IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-64

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR GLADES COUNTY, FLORIDA**

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Lambrix submits this Reply to the State's Answer Brief but will not reply to every argument raised by the State. Mr. Lambrix neither abandons nor concedes any issues or claims not specifically addressed in this Reply Brief. Additionally, he expressly relies on the arguments made in his Initial Brief for any claims or issues that are only partially addressed or not addressed at all in this Reply.

TABLE OF CONTENTS

INTRODUCTION ii

TABLE OF CONTENTS..iii-iv

TABLE OF AUTHORITIES .... v-vi

ARGUMENT I..1

THE STATE WITHHELD MATERIAL EXCULPATORY AND/OR IMPEACHMENT EVIDENCE INVOLVING A SEXUAL RELATIONSHIP BETWEEN WITNESS FRANCES SMITH AND STATE ATTORNEY INVESTIGATOR ROBERT DANIELS IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963), UNDERMINING CONFIDENCE IN THE VERDICTS AND RENDERING THE CONVICTIONS AND DEATH SENTENCES UNRELIABLE; MR. LAMBRIX IS ENTITLED TO A NEW TRIAL

ARGUMENT II 9

DEBORAH HANZEL'S TESTIMONY: NEWLY DISCOVERED EVIDENCE

ARGUEMTN III 12

THE LOWER COURT'S FAILURE TO ALLOW A FULL AND FAIR HEARING BELOW INCLUDING EXPERT TESTIMONY SUPPORTING A CONSPIRACY/COLLABORATION TO WRONGFULLY CONVICT MR. LAMBRIX RESULTED IN PREJUDICE TO MR. LAMBRIX; THE CLAIM BELOW WAS NOT DEPENDENT ON THE ALLEGATIONS OF A SEXUAL RELATIONSHIP

ARGUMENT IV 16

THE JUDICIAL BIAS OF JUDGE RICHARD M. STANLEY INFECTED THE CASE BELOW TO THE EXTREME PREJUDICE OF MR. LAMBRIX

ARGUMENT V 27

MR. LAMBRIX IS ENTITLED TO A NEW TRIAL BASED UPON HIS ACTUAL INNOCENCE OF THE CRIMES FOR WHICH HE WAS WRONGFULLY CONVICTED AND SENTENCED TO DEATH SUBJECT TO THE "FUNDAMENTAL MISCARRIAGE OF JUSTICE" DOCTRINE UNDER FEDERAL LAW AND THE RELATED "MANIFEST INJUSTICE" DOCTRINE UNDER FLORIDA STATE LAW; AND BECAUSE EMERGING EIGHTH AMENDMENT JURISPRUDENCE DEMANDS RELIEF FROM PROCEDURAL BARS

CONCLUSION..35

CERTIFICATE OF SERVICE 36

CERTIFICATE OF COMPLIANCE...36

TABLE OF AUTHORITIES

CASE PAGE(S)

Ballard v. State, 923 So. 2d 475 (Fla. 2006) 33

Cardona v. State, 826 So. 2d 968 (Fla. 2002) 31

Cartalino v. Washington, 122 F.3d 8 (7th Cir. 1997).......................................26

Clegg v. Chipola Aviation Inc., 458 So. 2d 1186 (Fla. 1st DCA 1984) 4, 8

Cool v. United States, 409 U.S. 100, 103 (1973)..4

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974)...5

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986)..........................6

Heiney v. State, 447 So. 2d 210 (Fla. 1984) 32

House v. Bell, 126 S. Ct. 2064 (2006) 29, 30

Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988)..32

Jimenez v. State, 997 So. 2d 1056 (Fla. 2008)...35

Kyles v. Whitely, 514 U.S. 419 (1994)..12

Lambrix v. State, 698 So. 2d 247 (Fla. 1997) 27

Lambrix v. State, 494 So. 2d 1143 (Fla. 1986) 32

Long v. State, 689 So. 2d 1055 (Fla. 1997) 33

Mayo v. State, 977 So. 2d 732 (Fla. 1st DCA 2008) 18

McArthur v. State, 351 So. 2d 972 (Fla. 1977)... 32, 34

McFarland v. Scott, 512 U.S. 849, 114 S.Ct. 2568 (1994)................................17

Mordenti v. State, 894 So. 2d 161 (Fla. 2004)..31

Murray v. Carrier, 477 U.S. 478 (1986) 29

Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480 (1988) 5, 6

Peek v. State, 488 So. 2d 52 (Fla. 1986)..23

Porter v. State, 723 So. 2d 191 (Fla. 1998) 17, 20-22, 26

Roberts v. State, 678 So. 2d 1232 (Fla. 1996) 30

Robinson v. State, 610 So. 2d 1286 (Fla. 1992)..14

Rogers v. State, 782 So. 2d 373 (Fla. 2001) 9

Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992)............................ 28, 30

Schulp v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995) 28-31, 35

Stanley v. State, 648 So.2d 1268 (Fla. 4th DCA 1995) 5

State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (Fla. 1930)............... 23

Sweet v. State, 235 So. 2d 40 (Fla. 1970) 5, 7

United States v. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525 (1948) 4, 8, 9

Florid Rules of Criminal Procedure

Rule 3.040...18

Rule 3.850...18

ARGUMENT I

The state claims that Mr. Lambrix views his credibility determinations as better than the trial court's. (Answer Brief, p. 41). However, this is a gross oversimplification and reveals the state's malleable view of witness credibility. Mr. Lambrix is arguing that, given the testimony presented, the trial court's conclusion that Ms. Smith is lying and Investigator Daniels was truthful is unreasonable and contrary to the evidence. The point being that the court below, and the state on appeal, engaged in selective credibility determinations. For instance, Francis Smith was the paragon of truth in her testimony at the trial proceedings when the state sought to use her testimony to convict Mr. Lambrix. However, when she finally came forward about an illicit affair she had with the state lead investigator she is miraculously lying and not credible.

In an attempt to discredit Smith the state essentially characterized her as a promiscuous lady who could have been "easily mistaken about the time, place and identity of any sexual partner she may have known over twenty years." (Answer Brief, p. 42). It is strange that the state would seek to characterize Smith as a promiscuous woman of ill repute for its advantage in this litigation. Such were not the state's characterizations of her at trial when was presented as the star witness against Mr. Lambrix. In fact the state readily acknowledged she was the hub of the prosecution. (Answer Brief p. 40). Thus, the state's prosecution rested entirely

upon Smith's credibility.

The state seems to suggest that having sex was such a mundane experience for Smith she is mistaken that she had it with Daniels. However, it is most certainly the only time in 20 years she was a star witness in a first-degree murder trial. While for lawyers, judges and investigators cases may seem to run together, for lay witnesses they no doubt stick in one's mind even twenty years later. Add to that the unusual event of being flown to the location by, drinking with and then having a sexual relationship with the state's lead investigator, it strains credulity that Smith is mistaken that she had sex with Daniels.

Furthermore, the double standard of raising Daniels as the paragon of virtue and truth in this setting is equally strained. Daniels admitted to having adulterous affairs. (PCR 8894). He admitted to flying Smith, through a thunderstorm to Glades County for the trial against Mr. Lambrix, staying in the same hotel with her during the trial and drinking with Smith at the hotel. (PCR 8883, 8902-04, 8932-33). It is, therefore, equally likely that Daniels is a serial womanizer who cannot remember his conquests and sexual exploitations twenty years ago.

Additionally, Daniels, not Smith, had motivation to lie about the illicit sexual affair. Daniels admitted that Smith apologized to him and admitted that after Smith's apology he said that 39 years went down the drain. He testified that if he admitted to having sex with Smith, even twenty years hence would jeopardize

his current marriage. (PCR 8742, 8845-48, 8946). He was also concerned that it would possibly affect his pension. Smith on the other hand, testified that she did not want to help Mr. Lambrix, notwithstanding that her belated admission to sex with Daniels would do just that. Between Smith and Daniels, Daniels is the one with motivation to lie about the affair.

Additionally, there is no evidence that even remotely tends to corroborate Daniels' denial of the illicit sexual affair. On the other hand there is substantial evidence corroborating Smith's testimony. First, Daniels corroborated virtually all the facts surrounding the illicit sexual affair that Smith testified about with the exception to admitting to the sex. He and Smith testified they flew to Glades County. He and Smith testified that during the flight they encountered a storm. He and Smith testified that the stayed in the same hotel in Glades County during the trial. He and Smith testified that they drank together at the hotel. Finally, Smith's ex-husband, Schwendeman testified that Smith had told him before they met she had and illicit sexual affair with "Bob the pilot."

In light of the record and factual circumstances, the trial court's definitive finding there was no illicit sexual relationship between Smith and Daniels is indefensible. The full weight of the evidence speaks against that finding. In fact, the only evidence supporting the finding is Daniels' self-serving denial of sex. Other than that single declaration, all other evidence points inextricably towards

the plain fact that Daniels and Smith had an illicit sexual affair. Therefore, the findings below are an abuse of discretion and this Court is not bound by them. *Clegg v. Chipola Aviation Inc*., 458 So. 2d 1186 (Fla. 1st DCA 1984)(abuse of discretion where credibility findings and totally unsupported by competent substantial evidence); *United States v. Gypsum Co*., 333 U.S. 364, 395 (1948)("a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

The state suggests that even with evidence of an illicit affair, there was no *Brady* violation. (Answer Brief p. 43). This is simply not the case. As mentioned above, Francis Smith was the hub and focus of the state's entire case against Mr. Lambrix. Her testimony was critical and the state would not have had a case against Mr. Lambrix but for her testimony. If the state's evidence at trial is to have been believed then Smith was an accomplice. It has been established that an accomplice may have a special interest in testifying which casts doubt upon her veracity. *See Cool v. United States*, 409 U.S. 100, 103 (1973). Therefore, her credibility and veracity were of utmost importance.

In order to adequately challenge Smith's testimony, proper impeachment is paramount. Evidence that she was having an illicit affair with the state's lead investigator, a man who directed the investigation and ultimate prosecution of Mr.

Lambirx, bears heavily on her testimony. Indeed, the thrust of the defense at trial was to establish that Smith had a motive to fabricate her testimony. PCR. 8891. Having an illicit romantic and sexual affair with the lead investigator would have gone a long way to establishing bias. The state's suggestion otherwise is simply misplaced.

Had the information about Daniels and Smith's illicit sexual affair been known at trial, it would have been ripe for cross-examination. Indeed, the Supreme Court has emphasized "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska,* 415 U.S. 308, 316-317, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). *See also, Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, (1988)(holding it was reversible error to prevent defense from cross-examining star witness regarding her romantic relationship with another witness).

In fact, this Court held that it was reversible error to prevent defense counsel from inquiring about a sexual relationship between the state's key witness and a state investigator. *See Sweet v. State*, 235 So. 2d 40 (Fla. 1970). This Court so held even though, as here, the male state investigator adamantly denied the sexual affair while the star female witness admitted it in a proffer. *Id,* at 41. *See also, Stanley v. State,* 648 So.2d 1268, 1269 (Fla. 4th DCA 1995)(trial court erred in refusing to allow appellant to cross-examine the victim and the eyewitness on

their relationship as it may have shown bias). Given the undisputed fact that Smith's testimony was the hub of the state's case, her credibility was vital. It is therefore obvious that a reasonable jury might have had a significantly different view of her credibility had they been informed of her illicit sexual affair with Daniels. *Olden v. Kentucky*, 488 U.S. 227 (1988). *See also, Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)(error to prohibit defendant prohibited from engaging cross-examination designed to expose to the jury facts from which it could appropriately draw inferences relating to witness' reliability).

The state also incorrectly suggests that Mr. Lambrix cannot show the state concealed the fact of the illicit affair as required in *Brady*. (Answer Brief p. 45). Daniels was working for the state as its investigator. Thus, he is presumed to be part of the state for the purpose of *Brady*. By the very nature of an illicit affair it is secretive and therefore suppressed from public knowledge. Here, Daniels was living with a woman with whom he had an extramarital affair. Furthermore, Daniels testified that if he admitted now he had an affair with Smith, his marriage would suffer and his pension would be impacted. Given this twenty years later, there is no question that his job would have been in jeopardy had anyone found out about the affair in 1984. More compelling reasons for concealing the affair from the defense can hardly be imagined. That an Assistant State Attorney did not

conceal this information is irrelevant. Daniels concealed for over twenty years.

The state also argues, incredibly, that the illicit affair is simple misconduct not related to this case. (Answer Brief p. 45). Daniels and Smith's actions are directly related to the case and Smith's testimony. It strains credulity to suggest that the lead investigator having an illicit affair with the star witness is somehow unrelated to the case. This misconduct goes to the very core of the case and to the very essence of Smith's testimony and Daniels' investigation. *See Sweet v. State*, 235 So. 2d 40 (Fla. 1970).

The malleability of witness credibility extends to Smith's receipt of immunity from prosecution in exchange for her testimony. Specifically, Daniels, who was considered beyond reproach regarding his denial of sex with Smith, must have been deemed incredible when he testified that it was his understanding that Smith received immunity. Indeed, the trial court's finding that no immunity was granted to Smith is even more troubling than its finding regarding the illicit sexual affair. There appears to be no record evidence indicating that Smith was not granted immunity. Rather, there are statements that individuals did not "understand" her to have been given immunity. Such statements are a far cry from a definitive declaration that no immunity was given. Quite to the contrary, the evidence is substantial that immunity was given.

The most glaring evidence that immunity was given is that Smith was not

prosecuted for what is potentially, accessory after the fact to first-degree murder. Nor was she prosecuted for the underlying charges for which she was arrested when she was stopped alone driving Lamberson's car. Other than the state wanting to secure her testimony, there is no reason she would not have been criminally liable for her actions assuming her testimony at trial was even remotely true. Second, Daniels testified that it was his understanding she did get immunity and told her she would not be charged if she passed a polygraph test. He also testified that is was State Attorney's Office policy to polygraph those getting immunity and Smith was issued a polygraph test. He even testified, as Mr. Lambrix has argued for over twenty years, that based on the polygraph, Smith showed signs of deception. Third, Assistant State Attorney Pires confirmed Daniels' testimony regarding office policy and polygraph testing. Fourth, Assistant State Attorney McGruther testified that he was not personally aware of an immunity deal. Contrary to the state's assertion, McGruther's testimony does not establish that no deal was offered, just that he, himself, had no personal knowledge of it. As is the case with the trial court's erroneous finding regarding the illicit sexual affair, the court's finding of fact here is belied by the competent substantial evidence to the contrary. Therefore, the trial court's findings are an abuse of discretion not entitled to any deference on appeal. *Clegg v. Chipola Aviation Inc.*, 458 So. 2d 1186 (Fla. 1st DCA 1984); *United States v. Gypsum Co.*,

333 U.S. 364, 395 (1948)

Given that there was competent substantial evidence establishing that there was an illicit sexual affair between Daniels and Smith and that Smith was granted immunity, the trial court's denial of Mr. Lambrix's postconviction motion was error and he is entitled to relief.

ARGUMENT II

Mr. Lambrix presented trial counsel Kinley Engvalson and Robert Jacobs to establish how the outcome of the trial would have been affected in light of the newly discovered testimony of Debbie Hanzel and the allegation of a sexual relationship between Frances Smith and investigator Daniels. (PCR. 8973-9025; 9054-9063) The lower court did not allow the trial attorneys to be fully examined regarding how the undisclosed evidence "handicapped the defendant's ability to investigate or present other aspects of the case." *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001). As a matter of fact, the lower court granted the State's motion to strike any testimony that was elicited during the direct of Mr. Engvalson that "went beyond, did it happen. . ."(PCR. 9018)

The issue concerning the scope of the examination of the trial attorneys arose because the State decided to question Kinley Engvalson, the trial attorney responsible for the guilt phase, concerning alleged statements that Mr. Lambrix made to him in the context of the privileged and confidential attorney-client

relationship. (PCR. 9004-9018) Mr. Lambrix objected on the grounds that any alleged statements attributed to Mr. Lambrix are not relevant and, because there was no claim of ineffective assistance of counsel pending, any statements made to counsel remained privileged. (PCR. 9004-9005) Mr. Lambrix exercised his right to remain silent upon his arrest and he was precluded from taking the stand on his own behalf at both trials. Mr. Engvalson summarized the general strategy that he and Mr. Jacobs followed:

> We were trying to find whatever elements we could use in the defense of the case. Part of the elements of the defense are questioning the credibility of the witnesses, [sic] questioning whether there's bias or prejudice or anything of that nature in the witnesses, questioning whether there was some motive for witnesses getting together and getting their stories together. (PCR. 8978)
>
> ***
>
> Well, inconsistencies can add up to reasonable doubt. It can add up to questioning the credibility of the witness. If the credibility on certain aspects is impeached, then the jury can extend that question of credibility to everything else the witness said. (PCR. 8991)

Thus, the defense theory at the second trial was to argue "reasonable doubt" and to attack the credibility of the witnesses. 2nd Trial, 2652-2688. The trial attorneys did not present any alibi witnesses nor did they employ any other common type of strategy that would have required an affirmative defense such as self-defense, voluntary intoxication or insanity. Instead, they went with the old-fashioned plan of "putting the State to its proof." Given the fact that Mr. Lambrix

did not testify at trial and that there was no affirmative defense, it would not make any difference if, hypothetically, *Mr. Lambrix had told both of his attorneys that he killed Ms. Bryant and Mr. Lamberson with premeditated intent*. There is hardly a rule for defense attorneys that says "if your client tells you that he 'did it" then you cannot provide him with a defense." Of course, Mr. Lambrix has never made such a statement. Quite the opposite in fact during his evidentiary hearing testimony. It simply does not matter *what* he told his trial lawyers because the strategy they undertook was to establish "reasonable doubt."

If trial counsel had the newly discovered evidence of the conspiracy present in Ms. Hanzel's testimony, Daniels' confirmation of the plea agreement in stark contrast to Smith's denial of any consideration in her trial testimony, and the evidence from Smith concerning the illicit affair, the cumulative information would not have changed the basic plan to attack the credibility of the witnesses at all. The only change is that the strategy that was chosen would have had a much better chance of working because the trial attorneys would have been armed with potent admissible impeachment information. Hanzel testified that Mr. Lambrix never told her that he killed anyone. (PCR. 8145) She testified that she was coerced to provide that false testimony at trial by Frances Smith and "a man from the state attorney's office". (PCR. 8154-56) She stated that they wanted her to go along with what Frances said. (PCR. 8147) She testified that at first she refused,

but agreed to cooperate after Smith and the state attorney's agent told her that she and her children would be in danger. (PCR. 8146-48) Hanzel also testified that she asked Frances Smith if Mr. Lambrix really did kill both victims and if the circumstances of the killings happened the way Frances said. She stated that Frances Smith told her that her story of premeditated murder was not true. Specifically, Hanzel testified, "I asked Frances Smith if that is what really happened she told me she didn't really know what happened outside, but that Mr. Lambrix had told her the guy went nuts and he had to hit him." (PCR. 8143-44; 8152-55; 5984-86)

Hanzel's testimony would have had a dramatic impact on the jury at trial. Her change of testimony included an admission that she lied, that Frances Smith coerced her to lie with assistance from a state agent, and that Frances Smith admitted to her that certain aspects of her own testimony were untrue. In other words, with cumulative consideration there is a "reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." *Kyles v. Whitely,* 514 U.S. 419 (1994).

ARGUMENT III

The state mischaracterizes the testimony of Deborah Hanzel and the implications of her recantation with respect to Mr. Lambrix's claim of conspiracy and collaboration. The state suggests that Hanzel was a minor witness at trial and

her recantation is not worthy of any postconviction consideration. The flaw in this assertion is that Hanzel's recantation and her testimony that Smith and an investigator (Daniels) convinced her to lie is newly discovered evidence that Smith and Daniels were engaged in a conspiracy to fabricate evidence in order to assure Mr. Lambrix's conviction. The revelations in Hanzel's testimony and affidavit are the newly discovered evidence supporting this claim. In an effort to fully and fairly develop this claim, Mr. Lambrix sought, but was denied the opportunity for a full evidentiary hearing.

The state's argument appears to be that since the court below found that there was no sexual relationship between Daniels and Smith there can be no claim for conspiracy and collaboration. This argument verges on the myopic. As has been argued in Arguments I and II herein and in the Initial Brief, the findings below are erroneous because substantial competent evidence below contradicts those findings. Furthermore, and more significantly, Mr. Lambrix's claim of conspiracy and collaboration was independent of the claim regarding the illicit sexual affair between Daniels and Smith. Indeed, the conspiracy and collaboration claim was filed before Smith admitted to having the illicit sexual affair with Daniels. While the existence of the sexual relationship between Smith and Daniels certainly strengthens the conspiracy claim, it is entirely possible for them to have conspired to convince Hanzel to lie independent of their illicit sexual affair.

Therefore, the notion that this claim of conspiracy and collaboration is dependant upon the illicit sexual affair between Smith and Daniels is simply incorrect.

The critical question here is whether Mr. Lambrix established a prima facie case of conspiracy and collaboration in order to justify a full and fair hearing on the matter. This Court has defined conspiracy as,

> an express or implied agreement of two or more persons to accomplish by concerted action, some criminal or unlawful act, Boyd v. State, 389 So. 2d 642, 647, n.2 (Fla. 2nd DCA, 1980). The existence of a conspiracy can be inferred from the conduct of the participants or from circumstantial evidence, See, Perez v. State, 561 So. 2d 1265 (Fla. 3d DCA), rev. denied 576 So. 2d 289 (Fla. 1990)(emphasis added) Robinson v. State, supra, 610 So. 2d at 1289.

Robinson v. State, 610 So. 2d 1286 (Fla., 1992). Thus, what Mr. Lambrix sought to do was establish by circumstantial evidence that which this Court has articulated is necessary for a conspiracy. The trial court prevented Mr. Lambrix from properly fairly and fully developing the necessary facts. Therefore, Mr. Lambrix is entitled to a full evidentiary hearing on this claim.

The State argues that Appellant "has never identified the genesis, scope, or purpose of any conspiracy. [Appellant] claims that his evidence now shows that Frances Smith and Bob Daniels had a reason to get Deborah Hanzel to lie, because they wanted Lambrix convicted, but he fails to explain why they would want to convict an innocent man." Answer Brief at 70. This argument strains logic. The

only motive necessary for this conspiracy is the motive to get Hanzel to lie. Once Smith and Daniels agree to convince Hansel to lie the conspiracy is formed. Mr. Lambrix presented evidence, through Hanzel, that Smith and Daniels were acting in concert in getting her to lie for them and that she did in fact lie at the trial as requested. Thus, the evidence presented is that two people, Smith and Daniels, worked in concert to get a third, Hanzel, to lie at a capital murder trial. A clearer description of a conspiracy is difficult to imagine.

Appellant's trial counsel, Kinley Engvalson, was asked at the evidentiary hearing below what his goal was when he repeatedly pointed out the inconsistencies in Frances Smith's testimony during his closing argument:

> [I]nconsistencies can add up to reasonable doubt. It can add up to questioning the credibility of the witness. If the credibility on certain aspects is impeached, then the jury can extend that question of credibility to everything else the witness has said.

(PCR. 8991) He testified that he would have used any evidence of an affair between Smith and Daniels to support his inconsistency argument to the jury. *Id.* He further explained that if he had been privy to Smith's statements about the affair, he would have questioned Smith and Daniels about the alleged sexual contact between them and any influence that such a relationship might have had on their trial testimony:

> [I]t suggests that there is a lot more of a relationship than independent investigator and independent witness. It suggests that they are in this together, they tend to have common goals, and that there would be an

> interest, each has, in supporting the statements of the other. Aside from just trying to get the truth out, there may be some additional interests in making sure that what one says is not contradicted.

(PCR. 9000-9001) Trial counsel Jacobs also testified that he would have used the information about the alleged affair to try to discredit both Bob Daniels' and Frances Smith's testimony. (PCR. 9057-9059) Trial counsel has identified the reasons why the witnesses would lie and attempt to influence Hanzel.

Having established the prima facie claim of conspiracy and collaboration, the trial court erred by preventing Mr. Lambrix from calling expert witnesses, Edward N. Wiley, MD., Arkady Katz-Nelson, M.D.(forensic pathologists), William Gaut (a police investigations and procedure expert), Steve Wistar (a weather expert) and Richard Thompson (a hydrologist). These experts would have been able to testify, that the scientific evidence supported Hanzel's recantation and Smith and Daniels' conspiracy. Furthermore, Sally Deller was also prevented from offering testimony that would have supported Mr. Lambrix's claim. Precluding these witnesses prevented Mr. Lambrix a full and fair opportunity to litigate this claim, and the trial court's summary denial of this claim should be reversed.

ARGUMENT IV

A. Mr. Lambrix's Claim is Timely

The state begins its argument contending that Mr. Lambrix's claim is procedurally barred. That is simply not the case as the lower court plainly found.

However, the state nonetheless continues to assert that argument here while relying on several incorrect facts. First, the state argues Mr. Lambrix should have known about Judge Stanley's bias from the Porter[1] case in 1995 because Mr. Porter was being represented by the same office that was representing Mr. Lambrix. This is incorrect as Mr. Lambrix was being represented by the Volunteer Lawyer Resource Center not the CCRC-South as the state contends. Indeed, CCRC-South was not appointed to represent Mr. Lambrix for the instant state court proceedings until December of 1997. The state's suggestion that 1995 is the proper time for which to calculate the timeliness of Mr. Lambrix claim is plainly wrong.

Alternatively, the state argues that since Judge Stanley testified in Mr. Porter's case on January 17, 1997 Mr. Lambrix had one year from that date to file the instant claim. Using this date, Mr. Lambrix's claim is timely for two reasons. First, Mr. Lambrix filed a Notice of Intent to Pursue Claims and sought to have counsel appointed in February of 1997 for the purpose of filing this judicial bias claim. Since Mr. Lambrix was unrepresented in state court at this time his filing of the Notice of Intent to Pursue Claims and the request for appointment of counsel was the equivalent of filing the postconviction motion. *Cf. McFarland v. Scott,* 512 U.S. 849, 856, 114 S.Ct. 2568, 2572 (1994)(a "post conviction proceeding" is commenced by the filing of a death row defendant's motion requesting the

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[1] *See Porter v. State,* 723 So. 2d 191 (Fla. 1998)

appointment of counsel for his federal habeas corpus proceeding).

Second, even using the state's date of January 17, 1998 as the deadline for Mr. Lambrix's claim his motion was timely. Mr. Lambrix's motion was timely served on January 16, 1998. The state however, claims that it was not filed until January 20, 1998 and is therefore untimely and barred. Even taking the state's date of January 20, Mr. Lambrix's claims were timely filed. Mr. Lambrix served his motion on January 16, 1998, a Friday, and was sent by FedEx to the circuit court clerk's office on that date. (PCR 1-67; 1669-1719). January 17, 1998 was a Saturday and January 19, the following Monday was the Martin Luther King, Jr. holiday observance.[2] Thus, the next available business day for which filing could have been made was January 20, 1998. Florida Rule of Criminal Procedure 3.040 plainly states, that "[i]n computing any time period prescribed or allowed by these rules, by order of court, or by any applicable statute . . . [t]he last day of the period so computed shall be counted, unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day that is neither a Saturday, Sunday nor legal holiday." Indeed, Rule 3.040 has been held to be applicable in the context of calculating time limits under rule 3.850. *See Mayo v. State*, 977 So. 2d 732 (Fla. 1st DCA 2008). Thus, even using the state's deadline

[2] Martin Luther King, Jr. Day is the third Monday of January. In 1998 the third Monday in January fell on January 19.

of January 17, 1998 Mr. Lambrix's motion is timely filed.[3]

B. Mr. Lambrix should have been allowed to depose Judge Stanley

Mr. Lambrix sought but was denied the opportunity to depose Judge Stanley before his death. The state claims it was Mr. Lambrix's actions that caused the delay in seeking to depose Judge Stanley. (Answer Brief, p. 85-86) This contention is deeply flawed and fails to acknowledge the procedural rabbit hole down which he was forced in these proceedings. After the filing of the motion, the CCRC-South office certified a conflict of interest in Mr. Lambrix's case, and requested that CCRC-Middle be appointed. On May 11, 1998, the CCRC-Middle office was officially appointed. For reasons not entirely clear from the record, the CCRC-Middle office was relieved of its representation of Mr. Lambrix, and private counsel, Thomas Ostrander, was appointed on August 2, 1999. Eventually, Ostrander withdrew and CCRC-South was reappointed at the end of May 2000.

In addition to the carousel of lawyers that rotated through representing Mr. Lambrix on the instant state court proceedings, there were various trial court judges involved. Mr. Lambrix had subpoenaed Judge Richard Stanley for a deposition on the issue of his bias as was done in the Porter case. On August 27, 1998, Judge John Carlin struck the subpoena finding Mr. Lambrix's claim

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[3] It should be noted that the trial court denied the state's motion to dismiss Mr. Lambrix's claim and calculated the one-year limit to have started December 15, 1998, the date this Court's decision in *Porter* became final.

procedurally barred. However, on September 2, 1998, Judge Pack wrote a letter to the parties, indicating that he, not Judge Carlin, was the assigned judge on Mr. Lambrix's case and nullified any ruling made by Judge Carlin on the issue of Judge Stanley's deposition. On March 29, 1999, Chief Judge Starnes entered an order of reassignment, assigning Mr. Lambrix's case to Judge Isaac Anderson.[4] On June 29, 1999, Judge Anderson issued a *sua sponte* order recusing himself from Mr. Lambrix's case. On June 29, 1999, Chief Judge Starnes appointed Judge Corbin to preside over Mr. Lambrix's case.

As diligently as Mr. Lambrix fought to depose Judge Stanley, the state fought to prevent the deposition. As a result there was an inordinate amount of time expended litigating the issue of Judge Stanley's deposition. During that time Judge Stanley died and his deposition will never be taken. The state attempts to cleanse its hands of any dilatory conduct here by arguing that Mr. Lambrix could not depose Judge Stanley because he could not point to any instance of bias in his case. However, this argument misses the fundamental nature of the bias described in *Porter*. The state seems to be of the opinion that Judge Stanley could be predisposed to sentencing people to the death, as was found in *Porter,* but unless Mr. Lambrix can, without benefit of deposing the judge, point to a specific

[4]In 1997, Judge Anderson had denied relief on the Judge Stanley bias issue in Raleigh Porter's case. This Court reversed that ruling. *Porter v. State*, 723 So. 2d 191 (Fla. 1998).

instance regarding him, Mr. Lambrix is never entitled to relief. This flies in the face of the holding in *Porter*. Such an argument is a self-fulfilling prophecy because that bias cannot be shown absent the deposition. Mr. Lambrix did, through the statements in *Porter* and by affidavit of trial counsel, demonstrate that Judge Stanley was biased and that bias infected the foundation of his case. Accepting the state's position would imposes an unreasonable standard upon Mr. Lambrix.

C. Mr. Lambrix was denied a full and fair review of Judge Stanley's bias.

Contrary to the state's position, the Porter case does disclose Judge Stanley's predisposition to and inclination for the death penalty. It is evident from the struggles that Mr. Porter undertook in establishing the bias of Judge Stanley and ultimately gaining relief, that the state, and indeed some courts in Florida, must be forced to accept the truth. The information about Judge Stanley's bias contained in this Court's opinion in *Porter* contains sufficient information upon which to depose him and grant an evidentiary hearing. In *Porter* this Court noted that Judge Stanley told a Miami Herald reporter that he "engaged in a debate with foes of the death penalty around the time of Porter's trial." 723 So. 2d 191, 194.[5] This Court continued and described that "In that debate, [with the death penalty foe] Judge

[5] Judge Stanley sentenced Mr. Porter to death in 1981. Mr. Lambrix's trial began February 24, 1984. Thus, the statements made in the Porter case comprise a relevant snapshot of what Judge Stanley thought during Mr. Lambrix's trial.

Stanley stated that, in answer to the question whether he would be willing to pull the switch, he had answered that he would do so as long as he could at the sentencing reach down his leg, pull up his pistol, and shoot them between the eyes." *Id.*(emphasis added).

Judge Stanley's use of the word "them" is critically important here. He is not saying, as the state suggests, that he wants to only "pull the switch" with regard to Mr. Porter or shoot only Mr. Porter between the eyes. He is using the word "them" as a pejorative to describe people charged with murder. Thus, he would want to "pull the switch" on all of "them" and shoot all of "them" between the eyes including Mr. Lambrix and possibly even the death penalty foes.

Due process compels a judge presiding over a capital trial to, at the very minimum, be free from the desire to actually physically carry out a death sentence using his own firearm. The state refers to Judge Stanley's well-known possession of a firearm on the bench as an eccentricity. Regardless of this Court's view of that practice, the possession of the gun in court in connection with the stated desire to use the weapon to shoot a defendant between the eyes does as much violence to the notion of judicial impartiality as Judge Stanley wanted to inflict upon defendants himself.

It has long been held in Florida that a trial judge not only must be impartial but must appear to be impartial. Every litigant and especially, those facing the

death penalty, are entitled to "the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 100 Fla. 1382, 1385, 131 So. 331, 332 (Fla. 1930). That impartiality must exist not only in the judge's own mind, but the judge "also must convey the image of imparity to the parties and the public." *Peek v. State*, 488 So. 2d 52 (Fla. 1986). "Judges must make sure that their statements, both on and off the bench, are proper and do not convey an image of prejudice or bias to any person or any segment of the community." *Id.*

Here, Judge Stanley's comments in the Porter case clearly demonstrate he was biased against all those charged with murder and facing the death penalty. As this court stated in Porter "due process under Florida capital sentencing procedure requires a trial judge who is not precommitted to a life sentence or a death sentence but rather is committed to impartiality weighing aggravating and mitigating circumstances." *Porter* at 195. The statements and braggadocio of Judge Stanley indicate he was indeed precommitted to a death sentence.

The state also argues that Judge Stanley stated in his testimony in *Porter* that he did not remember other death sentences he issued other that Mr. Porter's. (Answer Brief p. 82) Thus, the state argues that this is evidence that Judge Stanley did not remember Mr. Lambrix's case and a deposition would have been futile. Such an argument has absolutely no support in the record. First, if the state really wanted to determine if Judge Stanley recalled Mr. Lambrix's case then a

deposition is most certainly the best way to answer that question. Second, it does not appear that Judge Stanley was ever specifically asked about Mr. Lambrix's case during the Porter litigation. Third, it cannot be said that had Judge Stanley been given the opportunity to review Mr. Lambrix's case files his recollection would not be refreshed. Fourth, Judge Stanley obviously recalled enough about Mr. Lambrix's case to give statements to the Parole Commission in 1987, 1988 and 1994.[6] Given that his testimony in *Porter* was presented in 1997 it strains credulity to presume Judge Stanley had no recollection of Mr. Lambrix's case when he gave information about to the Parole Commission three years earlier. A reasonable conclusion from this is that Judge Stanley's claim that he did not remember other death sentences was an effort to forestall the other defendants he sentenced to death from attacking his impartiality as Mr. Porter did. The state's suggestion that Judge Stanley sentenced Mr. Lambrix to death in 1984 and then promptly forgot about his case is belied by the totality of the record. The real truth would have been brought to light upon deposing Judge Stanley. Alas, that is no longer possible.

Judge Stanley's bias is not limited to the penalty phase as it was in *Porter*.

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[6] Mr. Lambrix was also unfairly prevented from obtaining Judge Stanley's statements before the Parole Commission. The trial court failed to rule that Mr. Lambrix was entitled to that information in order to develop his claim here. Again this is an instance where substantial information existed to develop this claim was kept from Mr. Lambrix.

Indeed, the bias of Judge Stanley, while dismissed by the state, is described in trial counsel Robert Jacobs' affidavit of October 28, 1998 which plainly details the hostility Judge Stanley had for the defense in this case. His opinion was that Judge Stanley's rulings, including the denial of individual voir dire, the seating of biased jurors, and restrictions on his ability to cross-examine Frances Smith with her prior inconsistent statements, "manifested his bias against Mr. Lambrix" in such a manner that without Judge Stanley's bias, "the outcome of [Mr. Lambrix's] trial would have been different." (PCR 1720-23). Also, the evidence against Mr. Lambrix was far from overwhelming and largely circumstantial. This is starkly demonstrated by the fact that his first trial, based on virtually identical evidence, resulted in a hung jury.

Judge Stanley did not preside over the first trial that resulted in the hung jury. The record is silent as to why Judge Stanley was assigned to the re-trial. Although the evidence at the two trials was virtually identical except for the embellishments of Frances Smith's testimony, the result was quite different. This raises the very real possibility that Judge Stanley's bias infected the proceedings to such a degree as to swing marginal circumstantial evidence into a guilty verdict. As a practical matter, the main difference between the two trials was Judge Stanley's presence along with his attendant bias. Add to this the fact that Mr. Lambrix has been consistently arguing for over twenty years that he is factually innocent of first-degree

premeditated murder and one's confidence in the outcome of this trial is surely shaken.

Notwithstanding the marginal circumstantial evidence here, the right to be tried by an impartial judge is not subject to the harmless error rule. *See Cartalino v. Washington*, 122 F.3d 8, 10-11 (7th Cir. 1997). Where, as here, a trial judge lacks the requisite constitutional impartiality there can be no confidence in the trial's outcome. Therefore, Mr. Lambrix is entitled to an entirely new trial for the guilt phase as well. Judge Stanley's bias cannot be limited merely to the penalty phase. As Justice Anstead stated in *Porter*, "I dissent, however, from the majority's conclusion that it's finding of bias and lack of impartiality does not mandate that a new trial be granted on *both* the guilt and penalty phases of the defendant's case. Unless I am mistaken, I believe it is a fundamental principle of our justice system that a defendant is entitled to an impartial judge in all phases of the judicial proceedings." *Porter v. State,* 723 So. 2d 191, 199 (Fla. 1998)(Anstead, J., dissenting in part)(emphasis supplied).

Had Mr. Lambrix been allowed to develop specific facts through deposing Judge Stanley and through an evidentiary hearing, a clear showing of judicial bias would have been presented and Mr. Lambrix would have been entitled to a new trial. Because of the inordinate length of time Mr. Lambrix was forced to litigate his entitlement to depose Judge Stanley, the judge died and cannot now ever be

deposed. Such circumstances cannot operate to deprive Mr. Lambrix of his right to trial before a truly neutral judge. Foisting such a constitutional infirmity upon him after Judge Stanley's bias has come to light would turn the procedural rabbit hole down which Mr. Lambrix has been forced into a judicial one.

ARGUMENT V

The State's argument that the law of the case doctrine bars relief to Mr. Lambrix is disingenuous. This Court's opinion, cited by the State for the proposition that Mr. Lambrix had already been denied relief on such grounds in Case No. 86,119, states: "[t]he trial court summarily denied Lambrix's instant motion for postconviction relief, finding that his claims were without merit and procedurally barred as untimely and successive or abusive." *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1997). The claims that this Court found to be procedurally barred in 1997 are not the identical claims recently litigated below that are now before this Court for review. *Id.* at f. 2.

Appellant's 2004 Claim VIII raised the following: (1) Mr. Lambrix is entitled to review of procedurally barred claims under *Schlup v. Delo* because he can establish that he is actually innocent. PCR. 6831; (a) Mr. Lambrix was denied the effective assistance of appellate counsel because counsel J.L. LeGrande failed to argue on direct appeal the issue preserved at trial that he was entitled to judgments of acquittal on the charges of first-degree murder. Id. 6832-6841; (b)

Mr. Lambrix was denied his right to effective assistance of trial counsel because counsel's actions deprived him of his right to testify. *Id.* 6841-6848; (c) Mr. Lambrix was denied the effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments by trial counsel's failure to adequately cross-examine and impeach Frances Smith, the State's key witness. *Id.* 6848-6860; (d) Trial counsel was ineffective for failing to challenge the State's evidence on the cause of death of Bryant by failing to retain the expert assistance of an independent pathologist and by failing to effectively cross-examine the State witnesses. *Id.* 6860-6870; (e); Trial counsel was ineffective by failing to challenge unqualified jurors. *Id*. 6870-6883; (2) Mr. Lambrix is entitled to review of procedurally barred claims under *Sawyer v. Whitley* , 505 U.S. 333 (1992) because he is actually innocent of the death penalty. *Id.* 6883-6885; (3) Mr. Lambrix is entitled to relief from the judgments of conviction and sentence as Mr. Lambrix's wrongful convictions are the result of the State's use of perjured testimony. *Id.* 6885-6891.

The expert pathologist issue and the issue of using the newly discovered evidence for impeachment of witnesses Smith, Daniels and Hanzel were not previously considered by this Court. The claim of newly discovered evidence that Debbie Hanzel's false testimony at trial was the result of fabrication by Frances Smith and Investigator Daniels and the *Brady/Giglio* claim concerning Frances Smith's testimony that she had a sexual relationship with Investigator Daniels and

that there was an immunity deal have never been considered by this Court and are sufficient to warrant relief in the form of a new trial. (PCR. 6788-6828) They establish "a colorable claim of innocence" supported by newly discovered evidence. *Schulp v. Delo* 513 U.S. 298, 313-335 (1995), *Murray v. Carrier*, 477 U.S. 478 (1986).

Applicable constitutional law now entitles the Appellant to a full review of the procedurally barred claims under the fundamental miscarriage of justice doctrine. *See Schulp;Murray*; *House v. Bell*, 547 U.S. 518, 536 (2006) ("'In appropriate cases,"' the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'").

The standard of "probably resulted in the conviction of one who is actually innocent" governs the miscarriage of justice inquiry rather than the more stringent standard that was used in *Sawyer v. Whitley*, 505 U.S. 333 (1990*)*. *Schulp*, at 313-319. "The analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schulp*, at 328.

The State argues that Mr. Lambrix "has not identified any "new reliable evidence" to support his claim; he merely relies on his "current version of the murders" as being consistent with the evidence at trial. (Answer Brief at 96). The

State ignores the Hanzel affidavit and testimony that established that Mr. Lambrix made exculpatory statements ("He went nuts") and that he did not tell her what she testified to at trial: that he killed the victims to acquire the car. Argument III concerns the additional "new reliable evidence" in the form of newly discovered evidence and expert medical and scientific opinion that was proffered below but never heard or considered by the lower court.[7] The experts should have been allowed to testify because they could not have given the same testimony at trial in 1983 because the new evidence was not available to them then. *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996).

The State simply misses the point when it argues that "Lambrix's reliance on circumstantial evidence cases where the Court has deemed evidence to be insufficient to support a first degree murder conviction does not establish his innocence" (Answer Brief at 97). The State should be aware that "Under a proper application of either *Sawyer* or *Carrier*, [Mr. Lambrix's] showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Schulp* at 331. If that is so, a showing of insufficient evidence to convict is hardly immaterial. Mr. Lambrix is in a similar position as

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[7] "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schulp at 324.* However, this *Schulp* standard does not require the habeas court's analysis to be limited to such evidence. *House v. Bell* at 537.

was Schulp, in that "under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Schulp* at 330. In these circumstances "the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Schulp* at 327. This Court should reject the lower court's findings of fact. *See Cardona v. State, 826 So. 2d 968 (Fla. 2002); Mordenti v, State, 894 So. 2d 161 (Fla. 2004).*

Direct appeal counsel LeGrande failed to raise the issue of the sufficiency of the evidence after the trial court denied trial counsel's comprehensive motion for judgment of acquittal. This Court made no specific comment in the 1986 or 1988 *Lambrix* opinions concerning whether any independent review of the sufficiency of the evidence was undertaken, beyond the comment that "the thrust of his petition is that appellate counsel was ineffective in failing to argue numerous issues." *Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986); *Lambrix v. Dugger*, 529 So. 2d 1110, 1111 (Fla. 1988).

Mr. Lambrix himself raised the denial of judgment of acquittal issue in his Pro Se state habeas corpus petition, Issue IV, pages 25-31, which was specifically adopted by counsel and attached to the Consolidated Supplement served by CCR on January 27, 1988. In the 1988 opinion this Court noted that "[w]e have

considered the pleadings both of petitioner and of CCR." *Id.* at 1110 fn. 1.

In Schulp, the Court specifically instructed that a reviewing court must consider applicable law in making the probabilistic determination of actual innocence. The standard required the district court to make a probabilistic determination about what reasonable, *properly instructed jurors* would do...that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt...it must be presumed that a reasonable juror would fairly consider all the evidence presented. It must also be presumed that such a juror *would conscientiously obey the instructions* of the trial court requiring proof beyond a reasonable doubt. *Schulp*, at 329. This Court must consider the newly discovered evidence in conjunction with the claims presented under this instant fundamental miscarriage of justice claim in the context of applicable Florida jury instructions that require acquittal in a circumstantial case.

When a case is heard on circumstantial evidence, a special standard of sufficiency of evidence applies. The standard is: Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *Heiney v. State*, 447 So. 2d 210, 212 (Fla. 1984), quoting *McArthur v. State*, 351 So. 2d 973, 976 (Fla. 1977).

In this case, it is clear that especially in light of the newly discovered evidence presented in the conspiracy/collaboration issue and the *Brady/Giglio* issue, the State's circumstantial case of alleged premeditated murder would have been legally insufficient - and any reasonable juror conscientiously obeying the instructions of the trial court requiring proof beyond a reasonable doubt, *Schulp*, 513 U.S. at 329, would have been legally compelled to acquit Mr. Lambrix. *See Long v. State*, 689 So. 2d 1055-1057-59 (Fla. 1997); *see also Ballard v. State*, 923 So. 2d 475 (Fla. 2006). Had the jury heard the newly discovered evidence from Deborah Hanzel concerning collaboration and concealing crucial evidence and the *Brady/Giglio* information concerning the affair and the promise of immunity, no reasonable juror would have noted to convict Mr. Lambrix as substantial reasonable doubt would have existed.

As to whether the jury might have rejected Mr. Lambrix's theory of self-defense, it must be noted that when Mr. Lambrix testified before the lower court at the evidentiary hearing on April 5, 2004, the State failed to provide any evidence to impeach Mr. Lambrix's account of what transpired outside that night. At trial, the State provided virtually no evidence of what took place outside, thus the State has never produced any conflicting evidence that would had allowed the jurors to reject Mr. Lambrix's theory of self defense. The burden of proof should have been on the State to prove that there was an absence of any reasonable alternative theory

about what actually happened on the night of the deaths of Bryant and Lamberson. Mr. Lambrix should not have been required to provide a theory beyond reasonable doubt. To require him to do so would have been a violation of his right to remain silent.

Mr. Lambrix would have been entitled to have the jury instructed that in light of the virtual absence of conflicting evidence, his claim of involuntary self defense must be believed and cannot be rejected. *See McArthur v. State*, 351 So. 2d 972, 976, n. 12 (Fla. 1977) (In applying the standard [of circumstantial evidence], the version of events related by the defense must be believed if the circumstances do not show that version to be false).

Thus, in light of the fact that the State did not, and could not, provide any evidence to show that Mr. Lambrix's version of events was false, a properly instructed jury would not have rejected Mr. Lambrix's theory of involuntary self defense (and absolute actual innocence in the death of Aleisha Bryant), as that jury would had been specifically instructed that they must accept Mr. Lambrix's version of events as true in light of the virtual absence of any conflicting evidence.

Therefore, "a probabilistic determination about what reasonable, properly instructed jurors would do. . . that, in light of the new evidence, no juror, acting reasonably," *Schulp, Id*., at 329, "conscientiously obeying the instructions of the trial court requiring proof beyond a reasonable doubt," id., would have voted to

find (Mr. Lambrix) guilty beyond a reasonable doubt." Id.

The State is not correct in its assertion that the prior *Lambrix* opinion is entirely consistent with *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008). This Court held that Jimenez's factual innocence claim and due process claim were "unpreserved because Jimenez did not present this specific claim to the trial court during the successive rule 3.851 proceeding." *Jimenez* at 1072. This Court also recited the holding on direct appeal which denied Jimenez's claim "that the evidence against him was circumstantial and did not exclude a reasonable hypothesis of innocence" and affirmed on postconviction appeal that "the evidence currently before us does not support the claim that Jimenez is innocent." Id. Mr. Lambrix did present the specific claim to the lower court in the context of substantial miscarriage of justice. It is now before this Court.

CONCLUSION

Appellant relies on the conclusion on page 97 of his Amended and Corrected Initial Brief. Appellant requests the opportunity to amend and correct this Reply Brief based on this Court's ruling on Appellant's pending Motion to RelinquishJurisdiction and separate Motion to Toll Time.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Carol M. Dittmar, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, this 13th day of April, 2009.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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