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

REPLY 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

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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.

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?

Petitioner, JACK LEON DEMARIA, continues to argue 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 ineffective of counsel in the collateral proceeding. In support thereof, Petitioner continues to rely on the facts, arguments, and citations to legal authorities presented in his initial brief on the merits.

Petitioner takes this opportunity, nevertheless, to briefly reply to the arguments presented in Respondent's answer brief on the merits. Replying only to the narrow question certified to this Court by the Second District Court of Appeal, Petitioner will not reply to any of the largely irrelevant strawman arguments set up

and knocked down by Respondent in Respondent's answer brief on the merits. The question before this Court in not whether the Due Process Clause of the United States Constitution guarantees that a collateral movant, such as Mr. DeMaria, has a constitutional right to effective assistance of counsel at the appellate stage of postconviction proceedings. The question before this Court is, rather, whether 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), forecloses 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. Petitioner, Jack Leon DeMaria, answers that question in the negative and urges this Court to exercise jurisdiction and do the same. When considering this narrow certified question, this Court is urged to rely on the facts, arguments, and citations to legal authorities presented in Petitioner's initial brief on the merits rather than Respondent's characterization of same which in some instances take arguments or citations to legal authorities presented in Petitioner's initial brief on the merits out of context, inadvertently no doubt, in order to fit the overly broad contours of Respondent's answer.

Contrary to Respondent's answer, this 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, reasserts 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.

While Mr. DeMaria may not have had a Sixth Amendment right to counsel to pursue his postconviction motion, nevertheless, the State of Florida undertook to provide him with court-appointed collateral counsel for that purpose. Accordingly, Mr. DeMaria, under similar due process considerations, as relied upon by this Court in Steele v. Kehoe, No. 92,950 at slp op. 1-4, should have been entitled 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 which denied him access to the appellate court for purpose of appealing the trial court's denial in part of his Fla. R. Crim. P. 3.800(a) motion. The facts are undisputed that DeMaria had timely requested his court-appointed collateral counsel 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 that the court-appointed collateral counsel had admittedly failed to do so within the applicable time limits. See DeMaria v. State, No. 99-02314, slp op. 1 (Fla. 2d DCA Jan. 5, 2000). While the Due Process Clause

of the United States Constitution may not guarantee that a collateral movant, such as Mr. DeMaria, has a right to effective assistance of counsel at the appellate stage of a postconviction proceeding, once the State of Florida, although not constitutionally required to do so, exercised its discretion and undertook to provide court-appointed collateral counsel, Mr. DeMaria had a right to the protections afforded by the Due Process Clause.[1] In Evitts v. Lucey, 469 U.S. 387 (1985), Justice Brennan, delivering the opinion of the Court, wrote:

> [A]lthough a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. See Goldberg v. Kelly, 397 U.S. 254, 262, 90 S. Ct. 1011, 1017, 25 L. Ed. 2d 287 (1970). Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. See Morrissey v. Brewer, 408 U.S. 471, 481-484, 92 S. Ct. 2593, 2600-02, 33 L. Ed. 2d 484 (1972). See also Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853, 29 L. Ed. 2d 534 (1971); Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971); Sherbert v. Verner, 374 U.S. 398, 404, 83 S. Ct. 1790, 1794, 10 L. Ed. 2d 965 (1963); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 165-166, 71 S. Ct. 624, 645- 46, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring). In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause.

Evitts v. Lucey, 469 U.S. at 401. Plainly, DeMaria's access to the appellate court as demonstrated by his intent to appeal the trial court's order denying in part his postconviction motion was

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[1]See ORDER GRANTING, IN PART, DENYING IN PART, DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE [3.800(a)], wherein the trial court acknowledged appointing collateral counsel to represent Mr. DeMaria in his postconviction proceeding. (V1, R127).

frustrated by the negligent actions of his court-appointed collateral counsel. When the State of Florida undertook to provide Mr. DeMaria with court-appointed collateral counsel for the purpose of pursuing his postconviction motion, the State of Florida did so knowing that such discretionary action on the part of the State was subject to Constitutional dictates, particularly, the protections provided by the Due Process Clause. Under this narrow circumstance whereby access to the courts, i.e., the appellate court, has been denied Mr. DeMaria due to the ineffective assistance of his court-appointed collateral counsel, contrary to Respondent's mistaken assertions, DeMaria, under similar due process concerns as this Court rightly recognized in Steele v. Kehoe, should have been entitled 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 77, 81 (Fla. 1999).[2]

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[2]Contrary to Respondent's mistaken assertion, this Court does not need to concern itself with the recent United Supreme Court decision, Roe v. Flores-Ortega, 2000 WL 201148 (U.S. No. 98-1441, Feb. 23, 2000), not because Mr. DeMaria is not entitled to effective assistance of counsel in perfecting his collateral appeal but, rather, because the facts of DeMaria's case are dissimilar to the issue considered in by the Court in Roe v. Flores-Ortega in that DeMaria timely requested that his court-appointed collateral counsel file a notice of appeal in his case which his court-appointed collateral counsel admittedly failed to do. See Roe v. Flores-Ortega, wherein the Court narrowly cast the issue in terms of whether counsel was deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other:

> We have long held that a lawyer who disregards specific instructions from the defendant to file a

Further, Respondent mistakenly answers that, because the Due Process Clause does not guarantee the right to counsel in taking a postconviction appeal, due process does not guarantee the effectiveness of counsel, engaged or appointed, for the purpose of perfecting or prosecuting a postconviction appeal. See Respondent's Answer Brief on the Merits, No. 97,120 at 10. In support of this mistaken assertion, Respondent answers that "[i]t would be illogical to hold that due process requires effective assistance of collateral counsel, appointed or retained, when due process does not guarantee collateral counsel for the taking of a postconviction appeal in the first instance." See Respondent's Answer Brief on the Merits, No. 97,120 at 10-11. Plainly, Respondent's misguided

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> notice of appeal acts in a manner that is professionally unreasonable. See Rodriguez v. United States, 395 U.S. 327, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969); cf. Peguero v. United States, 526 U.S. 23, 28, 119 S. Ct. 961, 143 L. Ed. 2d 18 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit"). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently. See Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (accused has ultimate authority to make fundamental decision whether to take an appeal). The question presented in this case lies between those poles: Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?

Roe v. Flores-Ortega, No. 98-1441 at slp op. 5.

assertion failed to consider this Court's pronouncement in Steele v. Kehoe wherein this Court held that postconviction remedies are subject to the more flexible standards of due process afforded by the Constitution's Fifth Amendment:

> 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.

Steele v. Kehoe, No. 92,950 at slp op. 3. Moreover, as the United States Supreme Court held in Evitts v. Lucey, 469 U.S. at 401, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." See also Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), wherein Justice Stevens, concurring in part and dissenting in part, wrote:

> Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821 (1985). Likewise, even if a State has no duty to authorize parole or probation, if it does exercise its discretion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process. Morrissey v. Brewer, 408 U.S. 471, 480-90, 92 S. Ct. 2593, 2599-605, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 781-82, 93 S.

> Ct. 1756, 1759-60, 36 L. Ed. 2d 656 (1973). Similarly, if a State establishes postconviction proceedings, these proceedings must comport with due process. [FN3]
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> > FN3. While it is true that the constitutional protections in state postconviction proceedings are less stringent than at trial or on direct review, e.g., Pennsylvania v. Finley, 481 U.S. 551, 555-57, 107 S. Ct. 1990, 1993-94, 95 L. Ed. 2d 539 (1987), we have never held or suggested that the Due Process Clause does not apply to these proceedings.
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> > Indeed, Finley itself asked whether the State's post-conviction proceedings comported with the "fundamental fairness mandated by the Due Process Clause." Id., at 557, 107 S. Ct. at 1994; see also Murray v. Giarratano, 492 U.S. 1, 8, 109 S. Ct. 2765, 2769, 106 L. Ed. 2d 1 (1989) (opinion of REHNQUIST, C.J.) (" '[T]he fundamental fairness mandated by the Due Process Clause does not require that the [S]tate supply a lawyer' " (quoting Finley, 481 U.S. at 557, 107 S.Ct. at 1994)). THE CHIEF JUSTICE, then, is simply wrong when he states that these cases "make clear that there is no continuum requiring varying levels of process at every ... phase of the criminal system," ante, at 1251; instead, these cases simply turned on what process is due. If there could be any question whether state postconviction proceedings are subject to due process protections, our unanimous opinion in Yates v. Aiken, 484 U.S. 211, 217-218, 108 S. Ct. 534, 538, 98 L. Ed. 2d 546 (1988), makes it clear that they are.

Ohio Adult Parole Authority v. Woodard, 523 U.S. at 292-93; and

Pennsylvania v. Finley, 481 U.S. 551 (1987), wherein Justice Brennan, in his dissent joined by Justice Marshal, wrote:

> But it has long been settled that even if a right to counsel is not required by the Federal Constitution, when a State affords this right it must ensure that it is not withdrawn in a manner inconsistent with equal protection and due process. See Evitts v. Lucey, 469 U.S. 387, 400, 105 S. Ct. 830, 838, 83 L. Ed. 2d 821 (1985); Ross v. Moffitt, supra; Johnson v. Avery, 393 U.S. 483, 488, 89 S. Ct. 747, 750, 21 L. Ed. 2d 718 (1969); Smith v. Bennett, 365 U.S. 708, 713, 81 S. Ct. 895, 898, 6 L. Ed. 2d 39 (1961).
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> " 'Due process' emphasizes fairness between the State and the individual dealing with the State." Ross v. Moffitt, supra, 417 U.S., at 609, 94 S. Ct., at 2443.

Pennsylvania v. Finley, 481 U.S. at 567. Finally, as the Fifth District Court of Appeal properly observed, "[e]ven 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 1192, 1194 (Fla. 5th DCA 1998). 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. Thus, when the State of Florida, although not constitutionally required to do so, undertook to provide the postconviction movant, Mr. DeMaria, with court-appointed collateral counsel for the purpose of pursuing his postconviction motion, the State of Florida did so knowing that such discretionary action was subject to Constitutional dictates, particularly, the protections provided by the Due Process Clause.

Under these narrow circumstances where access to the courts has been denied due to the ineffectiveness of court-appointed collateral counsel, contrary to Respondent's mistaken assertions, Mr. DeMaria should have been entitled under similar due process concerns 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.

As this Court observed, in State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) citing Bounds v. Smith, 430 U.S. 817 (1997), "all that is required in postconviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process." State ex rel. Butterworth v. Kenny, 714 So. 2d at 408. Contrary to Respondent's answer, however, due process through meaningful access to the courts was not satisfied when the State of Florida, although not constitutionally required to, undertook the discretionary act of furnishing Mr. DeMaria, a postconviction movant, with court-appointed collateral counsel and such court-appointed collateral counsel, through per se ineffectiveness of counsel, failed to timely file a notice of appeal an order denying postconviction relief after having been requested to do so. Plainly, in Mr. DeMaria's case, meaningful access to the courts, in particular, the appellate court has been denied and due process should provide relief by allowing DeMaria 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.

As this Court previously made clear in Steele v. Kehoe, "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States," Steele v. Kehoe, No. 92,950 at slp op. 3, citing State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964). 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. Plainly, contrary to Respondent's answer, see Respondent's Answer Brief, No. 97,120 at n.4, 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. see n.1, supra at 4. 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 have entitled 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. Otherwise, as the postconviction movant, Steele, had been deprived of meaningful access to the courts in Steele v. Kehoe, similarly, Mr. DeMaria has been deprived of "meaningful access to the courts when his court-appointed collateral counsel, through per se ineffectiveness of counsel, failed to timely file a notice of appeal to the trial court's order, denying in part DeMaria's postconviction motion, after having been timely requested to do so.

Respondent, citing Darden v State, 588 So. 2d 275 (Fla. 2d DCA 1991)(belated appeal granted where the order denying postconviction relief failed to inform the petitioner of the right to appeal within thirty days) and Hildebrand v. Singletary, 666 So. 2d 274 (Fla. 4th DCA 1996)(belated appeal granted due to petitioner, through no fault of his own, not filing a timely appeal because he did not receive a copy of the order denying his postconviction motion in a timely manner), recognizes and acknowledges that due process concerns do apply to postconviction proceedings but just not to Mr. DeMaria's case. According to Respondent, DeMaria has not been denied access to the appellate court because he was aware

of the trial court's order denying his postconviction motion as well his right to appeal same despite the fact that his court-appointed collateral attorney, although timely requested to file a notice of appeal, admittedly failed to do so. Plainly, the inconsistent contradictory nature of Respondent's position in this regard is self-evident and requires no further comment other than to urge this Court to take note of same.

Finally, Respondent's speculation regarding a new tier of relief being created is fanciful at best and wholly irrelevant to this Court's determination of the question certified by the Second District Court of Appeal. It is both reasonable and prudent to conclude that access to the courts in postconviction proceedings required by due process includes the appellate courts and requires collateral counsel for a postconviction movant, particularly, court-appointed collateral counsel, to timely file a notice of appeal when timely requested to do so by the postconviction movant. If a postconviction movant, such as DeMaria, has been denied the opportunity to fully challenge his conviction or sentence under an appropriate postconviction rule only due to the negligence of his court-appointed collateral attorney who untimely filed a notice of appeal to the trial court's order denying postconviction relief, then due process concerns, similar to those recognized by this Court in Steele v. Kehoe, require a belated filing procedure similar to that allowed in belated appeals. Accordingly, Petitioner urges this Court to exercise discretionary jurisdiction in this case and answer the certified question in the negative.

CONCLUSION

Petitioner, JACK LEON DEMARIA, based on the facts, arguments and citations to legal authorities presented in his initial and reply briefs, 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.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia A. McCarthy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2001.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

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

RPA/dlc