IN THE SUPREME COURT OF FLORIDA

LYNWOOD WILLIAMS,	
Petitioner,	
v.	**Case No. 96,546**
STATE OF FLORIDA,	
Respondent.	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

STATEMENT REGARDING TYPE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

ISSUE:

DOES THE HOLDING IN LAMBRIX V. STATE, 698 So. 2d 247 (FLA. 1996), WHEN CONSIDERED IN LIGHT OF 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 INEFFECTIVENESS OF COUNSEL IN THE COLLATERAL PROCEEDING? 3

CONCLUSION 17

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

Abney v. United States,
431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) 6

Amendments to the Florida Rules of Appellate Procedure,
696 So. 2d 1103 (Fla. 1996) 6

Bounds v. Smith,
430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), . . . 11

Coleman v. Thompson,
501 U.S. 722, 111 S. Ct. 2546 (1991) 7,8,9

Darden v. State,
588 So. 2d 275 (Fla. 2d DCA 1991) 12,13

Diaz v. State,
724 So. 2d 595 (Fla. 2d DCA 1998) 5,15

Douglas v. California,
372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) . . . 6,10

Evitts v. Lucey,
469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) 6

Gideon v. Wainwright,
372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) 10

Graham v. State,
372 So. 2d 1363 (Fla. 1979) 13

Grubbs v. Singletary,
892 F. Supp. 1484 (M.D. Fla. 1995), reversed,
120 F.3d 1174 (11th Cir. 1997), cert denied, 118 S. Ct. 1388,
140 L. Ed. 2d 647 (1998) 15

Hildebrand v. Singletary,
666 So. 2d 274 (Fla. 4th DCA 1996) 13

Hill v. Jones,
81 F.3d 1015 (11th Cir. 1996) 11

Johnson v. State,
536 So. 2d 1009 (Fla. 1988) 15

Jones v. Crosby,
137 F.3d 1279 (11th Cir. 1998) 10

Lambrix v. State,
698 So. 2d 247 (Fla. 1996), cert. denied,
__ U.S. __, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998) 2,3,4,5,11,15

Lewis v. Casey,
518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) . . 11

Murray v. Giarratano,
492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) . 3,8,10,11

Pennsylvania v. Finley,
481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) 3,7,8,9,10

Rhome v. State,
293 So. 2d 761 (Fla. 1974) 7

Ross v. Moffitt,
417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974) 6,8,10,12

Russo v. Akers,
724 So. 2d 1151 (Fla. 1998) 13

State ex rel. Butterworth v. Kenny,
714 So. 2d 404 (Fla. 1998) 9,11

State v. Creighton,
469 So. 2d 735 (Fla. 1985) 6

State v. Weeks,
166 So. 2d 892 (Fla. 1964) 13

Steele v. Kehoe,
24 Fla. L. Weekly S237 (Fla. May 27, 1999) 2,4,5,11,12

Williams v. State,
24 Fla. L. Weekly D1927 (Fla. 2d DCA August 20, 1989) 5

Wainwright v. Torna,
455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982) . . . 6,8

STATEMENT OF THE CASE AND FACTS

The facts set forth in statement of the case and facts of the Amended Initial Brief on the Merits are substantially accurate, with the following exceptions and additions:

The state is unable to dispute or verify the representations regarding collateral counsel's conversations with Williams as to taking an collateral appeal or counsel's calculations regarding the time for appeal.

The state takes exception with Williams' inclusion of argument in his statement of the case that the district court's decision of Diaz v. State, 724 So. 2d 696 (Fla. 2d DCA 1998), was an "apparently mistaken interpretation of Lambrix v. State, 698 So. 2d 247 (Fla. 1996)." (Appellant's Amended Initial Brief on the Merits at p. 5)

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

This Court's decision in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), cert. denied, __ U.S. __, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998), forecloses Williams' claim that ineffective assistance of collateral counsel warrants a belated postconviction appeal. There is no due process guarantee of counsel's effectiveness in perfecting a state postconviction appeal, and thus, the district court's decision dismissing Williams' untimely appeal of the order denying postconviction relief does not conflict with this Court's recent decision in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999). Neither the Sixth Amendment guarantee of effective assistance of counsel nor the Due Process Clause is offended by requiring a postconviction movant such as Williams, who has been afforded an opportunity to present his claims in a rule 3.850 motion, to bear the risk of attorney error pertaining to perfection and/or prosecution of a collateral appeal. Therefore, this Court should decline to exercise its jurisdiction in this case.

ARGUMENT

ISSUE: DOES THE HOLDING IN LAMBRIX V. STATE, 698 So. 2d 247 (FLA. 1996), WHEN CONSIDERED IN LIGHT OF 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 INEFFECTIVENESS OF COUNSEL IN THE COLLATERAL PROCEEDING?

In Lambrix v. State, 698 So. 2d 247 (Fla. 1996), cert. denied, __ U.S. __, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998), a prisoner under sentence of death sought postconviction relief based upon his collateral counsel's failure to appeal a particular issue. This Court held that "claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief." Id. at 248. In so holding, this Court in Lambrix set forth a marker, illuminating the line between challenges based on ineffectiveness of trial counsel and claims spawned from the collateral quest itself. As such, the Lambrix decision afforded a measure of finality to the extent of limiting collateral attacks grounded on the effectiveness of a movant’s representation in the postconviction arena.

The demarcation recognized in Lambrix was established in the United States Supreme Court’s decisions in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(holding that the right to appointed counsel extends to the first appeal as a matter of right and no further), and Murray v. Giarratano, 492 U.S.

1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)(applying Finley to inmates under sentence of death).

Sub judice, Lambrix precludes Williams' claim of ineffectiveness which is premised on counsel's failure to properly perfect the collateral appeal. Because a postconviction counsel's failure to raise an issue on appeal is not cognizable in a postconviction proceeding, a collateral counsel's failure to file a timely notice of appeal of an order pursuant to rule 3.850 does not constitute a cognizable claim for relief.

Williams recognizes that a criminal defendant does not have a due process right pursuant to the Sixth Amendment to effective assistance of counsel in a postconviction proceeding. Notwithstanding, drawing upon this Court's recent pronouncements in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999), Williams argues that the more flexible due process standards of the Fifth Amendment should be applied to his motion seeking a belated appeal of the order on his rule 3.850 motion. The state counters that a criminal defendant is not guaranteed under the Due Process Clause a right of effective assistance of collateral counsel on appeal of an order pursuant to rule 3.850.

Steele involved a civil malpractice action in which a prisoner serving life in prison alleged that his privately retained appellate attorney negligently failed to file a timely a motion for postconviction relief under rule 3.850 on his behalf, despite an

oral agreement. Determining that appellate or postconviction relief is a prerequisite to maintaining a legal malpractice action, the Court in Steele went on to address the matter of a right to belatedly file a 3.850 motion. This Court concluded that when a prisoner alleges his attorney agreed to file a rule 3.850 motion but failed to do so in a timely manner, due process entitles the prisoner to a hearing to determine whether a belated postconviction motion should be permitted. Id.

Previous to the Steele decision, the Second District in Diaz v. State, 724 So. 2d 595, 596 (Fla. 2d DCA 1998), had held that Lambrix mandated 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. In dismissing Williams' untimely appeal, the district court sub judice expressed its doubt about the continued vitality of Lambrix and Diaz in light of Steele. Williams v. State, 24 Fla. L. Weekly D1927 (Fla. 2d DCA August 20, 1989).

This Court's decision in Steele does not compel any provision for a belated postconviction appeal where a collateral attorney is charged with, or even concedes, as is apparently the case sub judice, that a timely postconviction appeal was not instituted as requested. Williams stands in a different posture than a defendant such as Steele, in that Williams availed himself of this collateral

remedy in the circuit court in a timely manner. The difference in the belated collateral remedy sought compels a different result in this case. The Due Process Clause of the United States Constitution does not guarantee that a collateral movant such as Williams have the effective assistance of counsel at the appellate stage of the postconviction proceedings.

The Fourteenth Amendment guarantees a criminal defendant the right to counsel on first appeal as of right. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). This guarantee has been interpreted to require that counsel pursuing a first appeal render effective assistance in Evitts v. Lucey, 469 U.S. 387, 391-392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).[1]

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[1]The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. See Evitts v. Lucey, 469 U.S. at 393, 105 S.Ct. at 834 ("Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors."). Accord Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

In State v. Creighton, 469 So. 2d 735 (Fla. 1985), this Court stated that there was no right to appeal set forth in our state's constitution. In Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104 (Fla. 1996), this Court receded from Creighton to the extent that the Court construed the language of article V, section 4(b) as a constitutional protection of the right to appeal. Stating that "the legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights, the Court concluded that legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error. Id. at

In contrast, the United States Supreme Court has held that the Fourteenth Amendment does not require appointed counsel to indigent defendants seeking discretionary, second-tier, appellate review. Wainwright v. Torna, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982)(holding that since, under Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), the appellant had no constitutional right to counsel on a discretionary appeal, he was not deprived of effective assistance of counsel by his retained counsel's failure to timely file an application for certiorari in the Supreme Court of Florida).

In 1974, this Court held that an attorney's failure to seek a writ of certiorari or alternatively to notify his client of his right to apply for it does not constitute a violation of the client's right to appeal. In so holding, this Court specifically held that certiorari is limited to specific situations and is discretionary with the Court. See Rhome v. State, 293 So. 2d 761 (Fla. 1974). Thus, a criminal defendant in Florida has neither a state-based nor a federal constitutional right to claim a violation of his appellate rights when his attorney has failed to preserve his opportunity to seek discretionary review in this Court.

The United States Supreme Court has not interpreted the Due Process Clause to guarantee effectiveness of counsel on postconviction appeal. In Coleman v. Thompson, 501 U.S. 722, 111

1104.

S.Ct. 2546, (1991), the United States Supreme Court rejected a federal habeas petitioner's contention that collateral counsel's late filing of a notice of appeal of the denial of his state habeas application was the result of attorney error of sufficient magnitude to excuse the default. The Court reasoned as follows:

> There is no constitutional right to an attorney in state post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See* Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear [501 U.S. 753] the risk of attorney error that results in a procedural default."

Coleman, 111 S.Ct. at 2566.

In deciding that Coleman did not have a constitutional right to counsel on appeal of a state collateral determination, the Court in Coleman necessarily rejected the notion that due process principles require counsel in the taking of a collateral appeal thus:

> Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from that determination. Our case law will not support it.

> In Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), and Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. **We held in Ross that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right.** "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S., at 616, 94 S.Ct., at 2447. **Similarly, in Finley we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review.** 481 U.S., at 556, 107 S.Ct., at 1993-1994 (citing Ross, *supra*).
>
> These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel [501 U.S. 757] to appeal a state collateral determination of his claims of trial error.

Coleman, 111 S.Ct. at 2568 (emphasis supplied).

Because the Due Process Clause does not guarantee the right of counsel in the taking of a postconviction appeal, it stands to reason that due process does not guarantee the effectiveness of counsel engaged for the purpose of perfecting or prosecuting a postconviction appeal. It would be illogical to hold that due process requires effective assistance of collateral counsel retained by a criminal movant when due process does not guarantee counsel for the taking of a postconviction appeal.

Although the decision in State ex rel. Butterworth v. Kenny,

714 So. 2d 404 (Fla. 1998), involved representation of a capital defendant in the civil context, the Court's reasoning offers support for the state's assertion that due process guarantees do not require extension of the right to effective representation at the postconviction appellate stage. In rejecting the contention that barring the Office of the Capital Collateral Regional Counsel (CCRC) from representing prisoners under sentence of death in civil litigation would run afoul of due process and equal process as such would prevent it from filing and litigating petitions for writs of habeas corpus, this Court stated:

> As CCRC recognized at oral argument, both the United States Supreme Court and this Court have held that defendants have no constitutional right to representation in postconviction relief proceedings. Under the Sixth and Fourteenth Amendments to the United States Constitution, an indigent defendant is entitled to counsel at the state's expense at the trial stage of a criminal proceeding, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and for the initial appeal from a judgment and sentence of the trial court, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). **That right, however, does not extend to postconviction relief proceedings.** Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(constitution does not require states to provide counsel in postconviction proceedings). As noted by the United States Supreme Court in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), there is a distinction between the need for counsel in preconviction proceedings and the need for counsel in postconviction proceedings. **That distinction is based on the fact that during the initial proceedings, the State is presenting witnesses and arguing to a jury in an attempt to strip from the defendant the presumption of innocence; whereas, once the conviction and sentence become final, the presumption of innocence is no longer present and the defendant, in seeking postconviction relief, acts to "upset the prior determination of guilt."** 417 U.S. at

611, 94 S.Ct. at 2444.

This distinction holds true even where the defendant has been sentenced to death. Although the United States Supreme Court has stated that death is different and although no person has been executed in this state in recent years who has not had counsel at the time of execution, that Court has determined that **there is no right to counsel for postconviction relief proceedings even where a defendant has been sentenced to death**. *See* Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (holding that Finley applies to inmates under sentence of death as well as to other inmates). *See also* Jones v. Crosby, 137 F.3d 1279 (11th Cir. 1998). As the Supreme Court stated in Murray, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case ... are sufficient to assure the reliability of the process by which the death penalty is imposed."

492 U.S. at 10, 109 S.Ct. at 2770. *See also* Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996)(no constitutional right to postconviction relief counsel in this circuit; ineffective assistance of postconviction relief counsel not cognizable claim); Lambrix v. State, 698 So.2d 247, 248 (Fla. 1996)(based on Murray, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief), cert. denied, --- U.S. ----, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998). **All that is required in postconviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process**. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (furnishing access to adequate law libraries or adequate assistance from persons trained in the law may fulfill a State's obligation to provide prisoners' right of access to courts), disapproved in part by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Bounds disapproved to extent it can be read to require state to enable prisoner to discover grievances and litigate effectively once in court; state need only provide inmates with tools needed to attack sentences directly or collaterally).

Id., 714 So. 2d at 408.[2] (emphasis added)

If then, due process is satisfied by providing meaningful access to the courts, it can be logically concluded such concern is fully satisfied in furnishing a noncapital defendant the opportunity to raise his claims for relief in a rule 3.850 motion, i.e., the state's collateral remedy. The Steele decision affords defendants just such access where an attorney has neglected to file a timely 3.850 motion despite his agreement to do so. It does not offend due process to draw the line at that point. "Meaningful access" does not require that a noncapital postconviction movant, who is not guaranteed appointed counsel by our constitution, statutes, or rules at the appellate stage of the postconviction process, have a guarantee of effective assistance of counsel in properly perfecting or advocating a claim for relief in a collateral appeal.

Williams argues that he should be afforded the same due process given the convicted prisoner seeking a belated 3.850 motion in Steele. "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages.'" Ross v. Moffitt, 94 S.Ct. at 2444. That Florida provides a further vehicle for review

[2]This Court then pointed out that like most other states, Florida, to ensure the credibility and constitutionality of its death penalty process, has provided postconviction representation only in cases where the defendant has been sentenced to death. "This statutory right to representation acts to ensure meaningful access to the courts in a complex area of the law and to ensure that our death penalty process is constitutional." Id., 714 So. 2d at 408.

does not automatically mean that the right to effective counsel engages in the continuing quest for collateral relief on appeal. It suffices that Florida treats indigent movants and those with retained counsel alike in gaining access by affording equal access to a collateral appeal. See Ross v. Moffitt, 94 S.Ct. at 2444 ("Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty.").

Williams likens his situation to that presented in Darden v. State, 588 So. 2d 275 (Fla. 2d DCA 1991), in which a belated appeal was granted where the order denying postconviction relief failed to inform the petitioner of the right to appeal within 30 days. Williams also compares his situation to the petitioner's in Hildebrand v. Singletary, 666 So. 2d 274 (Fla. 4th DCA 1996), wherein the petitioner did not, through no fault of his own, file a timely appeal because he did not receive a copy of the order denying his postconviction motion in a timely manner. The state asserts that a defendant who is not informed of an order or the right to appeal cannot said to have meaningful access to the appellate court if he is unaware of such access or of the order within the time for appeal. Unlike the defendants in Darden or Hildebrand, however, Williams does not suggest he was unaware of the right to take an appeal or that he did not receive the order on his rule 3.850 motion in a timely manner.

The state contends that placing the risk of attorney omission upon a collateral movant's shoulders after the 3.850 motion has been birthed does not run afoul of this Court's decisions holding that appointment of counsel may be required by due process considerations for an evidentiary hearing if the issues are complex and require substantial legal research. See Graham v. State, 372 So. 2d 1363 (Fla. 1979); State v. Weeks, 166 So. 2d 892 (Fla. 1964). See also, Russo v. Akers, 724 So. 2d 1151, 1153 (Fla. 1998)(construing §924.066(3), Fla. Stat. (Supp. 1996)[3], to mean that there is no statutory right to counsel but does not preclude the appointment of counsel when constitutionally mandated under Weeks and Graham). The due process considerations regarding the conducting of a complex evidentiary hearing in the circuit court do not apply to the perfecting of a collateral appeal. Put simply, it cannot be said that the filing of a timely notice of appeal of an adverse rule 3.850 order is so complex as to require appointment of counsel in order for due process to be satisfied. Then, no attendant effective assistance guarantees flow.[4]

At the appellate stage of the postconviction process, there

[3]§924.066(3), Fla. Stat. (Supp. 1996), provides that "[a] person in a noncapital case who is seeking collateral review under this chapter has no right to a court-appointed lawyer."

[4]Moreover, Williams has not alleged that his claims were so complex as to necessitate appointment of counsel for the evidentiary hearing as a matter of due process. The fact that a movant has retained collateral counsel for an evidentiary hearing afforded him does not elevate the subsequent taking of a collateral appeal to due process dimensions.

are no longer the same concerns as with the direct review of a conviction which, when final, strips the defendant of the presumption of innocence. By the time of entry of a postconviction order, the movant has been afforded an opportunity to a jury trial, to direct review of his conviction, and to pursue postconviction relief in a rule 3.850 motion. In the case where a motion was summarily denied, a movant is not required to file a brief on appeal. See Fla.R.App.P. 9.140(i). And, in the case where an evidentiary hearing has been afforded, the due process concerns regarding presentation of witnesses and evidence in a complex hearing do not apply once the hearing is concluded and the case is ripe for appeal.[5]

Contrary to Williams' argument, the district court in Diaz v. State, 724 So. 2d 595 (Fla. 2d DCA 1998), properly relied on Lambrix to hold that relief by way of belated appeal based on ineffectiveness of counsel was not appropriate in postconviction setting. From a due process perspective vis-a-vis the collateral appeal, there are compelling policy considerations in favor of

[5]By this, the state does not suggest in any way that advocacy at the collateral appellate stage is necessarily simple or straightforward. That, the state contends, is not the lens through which the court should view due process to be afforded in the collateral quest to upset a final conviction. Rather, the question is whether the defendant is deprived of meaningful access to the court unless he is given the right of counsel. If counsel is not necessary to perform the mechanics of instituting an appeal and there is no need to present witnesses or evidence at the appellate stage of the collateral process, then due process considerations do not compel an extension of the right to effectiveness of counsel to a collateral appeal.

adhering to Lambrix's holding that claims of ineffective assistance of collateral counsel do not provide a basis for relief. The credibility of the criminal justice system depends upon both fairness and finality. See Johnson v. State, 536 So. 2d 1009, 1011 (Fla. 1988). Given no boundary on expansion of a "due process right to collateral counsel" doctrine to a due process right to effective collateral counsel, there can be little doubt movants will soon be making a myriad of claims of ineffective assistance of postconviction counsel in connection with a collateral appeal, adding a new tier of relief. For instance, one can, with modest foresight, envision the burden upon our district courts with such claims as the adequacy of collateral counsel's compliance with Anders requirements. Cf. Grubbs v. Singletary, 892 F.Supp. 1484 (M.D. Fla. 1995) (counsel on direct appeal deficient in failing to comply with Anders requirements), reversed, 120 F.3d 1174 (11th Cir. 1997), cert denied, 118 S. Ct. 1388, 140 L. Ed. 2d 647 (1998).

It is thus both reasonable and prudent to conclude that due process guarantees are not violated by requiring a postconviction movant to bear the risk of attorney error in connection with the perfecting and litigation of an appeal of a postconviction order. This is particularly true in the case of a movant, such as Williams, who has been afforded an adversarial testing of the state's case at trial, a direct review of his convictions, an opportunity to test the effectiveness of his trial attorney in a

rule 3.850 motion, and the benefit of representation at an evidentiary hearing upon which the circuit court resolved the motion with adverse credibility determinations. Under such circumstances, due process guarantees of the state and federal constitutions are satisfied by the state's furnishment of the remedy of 3.850. That attorney error hinders a movant's further pursuit of postconviction relief in the state appellate process does not mean that there was not sufficient meaningful access accorded to satisfy due process guarantees.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court decline jurisdiction, or alternatively, approve the district court decision and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Loren D. Rhoton, Rhoton & Hayman, P.A., 412 Madison Street, Suite 1111, Tampa, Florida 33602, this 10th day of November, 1999.

_____

COUNSEL FOR RESPONDENT