IN THE SUPREME COURT OF FLORIDA

JACK LEON DEMARIA,	:	
Petitioner,	:	
vs.	:	Case No. 97,120
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

RICHARD P. ALBERTINE, JR.
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 365610

Public Defender's Office
Polk County Courthouse
P.O. Box 9000-PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

Undersigned counsel certifies the size and style of type used in this brief is Courier 12 point, a font that is not spaced proportionally.

PRELIMINARY STATEMENT

Petitioner, JACK LEON DEMARIA, the prisoner whose Fla. R. Crim. P. 3.800(a) motion had been denied in part by the trial court, will be referred to by name or as the petitioner, the defendant, or the prisoner herein this initial brief on the merits. Respondent, THE STATE OF FLORIDA, the prosecuting authority in the trial court, will be referred to as the respondent or the state. The symbol "R" designates the original record on appeal and includes the transcript of the hearing on Mr. DeMaria's Fla. R. Crim. P. 3.800(a) motion as part thereof. The symbol "V" designates the volume of the record on appeal together with the number identifying the particular volume such that citation to the record on appeal will refer to the volume number and record page number, i.e., (V_, R__).

STATEMENT OF THE CASE AND FACTS

The State Attorney for the Tenth Judicial Circuit, Polk County, on May 19, 1994, filed an information, in case number CF94-02221A1-XX, charging Jack Leon DeMaria, with one count of armed burglary, in violation of § 810.02(2)(b), Fla. Stat. (1993), and one count of grand theft, in violation of § 812.014(2)(c), Fla.

Stat. (1993), alleged to have occurred in Polk County, Florida, between June 12 and June 13, 1993. (V1, R01-03). Circuit Court Judge Joe R. Young, Jr., on August 19, 1994, in case number CF94-02221A1-XX, pursuant to negotiated plea agreement and plea of nolo contendere to lesser included charge of second degree burglary and grand theft, sentenced DeMaria to ten years in Florida state prison on each count to be served concurrently plus $17,035.00 in restitution. (V1, R05-10, 12-14). Circuit Court Judge Cecelia M. Moore, on May 20, 1997, in case number CF94-02221A1-XX, rendered an order denying DeMaria's motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850, as time-barred, while granting a portion of the same motion for postconviction relief, treated as a Fla. R. Crim. P. 3.800(a) motion to correct illegal sentence, and corrected the illegal ten year sentence initially imposed for the third degree grand theft adjudication of guilt to read five years incarceration. (V1, R37-38). Circuit Court Judge Robert A. Young, on April 29, 1999, in case number CF94-02221A1-XX, rendered a written order granting in part, denying in part, DeMaria's motion to correct illegal sentence. (V1, R127-39).

Mr. DeMaria timely requested that his court-appointed collateral counsel, Mario J. Cabrera, file a notice of appeal, in case number CF94-02221A1-XX, as to Judge Young's order granting in part, denying in part, DeMaria's motion to correct illegal sentence rendered on April 29, 1999. Mr. DeMaria's court-appointed collateral counsel, however, failed to do so, instead filing an untimely notice of appeal on June 3, 1999, in case number CF94-

02221A1-XX, more than thirty days after the order, sought to be appealed, had been rendered. (V1, R140). On or about September 28, 1999, Mr. DeMaria filed a motion & affidavit for leave to apply for belated appellate review which the Second District Court of Appeal denied, dismissing his appeal and certifying the question of great public importance which is the subject of this discretionary review. See Appendix-3, DeMaria v. State, No. 99-02314 (Fla. 2d DCA Oct. 27, 1999). On or about November 2, 1999, Mr. DeMaria filed a motion for rehearing or clarification to correct a scrivener's error apparent on the face to the opinion which incorrectly named Mario J. Cabrera as counsel for appellant rather than James Marion Moorman, the Public Defender for the Tenth Judicial Circuit, who had been appointed for purpose of DeMaria's appeal, and undersigned counsel, who was assigned responsibility therefor. Thereafter, on November 24, 1999, notice to invoke discretionary jurisdiction of this Court as to the question certified to be of great public importance was filed in the Second District Court of Appeal.

On January 5, 2000, in DeMaria v. State, No. 99-02314 (Fla. 2d DCA Jan. 5, 2000), the Second District Court of Appeal granted the pending motion for rehearing or clarification and, but for correcting the scrivener's error regarding counsel for appellant, rendered an identical order, i.e., decision, which denied DeMaria's motion & affidavit for leave to apply for belated appellate review (herein after referred to as sworn motion for leave to file belated appeal), dismissed his appeal and certified the question of great

public importance which is the subject of this discretionary review. See Appendix-1, DeMaria v. State, No. 99-02314 (Fla. 2d DCA Jan. 5, 2000); Appendix-2, order granting DeMaria's motion for rehearing or clarification, withdrawing Oct. 27, 1999 opinion, and substituting Jan. 5, 2000 opinion in lieu thereof.

This Court appears to have held in abeyance the notice to invoke discretionary review filed on November 24, 1999, referred above, until the pending motion for rehearing or clarification was disposed of by the Second District Court of Appeal's January 5, 2000 decision which superseded the court's earlier October 27, 1999 decision now withdrawn. On January 19, 2000, this Court issued an order postponing its decision on jurisdiction. In an abundance of caution, an amended notice to invoke discretionary jurisdiction was filed on February 4, 2000 in the Second District Court of Appeal to include the decision rendered in Mr. DeMaria's case on January 5, 2000, DeMaria v. State, No. 99-02314 (Fla. 2d DCA Jan. 5, 2000), which superseded the withdraw decision, DeMaria v. State, No. 99-02314 (Fla. 2d DCA Oct. 27, 1999).

SUMMARY OF THE ARGUMENT

The holding in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), when considered in light of the Supreme Court of Florida's pronouncement in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999), does not foreclose provision of a belated appeal from the denial of a postconviction motion when the notice of appeal was not timely filed due to the ineffectiveness of counsel in the collateral proceeding. The Florida Supreme Court's due process rationale pronounced in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999) supports, rather than forecloses, the provision of a belated appeal from the denial of a postconviction motion where the notice of appeal had not been timely filed due to ineffectiveness of collateral counsel.

Thus, based on similar due process concerns and, further, relying on State v. Trowell, 739 So. 2d 77 (Fla. 1999) to establish ineffective assistance of counsel, Mr. DeMaria continues to assert that his sworn motion for leave to file belated appeal should have been granted after the trial court had denied in part his postconviction motion for relief and that he should be permitted to go forward with his appeal of the trial court's order thereof.

ARGUMENT

ISSUE I

DOES THE HOLDING IN LAMBRIX V. STATE, 698 SO. 2D 247 (FLA. 1996), WHEN CONSIDERED IN LIGHT OF THE SUPREME COURT OF FLORIDA'S PRONOUNCEMENT IN STEELE V. KEHOE, 24 FLA. L. WEEKLY S237 (FLA. MAY 27, 1999), FORECLOSE THE PROVISION OF A BELATED APPEAL FROM THE DENIAL OF A POSTCONVICTION MOTION WHEN THE NOTICE OF APPEAL WAS NOT TIMELY FILED DUE TO THE INEFFECTIVE OF COUNSEL IN THE COLLATERAL PROCEEDING?

No, the holding in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), when considered in light of the Supreme Court of Florida's pronouncement in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999), does not foreclose the provision of a belated appeal from the denial of a postconviction motion when the notice of appeal was not timely filed due to the ineffectiveness of counsel in the collateral proceeding. The Florida Supreme Court's due process rationale pronounced in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999) supports, rather than forecloses, the provision of a belated appeal from the denial of a postconviction motion where the notice of appeal had not been timely filed due to ineffectiveness of collateral counsel. Thus, based on similar due process concerns, Mr. DeMaria, relying on State v. Trowell, 739 So. 2d 77 (Fla. 1999) to establish ineffective assistance of counsel, asserts that his sworn motion for leave to file belated appeal should have been granted after the trial court denied in part his postconviction motion and his court-appointed collateral counsel failed to file a timely notice of appeal thereof as requested.

The Second District Court of Appeal, in DeMaria v. State, No. 99-02314 (Fla. 2d DCA Jan. 5, 2000), considered the issue of

whether DeMaria should be afforded relief in the form of a belated appeal based on his collateral counsel's failure to file a notice of appeal from the denial of a postconviction motion as timely requested and, based on Diaz v. State, 724 So. 2d 595, 596 (Fla. 2d DCA 1998) and Lambrix v. State, 698 So. 2d 247 (Fla. 1996), decided the issue in the negative, denying DeMaria's sworn motion for leave to file belated appeal and dismissing his appeal:

> In Diaz v. State, 724 So. 2d 595, 596 (Fla. 2d DCA 1998), this court held that the Supreme Court of Florida's decision in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), mandated that a defendant be afforded no relief in the form of a belated appeal based on counsel's failure to file a notice of appeal from the denial of a postconviction motion upon timely request by a defendant. We accordingly are required, under Lambrix and Diaz, to deny Demaria's motion for leave to file a belated appeal and to dismiss his appeal as having been untimely filed.
>
> In reaching this result, we recognize that, in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999), the supreme court held that when a convicted defendant alleges that his or her counsel agreed to file a postconviction motion on the defendant's behalf in the trial court, pursuant to Florida Rule of Criminal Procedure 3.850, but failed to do so in a timely manner, it is appropriate to order a hearing to determine whether a belated postconviction motion should be permitted. See 24 Fla. L. Weekly at S238. If the defendant prevails at the hearing, he or she is entitled to belatedly file a rule 3.850 motion. See id. The supreme court in Steele further modified rule 3.850(b) to expressly provide an exception to the two-year filing requirement for a rule 3.850 motion if the defendant alleges that he or she retained counsel to timely file such a motion and counsel, through neglect, failed to do so. See id. at S238-39.
>
> Although the supreme court in Steele did not address the issue of whether an appellant can maintain a belated appeal under either rule 3.850 or rule 3.800 due to counsel's neglect, [FN1] we have doubt about the continued vitality of Lambrix and Diaz, in light of Steele. If a defendant potentially can file a belated rule 3.850 motion in the trial court due to counsel's neglect, it should follow that the defendant can file a belated appeal of the trial court's denial of a rule 3.850 or rule 3.800 motion due to counsel's neglect.

> That, however, is precisely what Lambrix and Diaz preclude. We are accordingly constrained to dismiss this appeal as untimely filed based on those authorities.

DeMaria v. State, No. 99-02314 at slp op. 1-2 (footnote 1 omitted); see Lambrix v. State, 698 So. 2d 247 (Fla. 1996), wherein the Florida Supreme Court, in pertinent part, held:

> We do not need to reach Lambrix's claim that he should have been allowed to represent himself in the prosecution of his motion for postconviction relief. In his appeal from the denial of that motion, Lambrix did not raise the issue of whether he should have been permitted to represent himself. Lambrix has waited six years to raise this issue, well beyond the two-year time limit imposed by rule 3.850. In the meantime, Lambrix has had a number of opportunities to represent himself, including two pro se proceedings considered on their merits by this Court. See Lambrix, 529 So. 2d at 1110; Lambrix, 559 So. 2d at 1137. Furthermore, Lambrix has failed to establish that there are issues he would have raised while representing himself in his first 3.850 proceeding that have not already been raised in subsequent proceedings.
>
> Lambrix also argues that his collateral counsel's failure to appeal the trial court's denial of his request to represent himself constituted ineffective assistance of counsel. However, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989); Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). In any event, in a previous pro se petition, Lambrix raised a claim of ineffective assistance of collateral counsel which was denied. Lambrix, 559 So.2d at 1138. Successive claims of ineffective assistance of counsel on different grounds are not permitted. Aldridge v. State, 503 So. 2d 1257 (Fla. 1987).

Lambrix v. State, 698 So. 2d at 248 (citing Lambrix v. State, 559 So. 2d 1137 (Fla. 1990) and Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988). See also Diaz v. State, 724 So. 2d 595 (Fla. 2d DCA 1998), wherein the court held:

> In this petition for a belated appeal filed pursuant to Florida Rule of Appellate Procedure 9.140(j), Alfredo Heredia Diaz complains that appointed counsel failed to

> file a notice of appeal, upon Diaz's timely request, from an adverse decision of the trial court on a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Until recently Florida courts have granted relief in such circumstances upon a proper evidentiary basis. See e.g., Jones v. State, 642 So. 2d 121 (Fla. 5th DCA 1994); McLeod v. State, 586 So. 2d 1351 (Fla. 5th DCA 1991). Our supreme court, however, recently stated that such relief was inappropriate in the postconviction setting. See Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), cert. denied, --- U.S. ----, 118 S. Ct. 1064, 140 L. Ed. 2d 125 (1998). This decision has been criticized by the majority of a divided panel of the Fifth District. See Steele v. Kehoe, 724 So. 2d 1192, 23 Fla. L. Weekly D771 (Fla. 5th DCA 1998).
>
> Lambrix apparently mandates that counsel's purported failure to file a notice of appeal upon timely request by Diaz from the denial of a postconviction motion affords Diaz no relief in the form of a belated appeal. Accordingly, we deny the petition. The court in Lambrix foreclosed inquiry into the effectiveness of appellate counsel employed in a collateral proceeding for failing to brief a specific issue, whereas Diaz here hopes to resuscitate an appeal which he asserts was lost due to the negligence of trial counsel.

Diaz v. State, 724 So. 2d at 596. In Mr. DeMaria's case, the Second District Court of Appeal, denied DeMaria's sworn motion for leave to file belated appeal and dismissed his appeal, following the precedent in Lambrix v. State, 698 So. 2d 247 (Fla. 1996) and Diaz v. State, 724 So. 2d 595, 596 (Fla. 2d DCA 1998) to hold that DeMaria could not be afforded relief in the form of a belated appeal based on his collateral counsel's failure to file a notice of appeal from the denial of a postconviction motion although timely requested by DeMaria. The Second District Court of Appeal, nevertheless, recognized that the due process rationale announced by this Court in Steele v. Kehoe, No. 92,950, slp op. 1-4 (Fla. May 27, 1999) appeared to undercut the vitality of Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996) and Diaz v. State, 724 So. 2d 595,

596 (Fla. 2d DCA 1998) to the extent that these cases mandated that a prisoner, such as DeMaria, could be afforded no relief in the form of belated appeal based on ineffectiveness of collateral counsel, i.e., collateral counsel's failure to file a notice of appeal from the denial of a postconviction motion although timely requested. See DeMaria v. State, No. 99-02314 at slp op. 2.

In Steele v. Kehoe, No. 92,950 (Fla. May 27, 1999), this Court, appeared to be persuaded by the Fifth District Court of Appeal's due process concerns, and held:

> The district court also noted that Steele could not pursue a claim of ineffective assistance of postconviction counsel because he had no constitutional right to postconviction counsel. See Lambrix v. State, 698 So. 2d 247 (Fla. 1996). The district court, however, believed that Steele should not be precluded from seeking some form of relief. It considered what possible remedies are available under due process to a prisoner who has relied on his or her attorney to pursue postconviction relief and the attorney failed to timely file a motion for relief within the two-year period. With respect to this issue, the district court found that "[i]f a prisoner is denied the opportunity to challenge his conviction under an appropriate rule only because of the negligence of his attorney, then due process requires a belated filing procedure similar to that allowed in belated appeals." Steele, 724 So. 2d at 1194. The district court noted that the issue in such a proceeding would be whether the attorney was retained to file a postconviction motion, but failed to do so in a timely manner. The district court held that, if counsel is determined to have failed to timely file the postconviction motion, then our procedure should permit the defendant to belatedly file the motion.
>
> In a concurring opinion, Judge Sharp suggested that Steele was entitled under due process to seek the remedy afforded by the majority by petitioning for a writ of habeas corpus. Judge Sharp noted that the use of habeas corpus under the circumstances appeared to be authorized under rule 3.850(h). Judge Sharp also noted that habeas corpus is similarly available to pursue belated appeals.
>
> ....
>
> BELATED MOTION FOR POSTCONVICTION RELIEF
>
> We now address the issue regarding the right to

> belatedly file a motion for postconviction relief. In this Court's decision in State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964), we made clear that "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." For example, although a prisoner has no Sixth Amendment right to postconviction counsel, in Weeks and Graham v. State, 372 So. 2d 1363 (Fla. 1979), we held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed.
>
> We agree with the district court below that due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner. We hold that, if the prisoner prevails at the hearing, he or she is authorized to belatedly file a rule 3.850 motion challenging his or her conviction or sentence. We also agree with Judge Sharp's concurring opinion that the prisoner's claim under these specific circumstances should be presented to the court in a petition for writ of habeas corpus, which would not be barred under rule 3.850(h) because it would come within the final clause thereof. See Ward v. Dugger, 508 So. 2d 778, 779 (Fla. 1st DCA 1987)(construing a prisoner's letter to the district court as a habeas petition and finding that the prisoner "might be entitled to file a belated motion for postconviction relief if the actions of her attorney had frustrated her intention to file such a motion in a timely fashion").
>
> For the reasons expressed, we answer the rephrased certified questions in the affirmative, approve the decision below, and disapprove Martin v. Pafford, 583 So. 2d 736 (Fla. 1st DCA 1991). Steele is entitled to petition the circuit court for a writ of habeas corpus. Upon receiving the petition, the court will conduct a hearing on whether Kehoe undertook to file a rule 3.850 motion on Steele's behalf, but failed to timely file the motion. If Steele prevails at the hearing, he will have the right to belatedly file a rule 3.850 motion.

Steele v. Kehoe, No. 92,950 at slp op. 1-4; see also Steele v. Kehoe, 724 So. 2d 1192 (Fla. 5th DCA 1998). Plainly, in light of the due process rationale expressed by this Court in Steele v. Kehoe, No. 92,950, slp op. 1-4 (Fla. May 27, 1999), which echoed

similar due process concerns articulated by the Fifth District Court of Appeal, in Steele v. Kehoe, 724 So. 2d 1192, 1194-97 (Fla. 5th DCA 1998), the holding in Lambrix v. State, 698 So. 2d 247 (Fla. 1996) does not foreclose provision of a belated appeal from the denial of a postconviction motion when the notice of appeal had not been timely filed, although timely requested, due to the ineffectiveness of counsel in the collateral proceeding.

Accordingly, DeMaria should not be precluded from appealing the trial court's denial in part of his Fla. R. Crim. P. 3.800(a) motion because of his collateral counsel's failure to timely file a notice of appeal as requested. The remedy available under due process to Mr. DeMaria who had relied on his collateral counsel to timely file a notice of appeal as requested to appeal the trial court's denial in part of his postconviction motion was to file a sworn petition for belated appeal, pursuant to Fla. R. App. P. 9.140(j), which DeMaria did. If a convicted prisoner, such as Mr. DeMaria, is denied the opportunity to appeal the trial court's denial of his postconviction challenge to his conviction or sentence under an appropriate rule only because of the negligence of his collateral counsel, then due process would seem to require a belated filing procedure similar to that allowed in belated appeals. The issue in such a proceeding, contrary to the Second District Court of Appeal's holding in Mr. DeMaria's case, was whether the collateral counsel appointed to represent DeMaria at his hearing on his postconviction motion had a duty, once appointed, to provide effective assistance of counsel and whether

the attorney failed to do so by not timely filing a notice of appeal as timely requested after the trial court had denied in part DeMaria's postconviction motion. See Jones v. State, 642 So. 2d 121 (Fla. 5th DCA 1994), wherein the court held:

> If counsel is appointed to assist a prisoner in a postconviction proceeding, the prisoner is entitled to effective assistance. See Madden v. State, 535 So. 2d 636 (Fla. 5th DCA 1988).

Jones v. State, 642 So. 2d at 122. As shown in his sworn motion for leave to file belated appeal and as found by the Second District Court of Appeal, in DeMaria v. State, No. 99-02314 at slp op. 1, DeMaria's collateral counsel, although requested, failed to timely file the notice of appeal of the trial court's order denying in part DeMaria's postconviction motion. Thus, Mr. DeMaria's sworn motion for leave to file belated appeal should have been granted since his sworn motion alleged the requisite facts which should have entitled him to file a belated appeal. An "appellate court should grant a petition seeking a belated appeal if the defendant alleges that a timely request of counsel to file the notice of appeal was made and that counsel failed to do so." State v. Trowell, 739 So. 2d 77, 81 (Fla. 1999).

As this Court noted, Judge Sharp in his concurring opinion, Steele v. Kehoe, 724 So. 2d at 1196-97, suggested that the prisoner in that case was entitled under due process to seek the remedy afforded by the majority by petitioning for a writ of habeas corpus. See Steele v. Kehoe, No. 92,950 at slp op. 2. Judge Sharp also noted that the use of habeas corpus under the circumstances appeared to be authorized under rule 3.850(h) and that habeas

corpus was similarly available to pursue belated appeals. Id. Similarly, Mr. DeMaria should have been entitled under due process to seek the remedy of filing a petition for belated appeal, pursuant to Fla. R. App. P. 9.140(j), afforded to those whose counsel, whether court-appointed or privately retained, had failed, as requested, to file a timely notice of appeal, after the trial court had denied in part his postconviction motion which he did. See State v. Trowell, 739 So. 2d 77, 81 (Fla. 1999). Thus, the Second District Court of Appeal, by relying on Lambrix v. State, 698 So. 2d 247 (Fla. 1996) and Diaz v. State, 724 So. 2d 595, 596 (Fla. 2d DCA 1998) to the extent that these cases mandated that DeMaria could be afforded no relief in the form of a belated appeal based on his counsel's failure to file a timely notice of appeal as timely requested from the denial of his postconviction motion, erroneously denied DeMaria's sworn motion for leave to file belated appeal, a circumstance that the Second District Court Appeal appeared to recognize given the court's expressed doubt concerning the continued vitality of Lambrix and Diaz, in light of Steele and the question certified to this Court for discretionary review. See DeMaria v. State, No. 99-02314 at slp op. 2.

This Court's decision in State v. Weeks, 166 So. 2d 892 (Fla. 1964) made clear that postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States:"

> The sum of the authorities is that post-conviction remedies of the type under consideration are civil in nature and do not constitute steps in a criminal prosecution within the contemplation of the Sixth

> Amendment, supra. They do not require the application of the standard of absolutism announced by that amendment. Such remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States. This means that in these collateral proceedings there is no absolute right to assistance of a lawyer. Nevertheless, Fifth Amendment due process would require such assistance if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need.

State v. Weeks, 166 So. 2d at 896. See Brevard County Board of County Comm'rs v. Moxley, 526 So. 2d 1023 (Fla. 5th DCA 1988), wherein the court observed:

> It is important to note that in Weeks the due process requirements were considered pursuant not only to the fifth amendment of the United States Constitution, but on the basis of section 12, Declaration of Rights, Florida Constitution (1885). This due process provision has been retained in Article I, section 9, of the current Florida Constitution as revised in 1968.

Brevard County Board of County Comm'rs v. Moxley, 526 So. 2d at 1026. See also Graham v. State, 372 So. 2d 1363 (Fla. 1979), wherein this Court held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed. Arguably, Mr. DeMaria had met that due process requirement inasmuch as the trial court had appointed collateral counsel to assist him with the hearing on his Fla. R. Crim. P. 3.800(a) postconviction motion. If, as this Court held in Steele v. Kehoe, No. 92,950, slp op. 1-4., due process entitled a prisoner to a hearing on a claim that he missed the deadline to file a notice a rule 3.850 motion because his attorney had agreed to file the motion but failed to do

so in a timely manner, then, likewise, due process should entitle a prisoner, such as Mr. DeMaria, to file a sworn motion for leave to file belated appeal, pursuant to Fla. R. App. P. 9.140(j), based on sworn allegations that his court-appointed collateral counsel, although timely requested, had failed to file a timely notice of appeal as occurred in DeMaria's case after the trial court had denied in part his Fla. R. Crim. P. 3.800(a) postconviction motion. This Court, in Steele v. Kehoe, No. 92,950 at slp op. 1-4, held that if the prisoner prevailed at a hearing on his claim that his counsel had failed to timely file his postconviction claim as requested, then he was authorized to belatedly file a rule 3.850 motion challenging his conviction or sentence. Similarly, this Court should hold that a prisoner, such as Mr. DeMaria, should be entitled to a belated appeal, under the provisions of Fla. R. App. P. 9.140(j), if, pursuant to State v. Trowell, 739 So. 2d 77, 81 (Fla. 1999), the prisoner has alleged, as DeMaria did, in a sworn motion for leave to file belated appeal, that a timely request of collateral counsel to file the notice of appeal had been made and that collateral counsel had failed to do so.

Furthermore, in Mr. DeMaria's case, the Second District Court of Appeal arguably misplaced its reliance on Lambrix v. State, 698 So. 2d 247 (Fla. 1996), a factually distinguishable case involving a claim that postconviction counsel had been ineffective in not appealing the trial judge's denial of the prisoner's request to represent himself in his original motion for postconviction relief wherein this Court held that claims of ineffective assistance of

postconviction counsel did not present a valid basis for relief. Unlike DeMaria's case, the facts in Lambrix v. State, 698 So. 2d 247 (Fla. 1996) did not involve a postconviction proceeding wherein collateral counsel had provided ineffective assistance of counsel by failing to timely file, although timely requested, a notice of appeal as to the trial court's order denying relief of the prisoner's postconviction motion thereby precluding direct appeal altogether but, instead, involved successive claims of ineffective assistance of collateral counsel in that the prisoner, Lambrix, had raised a claim of ineffective assistance of collateral counsel which previously had been denied. See Lambrix v. State, 559 So. 2d 1137, 1138 (Fla. 1990). As this Court correctly noted in Lambrix v. State, 698 So. 2d at 248, "[s]uccessive claims of ineffective assistance of counsel on different grounds are not permitted," citing Aldridge v. State, 503 So. 2d 1257 (Fla. 1987). Unlike DeMaria's case, the prisoner in Lambrix v. State, 698 So. 2d 247 (Fla. 1997) had opportunity to file appeal as to the trial court's denial of his motion for post-conviction relief, including at least one claim of ineffective assistance of collateral counsel. In contrast, DeMaria's collateral counsel, through his ineffective assistance of counsel, frustrated DeMaria's intention to appeal the trial court's order denying in part postconviction relief.

Moreover, as the Fifth District Court of Appeal, in Steele v. Kehoe, 724 So. 2d at 1194, noted, the Lambrix holding, since Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) was cited as authority, seemed to be based on the proposition that

because one was not entitled to appointed counsel in postconviction matters, he had no right to relief if counsel were in fact appointed for him or if he had obtained his own counsel and suffered a disadvantage because of his counsel's incompetence. This interpretation, which the Second District Court of Appeal appeared to embraced by virtue of its earlier holding in Diaz v. State, 724 So. 2d at 596, ignored the difference between the right to appointed counsel and the right to counsel. See DeMaria v. State, No. 99-02314 at slp op. 1. "Even if a defendant was not necessarily entitled to appointed counsel, still if one is appointed for him or if he is able to obtain his own, he should be able to rely on such counsel at least filing within the time period." Steele v. Kehoe, 724 So. 2d at 1194. Similarly, in Mr. DeMaria's case, even if DeMaria had not been entitled to court-appointed counsel under the Sixth Amendment, once counsel had been court-appointed to represent him in his collateral proceeding, DeMaria was entitled to effective assistance of counsel and should have been able to rely on his court-appointed collateral counsel to at least file a timely notice of appeal, having been timely requested to do so, after the trial court had denied in part DeMaria's postconviction motion. If a prisoner, such as DeMaria, is denied the opportunity to challenge his conviction or sentence under an appropriate rule only because of the negligence of his attorney who untimely files a notice of appeal to the trial court's order denying in part his postconviction motion, then due process requires a belated filing procedure similar to that allowed in

belated appeals. The sole issue, in a case such as Mr. DeMaria's, should be whether counsel was appointed for the purpose of representing the him at the hearing on his postconviction motion and whether that appointment included filing a timely notice of appeal after being timely requested to, which in DeMaria's case, the court-appointed collateral counsel failed to do. See Jones v. State, 642 So. 2d at 122. If so, then, DeMaria should have been permitted to file a sworn motion for leave to file a belated appeal, pursuant to Fla. R. App. P. 9.140(j), which should have been granted since DeMaria's sworn motion for leave to file belated appeal alleged that a timely request had been made of his collateral counsel to file the notice of appeal and that his collateral counsel had failed to do so. See DeMaria v. State, No. 99-02314 at slp op. 1-2, relying on State v. Trowell, 739 So. 2d at 81. Otherwise, Mr. DeMaria would be denied meaningful access to the judicial process, thereby, denying him due process.

As Judge Sharp, in Steele v. Kehoe, 724 So. 2d 1192 (Fla. 5th DCA 1998), noted in his special concurring opinion:

> [P]ost-conviction proceedings are governed by the more flexible standards of the due process guarantee of the constitution. See Weeks, 166 So. 2d at 895. For example, due process may require the appointment of counsel in post-conviction proceedings if the motion presents an apparently meritorious claim for relief and the hearing is potentially so complex as to suggest the need for counsel. Weeks.
>
> In the present case, Steele may not have had a Sixth Amendment right to counsel to pursue his post-conviction motions. Nonetheless, according to Steele, his counsel had agreed to file these proceedings and failed to do so within the applicable time limits. Thus, Steele's intent to file timely post-conviction proceedings was frustrated by the actions of his attorney. In these circumstances, Steele would appear entitled under due process to

petition for a writ of habeas corpus [FN1] to address this issue. See Ward v. Dugger, 508 So. 2d 778 (Fla. 1st DCA 1987).

....

Habeas corpus is now available for belated appeals and for relief based on allegations of ineffective assistance of counsel. See Fla. R. App. P. 9.140(j); State v. District Court of Appeal of Florida, First District, 569 So. 2d 439 (Fla. 1990) (rule 3.850 is intended to prohibit courts from entertaining habeas corpus petitions raising issues cognizable under the rule--claims of ineffective assistance of appellate counsel shall continue to be raised by petition for habeas corpus filed in the appellate court); McLeroy v. State, 704 So. 2d 151 (Fla. 5th DCA 1997) (to the extent that the defendant's petition for habeas corpus may be considered as a request for belated appeal, the defendant should file this petition with the appropriate district court of appeal); Leath v. State, 694 So. 2d 855 (Fla. 4th DCA 1997) (appellant's appeal from the denial of his 3.850 motion for belated appeal was treated as a petition seeking habeas corpus relief under rule 9.140(j)).

....

Lambrix v. State, 698 So. 2d 247 (Fla. 1996) is distinguishable and thus does not foreclose habeas corpus relief. In that case, Lambrix requested that he be allowed to represent himself in his initial motion for post-conviction relief. Apparently this request was denied. Lambrix appealed but did not raise this issue. Later, Lambrix sought permission to file a new original motion for post-conviction relief, claiming that he was deprived of his right to represent himself in the initial motion. The supreme court found that Lambrix's claims were procedurally barred. Unlike the present case, Lambrix had an opportunity to file a motion for post-conviction relief. In contrast, Steele's counsel frustrated his intention to file post-conviction relief proceedings.

Because habeas corpus relief is based on due process considerations, whether counsel is appointed or privately retained should not be an issue. Initially, belated appeals due to the actions of court-appointed attorneys were permitted on the basis that the defendants had been prejudiced by "state action." However, in State v. Meyer, 430 So. 2d 440 (Fla. 1983), the Florida Supreme Court held that the actions of a court-appointed attorney do not constitute state action. Nonetheless, this did not foreclose appellate review for a client whose attorney who had failed to file a notice of appeal because:

> A collateral attack raising the issue of ineffective assistance of counsel is open to the indigent and the non-indigent on the same terms.

> The ends of justice will be better served when all who seek justice may seek it by the same paths.

State v. Meyer, 430 So. 2d at 443. Thus whether counsel is appointed or retained does not matter--the only consideration is the due process rights of the defendant.

Steele v. Kehoe, 724 So. 2d at 1195-97 (footnote 1 omitted). Similarly, in Mr. DeMaria's case, he may not have had a Sixth Amendment right to counsel to pursue his postconviction motion. Nonetheless, according to DeMaria's sworn motion for leave to file belated appeal, his court-appointed collateral counsel had been timely requested to file a timely notice of appeal as to the trial court's order denying in part his Fla. R. Crim. P. 3.800(a) postconviction motion and failed to do so within the applicable time limits. See DeMaria v. State, No. 99-02314 at slp op. 1. Plainly, DeMaria's intent to appeal the trial court's order denying in part his postconviction motion was frustrated by the negligent actions of his collateral counsel. Under these circumstances, DeMaria would appear to be entitled under similar due process considerations to petition for belated appeal and have his sworn motion for leave to file belated appeal granted to address his collateral counsel's ineffective assistance of counsel. See Steele v. Kehoe, No. 92,950 at slp op. 1-4; State v. Trowell, 739 So. 2d at 81; Steele v. Kehoe, 724 So. 2d at 1195-97.

Accordingly, based on the above facts, arguments, and citations to legal authorities, this Court should answer the certified question in the negative, disapprove the decision below, and remand back to the lower appellate court for reconsideration of Mr. DeMaria's sworn motion for leave to file belated appeal.

CONCLUSION

Petitioner, JACK LEON DEMARIA, respectfully, urges this Court; to rule that the holding in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), when considered in light of the Supreme Court of Florida's pronouncement in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999), does not foreclose the provision of a belated appeal from the denial of a postconviction motion when the notice of appeal was not timely filed due to the ineffectiveness of counsel in the collateral proceeding; to disapprove the Second District Court of Appeal's decision in DeMaria v. State, No. 99-02314 (Fla. 2d DCA Jan. 5, 2000); and to remand back to the Second District Court of Appeal for reconsideration of Petitioner's Motion & Affidavit for Leave to Apply for Belated Appellate Review.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 434-4200

RICHARD P. ALBERTINE, JR.
Assistant Public Defender
Florida Bar Number 365610
P.O. Box 9000-PD
Bartow, FL 33831

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy of Petitioner's Initial Brief on the Merits with attached Appendix has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2001.

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 434-4200

RICHARD P. ALBERTINE, JR.
Assistant Public Defender
Florida Bar Number 365610
P.O. Box 9000-PD
Bartow, FL 33831

RPA/dlc