilistic determination about what reasonable, properly instructed jurors would do....
>
> [The] standard requires a petitioner to show that it is more likely than not that "no reasonable juror" would have convicted him.... It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.

Id. at 837.

Here, the governing legal standard is that circumstantial evidence of premeditation must exclude "all reasonable hypotheses of innocence," Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995); see Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956), in order to support a conviction of first degree murder. Under Barwick and Davis, this case should not even have gone to the jury with respect to premeditation, but if it had gone to the jury, the jury would have been required to apply that standard. Since the State could not prove premeditation under that standard, no reasonable juror would have convicted Mr. Lambrix. Mr. Lambrix has met the Schlup standard; consideration of the merits of his claims is required.

With respect to "innocence of the death penalty," the State argues that Mr. Lambrix cannot meet the standard of Sawyer v. Whitley, 120 L.Ed.2d 269 (1992), on the grounds that even accepting Mr. Lambrix's claims two valid aggravating factors remain: prior conviction of a violent felony (each murder conviction aggravating the other), and under sentence of imprisonment. This argument ignores the fact that before the jury, which acts as the co-sentencer, Espinosa v. Florida, 112 S. Ct. 2926 (1992), the State specifically waived the prior violent felony conviction aggravator, and the jury was not instructed on that factor. R. 2645, 2663. Thus, the jury could not have relied on it. In arguing that the jury could have voted for death based on the remaining aggravating factor of under sentence of imprisonment, the State relies on cases where death was upheld based on only a single aggravator such as

"especially heinous, atrocious or cruel." Answer Brief, at 19. The HAC and CCP aggravating factors are well recognized as uniquely powerful. Here, in contrast, the under sentence of imprisonment aggravating factor was based on the fact that Mr. Lambrix had walked away from a work release camp where he had been placed on a bad check conviction. On these facts, the under sentence aggravating factor did not make Mr. Lambrix eligible for the death sentence, as set forth in the Initial Brief. Merits review of Mr. Lambrix's claims is required.

ARGUMENT III

TRIAL COUNSEL WERE INEFFECTIVE BECAUSE THEY DEPRIVED MR. LAMBRIX OF HIS RIGHT TO TESTIFY

The State first contends that this claim is procedurally barred because ineffectiveness claims were raised in the initial Rule 3.850 motion, and that the facts supporting the claim were known to Mr. Lambrix and to CCR. Answer Brief, at 21. These assertions, however, merely go to the heart of the issues concerning denial of Mr. Lambrix's right to represent himself and ineffectiveness of CCR raised in Argument II, supra. Whether CCR in fact knew that this claim existed and if so whether CCR was ineffective for failing to raise it are factual issues that cannot be resolved by this Court. Moreover, this claim establishes Mr. Lambrix's actual innocence. It is not barred.

On the merits, the State argues for the first time that Mr. Lambrix's attorneys threatened to withdraw because they thought he was going to commit perjury. Answer Brief, at 21-22. Counsel, however, did not actually say that Mr. Lambrix was going to commit

perjury -- that is the State's interpretation of vague comments by counsel about not "ethically allow[ing Mr. Lambrix] to take the stand," Answer Brief, App. A, T. 6, and "At the time he chooses to take the stand, under the canons, we would be forced to withdraw." Id. at T. 7. Even if it is assumed that counsel were referring to a possibility of perjury, there is nothing in the record to show what counsel thought Mr. Lambrix would testify to, or their reasons for thinking it would be false. Indeed, counsel's recollections of any discussions with Mr. Lambrix concerning his potential testimony were meager at best, see, e.g., R. 306, and Mr. Lambrix has sworn that there were virtually no such discussions, App. 1, and thus no basis for counsel to believe that Mr. Lambrix might commit perjury.

To the extent that this issue has any relevance whatsoever, a hearing is required to resolve the disputed facts, including 1) what Mr. Lambrix actually told counsel about the offense; 2) the reason or reasons for counsel's threat to withdraw if Mr. Lambrix testified; and 3) if counsel's threat had anything to do with potential perjury, counsel's reasons for thinking the testimony might be false and the extent of counsel's investigation to determine the likelihood that the testimony was or might be false. Even if all of the ambiguities in the record are read in the State's favor, at most counsel were threatening to withdraw because of an unsupported belief that their client might testify falsely. Such a belief is clearly an insufficient basis to deprive a criminal defendant of his fundamental right to testify.

This case is thus entirely different from Nix v. Whiteside,

475 U.S. 157 (1986), cited by the State. In Whiteside, the defendant consistently told counsel that he had not seen a gun in the victim's hand. After it was explained to Whiteside that he had no case of self-defense unless the victim had a gun, Whiteside told counsel that he had seen something "metallic" in the victim's hand, explaining the discrepancy by saying, "If I don't say I saw a gun, I'm dead." Id. at 160-61. The question presented to the Court was whether counsel had acted reasonably in their response "to a criminal defendant who informs counsel that he will perjure himself on the stand." Id. at 166 (emphasis added). Given that the defendant had told counsel his testimony would be false, there was no violation of the right to counsel or the right to testify, particularly since Whiteside actually testified to his original version of the events.

Here, in contrast, none of counsel's statements can be seen as reflecting an admission by Mr. Lambrix that he intended to testify falsely. This case is therefore similar to United States v. Scott, 909 F.2d 488 (11th Cir. 1990), and completely different from Whiteside. In Scott, counsel moved to withdraw for unspecified ethical reasons. The district court gave Scott a choice between representing himself and testifying or having counsel and letting counsel decide whether or not he would testify. The court of appeals found as follows:

> This court simply cannot determine from the record what the problem between counsel and his client was. What this court can determine from the record is that Scott had absolutely no desire to proceed without counsel.... To advise Scott that he could be precluded from testifying, without confirmation that Scott intended

> to commit perjury, or could proceed pro se impermissibly forced Scott to choose between two constitutionally protected rights.

Id. at 493 (footnotes omitted). Here, counsel's threat to withdraw had exactly the same effect. Accordingly, here as in Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992) (en banc), the performance of trial counsel "was clearly deficient."

The State argues at some length that Mr. Lambrix has failed to show that he wished to testify at his retrial. This completely ignores the fact that Mr. Lambrix has sworn that he wished to do so. App. 1. Mr. Lambrix's sworn allegations themselves require that a hearing be held on this issue. See Merritt v. State, 642 So. 2d 845 (Fla. 4th DCA 1994) (collecting cases). Mr. Lambrix has also alleged that trial counsel Kinley Engvalson would testify to the same effect, an allegation that in context clearly refers to both trials, contrary to the State's contention.[2]

The State's argument is thus without any factual basis. Legally, the State's argument is also meritless. Mr. Lambrix was not required to continually reassert his desire to testify. See Orazio v. Dugger, 876 F.2d 1508, 1512 (11th Cir. 1989) (defendant

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[2]The State also asserts that counsel has blatantly misrepresented the facts by stating that the Eleventh Circuit ruled on the claim "as originally advanced by CCR." That statement in no way misrepresented the facts. The claim as exhausted by CCR, presented to the district court and ruled on by the Eleventh Circuit, was a legal claim of violation of the right to testify, with no factual support. The facts alleged here concerning counsel's interaction with Mr. Lambrix were not exhausted by CCR and therefore not presented in federal court. Mr. Lambrix sought to have the Eleventh Circuit hold proceedings in abeyance until the current proceedings were resolved, precisely so that the claims presented here could be exhausted and only then, if necessary, ruled on by the Eleventh Circuit.

not required to reassert desire to represent himself). A waiver of the right to testify, once the right has been asserted, cannot be inferred from a silent record. To the contrary, it must be presumed that Mr. Lambrix did not voluntarily waive his right to testify at the retrial. The right to testify is clearly a fundamental right. Rock v. Arkansas, 483 U.S. 44, 52 (1987). In order to establish waiver of a fundamental constitutional right, the State must prove "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Since Zerbst, the Court has consistently held that for there to be a valid waiver of a fundamental constitutional right, the record must clearly reflect a voluntary and knowing waiver. Carnley v. Cochran, 369 U.S. 506, 516 (1962) ("Presuming waiver from a silent record is impermissible."); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (same with respect to voluntariness of guilty plea); Brewer v. Williams, 430 U.S. 387, 404 (1977) (State has burden of establishing waiver).

The record establishes that Mr. Lambrix expressed his desire to testify at the first trial, but that he was coerced into giving up that right by counsel's threat to withdraw coupled with the court's admonishment that if counsel withdrew, "the trial is not going to stop. The trial is going right on. If you want to go without a lawyer, that is your choice." Answer Brief, App. A, at T. 7. The record is silent as to what took place at the second trial. If any presumption is to be applied, Zerbst and its progeny require that this Court presume that Mr. Lambrix continued to wish

to testify, and that he continued to be coerced by counsel's threat to withdraw.

Finally, the State argues that counsel were not required to protect Mr. Lambrix's right to testify prior to the United States Supreme Court's decision in Rock v. Arkansas, 483 U.S. 44 (1987). This ignores the fact, which is apparent from Rock itself, that that decision was clearly dictated by well established precedent. It has long been recognized that due process requires that a defendant be given "an opportunity to be heard in his defense." In re Oliver, 333 U.S. 257, 273 (1948). In Ferguson v. Georgia, 365 U.S. 570 (1961), the Court held that the "right to be heard" cannot be limited to an unsworn statement, thus effectively recognizing the right to testify. See Rock, 483 U.S. at 49-51 and n.8. Accordingly, in Harris v. New York, 401 U.S. 222 (1971), the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. at 225. Again, in Jones v. Barnes, 463 U.S. 745 (1983), the Court held that it is the defendant who has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... testify in his or her own behalf." Id. at 751. And in Faretta v. California, 422 U.S. 806 (1975), the Court wrote that "[i]t is now accepted ... that an accused has a right ... to testify on his own behalf." Id. at 819 n.15. Given these consistent pronouncements by the Court over a period of more than twenty years, culminating in Jones less than a year before Mr. Lambrix's trials, no reasonable attorney at the time of the trials could have thought

that he or she could force a defendant to choose between the right to counsel and the right to testify.[3]

It is clear that counsel's performance in threatening to withdraw if Mr. Lambrix took the stand was deficient. Nichols v. Butler, 953 F.2d at 1553. It is also clear that Mr. Lambrix was prejudiced by counsel's deficient performance. A defendant's testimony will often be decisive of the outcome of a case. In the instant case, Mr. Lambrix's testimony would have directly challenged the State's case and established a reasonable hypothesis of innocence, precluding a finding that he was guilty of premeditated murder. Mr. Lambrix is innocent, and it is because of counsel's constitutionally ineffective assistance that he was unable to tell the jury that he was innocent. This Court should grant Mr. Lambrix a new trial or at least remand for a full evidentiary hearing.

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[3]This conclusion is buttressed by reference to the American Bar Association's Standards for Criminal Justice, which the Supreme Court noted in Strickland v. Washington, 466 U.S. 668, 688 (1984), can serve as a guide to determining what is reasonable representation. The 1980 edition of the Standards lists three decisions as being "ultimately for the accused," after consultation with counsel, including "whether to testify in his or her own behalf." 1 Standards for Criminal Justice Standard 4-5.2(a) (2d ed. 1980).

ARGUMENT IV

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

The state argues that this claim was rejected in the initial Rule 3.850 proceeding. The claim previously raised, however, related only to State witnesses Debra Hanzel, Preston Branch and John Chezem. Because of the violations of Mr. Lambrix's Faretta rights and his right to the effective assistance of post-conviction counsel, no such claim was previously raised with respect to Frances Smith and Deputy Ronald Council.

The State's primary contention is that the trial court and this Court were aware of all of the circumstances of the statements given by Frances Smith at the time of trial and direct appeal. However, as is quite clear from this Court's opinion on direct appeal, Lambrix v. State, 494 So. 2d 1143, 1147 (Fla. 1986), trial counsel actually attempted to impeach Ms. Smith only with a single statement made in connection with her arrest on the aiding and abetting charge. Counsel never apprised the trial court or this Court of the additional statements made as part of a missing person investigation. Those statements would not have opened the door to bring out Mr. Lambrix's status as an escapee.

Even if they had, however, it was still unreasonable not to pursue impeachment of the State's crucial witness. The State argues that jurors did not already know of Mr. Lambrix's status, based on the record of voir dire, and that even if they did it would have been more damaging to permit testimony concerning the

issue. Obviously, however, counsel could not ask during voir dire whether the jurors knew of Mr. Lambrix's status. Nevertheless, many jurors had read newspapers and had other sources of information concerning his status. See Initial Brief, at 47. The bare fact -- almost certainly known to jurors -- that he was an "escaped prisoner" was undoubtedly highly prejudicial. Reasonable counsel would have wanted the jury to know that Mr. Lambrix had actually walked away from work release on a bounced check, and certainly would not have cut short impeachment of the State's key witness on that basis.

With respect to prejudice, the State again relies on the testimony of Debra Hanzel to corroborate Frances Smith. However, as set forth above, Hanzel's testimony that Mr. Lambrix had admitted the murders was contradicted by the testimony of State witness Preston Branch, and was impeached and impeachable in other significant respects. Hanzel's testimony failed to provide credible collaboration for Frances Smith. It is thus highly likely that effective impeachment of Smith would have precluded a conviction of first degree murder.

ARGUMENT VI

INEFFECTIVE ASSISTANCE DURING JURY SELECTION

The State argues that counsel's failure to challenge jury foreman Snyder was reasonable because Snyder said he thought he could keep an open mind, despite having admitted a bias in favor of the police. All that is required to challenge a juror, however, is a reasonable doubt about the juror's ability to render an impartial

verdict. Turner v. State, 645 So. 2d 444, 447 (Fla. 1994). Where such a doubt is raised by a juror's initial statements, "equivocal answers" like Snyder's fail to remove the reasonable doubt. Jones v. State, 652 So.2d 967, 969 (Fla. 5th DCA 1995).

With respect to juror Winburn, the State relies on the fact that Winburn minimized his relationship to Deputy Green during voir dire. The fact remains that Winburn was the stepfather of a police officer who processed the crime scene and was under investigation for an alleged assault on Mr. Lambrix. Counsel never brought the latter fact to the court's attention and never explored it during voir dire. Counsel's performance was clearly deficient, and just as clearly Mr. Lambrix was prejudiced by the failure to secure a fair and impartial jury.

CONCLUSION

For all of the foregoing reasons, Mr. Lambrix respectfully requests that he be granted a new trial, 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 Reply 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 21st day of May, 1996.

Attorney