IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-64
Lower Tribunal No. 83-12-CF
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal of the denial of a successive motion for postconviction relief filed by death row inmate Cary Michael Lambrix. Lambrix received two death sentences in 1984 following his convictions for the murders of Aleisha Bryant and Clarence Moore. The facts are outlined in this Court's initial opinion affirming the convictions and sentences, Lambrix v. State, 494 So. 2d 1143, 1145 (Fla. 1986):

> On the evening of February 5, 1983, Lambrix and Frances Smith, his roommate, went to a tavern where they met Clarence Moore, a/k/a Lawrence Lamberson, and Aleisha Bryant. Late that evening, they all ventured to Lambrix's trailer to eat spaghetti. Shortly after their arrival, Lambrix and Moore went outside. Lambrix returned about twenty minutes later and requested Bryant to go outside with him. About forty-five minutes later Lambrix returned alone. Smith testified that Lambrix was carrying a tire tool and had blood on his person and clothing. Lambrix told Smith that he killed both Bryant and Moore. He mentioned that he choked and stomped on Bryant and hit Moore over the head. Smith and Lambrix proceeded to eat spaghetti, wash up and bury the two bodies behind the trailer. After burying the bodies, Lambrix and Smith went back to the trailer to wash up. They then took Moore's Cadillac and disposed of the tire tool and Lambrix's bloody shirt in a nearby stream.
>
> On Wednesday, February 8, 1983, Smith was arrested on an unrelated charge. Smith stayed in jail until Friday. On the following Monday, Smith contacted law enforcement officers and advised them of the burial.
>
> A police investigation led to the discovery of the two buried bodies as well as the recovery of the tire iron and bloody shirt. A medical examiner testified that Moore died from multiple crushing blows to the head and Bryant died from manual strangulation.

Trial, Sentencing, and Direct Appeal

Lambrix was charged in an indictment filed on March 29, 1983, with two counts of first degree murder (DA-R. 20).[1] Lambrix pled not guilty, and proceeded with a jury trial which commenced on Nov. 29, 1983, before the Hon. James R. Adams. Prior to the beginning of trial, defense counsel requested a continuance because, according to counsel, they had been provided with information late the previous day that Lambrix's sister Mary "was changing her story" and "saying everything she told us previously was false" (V15/2938-40). Counsel indicated that they had a lengthy discussion with Lambrix about this, and Lambrix then admitted to them "that, in fact, he was present when the victims in this case were killed. He did not strike any blows in killing them and that other people had killed them." (V15/2940-41). Counsel stated that Lambrix had provided information to verify his new version of events, and asked for a continuance in the interest of justice so that these new matters could be investigated. The State opposed the continuance, and the defense advised that their "whole defense theory--being candid with the Court--was based on his sister corroborating

[1] References to the direct appeal record, Lambrix v. State, Florida Supreme Court Case No. 65,203, will be designated by "DA-R." followed by the applicable page number; references to the instant record in this postconviction appeal will cite to the applicable volume and page number.

times and events as to what the Defendant said," and that when the sister called them to tell them she had been lying, the entire defense went "out the window" (V15/2941-45). In response to that, Lambrix had given them a whole new theory, but they were not prepared to go forward with it. The motion to continue was denied (V15/2945-48).

On the morning of Dec. 1, after two days of jury selection, there was an in-chambers discussion between the judge, defense counsel, and Lambrix. The transcript from that discussion reveals that defense counsel approached the court about an ethical dilemma, concerned that Lambrix had expressed a desire to testify to matters that were not as he had previously related to counsel (V15/2950, 2955). The trial court recognized Lambrix's right to testify, telling the attorney he couldn't keep Lambrix off the stand. Defense counsel suggested that one solution to the problem might be to allow defense counsel to withdraw once it was apparent that his client was committing perjury. The trial judge agreed and advised Lambrix that he would permit the attorneys to withdraw under such circumstances, and warned Lambrix that the trial would continue even if Lambrix was not represented (V15/2955-56).

Thereafter, a jury was selected and the case was heard, but the trial ended in a mistrial when the jury could not agree on a

verdict. Lambrix did not testify and neither he nor his attorneys indicated that Lambrix may have wanted to testify truthfully.

A second trial was conducted Feb. 20-24, 1984, before a different judge, the Hon. Richard M. Stanley. The evidence presented at this trial included the following:

Florida Department of Law Enforcement Special Agent Connie Smith testified that she went to Tampa on Feb. 14, 1983, to meet with Frances Smith[2] at the State Attorney's Office (DA-R. 1842-43). Frances revealed that she had helped Lambrix bury two bodies in LaBelle, Florida, so Agent Smith and Frances Smith traveled to LaBelle with other investigators on Feb. 16 (DA-R. 1844-45). The scene was as described by Frances; it was raining at that time, and the ground was soaked, which inhibited the investigation (DA-R. 1845-46). Agent Smith described finding the bodies, as directed by Frances, and excavating them from their crude, shallow graves (DA-R. 1852-55). Agent Smith also testified about the trailer on the property, which appeared as though no one was living there (DA-R. 1858-59). There were abandoned cars and garbage around the yard, clothes soaking in a

[2] Frances Smith is no relation to Connie Smith. Frances Smith has also been known as Frances Ottinger and Frances Swendeman, but will be referred to as Frances Smith in this brief.

bathtub, and dirty dishes with dried spaghetti in the sink (DA-R. 1858-59).

Agent Smith's testimony was corroborated by State Attorney Investigators Carla Mitar and Robert Daniels (DA-R. 1901-16, 1920-67). In addition, a Medical Examiner Investigator, Samuel Johnson, described the grave sites and the condition of the bodies (DA-R. 1992-2016). Both bodies were in a state of decomposition, and Johnson observed the female body to have trauma to both sides of her face, as well as her left hand (DA-R. 2001-02, 2011). Her ear lobe was torn and her pants were pulled down around her legs (DA-R. 2002-03). The male body had injuries on and about the face, as well as a bashing, crushing type circular injury to the back of the head (DA-R. 2011-12).

Dr. Robert Schultz, Associate Medical Examiner, performed autopsies on both bodies on Feb. 17, 1983 (DA-R. 2038, 2044). He described the bodies as being in an advanced state of decomposition and estimated that the victims had been dead for one to three weeks (DA-R. 2045, 2056, 2072). As to the female victim, Dr. Schultz observed non-lethal but painful wounds to her ear and hand; he concluded that the probable cause of death was manual strangulation (DA-R. 2046,2050,2073,2077). As to the male victim, Dr. Schultz observed multiple lacerations and crushing injuries to the head, and a puncture wound to the back

of the chest (DA-R. 2056-58). Dr. Schultz noted at least ten separate blows to the head, resulting in severe fractures of the skull and the bones around the eyes and cheeks (DA-R. 2058-59). The multiple blows to the head were identified as the cause of death (DA-R. 2064).

Glades County Sheriff's Deputy Ron Council testified that he worked on Feb. 5, 1983, from 7:00 p.m. to 3:00 a.m., and that he had been in the County Line Bar, also known as Squeaky's, on a routine check (DA-R. 2149-51). He had observed defendant Lambrix, Frances Smith, Aleisha Bryant, and Clarence Moore (a/k/a Lawrence Lamberson) together in the bar that evening (DA-R. 2152-53). He recalled that Lambrix had stood and had words with him, and also that there had been an out-of-county black Cadillac in the parking lot (DA-R. 2155-56).

Frances Smith testified that she met defendant Lambrix on Jan. 3, 1983, when Lambrix came to her house looking for her brother (DA-R. 2178-79). She saw him again the next day at a friend's house; they went out on a date that night, and she began seeing him regularly (DA-R. 2180). Smith was in an unhappy marriage and on Jan. 14, 1983, she left her husband and three children to go with Lambrix to Glades County (DA-R. 2181-82). They drove her car, a green, 1973 Chrysler, and rented a small trailer on a large piece of property near LaBelle (DA-R.

2183-84). She had taken $200 with her when they left Tampa, and Lambrix had no money; the money was gone in a week but they were able to make a little by doing odd jobs (DA-R. 2186-87). Her car stopped working, and although Lambrix towed in another Chrysler to use for parts, neither car ran (DA-R. 2185-86).

On the evening of Feb. 5, 1983, they rode into LaBelle with a friend and she and Lambrix went to a bar, where they met and began visiting with Lamberson (DA-R. 2188-90). He was expecting Bryant, and she joined them about a half hour later (DA-R. 2191). They left together in Lamberson's car, a black Fleetwood Cadillac, and followed Bryant home so she could drop off her car (DA-R. 2193-94). The four of them then went to Squeaky's Bar, and left around midnight (DA-R. 2193,2203).

Lambrix invited Lamberson and Bryant to the trailer for spaghetti, and they took plastic cups, Coke and whiskey with them (DA-R. 2204). They were still in Lamberson's car; Bryant was driving (DA-R. 2204-05). At the trailer, Smith started making spaghetti from a jar and the others were talking and joking (DA-R. 2205). Lambrix asked Lamberson to go outside, as he wanted to show him some plants (DA-R. 2205). Smith thought this was unusual because she did not know of any plants out back; although they had planted corn and tomatoes from seeds, these had not come up yet (DA-R. 2206-07). Lambrix came back

about twenty minutes later, and told Bryant that Lamberson wanted her to come out and see the plants (DA-R. 2207-08). Bryant grabbed Smith's arm and told her to come, and Smith went outside with Bryant (DA-R. 2208-09). Smith said she was going back inside to get shoes, and Lambrix directed her to stay and watch the spaghetti so it didn't burn (DA-R. 2209).

Smith didn't hear anything except a neighbor's loud radio, then Lambrix returned about forty-five minutes later (DA-R. 2209). He was alone, had blood on his face and arms, and threw a tire iron on the floor as he said they were both dead (DA-R. 2209-11). Smith backed up and started screaming, and Lambrix grabbed her, shook her, and said he would do her, too (DA-R. 2211). He took his shirt off then went into the bathroom and washed up, spitting blood (DA-R. 2211). Smith asked him about the blood and Lambrix said that Bryant had spit blood into his mouth (DA-R. 2212). Lambrix then put on a clean shirt and ate a big plate of spaghetti (DA-R. 2212).

Smith asked Lambrix why he did it, and he said "did what?" like he didn't know what she was talking about (DA-R. 2212). Eventually he told her that he hit Lamberson in the head with the tire tool and choked Bryant, then stomped her in the head (DA-R. 2213). He said that he had no difficulty with Lamberson, he was easy, but that Bryant put up a real fight; he had swung

the tire tool at her, but she ducked and ran, and he had to catch her (DA-R. 2213).

Smith testified that she was scared to death of Lambrix, and he told her that she was going to help bury them, because if she didn't he would just put her in the middle (DA-R. 2213-14). Lambrix drove Lamberson's car and made Smith go with him to a convenience store, where he bought a flashlight; then they went to a neighbor's trailer to borrow a shovel (DA-R. 2214-15). It was morning, but still dark (DA-R. 2216). They returned to their own trailer, and Lambrix led her to the bodies (DA-R. 2218). She first saw Lamberson, lying on his back, with his head caved in and blood all over the side of his face (DA-R. 2219). She held the flashlight while Lambrix started digging, then he had her lie down to check the size of the grave (DA-R. 2220). Lambrix went over to Lamberson's body, took a gold necklace from the body and put it around his neck, then went through Lamberson's pockets; Smith did not see whether he took anything (DA-R. 2221). Then Lambrix grabbed Lamberson by the feet and drug him over to the grave (DA-R. 2221). As he did so, Lamberson made a horrible, unusual noise, and when Smith asked Lambrix about it Lambrix told her it was the air escaping from Lamberson's lungs (DA-R. 2222). Lambrix was acting happy; he rolled Lamberson over into the grave and started covering the

body (DA-R. 2222). He walked over the area then spread branches around (DA-R. 2223).

Smith then held the shovel while Lambrix looked around for a place to dig the other grave (DA-R. 2223). About 1,000 feet away, he started to dig, with Smith again holding the flashlight (DA-R. 2223). He again had her lie down to measure; once he was finished digging, he led her to Bryant's body (DA-R. 2224). Bryant was lying face down in a pond (DA-R. 2225). Lambrix drug her out by her feet; there were no signs of life, but she was making the same noise Smith had heard from Lamberson (DA-R. 2225-27). While Lambrix worked, Smith again asked him why he did it, to which he responded "did what?" (DA-R. 2228). Several times during the course of the evening, Lambrix told Smith that if she ever turned him in, he would kill her, and she believed him (DA-R. 2228).

After the bodies were buried, Lambrix and Smith returned to the trailer (DA-R. 2229). Lambrix told her to get a few things, that they were going to his sister Mary's house near Plant City (DA-R. 2229). They packed and left; Lambrix wrapped a shirt around the tire tool and put it in the car (DA-R. 2230). Lambrix was driving Lamberson's Cadillac (DA-R. 2231). They stopped on a bridge down the road and Lambrix dropped the tire tool and shirt over the bridge into the water (DA-R. 2231-32).

They stopped at a Pancake House on the way to Mary Lambrix's house because Lambrix wanted to eat breakfast (DA-R. 2243-44). During the trip, she again asked Lambrix why he had done it, and he said "Do what? It's already forgotten. You should forget it too. At least now we have a car" (DA-R. 2244-45). They arrived at his sister's house very early Sunday morning, where Lambrix told Mary that he had bought the car (DA-R. 2245). He searched the car, and commented to Smith that he'd thought Lamberson had more money than that (DA-R. 2246).

While they were staying at Mary's, Smith saw Lambrix take a briefcase out of the trunk and burn some of the papers from the briefcase (DA-R. 2246). He also took out some of Lamberson's clothes and wore them (DA-R. 2247). He told Smith that he sold the necklace; she had seen him show it to Mary and her boyfriend, but he didn't tell them where he'd gotten it (DA-R. 2247-48).

They left Mary's house on Tuesday night and spent that night with Smith's brother, Harlen Ottinger (DA-R. 2248). Wednesday morning, Lambrix sent Smith back to Mary's to check the mail, and Smith was arrested for something not connected to Bryant or Lamberson. She remained in jail until late Friday night (DA-R. 2249). The following Monday, she contacted law enforcement and told them about the two bodies (DA-R. 2250).

She was still afraid of Lambrix, but she had talked to her family, and her sister had told her that she could get police protection (DA-R. 2250). Smith detailed her conversations with law enforcement, and described how she waived her rights without being threatened or pressured and voluntarily went down to Ft. Myers, then to LaBelle, to show the authorities where the bodies were buried (DA-R. 2251-58).[3]

Back in Tampa, Lambrix called her once, telling her that she had a letter waiting at the post office in Dover (DA-R. 2259-60). The letter, written by Lambrix, discussed telling authorities that Lamberson and Bryant wanted to elope, and that the couples had traded cars (DA-R. 2266). Smith read the letter and turned it over to FDLE Agent Smith; it was admitted into evidence (DA-R. 2280-84).

Smith testified that she didn't know Preston Branch, but she recalled meeting him one time after she and Lambrix had returned from Glades County (DA-R. 2285). Branch was Smith's sister-in-law's cousin. Smith knew Deborah Hanzel "slightly," having met her about three times (DA-R. 2286).

[3] In a pretrial deposition, Daniels testified that he told Frances Smith that, if she was being honest in describing her role in these offenses, she would not be charged with a crime in connection with the homicides, and that her polygraph examination indicated no deception on this (DA-R. 318-19).

On cross examination, defense counsel started to ask Smith about statements which she made to a Hillsborough County deputy while she was in custody on Feb. 11, 1983 (DA-R. 2319). The prosecutor objected and, at the bench, advised the judge that he wanted to make sure that counsel was aware of the circumstances: that Smith had been arrested for aiding a fugitive, Lambrix, because Lambrix was wanted for escape (DA-R. 2319-21). The court ruled that defense counsel could ask about the statement, but that such questioning would open the door to having the State present the circumstances of the statement (DA-R. 2321-26). Smith was not asked about her statement in front of the jury (DA-R. 2326). The trial court's ruling on this issue was presented as an issue on appeal, and this Court affirmed the ruling. Lambrix, 494 So. 2d at 1147.

Bob Johnson testified that he owned a 240-acre cattle ranch near LaBelle, and rented a trailer on the property to Lambrix around the end of January, 1983 (DA-R. 2337-40). He knew Lambrix as Mike Townsend, and did not know him before 1983 (DA-R. 2339). Johnson thought Lambrix and Smith were married (DA-R. 2340). He gave police permission to search his property in February, 1983; the previous Saturday, Lambrix had moved out, telling Johnson that his wife had been in an accident and was in

the hospital, and that he was moving out but would be back (DA-R. 2341-42).

Hendry County Sheriff's Deputy Larry Bankert described the discovery of the tire tool, wrapped in a shirt, in a nearby creek on Feb. 17, 1983 (DA-R. 2350-59). John Chezem testified that he lived about a mile from the trailer Lambrix rented (DA-R. 2371-73). He stated that on Feb. 6, 1983, about 2:30 a.m., Lambrix came to borrow a shovel (DA-R. 2375). Lambrix was driving a Cadillac and told Chezem that he needed the shovel because a relative was stuck on the road (DA-R. 2377). According to Chezem, Lambrix did not appear to be intoxicated, and acted normal, in a good mood, bragging about his car (DA-R. 2378,2381).

Billy Williams was a friend of Lambrix's from LaBelle (DA-R. 2387,2390). Williams went by the trailer and noted that Lambrix and Smith had left suddenly, there was still spaghetti on the plates (DA-R. 2391). He went back to the trailer later and Lambrix was there with friends; Lambrix told Williams that Smith was in the hospital, and that Williams could have the cars on the property (DA-R. 2392-95).

Preston Branch testified that he was a friend of Lambrix's and he went with Lambrix to LaBelle to retrieve belongings from a trailer (DA-R. 2401,2403,2407). After they left LaBelle,

Lambrix told Branch that there were two dead bodies back there, don't laugh, and Lambrix would have Branch done away with if he ever told anyone (DA-R. 2418-22). Branch's girlfriend, Deborah[4] Hanzel, also went with them to LaBelle and remembered the statement as Lambrix saying "if you give me $100 I'll take you back and show you where I killed two people and buried them," but Hanzel thought Lambrix was kidding (DA-R. 2445). Hanzel testified that Lambrix had shown up before they went to LaBelle, driving a Cadillac, with lots of money (DA-R. 2431). After they had returned from LaBelle, Lambrix called her collect a few times (DA-R. 2448-49). During one of these conversations, Hanzel asked Lambrix if it was true that he had killed the guy for his car, and Lambrix had said "that was of the reason" [sic] (DA-R. 2449). During the first trial and in her pretrial statement to Investigator Daniels, Hanzel had described Lambrix's response as "it was part of the reason why" (V15/2959,2982,2990,2995).

Lambrix did not testify or express any desire to testify during this second trial. The defense rested without presenting any additional evidence; the theory of defense was that the State had failed to prove its case and that Lambrix was not guilty of any crime (DA-R. 2466,2478-98). In closing argument,

[4] Spelled "Debra" in the original trial transcript.

defense counsel noted inconsistencies in the State's evidence; suggested that victim Lamberson was running from the law; claimed Frances Smith's testimony was inaccurate on several points, and that she had an obvious interest in the case and "was told she would not be prosecuted" (DA-R. 2479-94).

On Feb. 27, 1984, the jury found Lambrix guilty as charged on both counts of the indictment (DA-R. 2553). At the penalty phase of the trial, the State presented Investigator Daniels, who identified a picture of victim Lamberson taken shortly after his body had been exhumed; however, the photo was excluded upon objection by the defense (DA-R. 2571-78). The State also presented Polly Moore, secretary at Lakeland Community Correctional Center, to identify business records from that work release facility establishing that Lambrix entered the institution on Nov. 1, 1982, pursuant to a sentence of imprisonment, and escaped on Dec. 23, 1982 (DA-R. 2578-83). Moore testified that Lambrix was still under a sentence of imprisonment on Feb. 6, 1983 (DA-R. 2583). Lambrix presented five witnesses in mitigation: Lambrix's sister Janet, two brothers, father, and stepmother (DA-R. 2591-2624).

Following the penalty phase of the trial, the jury recommended the death penalty as to Count I (on Aleisha Dawn Bryant) by a vote of 10-2, and as to Count II (on Clarence

Edward Moore, a/k/a Lawrence Lamberson), by a vote of 8-4 (DA-R. 2680). On March 22, 1984, Judge Stanley conducted a sentencing proceeding and entered his findings of fact in support of the two death sentences imposed (DA-R. 1354,2691-2701). The aggravating circumstances found were: (1) the capital felonies were committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of another capital felony; (3) the capital felony was committed for pecuniary gain (does not apply to the murder of Bryant); (4) the capital felonies were especially heinous, atrocious, or cruel; and (5) the capital felonies were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The court did not find any mitigating circumstances to apply.

This Court affirmed the judgments and sentences of death on Sept. 25, 1986. Lambrix, 494 So. 2d at 1148.

Initial State Postconviction Proceedings

On or about Nov. 2, 1987, Lambrix filed a *pro se* petition for writ of habeas corpus with this Court. The State filed a response and the Office of the Capital Collateral Representative was permitted to appear and filed a supplement to the *pro se* petition. This Court denied the petition on Aug. 18, 1988. Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988).

A request by Lambrix for clemency was apparently denied when then-Governor Bob Martinez signed a death warrant in Lambrix's case on Sept. 27, 1988. On or about Oct. 27, 1988, Lambrix filed an emergency motion to vacate judgment and sentence in the circuit court pursuant to Florida Rule of Criminal Procedure 3.850.

On Nov. 18, 1988, the Hon. Elmer O'Friday summarily denied the 3.850 motion and application for stay. On Nov. 30, 1988, this Court affirmed the denial of the 3.850 motion and declined to extend the temporary stay of execution. Lambrix v. State, 534 So. 2d 1151 (Fla. 1988).

During the pendency of later federal habeas corpus proceedings, Lambrix filed a *pro se* petition for writ of habeas corpus in the state circuit court, alleging ineffective assistance of collateral counsel. The court denied the petition and this Court affirmed the denial. Lambrix v. State, 559 So. 2d 1137 (Fla. 1990). In its opinion, the Court considered and rejected the merits of Lambrix's claim that collateral postconviction counsel had been ineffective for failing to raise an issue of misconduct as to Juror Hough.

Lambrix filed another state habeas petition in this Court while his federal habeas appeal was pending. This Court denied

the petition on June 16, 1994. Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994)

Federal Habeas Review

While under an active death warrant in 1988, Lambrix filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Florida, Ft. Lauderdale Division. The Hon. William J. Zloch, District Judge, entered a stay of execution and ultimately conducted an extensive evidentiary hearing from August 12 - 20, 1991.

At the hearing, Lambrix presented five family witnesses and the testimony of a childhood friend, Alda Chambers. The family witnesses were: Lambrix's natural mother, Loretta Yeafoli; his aunts, Virginia Brown and Ella Umland; and his sisters, Debra Lambrix and Mary Lambrix Felker. The family witnesses all discussed Lambrix's extensive family history of alcoholism, although they could not provide any information about Lambrix's drinking habits or whether he was drinking on the night of the murders (V15/3050,3066,3074-3075,3081,3087,3090,3092,3097,3099, V16/3107-3108,3113,3145-3153,3186-3193,3199-3200,3203). Mary Felker acknowledged that she had been subpoenaed by defense counsel for trial, but had asked to be released from that subpoena because she had lied during the investigation

concerning an alibi which did not exist, and did not want to be subjected to a perjury charge (V16/208).

Lambrix also presented several expert witnesses, including attorney Roy Black; former Justice Alan Sundberg; Dr. Peter Macaluso, an addictionologist; and mental health experts Dr. Robert Philips, Dr. Brad Fisher, and Dr. William Whitman, the psychiatrist who examined Lambrix in 1983 at the request of his attorneys (V17/3432-3484, V18/3528-3593; V19/3799-3835; V17/3303-3429; V18/3595-V19/3741; V19/3765-3782; V17/3500-V18/3527). At the time of the examination, Lambrix denied any involvement in the murders (V18/13,25).

Depositions of Lambrix's trial attorneys, Kinley Engvalson and Robert Jacobs, were taken in June, 1990, and admitted as exhibits at the evidentiary hearing. Both attorneys verified that at the time of trial, Lambrix consistently maintained that he had nothing to do with the murders. They discussed the difficulty they had in formulating a viable defense. They explored Lambrix's competency, but Dr. Whitman found Lambrix to be competent, as well as having an alcohol problem and an antisocial personality disorder (V22/4312-14,4333-34). They also explored an alibi defense; the defense team went to Lambrix's parent's house in Plant City and traced Lambrix's

route on the day of the murders in order to try and justify the alibi defense Lambrix was giving them (V22/4349).

They explored voluntary intoxication, but it was not available based upon what Lambrix was telling them; it could not be shown that Lambrix was so drunk that he didn't know what he was doing (V22/4314-15,4326,4335,4391). They also talked to family members about alcohol abuse (V22/4315-16,4351,4362-63, 4382-83). Lambrix repeatedly asserted that he "didn't do it" and advised them that he took the victim's car in order to sell it and that he didn't know how the victims were murdered (V22/4319).

Mr. Jacobs recalled how they questioned one sister of Lambrix concerning possible intoxication and to his recollection, the sister replied, "I'm not going to lie for Cary anymore" (V22/4361).

Lambrix never gave counsel any reasonable defense other than "I didn't do it" until 1986 when Lambrix wrote to the Public Defender investigator and stated that he could have asserted a self-defense type of argument (V22/4355). The only thing that could now be done differently is to assert a defense which was possible based on the more recent representations of their client. If Mr. Lambrix had, at the time of trial, given the defense that he did in 1986 (i.e., that Lamberson had killed

Aleisha Bryant and that Lambrix then got into a fight with Lamberson who was killed in self-defense), that defense would have been pursued. (V22/4387,4397-98). However, Lambrix was adamant about his defense that "he didn't do it" (V22/4391-4355).

The State countered the testimony of Lambrix's experts on his alcohol use, his mental state at the time of the murders, and the applicability of mental mitigating circumstances through the testimony of Dr. Harley Stock, a forensic psychologist (V20/3949-V21/4154). The State also submitted the deposition of Frances Smith (Schwendeman) (V21/4205-56) regarding Lambrix's drinking habits before and during the time of the murders. As to the night of the murders, Smith could not tell whether Lambrix was drunk; his speech was not slurred, nor was his walking gait abnormal (V21/4228). In rebuttal, Lambrix presented Dr. David Price, a clinical psychologist (V21/4165-4192).

In a lengthy order, the district court denied the petition for writ of habeas corpus. Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch (S.D. Fla. May 12, 1992). On appeal, the Eleventh Circuit granted a motion to hold the appeal in abeyance so that Lambrix could return to state court to litigate his claim alleging a violation of Espinosa v. Florida, 505 U.S. 1079

(1992), which had been decided following the denial of Lambrix's habeas petition. After this Court ruled that Lambrix's Espinosa claim was procedurally barred, Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994), the Eleventh Circuit affirmed the federal district court's denial of relief. Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996), reh. denied, 83 F.3d 438 (11th Cir. 1996). In its opinion, the Eleventh Circuit found that the Espinosa claim was barred from federal review by the doctrine of Teague v. Lane, 489 U.S. 288 (1989), and discussed and rejected the merits of Lambrix's claims that (1) his penalty phase attorney was ineffective for failing to investigate and present evidence of Lambrix's alcoholism and drug dependence, as well as physical and sexual abuse and neglect Lambrix suffered as a child; (2) his appellate attorney was ineffective for failing to challenge the applicability of three aggravating factors (heinous, atrocious, or cruel; cold, calculated, and premeditated; and pecuniary gain); (3) Lambrix's second trial violated double jeopardy because his initial mistrial was not a manifest necessity; and (4) Lambrix was denied his right to testify because his attorney and the judge coerced him into choosing between the right to testify and the right to counsel. The court summarily found Lambrix's remaining issues to be meritless. 72 F.3d at 1503, n. 3.

The United States Supreme Court accepted certiorari review of the Eleventh Circuit opinion, to consider the court's ruling that Lambrix's Espinosa claim was barred from federal review by Teague. That Court determined that the Eleventh Circuit properly refused to consider the merits of the claim, and affirmed the denial of federal relief. Lambrix v. Singletary, 520 U.S. 518 (1997).

Successive State Postconviction Proceedings

In 1994, Lambrix filed a successive motion for postconviction relief. He asserted that his trial attorneys had rendered ineffective assistance of counsel, and claimed that the manifest injustice exception prevented the application of any procedural bars to defeat his claim. According to the motion, time limits for postconviction motions did not apply because his prior postconviction attorneys had been ineffective and because he was actually innocent of first degree murder and of the death penalty. The State filed a response asserting a procedural bar to the motion as well as addressing the merits of each claim raised. On March 20, 1995, the Hon. Thomas Reese summarily denied the motion. On appeal, this Court affirmed the summary denial, finding that the claims were procedurally barred and that the assertion of ineffective assistance of postconviction counsel did not offer "a valid basis for relief." Lambrix v.

State, 698 So. 2d 247, 248 (Fla. 1996), cert. denied, 522 U.S. 1122 (1998).[5]

Postconviction Proceedings Subject to Current Appeal

In January, 1998, Lambrix filed another successive motion for postconviction relief, asserting that his trial judge, the Hon. Richard Stanley, had been biased (V1/1-22). This motion was repeatedly amended; in all, six different motions advanced a total of eight separate claims (V2/282-494;V7/1321-26;V7/1402-V8/1565;V29/5869-5906;V30/6019-93;V31/6099-6186;V33/6657-82; V34/6781-V35/6894). Evidentiary hearings were held on October 17, 2002 (V41/8029-84); February 9, 2004 (V41/8127-V42/8204); April 5, 2004 (V42/8370-V43/8370); and July 19-20, 2006 (V44/8701-V46/9093).

The motion was initially amended to include a claim of newly discovered evidence alleging that State witness Deborah Hanzel had recanted her trial testimony, as well as a claim that due process required all prior issues in the case to be reconsidered and any procedural bars to be disregarded (V7/1402-

[5] This procedural summary is not intended to be exhaustive. This Court has also denied numerous requests for extraordinary relief from Lambrix in other actions. See Lambrix v. State, 900 So. 2d 553 (Fla. 2005) (mandamus dismissed); Lambrix v. State, 766 So. 2d 221 (Fla. 2000) (mandamus dismissed); Lambrix v. State, 727 So. 2d 907 (Fla. 1998) (prohibition denied); Lambrix v. Reese, 705 So. 2d 902 (Fla. 1998) (mandamus denied); Lambrix v. Martinez, 534 So. 2d 400 (Fla. 1988) (mandamus dismissed); Lambrix v. Friday, 525 So. 2d 879 (Fla. 1988) (petition for extraordinary relief dismissed).

V8/1565). On August 31, 2001, the court issued an Order summarily denying the claims based on judicial bias and due process and granting an evidentiary hearing on the claim that Hanzel had recanted (V6/1159-60).

The evidentiary hearing was held on Oct. 17, 2002 (V41/8029-84). Deborah Hanzel testified that, although she believed then and she believes now that she told the truth at Lambrix's trial, the truth may have been "colored" by her fear of Lambrix prior to the trial (V41/8042). She was afraid at the time of trial because the police considered Lambrix to be a suspect in two murders; she had young children at home, and she feared for her safety and for theirs (V41/8040). Hanzel's memory at the hearing was poor, given the passage of twenty years, and her testimony repeatedly acknowledged that she had little current recollection of the time prior to and during Lambrix's trials (V41/8039-45, 8047-48). At the hearing, Hanzel testified that she had no present memory of Lambrix telling her that he had killed two people; as she recalled the statement, he had said only that he could show her where two bodies were buried. However, she affirmed that she was not testifying that his statement about killing two people did not happen, only that she did not remember it (V41/8050,8053-55). She had no current memory of having any telephone conversations with Lambrix, as

described in her pretrial statements and trial testimony (V41/8044,8050,8052). Hanzel affirmed that, in preparing her to testify, the prosecutors did not threaten or pressure her, but told her to tell the truth (V41/8056).

On July 8, 2003, the circuit court issued an Order denying Lambrix's motion, finding that Hanzel had not recanted her testimony (V29/5793-5809). A motion for rehearing was filed by Lambrix (V30/5907-14), and while the motion was pending Hanzel wrote the court a letter (V30/5950-52), stating that she had additional information to supplement her testimony from the previous year. She stated that just before Lambrix's arrest, Frances Smith was aware that Hanzel and Preston Branch were cooperating with the police, and Frances called her several times at home to discuss it. According to the letter, Frances told Hanzel to tell the police that Lambrix had told Hanzel that he killed the people for their car. Hanzel initially told Frances she would think about it, and when Frances called back the next day, Hanzel agreed to give the story Frances had suggested to the police. The letter asserts that Hanzel never received any phone call from Lambrix and Hanzel could "clearly remember" having made up the claim that Lambrix had called her (V30/5951).

Hanzel's letter was followed by an affidavit she signed on Dec. 23, 2003 (V30/5982-86). The affidavit repeats most of her letter, although the affidavit acknowledges that Lambrix did in fact call Hanzel while he was on the run, but claims that he did not tell her that he killed anyone or that he had killed in order to get the car. It also states that Hanzel recalled the truth when she talked to Lambrix's lawyers in 1998, but because she was still so afraid of him at that time she did not reveal that she had previously lied at Frances's behest. She chose instead to move to Tennessee in order to avoid getting involved. According to the affidavit, Hanzel was only starting to remember the events of twenty years ago and could no longer live with the guilt of having lied.

The circuit court held a hearing to explore the circumstances outlined in Hanzel's letter on Feb. 9, 2004 (V41/8127-V42/8204). Deborah Hanzel authenticated the letter she sent to the Court and her subsequent affidavit of Dec. 23, 2003, and they were admitted as exhibits (V42/8143-45). Hanzel testified that Frances Smith had actually called Preston Branch, Hanzel's boyfriend, on the telephone, and that Hanzel was just listening in when Frances asked her if she would "go along with" what Frances had to say, that Lambrix had killed those people (V42/8146-48). Hanzel told Frances she would think about it

(V42/8147). Hanzel had only met Frances briefly a few times, and did not care for her (V42/8165-66).

At the hearing, Hanzel was confused about what she had related to the police in 1983, and could not remember much else without reading from the affidavit that had been admitted (V42/8148-52). She stated that, when she testified in 2002, she had not remembered these facts because she did not want to remember and had no intention of coming back. When she testified in 2002, she believed she was telling the truth (V42/8153). She stated that she had been afraid of Lambrix because of what State officials and Frances Smith were telling her, that he would probably come back and hurt her or her children. This fear affected her recollection of events to such a point that Frances Smith was able to persuade her to lie (V42/8155).

Hanzel affirmed that she did not recall the phone conversations she testified about in trial, but she remembered Lambrix calling and asking for a ride to the fairgrounds. She did not recant, deny, or explain her trial testimony that she spoke with Lambrix, read the article that had been in the Lakeland Ledger about the murders, and asked him if he killed the guy for his car, prompting Lambrix to respond that was part of the reason (DA-R. 2449; see also V15/2982,V15/2996-97).

On cross examination, Hanzel admitted that she really did not recall the facts recited in her affidavit (V42/8160-61). It had been composed by Lambrix's legal team, and when they presented it to her, they discussed the fact that she really didn't remember the events, but she was willing to sign it (V42/8161-64). She affirmed that she was being truthful in October, 2002, when she said that she told the truth at trial (V42/8164-65). She acknowledged having felt that no one could tell her what to say, she will say what she thinks, and her testimony at trial was the truth as she understood it then (V42/8168-69). Hanzel also admitted that her feelings about Lambrix's guilt or innocence have changed over time (V42/8169).

Hanzel agreed that she had probably read the Lakeland Ledger article before the trial, but she didn't really remember and did not recall discussing it with Lambrix over the phone; she didn't think she had talked to him at all when he was in the Orlando area (V42/8169-70). But she did not think she had made up the testimony about him calling (V42/8185). She also did not make up the part about Lambrix coming by her house with Frances after they returned from LaBelle, driving a black Cadillac, wearing nice clothes and waving wads of money around (V42/8186). On re-cross examination, she continued to affirm that she had told the truth at trial (V42/8185).

Further evidence was taken relating to Hanzel's allegations on April 5, 2004 (V42/8236-V43/8370). Phone records were admitted showing that three telephone calls had been made ***from*** the house Hanzel shared with Preston Branch ***to*** a neighbor of Frances Smith's, which was the phone Smith would have used or had access to at the time: a seventeen minute call on Feb. 21, 1983; a four minute call on March 3, 1983; and a one minute call on March 5, 1983 (V42/8311-13). The defendant, Cary Lambrix, testified at this hearing that he told Frances Smith on the night of the killings that the victims, Bryant and Lamberson, had an argument and that Lambrix killed the male victim in order to end Lamberson's attack on Bryant (V42-8320-24). Lambrix stated that he and Frances made a mutual decision to bury the bodies since Lambrix was wanted for escape at the time (V42/8325-26). He denied statements which Frances had attributed to him at trial and denied that he had asked Hanzel to fabricate anything on his behalf (V42/8328-29). He denied having ever told Hanzel that he killed anyone or killed to steal a car (V42/8335).

Frances [Ottinger] Smith testified that she never had any conversation with Debbie Hanzel or Preston Branch asking them to provide false information to investigators or to testify falsely against Lambrix (V43/8351). Frances' testimony led to the

presentation of additional claims; Lambrix's pending motion was again amended to assert that a conspiracy existed between Frances and Robert Daniels, an investigator with the State Attorney's Office, to fabricate evidence against Lambrix (Amended and Corrected Initial Brief [AIB], p. 57, V34/6781-V35/6894). This conspiracy allegedly resulted in Debra Hanzel providing false testimony, which she has now recanted, and in Frances exaggerating details of the incident, such as concocting that Lambrix left Aleisha Bryant face down in a pond. In addition, the conspiracy included an alleged plea or immunity deal between the State and Frances Smith, although Lambrix has never identified any details regarding the purported deal.

Lambrix was provided an opportunity to present evidence on his additional claims on July 19-20, 2006 (V44/8701-V46/9093). Testimony was offered from Frances Ottinger Smith, Douglas Schwendeman, Robert Daniels, Kinley Engvalson, Robert Jacobs, William O'Quinn, and Randall McGruther. None of these witnesses provided any support for Lambrix's claim of a conspiracy or any other basis for relief.

Frances testified that she and Robert Daniels had sex one night after flying to southwest Florida in connection with Lambrix's prosecution, but she could not recall when this occurred (V43/8355-56). She remembered that Daniels had called

her to come to his hotel room, and that this incident was an isolated occurrence (V44/8716,8723). She knew it was not the first time she came down, to give her Feb. 15, 1983, statement to Daniels, as her brother was with her at that time (V45/8753-54).

Douglas Schwendeman testified that Frances told him that she had sex with Daniels (V45/8847). He suspected that it may have happened more than once. He was clearly biased, readily admitting that Frances was the one that reported him to the authorities for molesting his own children (V45/8850). Robert Daniels denied that he and Frances ever had sex (V46/8944). He testified that the only time he stayed overnight in a hotel in connection with the Lambrix case was during the second trial (V45/8892). Daniels' flight logs were admitted, corroborating his testimony (V45/8876-81).

On November 9, 2007, the circuit court entered an extensive Order denying all relief (V40/7870-85). The court specifically found that Deborah Hanzel was “confused” at the evidentiary hearing, and that her testimony “never met the legal requirements for a recantation;” that there was no illicit relationship between Frances Smith and Bob Daniels; that there was no evidence of any plea deal with Frances Smith; and that Lambrix’s claim that “this case was never a first degree-murder

case” was not supported by the record; concluding “there was no affair, no undisclosed plea bargain, no credible recantation, and no newly discovered evidence of any conspiracy;” further, “there was no need for the Court to determine how the Defendant was prejudiced by events that did not occur” (V40/7881-83). This appeal follows.

SUMMARY OF THE ARGUMENT

1. The trial court did not err in denying Lambrix's claim that the State withheld material, exculpatory information regarding a sexual relationship between State witness Frances Ottinger Smith and State Attorney Investigator Bob Daniels. Following an evidentiary hearing, the court below concluded that no such relationship existed; a factual finding supported by substantial, competent evidence and entitled to deference in this appeal.

2. The trial court did not err in denying Lambrix's claim of newly discovered evidence of a conspiracy, culminating in the presentation of false testimony at trial by State witness Deborah Hanzel. Following an evidentiary hearing, the court below concluded that Hanzel's attempt to recant her trial testimony was not credible and that no credible evidence of a conspiracy had been presented; factual findings supported by competent, substantial evidence and entitled to deference in this appeal.

3. The trial court did not deny Lambrix a full and fair evidentiary hearing on his conspiracy claim. The court correctly ruled that this case would not be re-tried in this postconviction proceeding. Further evidentiary development

could not have impacted the rulings entered below and would have only served to further delay this case.

4. The trial court did not err in summarily denying Lambrix's claim of judicial bias. Lambrix relied solely on a finding of partiality in an unrelated case and judicial rulings during his trial. Since he did not offer any case-specific allegations of bias beyond discretionary trial rulings that have repeatedly been upheld, his claim of bias was legally insufficient and properly summarily denied.

5. The trial court did not err in summarily denying Lambrix's claim that the Eighth Amendment prohibits the application of procedural bars. This Court previously rejected this same claim in this case. The extent to which due process protects against the execution of an innocent person is not a relevant question in this appeal, since Lambrix has never offered any reasonable evidence of his alleged innocence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING LAMBRIX'S BRADY CLAIM ALLEGING A SEXUAL RELATIONSHIP BETWEEN WITNESS FRANCES SMITH AND STATE ATTORNEY INVESTIGATOR ROBERT DANIELS.

Lambrix's first issue challenges the denial of a claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose a sexual relationship between State witness Frances Smith and State Attorney Investigator Robert Daniels. This claim was subject to an evidentiary hearing below, and was denied when the trial court determined that no sexual relationship had existed (V39/7837). The trial court's factual findings are reviewed for competent, substantial evidentiary support, and legal conclusions are reviewed *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

In denying this claim, the court below summarized the relevant testimony and entered factual findings as follows:

> The Court heard from eight witnesses. The two primary witnesses were Francis Smith Ottinger and Robert Daniels. The Court also heard from Ms. Ottinger's ex-husband, Doug Schwendeman; former trial counsel for the Defendant, Kinley Engvalson and Robert Jacobs; Tony Pires, a former Assistant State Attorney who was employed at the time of this prosecution, and another Assistant State Attorney, Chief Deputy State Attorney Randall McGruther. Finally, the Court heard from State Attorney Investigator William McQuinn.
>
> These proceedings were held in the Court's hearing room. The witness stand is within arm's

length of the bench. The Court could see and hear the witnesses at close range.

- **Frances Smith Ottinger**

Frances Smith, n.k.a. Frances Ottinger, was living with the Defendant at the time of the homicides. She was a witness for the State at both trials in 1983 and 1984. Her testimony at the trials and every recorded statement or deposition she has made in the past were received in evidence at the hearing.

Ms. Ottinger testified that she had one sexual encounter with Mr. Daniels, although she cannot state where or when it occurred in relation to the pretrial investigation or either of the two trials. She does not know when it occurred. She testified that she remembered only that it happened in a hotel. When questioned about details of the encounter, Ms. Ottinger did not remember any significant facts. She repeatedly answered that she “does not recall,” “does not remember” or “does not know” about the time and place of the encounter. She could not state the name the town in which the hotel was located.

Ms. Smith answered each question slowly and deliberately. Her responses were sometimes halting. With nearly every answer that she gave, she paused for a significant time between the question and the answer. She related that she takes several medications for anxiety and depression.

The Court has listened carefully to what Ms. Ottinger said and how she said it. The Court observed how she acted and the Court also heard what she said. Her testimony is not credible, when considered in light of all of the evidence.

- **Robert M. Daniels**

Robert Daniels also testified. Mr. Daniels was employed as an investigator with the State Attorney’s Office of the Twentieth Judicial Circuit from 1980 through 1994. He was also a pilot for that office during those years. Throughout his tenure, he maintained records of the flights he made. Copies of his flight logs were received in evidence. At the time of the prosecution of the Defendant, Mr. Daniels was a lead investigator, and his supervisor was William McQuinn. The Chief Investigator at the time of the Defendant’s prosecution was Ralph Cunningham, now deceased.

Mr. Daniels testified that he first became involved in the case in 1983 after the State Attorney's Office was notified by FDLE that it had Ms. Frances Smith, now Ottinger, in their custody and that she might be involved in the double homicide that is the subject of this case. After that notification, Mr. Daniels flew to Tampa and picked up FDLE Agent Connie Smith (no relation to Frances Smith), and Frances Smith's brother. Mr. Daniels flew them to the Fort Myers area so that they could talk to the law enforcement officers who were investigating the homicides.

On cross-examination by the State, Mr. Daniels expressly denied any sexual relationship with Ms. Ottinger. Mr. Daniels was at all times forthright and direct. He did not evade the questions posed to him, and he answered each question promptly and without delay. He never wavered in his denial of a sexual encounter between himself and Ms. Ottinger. He said that he did not stay in a hotel during the pendency of the first trial, but during the second trial he did stay in a hotel in Moore Haven with the prosecution team.

In addition, the State introduced into evidence copies of the flight logs maintained by Mr. Daniels throughout his tenure at the State Attorney's Office. These records set forth the details of the flights Mr. Daniels made as a pilot while working for the State Attorney's Office. The records tend to corroborate Mr. Daniels's denial of a sexual encounter with Ms. Ottinger, although they do not negate the possibility of an encounter.

- **Doug Schwendeman**

The only other witness with any knowledge that might bear upon the alleged sexual encounter between Ms. Ottinger and Mr. Daniels was Ms. Ottinger's ex—husband, Doug Schwendeman. Mr. Schwendeman testified for the Defendant that he and Ms. Ottinger were married on May 31, 1986. He testified that Ms. Ottinger told him just prior to their marriage that she had one and perhaps two sexual encounters with a "pilot" named "Bob" at sometime during the prosecution of the Defendant.

That testimony notwithstanding, both the State and defense stipulated, at pages 151, 152, and 153 of the transcript of the hearing of July 19 and 20, 2006,

> that Ms. Ottinger, if called to the stand again, would testify consistently with her deposition taken January 1, 2006. At that time she denied ever telling Mr. Schwendeman about the alleged sexual encounter with Mr. Daniels.
>
> The circumstances surrounding Mr. Schwendeman's testimony about the admission of the encounter by Ms. Smith to Mr. Schwendeman are suspect. Mr. Schwendeman kept this information to himself for 18 years, from before May of 1986 until 2004. Ms. Ottinger and Mr. Schwendeman had a difficult divorce proceeding. Finally, Mr. Schwendeman admitted on cross-examination to having been convicted in 1998 of six counts of sexual abuse on Ms. Ottinger's children, as well as domestic violence against Ms. Ottinger.
>
> The testimony of Mr. Schwendeman, offered to rebut a claim of recent fabrication by Ms. Ottinger, is unpersuasive and did not lend any clarity to the vagueness of Ms. Ottinger's testimony.
>
> * * *
>
> The Court finds that Ms. Ottinger's testimony is not credible and that Mr. Daniels's testimony is credible. The testimony of Mr. Schwendeman is unpersuasive on the issue before the Court.
>
> The Court finds that the alleged sexual encounter between Ms. Ottinger and Mr. Daniels did not occur.

(V39/7831-37).

Lambrix claims that the court's rejection of this issue was unreasonable and irrational. His brief initially asserts that Frances was the hub of the State's case, a characterization which the State does not dispute. After recapping information which has been known since before the trial, Lambrix concludes that the court below was mistaken, alleging not only that Daniels and Smith had sex (as Smith claimed and Daniels denied) but that it was not simply an isolated encounter, but culminated

in an extended relationship which impacted the trial testimony (which Smith and Daniels both denied).

While Lambrix pays lip service to this Court's obligation to defer to a trial court's factual findings, the thrust of his appeal is an attempt to convince this Court that his credibility determinations are more accurate than the credibility findings offered by the court below. Clearly his attempt to convince the Court to accept his version of events is misplaced. As this Court has acknowledged numerous times, appellate courts do not reweigh the evidence or second-guess the circuit court's findings on credibility. Brown v. State, 959 So. 2d 146, 149 (Fla. 2007); Banks v. State, 732 So. 2d 1065, 1067, n.5 (Fla. 1999); Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981).

The court's finding below that Lambrix failed to establish that Frances Smith and Bob Daniels had sex during the investigation and/or trial in this case is clearly supported by competent, substantial evidence. Bob Daniels, a law enforcement officer with over 25 years of experience at the time of Lambrix's trial, testified directly that he did not have sex with Frances Smith (V45/8891;DA-R. 314). As the trial court noted, Daniels was "forthright and direct;" his testimony was unequivocal.

Lambrix asserts that Daniels could not tell the truth at the evidentiary hearing, because if he had told the truth, he would have had to admit that he committed perjury at trial when questioned about his relationship with Frances Smith (AIB, p. 31). However, the record reflects that Daniels was never asked any question about any relationship with Smith at the trial (DA-R. 1920-86); the accusation of possible perjury is therefore refuted by the record.

Frances Smith, who testified at the evidentiary hearing that she had sex with Daniels one time while they were staying at a hotel, was clearly not more credible than Daniels on this issue. Smith was describing a memory from twenty years earlier, and had difficulty recalling the particulars of any sexual encounter which she experienced at that time. Although Lambrix insists that Smith had no motive to lie, she could easily have been mistaken about the time, place, and identity of any sexual partner she may have known over twenty years ago.

Lambrix asserts that the trial court's findings are not entitled to deference in this case because Judge Corbin neglected to analyze what a jury might have concluded about the "developing relationship" between Daniels and Smith at the time of trial. This assertion is without merit. First of all, there was not a word of evidence from any witness at the evidentiary

hearing about any "developing relationship" between Daniels and Smith; it is difficult to assess the impact of evidence which has never been presented. In addition, this Court has never held that deference to factual findings is only required when a trial judge analyzes the testimony in terms of how another fact-finder might interpret the evidence; Judge Corbin was the fact-finder below, and it is his findings and conclusions which are relevant and, clearly, subject to deference. The court below considered all of the evidence and argument submitted, and made written findings sufficient to explain its reasoning and to ensure appropriate appellate review.

Furthermore, even if the court below was mistaken in accepting Daniels' testimony, no Brady claim would succeed. In order to establish a Brady violation, a defendant must show that (1) favorable evidence was (2) suppressed by the State and was (3) material to the case, meaning the withholding of the evidence prejudiced the defense. Riechmann v. State, 966 So. 2d 298, 307 (Fla. 2007); Guzman v. State, 868 So. 2d 498, 508 (Fla. 2003). It is Lambrix's burden to establish each of these elements. Archer v. State, 934 So. 2d 1187, 1202 (Fla. 2006); Duckett v. State, 918 So. 2d 224, 235 (Fla. 2005). He cannot establish any element on the facts of this case.

In order for the information to be "favorable" as exculpatory or impeachment, it must be something that Lambrix's attorneys could have used to their benefit at trial. As Lambrix appears to recognize, the testimony below which contradicted Daniels' testimony denying the sex established that the only possible opportunity for an encounter would have been during Lambrix's second trial (AIB, pp. 32-33). Although Lambrix claims that his attorneys would have used this information to impeach Daniels and Smith, he can't show that the sex occurred prior to either witness testifying. Even if it did, the admissibility cannot be presumed. See Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991) ("Evidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the witness or misleads the trier of fact. Therefore, inquiry into collateral matters, if such matters will not promote the ends of justice, should not be permitted if it is unjust to the witness and uncalled for by the circumstances"). Lambrix has not demonstrated that this line of questioning would have been permitted as proper impeachment at Lambrix's trial; even if it could have been, such a tactic would have permitted the State to present the prior consistent statements of these witnesses in order to rebut the inference of recent fabrication.

In addition, Lambrix must be able to establish that the State suppressed this information. While information known by investigators and other members of the prosecution team is typically imputed to the case prosecutor, there are recognized exceptions, including when there is individual misconduct, unrelated to the case or the investigation, which is not revealed to the prosecution. Thus, in Breedlove, this Court held that "the State" had not suppressed information about the crimes because the facts were not "reasonably available" to the prosecutor. See also Smith v. Massey, 235 F.3d 1259 (10th Cir. 2000) (rejecting claim that false testimony from a chemist from the Oklahoma State Bureau of Investigation should be imputed to the state prosecutor). Since knowledge of this affair cannot reasonably be imputed to the prosecutor in this case,[6] Lambrix cannot demonstrate that the State suppressed this information.

As part of this issue, Lambrix suggests that there was also an undisclosed plea agreement or promise of immunity, where the State agreed not to prosecute Frances Smith if she testified truthfully (AIB, pp. 35-38). There was no direct evidence presented below on the existence of any plea, and the court below properly found that "there is no credible evidence that

[6] The court below specifically found that there was no evidence "that the State was aware of any misconduct on the part of one of its investigators" (V40/7882).

the State offered a plea deal or a plea bargain or any other consideration to Frances Smith Ottinger in exchange for her testimony" (V40/7882-83).

The record reflects that, prior to trial, Bob Daniels indicated in a discovery deposition that Frances Smith would not be charged in these offense as long as she was truthful about her role in the deaths of Bryant and Lamberson; she was thereafter subjected to a polygraph examination, which affirmed her veracity (DA-R. 318-19). In his postconviction hearing testimony, Daniels repeated this information, and noted that polygraph examinations were often used when the State was considering whether to reach any agreement with a witness (V45/8857-58,8869). Daniels had not reviewed the case file in over 23 years, and his testimony about an agreement between Frances Smith and the State was based on his familiarity with standard practice in the office, and not on any memory of a specific agreement in this case; he was not present when any agreement may have been discussed, "and I never saw one in writing, so I don't even know if one exists" (V45/8870-71). The prosecutor, Randall McGruther, testified that no "deal" was ever struck between the State and Smith (V46/9068-69). Since the postconviction testimony was consistent with Daniel's pretrial

deposition, there is no support for Lambrix's current claim of an undisclosed pretrial deal with Frances Smith.

Finally, Lambrix could not demonstrate materiality, even if he could show that there was a sexual encounter or plea deal that could have been used as impeachment at trial. The relevant standard requires a showing of "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); Guzman, 868 So. 2d at 508. The burden is on the defendant to show materiality. Strickler v. Greene, 527 U.S. 263, 281 n.20, 289 (1999). Lambrix cannot meet this burden on the facts of this case. See Gallo v. Kernan, 933 F. Supp. 878, 884-885 (D. Cal. 1996) (failure to disclose sexual relationship between state witness and investigating police officer not material for Brady purposes).

Lambrix asserts that the court below would not permit him to develop the facts to support a showing of prejudice,[7] and also claims that the record demonstrates prejudice because Smith's testimony at the second trial revealed details which she had not mentioned during the first trial. The record reflects that

[7] This assertion is fully explored in Issue III, *infra*.

Smith's testimony in both trials was consistent, and the testimony was consistent with her sworn statements prior to trial.[8] The only change in her testimony is a consequence of the fact that the prosecutor asked additional questions in the second trial that had never been asked in the first trial. Since any "changes" are due to a change in the questioning, no prejudice can be discerned from Smith's testimony in the second trial.[9]

Moreover, since there was no undisclosed information, there was no potential prejudice to assess. In addition, the evidence Lambrix proffered for a showing of prejudice was entirely unrelated to the purported trial errors alleged. No actual prejudice has been identified, and the failure to disclose any possible sexual encounter or pretrial deal could not be considered material to Lambrix's convictions.

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[8] The State filed a chart with the court below, tracking the details of Frances Smith's recorded statements prior to and during the Lambrix trials (V37/7339-44).

[9] Lambrix has devoted a page in his brief to identifying impeaching evidence, all of which was known at trial but not used based on strategic decisions by counsel, to suggest that Frances Smith was not properly impeached before the jury (AIB, p. 29). The defense attempted to impeach Smith in several ways, including bringing out that she had left her husband and three children to run off with Lambrix; that she had failed to reveal her knowledge of the crime until about ten days after the murders, despite opportunities to go to the police; and that she had made statements in her pretrial statements and deposition which were different than her trial testimony (DA-R. 2286-2327). Also, much of her testimony was corroborated independently.

No basis for relief has been presented in this issue, and this Court must affirm the denial of relief.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING LAMBRIX'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF A CONSPIRACY AND RECANTATION BY STATE WITNESS DEBORAH HANZEL.

Lambrix also challenges the denial of his claim of newly discovered evidence, premised on an allegation that Deborah Hanzel has recanted her trial testimony. This claim was also subject to an evidentiary hearing; factual findings are entitled to deference, and accepted where supported by competent, substantial evidence; legal conclusions are reviewed *de novo*. Stephens, 748 So. 2d at 1033.

Following Hanzel's testimony on Oct. 17, 2002, the court below entered the following findings:

> The gravamen of the Defendant's claim is that a material witness, Deborah Hanzel, recanted inculpatory evidence given during the trial of this cause. The subject of the alleged recantation is an admission attributed to the Defendant by Ms. Hanzel. The relevant colloquy that yielded the statement is as follows:
>
> Q On the way back, did there come an occasion when an unusual conversation was struck up?
>
> A Yes, sir.
>
> Q Who initiated the conversation?
>
> A Cary.
>
> Q Okay. Can you tell the jury what was said as best you recall?
>
> A It was after we were driving a little while. And he said: If you give me $100, I could take you and show you where two bodies are buried. I started laughing, because I didn't think nothing of it. He said I can take you right to it and show you where I killed two people and buried two bodies behind the trailer.

See, excerpt from transcript of trial, Hanzel testimony at pages 83 - 84 [emphasis supplied].

Defense counsel asserts that this testimony was recanted in 1998 when Ms. Hanzel gave a statement to the Office of the Capital Collateral Counsel and again at the evidentiary hearing held in this cause on October 17, 2002. In particular, the following testimony was elicited from Ms. Hanzel on direct examination at the evidentiary hearing:

Q What you said in 1998, were you sworn to give the truth before you gave your statement?

A Yes.

Q What you said in the statement is true and correct?

A Yes.

Q Your recollection regarding the statement would be that Mr. Larnbrix told you that there were two bodies buried there?

A Yes.

Q That would be the -- he didn't say anything to you about having killed the two people that were buried?

A No, ma'am.

See, transcript of evidentiary hearing at page 16.

Ms. Hanzel then went on to state that she did not remember receiving any telephone calls from Mr. Lambrix (as had been related during the trial).

Later on in the evidentiary hearing, the following colloquy occurred between defense counsel and Ms. Hanzel:

Q To get down to the nitty gritty, [did] Mr. Lambrix ever tell you he killed those two people? [sic]

A No.

Q Do you remember that back in 1998 when you gave your statement to CCR?

A No, I don't remember. To my knowledge, I didn't believe that he told me he killed two people.

Q Do you recall you were afraid and that colored [your] recollection? [sic]

MS. SWETT: Objection, your Honor.

THE COURT: Overruled. You can answer the question.

A I believed he killed the people at the time. I don't believe he did now.

Q Would it be fair to say that you clearly remember him only making a statement about the buried bodies?

A Yes.

Q Your recollection now is he never told you he killed these people?

A Yes.

See, transcript of evidentiary hearing at pages 29 - 30.

The Court also reviewed a transcript of a sworn statement provided by Ms. Hanzel to law enforcement agents, including State Attorney Investigator Bob Daniels on February 25, 1983. In a colloquy from that statement, Ms. Hanzel related the following:

> Daniels: During that trip back up there was evidently some conversation that took place that we discussed earlier. Tell us for the record please about that conversation.
>
> Hanzel: Well, I don't really know how it came out, it's just that he said if you give me a hundred dollars I can show you where two bodies are buried right now. And then we were sitting there talking, I don't remember all what we were talking about or how it came up but he says yeah, he says I killed two people, you know. And he was talking about it being back there at the trailer and they were buried under a corn field (inaudible) you know, and then he's going on and I'm sitting there and I was laughing, you know, didn't believe him. And then uh he said don't laugh he says, you know, it's true. And then uh I stopped laughing and everything got quiet and he says boy he says I can bullshit you into believing anything, you know, and then nothing more was really said about it.

See, transcript of sworn statement of Deborah Hanzel at page 6 [emphasis supplied].

The Court has reviewed the transcript of the sworn statement given by Deborah Hanzel before trial, as well as the transcript of her trial testimony. The Court compared those transcripts with the testimony given at this evidentiary hearing. Even when taken in the light most favorable to the Defendant, perhaps all that counsel has proven is that Ms. Hanzel does not

now have a very good memory of something that occurred nearly twenty years ago.

For example, Ms. Hanzel recalls today that the Defendant told her about buried bodies, but she now asserts that he did not say anything about killing them. Ms. Hanzel also states that she does not now remember "the phone calls" she received from the Defendant after the crimes were committed (although she testified about them at trial). Ms. Hanzel does not, however, now deny that the calls were placed.

In addition, Ms. Hanzel concedes that she remembers some things, but not others. She allowed that some statements she made which were recorded twenty years ago did not refresh her recollection, while at the same time asserting that she does not "recollect" that the Defendant confessed to the killings.

Upon evaluation of the testimony of Ms. Hanzel (and the other two witnesses who testified at the hearing), it is apparent that perhaps the only thing Ms. Hanzel knows for certain at this time is that twenty years ago she believed Mr. Lambrix killed two people and buried their bodies behind a trailer in Glades County, but now she does not.

At no time during this proceeding did Ms. Hanzel repudiate her prior testimony or otherwise acknowledge that she did not tell the truth at any time she was placed under oath in 1983 or 1984.

* * *

In the context of its analysis, the Court recognizes that recanted testimony is "exceedingly unreliable," and that a court has a duty to deny a new trial where it is not satisfied that the recantation is true. Sweet v. State, 810 So. 2d 854, 867 (Fla. 2002); Stano v. State, 708 So. 2d 271, 275 (Fla. 1998).

As referenced above, Deborah Hanzel gave a sworn statement prior to trial, and then testified under oath at trial. At the evidentiary hearing, Hanzel testified unequivocally that she believed she told the truth at trial. The relevant trial testimony is quoted above. There has been no repudiation of that prior testimony.

The defense has succeeded in demonstrating that Ms. Hanzel's recollection of events nearly twenty

years ago is now understandably equivocal. She stated that she does not remember Lambrix ever telling her that he had killed two people, but at the same time she did not concede that the statement or testimony she gave in 1983 and 1984 were false (or that they even refreshed her recollection).

Accordingly, based upon the evidence presented at the evidentiary hearing, the Court finds that Ms. Hanzel has not recanted. She has neither withdrawn nor repudiated her trial testimony, but rather has simply confirmed that she does not now believe Mr. Lambrix committed the crimes for which he has been convicted. Plainly this is insufficient as a matter of law to support the claim of recantation.

Even if this Court were to assume that the testimony presented by Ms. Hanzel legally qualifies as a recantation, the Defendant would still not be entitled to relief. This is because the Defendant has failed to demonstrate that a different result at trial would be "probable" should the relief be granted. Jones v. State, 709 So. 2d 512 (Fla. 1998); Armstrong v. State, 642 So. 2d 730 (Fla. 1994).

In that regard, the Defendant provided no testimony or other evidence that would refute or otherwise rebut the testimony provided by Frances Smith or the independent evidence of guilt that served as the basis for the convictions.

Indeed, the testimony of Hanzel is cumulative to the testimony of Frances Smith. According to the rule of law in Ragsdale v. State, 720 So. 2d 203 (Fla. 1998), where more than one witness testified to a statement allegedly recanted by one witness, the "recantation" would be insufficient to satisfy the requirement that the Defendant demonstrate the probability of an acquittal on retrial.

The Court is well aware that Mr. Lambrix signed an affidavit on November 20, 1998 which contains his "account" of what occurred on the night that Clarence Moore and Aleisa Bryant were murdered. This affidavit was not prepared until after Deborah Hanzel first spoke with prior counsel, Mark Reinhold, and the spectre of an alleged "recantation" arose.

At trial Mr. Lambrix defended the case by taking the position that he had not killed either victim. His "theory" of having killed Moore in self-defense after Moore killed Bryant did not arise until 1986,

> several years after the trial and many years before Ms. Hanzel's alleged "recantation."
>
> This finding is supported by the testimony of Mr. Lambrix's trial counsel, Robert Jacobs and Kinley Engvalson. See, depositions of Kinley Engvalson and Robert Jacobs taken June 14, 1990, copies of which are attached to the State's Response to the Defendant's postconviction motion.
>
> The Defendant did not avail himself of the opportunity to testify before this Court about what happened as related in his affidavit. Of course that is the Defendant's right. But because the State was deprived of the opportunity to test the veracity of the affidavit, it cannot be considered by this Court as proof of anything germane to Claim II.
>
> Suffice it to say that the evidence presented at the evidentiary hearing was insufficient as a matter of law to support the relief requested in Claim II of the second amended motion.

(V29/5796-5803).

Following this ruling, Hanzel wrote a letter to the court, indicating that she had additional information to supplement her testimony from the previous year (V30/5950-52). She stated that just before Lambrix's arrest, Frances Smith was aware that Hanzel and Preston Branch were cooperating with the police, and Frances called her several times at home to discuss it. According to the letter, Frances told Hanzel to tell the police that Lambrix had told Hanzel that he killed the people for their car. Hanzel initially told Frances she would think about it, and when Frances called back the next day, Hanzel agreed to give to the police the story Frances had suggested. The letter asserts that Hanzel never received any phone call from Lambrix

and Hanzel could “clearly remember” having made up the claim that Lambrix had called her (V30/5951).

Hanzel’s letter was followed by an affidavit she signed on December 23, 2003 (V30/5982-86). The affidavit repeats most of her letter, although the affidavit acknowledges that Lambrix did in fact call Hanzel while he was on the run, but claims that he did not tell her that he killed anyone or that he had killed in order to get the car. It also states that Hanzel recalled the truth when she talked to Lambrix’s lawyers in 1998, but because she was still so afraid of him at that time she did not reveal that she had previously lied at Frances’s behest. She chose instead to move to Tennessee in order to avoid getting involved. According to the affidavit, Hanzel was only starting to remember the events of twenty years ago and could no longer live with the guilt of having lied.

The circuit court held a hearing to explore the circumstances outlined in Hanzel’s letter on Feb. 9, 2004 (V41/8127-V42/8204). At that hearing, Hanzel admitted that she really did not recall the facts recited in her affidavit (V42/8160). It had been composed by Lambrix’s legal team, and when they presented it to her, they discussed the fact that she really didn’t remember the events, but she was willing to sign it (V42/8161-64). She affirmed that she was being truthful in

Oct., 2002, when she said that she told the truth at trial (V42/8164-65).

At a subsequent hearing, phone records were admitted, showing that phone calls between Hanzel or Preston Branch and Frances Smith would have originated from the Branch/Hanzel number (V42/8312-15). Frances Smith testified that she did not solicit Hanzel or Branch to provide any false information to investigators, and that she never asked them to lie at the trial (V43/8351-52). The defendant, Cary Lambrix, testified that he did not make the statements which Frances attributed to him at trial, but he told her that he struck Lamberson with the tire iron because Lamberson had attacked Bryant (V42/8319-25).

Following this hearing, the court below reiterated that Hanzel had not provided a credible recantation and that no credible evidence of any alleged conspiracy to present false evidence had been demonstrated:

> Counsel's discussion of a "conspiracy collaboration" between Hanzel, Ottinger and Daniels is not supported by the record. With regard to Deborah Hanzel, the Court is presented with a confused witness who made equivocating statements about testimony she gave with respect to a double homicide that occurred well over twenty years ago. As the Court previously ruled on July 9, 2003, Hanzel's testimony never met the legal requirements for a recantation.

(V40/7881).

Lambrix now claims that the court below abused its discretion by denying Hanzel's recantation. He asserts that the court's findings are not supported by the evidence, and that the court ignored "unrebutted" evidence which corroborated Hanzel's testimony that she lied at his trial, including the letter she wrote to the court, the affidavit she submitted, the evidence regarding her phone records in 1983, and Lambrix's testimony at the hearing. Once again, Lambrix's assertions are refuted by the record.

As to Hanzel's letter and affidavit, the record reflects that these documents did not provide credible support for Hanzel's purported recantation. First of all, Hanzel repeatedly affirmed that she had very little recall of Lambrix's trial and the events leading up to her testimony; her testimony was vague, uncertain, and contradictory (V41/8047,8051;V42/8148-49,8153,8158,8160,8169). Both times that she testified at the evidentiary hearing, she maintained that she had told the truth at trial and every time that she testified (V41/8042,8056;V42/8165,8169,8174). At the second hearing, she was unable to offer any meaningful testimony about the facts without having the affidavit before her for reference (V42/8148,8150,8158-59). The letter she wrote the court after this claim was initially denied was unsworn and factually

inaccurate on at least some details. For example, she states in the letter that she "clearly remembered" having made up testimony about Lambrix calling her, yet her later affidavit acknowledges that she knew he did in fact call her. The affidavit was composed entirely by Lambrix's attorneys, and Hanzel acknowledged that she did not remember the information provided in the affidavit (V42/8160-64).

The phone records do not corroborate Hanzel's testimony, since she claimed that Frances Smith had called her house, but the records clearly demonstrate that the phone calls were made from the number used by Hanzel and her boyfriend Preston Branch to a neighbor where Frances could be reached - there were no calls *from* Frances *to* the Branch/Hanzel residence. The records are therefore consistent with the trial testimony that Branch had called Frances during that time, along with a phone conversation that Lambrix had with Frances on March 3, 1983, from the Glades County Jail,[10] when Lambrix told Frances that he had asked "Debbie" to call her (DA-R. 1063-1064; V32/6470-71).[11]

[10] This conversation was excluded from trial at the request of the defense.

[11] While Hanzel testified at the evidentiary hearings that she was terrified of Lambrix during this time, the trial record includes independent evidence that she was accepting phone calls and continuing to communicate with him, even up to the time of his arrest (DA-R. 479, 1060).

Finally, Lambrix's self-serving testimony provides no support. As the court below noted, this testimony is inherently suspect by the fact that it is inconsistent with what Lambrix was telling his attorneys at the time of trial. Lambrix has an obvious motive to lie, and has never explained why he never previously revealed that he had allegedly told Frances Smith that he "went nuts" because the male victim was attacking the female victim on the night of the murders. He repeatedly faults Smith for failing to spontaneously provide this defense at trial. Of course, there is nothing in the record which supports this theory, only Lambrix's self-serving testimony twenty years after his conviction. In addition, his testimony could not corroborate Hanzel's claim of a conspiracy, since Lambrix had no personal knowledge of Frances Smith's alleged solicitation of false information or evidence.

Furthermore, Lambrix's claim that the finding of no recantation entered by the court below does not have sufficient evidentiary support is refuted by the record; Frances Smith testified directly that she never asked Hanzel or Branch to provide false information to the investigators or to lie at trial (V43/8351-52). This testimony clearly provides competent, substantial evidence to reject the conspiracy claim.

Thus, we are left with no credible evidence of a recantation, direct evidence refuting the suggestion of a conspiracy, and a wealth of case law recognizing that such post-trial claims are "exceedingly unreliable." Heath v. State, 2009 Fla. LEXIS 134 (Fla. Jan. 29, 2009); ("This Court has noted that recanted testimony is 'exceedingly unreliable,' and if a trial court is not satisfied that the recanted testimony is true, it has a duty to deny the defendant a new trial"); Green v. State, 975 So. 2d 1090, 1101 (Fla. 2008); Consalvo v. State, 937 So. 2d 555, 561 (Fla. 2006); Sweet v. State, 810 So. 2d 854, 867 (Fla. 2002); Stano v. State, 708 So. 2d 271, 275 (Fla. 1998); Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994); see also Herrera v. Collins, 506 U.S. 390, 424 (1993) ("Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.")

This Court has acknowledged that review is "highly deferential" with regard to a trial court's determination concerning the credibility of a recantation, and that such a determination will be affirmed if supported by competent,

substantial evidence. Heath; Archer v. State, 934 So. 2d 1187, 1196 (Fla. 2006). The finding of the court below that Deborah Hanzel was a "confused" witness who did not offer a credible recantation is fully supported by the record, and must be affirmed.

Even if Lambrix could demonstrate some error in the court's factual rejection of the recantation, he could not meet his burden of establishing prejudice. In determining whether relief is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case. Only when it appears that, on a new trial, the witness' testimony would change to such an extent that a different result is probable should relief be granted. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Much of Hanzel's trial testimony was corroborated by Frances Smith and Preston Branch. Thus, the court below properly concluded that, even assuming a credible recantation could be demonstrated, Hanzel's testimony was cumulative and a new trial would not probably produce a different result (V29/5802).

As part of this claim, Lambrix complains of alleged State "misconduct" during the course of the proceedings below (AIB, pp. 52-56). Once again his complaints are unwarranted and

clearly refuted by the record. Specifically, Lambrix asserts that the State: tried to intimidate Deborah Hanzel by requesting that the court appoint counsel for her, and suggesting to the trial court (and not in Hanzel's presence) that any recantation might implicate perjury concerns; permitted prosecutor Randall McGruther to participate as a witness without withdrawing from the case and cutting off Lambrix's cross-examination of him at the hearing; improperly instructing Smith that she did not have to answer irrelevant questions at the discovery deposition in 2004; "secretly" meeting with Smith in her home while denying that a formal "investigation" into her claim of sex with Bob Daniels had been undertaken; and objecting to producing aerial photographs, and then offering them later without a proper foundation.

Lambrix has offered his complaints in a vague and general manner, without providing any of the background for the alleged improprieties and without having requested relief from the court below with regard to the actions he now disputes. He has not raised any issue on appeal concerning the court's rulings below which sustained the objections to cross-examination at the hearing and denied the motion to compel aerial photographs, but instead simply asserts that the State committed misconduct by

advancing legal positions which were thereafter accepted by the court below.

A full review of the record clearly demonstrates that the State's actions throughout the proceedings below were beyond reproach. Certainly, the State had an obligation to determine the facts once Frances Smith indicated that she had sex with Bob Daniels; whether the State Attorney's Office considers exploration of her claim to be an official "investigation" is of no moment. Obviously, Lambrix is disappointed that the State did not simply sit back and allow his attorneys to rewrite history in a manner befitting their client, but the State does have an affirmative duty to seek justice. Berger v. United States, 295 U.S. 78, 88 (1935).

As to the allegation that the State attempted to intimidate Deborah Hanzel by securing an appointment of counsel, the State provided legal authority for the motion and there was no suggestion below that the motion for counsel was filed in bad faith - in fact, Lambrix did not object to the appointment of counsel, which the court denied (V31/6232; V41/8129-32). There is, of course, no claim that the State threatened Hanzel with perjury, only that they advised the court, while Hanzel was not present, that an appointment of counsel was appropriate given the possibility of perjury charges based on the allegation that

Hanzel would acknowledge having lied at Lambrix's capital trial. No misconduct is demonstrated.

The complaint with regard to the aerial photos provides a good example of how baseless accusations of State misconduct are going to be levied under any circumstance, simply because Lambrix is desperate for relief and has no legitimate claim to pursue. When Lambrix filed a motion seeking to obtain these photos in March 2004 (V31/6274-75), the trial court properly denied the motion (V32/6305-06), a ruling which Lambrix has not challenged on appeal.[12] Yet, Lambrix continued to complain below about the lack of access to these photos (V32/6399-6402). When Bob Daniels testified at the evidentiary hearing in July, 2006, he was asked about water on the property where the bodies were discovered, about the aerial photographs he had taken before trial, and about other photographs that had been provided at a previous hearing (V46/8943,8952-54). A series of photographs was admitted reflecting "quite a bit of water" on the property, and counsel for Lambrix asked the court to require the State to provide "all photographs the State Attorney's Office has in

[12] Lambrix had Xeroxed photocopies of the aerial photographs, but wanted actual prints from the negatives (V31/6275). At trial, aerial photographs were admitted which showed standing water in the area of the crime scene (DA-R. 1926-27). Lambrix has claimed that aerial photos in the State's possession would support his assertion that there was no pond on the crime scene property.

their possession" before proceeding further (V46/8953-57). The court did not delay the hearing, but told Assistant State Attorney Cynthia Ross to "get them" and told counsel for Lambrix that she would get every photograph the State Attorney had in the file (V46/8957). Following the conclusion of the testimony that day, Ms. Ross produced a set of documents which she had obtained over the lunch break--two copies of every photograph from the State Attorney file, for the defense and for the court (V46/9052). While the record is abundantly clear that the State was acting at the direction of the court below pursuant to a request by Lambrix's attorney, provision of the additional photos at the July hearing has now led to further accusations of State misconduct, with Lambrix asserting "Inextricably, at the final evidentiary hearing in 2006 the State decided to trot out undocumented photos of wet swampland as some sort of 'rebuttal' to a fact that Mr. Lambrix had not even been allowed to discuss in his case-in-chief" (AIB, p. 55).

Similarly, the claim that the State improperly interfered with Lambrix's deposition of Frances Smith is unfounded. The record reflects that, in ordering the deposition, the court below limited the permissible scope: "testimony will be limited solely to the issues presented by Ms. Hanzel's affidavit, testimony before this Court and letter referenced above"

(V31/6267-68). When the prosecutor instructed the witness not to answer questions that went beyond this scope, she was clearly within the authority of Florida Rule of Civil Procedure 1.310(c), which permits a party to instruct a deponent not to answer when necessary "to enforce a limitation on evidence directed by the court." No impropriety in the State's actions at the deposition has been shown.

Lambrix's final point in this claim asserts that he was denied the cumulative analysis required on his claim of newly discovered evidence (AIB, pp. 56-57). However, he does not even attempt to explain how the court can cumulatively analyze error which the court specifically found did not occur. He does not cite any authority for the suggestion that a trial court must reconsider all trial testimony after rejecting a claim that a witness lied at trial. No error is shown. In the absence of any demonstrated errors, no cumulative analysis is necessary. Rose v. State, 774 So. 2d 629, 637 (Fla. 2000).

A review of the record fully supports the lower court's rejection of this claim. No basis for relief has been offered, and this Court must affirm the ruling on this issue.

ISSUE III

WHETHER THE TRIAL COURT DENIED LAMBRIX A FULL AND FAIR HEARING ON HIS POSTCONVICTION CLAIMS.

Lambrix next claims that he was denied a full and fair hearing when the trial court excluded expert testimony to support a claim of conspiracy. This claim presents an evidentiary ruling, reviewed on appeal for an abuse of discretion. Asay v. State, 769 So. 2d 974, 981 (Fla. 2000) (reviewing trial court's limitation of testimony at a postconviction evidentiary hearing for an abuse of discretion).

In typical fashion, Lambrix presents this issue in a manner which completely ignores the facts and mischaracterizes the record. For example, he suggests that Deborah Hanzel was a critical witness at trial, asserting that she was "so reliable that based upon her otherwise unsupported testimony the State was willing to convict and condemn a man to death" (AIB, p. 58). In fact, Hanzel's testimony was corroborated by Preston Branch at trial, and certainly was never the only or even the primary basis for Lambrix's prosecution. The insignificance of Hanzel's testimony is reflected by the fact that her evidence is not even mentioned in this Court's description of the facts on direct appeal.

At any rate, consideration of this issue provides no basis for relief. As part of the evidentiary hearing on Lambrix's

claims, he requested the opportunity to present evidence rebutting the testimony presented at trial. He now challenges the trial court's denial of his request, alleging that he should have been able to call additional witnesses at the evidentiary hearing, including two forensic pathologists (Edward N. Willey, M.D., and Arkady Katz-Nelson, M.D.); an expert in police investigations and procedures (William Gaut); and three witnesses that could provide testimony that there was not a pond on the property where the murders occurred (Sally[13] Deller, Steve Wistar, of AccuWeather, Inc., and hydrologist Richard Thompson). There has never been any suggestion that any of these witnesses could provide newly discovered evidence or that any of their information was not readily available at the time of trial.

The trial court's ruling to deny presentation of this evidence was proper and fully supported by relevant authorities. As this Court has recognized, the court below had "'wide latitude' to regulate proceedings before it 'in order that the administration of justice be speedily and fairly achieved in an orderly, dignified manner' and that 'in this function the trial judge exercises the sound discretion with which he is vested.'" Asay, 769 So. 2d at 981; Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (quoting Hahn v. State, 58 So. 2d 188, 191 (Fla.

[13] Referred to as "Susan" Deller in Lambrix's brief.

1952)); Robinson v. State, 707 So. 2d 688, 695 (Fla. 1998); Garcia v. State, 622 So. 2d 1325, 1327 (Fla. 1993). As in Smith v. State, 931 So. 2d 790, 800 (Fla. 2006), the court below did not err "in requiring the evidence admitted at the evidentiary hearing to be related to the issues before it."

Although none of these proposed witnesses had any first-hand knowledge relating to Deborah Hanzel, Frances Smith, Bob Daniels, or any alleged conspiracy, Lambrix contends that the testimony would be relevant by providing indirect circumstantial evidence of a conspiracy. However, the fact that the defense can find witnesses to critique trial testimony many years after a conviction does not reasonably infer the existence of any conspiracy. Lambrix has invoked the word "conspiracy" and suggested possible participants, but he has never identified the genesis, scope, or purpose of any conspiracy. He 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. According to what Lambrix now claims he told Frances Smith the night of the murders, she had no reason to fear him or want to see him arrested.

Moreover, any claim of conspiracy based solely on this other proffered evidence would be procedurally barred, since all

of this information was previously known to Lambrix and his attorneys and it was never asserted in support of an alleged conspiracy claim. The only reason the court below considered the conspiracy claim is that it was based on newly discovered evidence, including Hanzel's alleged recantation and the alleged sexual encounter between Frances Smith and Bob Daniels. Once the court below determined there was no recantation and no sexual encounter, there was no further evidence to be considered with regard to the existence of any conspiracy.

Lambrix asserts that this testimony should have been allowed because it would undermine confidence in the verdict. However, evidence which merely contradicts trial testimony does not warrant an evidentiary hearing, particularly when the evidence was available at the time of trial. Tompkins v. State, 980 So. 2d 451, 458-59 (Fla. 2007). And although Lambrix claims that the testimony would have assisted the court below "in determining how the suppressed evidence precluded Mr. Lambrix from defending himself fully and fairly at his trial" (AIB, p. 62), the court below, of course, denied the claim that any evidence had been suppressed.

The court below properly limited the evidentiary hearing to relevant witnesses, and correctly denied Lambrix's intent to re-try this case. No error has been shown in this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE CLAIM OF JUDICIAL BIAS.

Lambrix next asserts that the court below erred in summarily denying his claim of judicial bias. To the extent he challenges the summary denial, this claim is reviewed *de novo*; to the extent he challenges the trial court's ruling denying an opportunity to depose Judge Stanley, this claim is reviewed for an abuse of discretion. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*); State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding pure questions of law discernible from the record to be subject to *de novo* review); State v. Lewis, 656 So. 2d 1248, 1249-50 (Fla. 1994) (denial of postconviction discovery is reviewed for abuse of discretion).[14] As will be seen, no error has been presented.

It must be noted initially that this claim was procedurally barred as presented below. Lambrix filed the postconviction motion presenting this issue on Jan. 20, 1998, requiring the facts to have been known or reasonably available to him no earlier than Jan. 20, 1997 (V1/1). Jimenez v. State, 33 Fla. L.

[14] Lambrix also claims that he was denied access to records from the Florida Parole Commission; because he failed to secure a ruling on his request and the Commission's objection below, there is no ruling and therefore no applicable standard of review.

Weekly S 805 (Fla. Sept. 29, 2008) (noting claims of newly discovered evidence must be filed within one year); Buenoano v. State, 708 So.2d 941, 948 (Fla. 1998); Mills v. State, 684 So.2d 801, 804-805 (Fla. 1996) (applying same limit prior to 2001 changes to Rule 3.851). Lambrix claimed below that his motion was timely because he could not have been reasonably expected to discover Judge Stanley's statements prior to Stanley testifying at the Porter evidentiary hearing on Jan. 17, 1997 (V5/946-54). However, similar statements were known and recited by the Eleventh Circuit Court of Appeals in remanding Porter (who was represented by the same office of Capital Collateral Representative as Lambrix, see V8/1670) for a federal hearing on March 31, 1995 (with rehearing denied June 5, 1995). Porter v. Singletary, 49 F.3d 1483, 1487-88 (11th Cir. 1995). Thus, Lambrix was on notice of the facts relied on in support of his postconviction motion well over a year prior to the January, 1998 filing of the motion.

The court below denied the State's motion to dismiss the postconviction motion on this basis, noting that this Court's decision in Porter was not final until December, 1998 (V5/914-19,1048-49). However, Lambrix was clearly aware of this claim prior to that time, and reasonably should have been aware of the statements on which he premised his claim of bias in 1995.

Because this claim could have been denied as procedurally barred, the court's denial of this claim on the merits should be affirmed. See Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (noting principle of appellate law permitting court to affirm lower court's ruling for any reason supported by the record).

However, the court's rejection of this issue on the merits is also fully supported by the record, and must be affirmed for the reasons that follow.

A. Summary Denial of Judicial Bias Claim

The record fully supports the trial court's summary rejection of Lambrix's claim of judicial bias. This claim was the sole issue presented in the successive motion to vacate filed in January, 1998 (V1/1-22). In that motion, Lambrix alleged that the trial judge in this case, the Hon. Richard Stanley, harbored a general bias against all capital defendants. The allegations of bias are based on statements made by Judge Stanley during an evidentiary hearing in the capital case of State of Florida vs. Raleigh Porter, 20th Circuit Case No. 78-199F. See Porter v. State, 723 So. 2d 191 (Fla. 1998), cert. denied, 526 U.S. 1120 (1999). Lambrix relied on the finding of bias in Porter in conjunction with unfavorable rulings during

the course of the Lambrix trial in attempting to demonstrate bias in this case.

The trial court summarily denied this claim on August 31, 2001, as follows:

> This claim is **denied** without a hearing. This claim is legally insufficient because the motion does not allege any evidence of judicial bias in this case. The defendant bases this claim on the decision of *Porter v. State*, 723 So.2d 191 (Fla. 1998) and the facts of judicial bias relied on by the supreme court in reaching its decision in that case. In this case, the state does not dispute any of the facts from the record in *Porter*. The trial judge in *Porter* was the same trial judge who tried this case. *Porter* was tried in November, 1978, and sentencing in that case was concluded in 1981 after the first sentencing order was reversed due to a procedural defect. This case was tried in February, 1984.
>
> In *Porter*, the defendant's motion alleged evidence of judicial bias against Mr. Porter, that is, statements of the trial judge in March 1995 to newspaper reporters and the affidavit of the clerk of court dated that same month which told of a conversation between the clerk and the trial judge before or during Mr. Porter's trial in 1978. Once these allegations were developed by discovery and an evidentiary hearing, the supreme court found evidence of actual bias against Mr. Porter.*Porter*, at 199,fn 1.
>
> However, in this case, there is no evidence of bias against Mr. Lambrix alleged in the motion beyond the trial judge's statements in the record in *Porter* to the effect that he favored the death penalty. *Porter* did not decide the trial judge was generally unable to be impartial in capital cases. Further, in *Porter* the trial judge overrode the jury's recommendation of a life sentence while in this case the judge followed the jury's recommendation of the death penalty.
>
> For these reasons, this claim is legally insufficient and it is denied. No hearing is required on this claim.

(V6/1159).

Lambrix now claims that his "ability to obtain a full and fair hearing on the judicial bias claim below was crippled by the lower court's acts and omissions," since Lambrix did not depose Judge Stanley before Stanley's death in or around 2001 (AIB, p. 72). In fact, Lambrix was denied an evidentiary hearing on this issue because he failed to allege any disputed facts to support a claim of judicial bias in this case. As noted, his claim relied solely on undisputed statements which Judge Stanley made in the Porter case and Stanley's rulings against him at trial to demonstrate Stanley's alleged bias. His brief does not identify any disputed evidence of bias or suggest additional evidence may have been available had an evidentiary hearing been granted on this claim. There was no basis for an evidentiary hearing where there were no facts in dispute.

In addition, Lambrix does not offer any authority to support a finding of bias on the undisputed facts he offered. In fact, Porter is the only case cited in his brief on this claim. Evidently, his position is that once a judge has been found to be biased in one case, the same bias must be presumed for all defendants. There is no case or legal proposition supporting this position. To the contrary, judicial bias or even misconduct in one case does not lead to the presumption of bias in all cases. See Maharaj v. State, 778 So. 2d 944 (Fla.

2000) (refusing to assume solely from the judge's action in a different case that the judge had knowledge of, and consented to, solicitation of a bribe from Maharaj).

Moreover, this case is easily distinguished from Porter, where a state constitutional officer provided a sworn affidavit alleging particular statements by Judge Stanley of a preexisting intention to sentence Porter to death if a first degree murder conviction were returned. The finding of partiality in Porter does not compel a finding of partiality with regard to unrelated capital defendants. It is noteworthy that Judge Stanley's possession of a gun in the courtroom was repeatedly explored in Porter and "readily explained" to be the result of security precautions; no court has ever expressed concern about Stanley's admissions on exercising his right to possess a gun. See Porter v. Singletary, 49 F.3d 1483, 1488 (11th Cir. 1995).

In Asay v. State, 769 So. 2d 974 (Fla. 2000), this Court rejected a claim of judicial bias which alleged that statements of the trial judge demonstrated that Asay was denied his right to a fair and impartial tribunal. During the course of Asay's trial, while the prosecutor was questioning prospective jurors, one venireperson indicated difficulty with the concept of mitigation sufficient to overcome aggravation in a premeditated murder, stating that he opposed paying for someone to sit in

jail and rot for years and years. At a bench conference, the judge suggested they should let this person off the jury, but put him on the Supreme Court. Later in Asay's trial, during a bench conference on jury instructions, the judge stated that if there were a first degree murder conviction, the First District Court of Appeals would not be hearing the appeal. In rejecting the claim of bias, the Court noted these statements "contrast markedly" with those involved in the Porter case. The Court noted that, although Porter showed his trial judge "actually lacked impartiality," Asay's allegations were "insufficient to show actual impartiality amounting to a denial of Asay's constitutional right to a fair and impartial tribunal." The Court concluded that relief was properly denied because Asay's allegations were "sheer speculation" which did not constitute legally sufficient grounds to support a motion for disqualification. Asay, 769 So. 2d at 980.

This Court has routinely rejected suggestions that extrajudicial comments on general legal issues, not pertaining to a specific case, will warrant judicial disqualification. See Quince v. State, 592 So. 2d 669 (Fla. 1992) (rejecting assertion that comment by judge years earlier in an educational address did not require recusal); State ex rel. Sagonias v. Bird, 67 So. 2d 678 (Fla. 1953) (rejecting assertion that statements made at

meeting of circuit judges and reported in newspaper encouraging zealous enforcement of gambling laws did not require recusal in case charging violations of these laws under theory that judge was biased and prejudiced against all persons charged with violations of gambling laws); see also Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981) (mere fact that trial judge was previously a highway patrol officer did not support claim of bias or prejudice).

Federal courts similarly reject these claims. See United States v. Bauer, 84 F.3d 1549, 1559-60 (9th Cir.) (no bias shown when judge indicated in published article that he considered marijuana distribution a serious and pervasive social problem; judge's views on legal issues do not constitute active and deep-rooted animus), cert. denied, 519 U.S. 1131 (1996); Brown v. Doe, 2 F.3d 1236, 1249 (2d Cir. 1993) (due process not violated when judge used example of defendant's conviction and sentence in post-hoc re-election campaign because no evidence of partiality during trial), cert. denied, 510 U.S. 1125 (1994).

The only specific allegations of bias noted in Lambrix's brief are the denial of the defense motion for judgment of acquittal at the close of the State's case and similar rulings during the course of the trial. As this Court has recognized repeatedly, reliance on adverse discretionary rulings is

insufficient to demonstrate undue bias or the need for judicial disqualification. Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992). In addition, Lambrix's claim that the denial of his motion for judgment of acquittal demonstrates judicial bias because premeditation was not established is refuted by the fact that this Court found sufficient evidence to support the convictions, and specifically upheld the aggravating factor of cold, calculated and premeditated. Lambrix, 494 So. 2d at 1148. The Eleventh Circuit Court of Appeals agreed that there was adequate record support for this aggravating factor. Lambrix v. Singletary, 72 F.3d 1500, 1507 (11th Cir. 1996).

Thus, as the court below properly ruled, this was a legal claim, not subject to any factual dispute, and properly denied without an evidentiary hearing. See Porter, 723 So. 2d at 196 ("However, the issue as to whether, based upon the facts presented at the evidentiary hearing, Judge Stanley met the required standard of impartiality is an issue of law subject to our review as a matter of law"). Since Lambrix failed to offer any factual support for a finding of judicial bias, the court below properly summarily denied this claim.

B. Lack of Opportunity to Depose Judge Stanley

Lambrix also asserts that the court below erred in granting the State's motion to strike his notice of intention to depose Judge Stanley. He claims that, due to Judge Stanley's death, the delay in having this issue heard resulted in his inability to prove his claim of bias. He further claims that the delay can only be attributed to the State, and that these facts establish a prejudicial due process violation, requiring that he be awarded a new trial.

The first reason to deny relief is that Lambrix did not provide good cause for authorization to depose Judge Stanley. See Lewis, 656 So. 2d at 1250. Lambrix launches into this issue as if he had a clear right to take Judge Stanley's deposition, without any analysis as to whether the relevant factors for consideration when a party seeks to depose the trial judge would compel the granting of this discovery. As this Court has recognized, a postconviction request to depose the presiding trial judge should be granted only upon a showing of good cause, when "absolutely necessary," taking into account "the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." Lewis, 656 So. 2d at 1250.

In this case, Lambrix had copies of a deposition given by Judge Stanley on January 15, 1997, as well as a transcript of his full testimony at the Porter evidentiary hearing two days later; these were provided to the court below (V8/1669-V9/1719; V21/4257-4293). The transcripts reflect that Stanley was asked about other capital defendants that he had sentenced to death -- he did not even recall the Lambrix case (V9/1708-09; V21/4267-68). Requiring another deposition to inquire about a case which Judge Stanley did not recall in 1997 would have been unnecessary and unduly burdensome. No good cause to permit the deposition has been offered.

In Bracy v. Gramley, 520 U.S. 899 (1997), the United States Supreme Court considered the propriety of permitting similar postconviction discovery in the context of a federal habeas corpus proceeding by a state prisoner sentenced to death. The allegations of judicial bias in that case stemmed from the state trial judge's later conviction for taking bribes in other criminal cases. Although the judge was not accused of having accepted a bribe in Bracy's case, the claim was that the judge would be motivated to convict Bracy in order to deflect suspicion that the rigged cases might otherwise attract. The United States Supreme Court determined that Bracy had shown "good cause" to justify discovery for his habeas action.

Significantly, the Court relied on the fact that Bracy alleged specific facts of actual bias **in his own case** rather than simply relying on the judicial misconduct that had occurred in other, unrelated cases:

> We emphasize, though, that petitioner supports his discovery request by pointing not only to [Judge] Maloney's conviction for bribe taking in other cases, but also to additional evidence, discussed above, that lends support to his claim that Maloney was actually biased in petitioner's own case.

520 U.S. at 909 (emphasis in original).

Unlike the Bracy case, Lambrix failed to demonstrate a reasonable concern of case-specific bias by Judge Stanley. His reliance on judicial rulings made over the course of the trial is not persuasive since those same rulings have been subjected to numerous appellate and postconviction challenges and have been consistently upheld. Similarly, the fact that his trial attorney has provided a statement indicating his belief that Judge Stanley's alleged bias hindered his representation of Lambrix is insignificant since that belief is again based on nothing more than discretionary rulings which have been repeatedly upheld. Certainly, if trial counsel felt constrained by some perception of judicial bias at the time of trial, he should have preserved any such relevant perception on the record rather than wait until more than fifteen years after Lambrix's conviction to reveal his concerns. A deposition on these facts

would amount to no more than a fishing expedition; no reasonable basis to subject Judge Stanley to another deposition existed.

Even presuming a deposition could have bolstered Lambrix's claim of bias, Lambrix's attempt to fault the State for the delay in litigating the deposition issue is not persuasive. A review of the record in this case suggests a number of reasons for the inordinate delay, and clearly refutes the suggestion that it must be attributed solely to the State. Lambrix, by his own admission, was on notice of this claim since January, 1997 (V5/946-54). A defendant is given one year to file a motion to vacate following the discovery of new information which may lead to a postconviction claim in order to have time to investigate the new information. Therefore, under Lambrix's time frame, the time for investigating any possible judicial bias in this case was from January 17, 1997 to January 17, 1998. During that time, there was no attempt to depose Judge Stanley, and no request for any additional time to investigate. At the end of the year, Lambrix simply filed a motion alleging judicial bias based on Stanley's testimony in the Porter hearing.

Although the motion did request the opportunity to question Judge Stanley and to amend the motion, the defendant took no action on this issue until August, 1998, when a notice for a deposition of Judge Stanley was filed (V1/197-202). The State

opposed the deposition on a number of grounds (V2/212-18), and a hearing was held on the issue. However, the hearing was held before the wrong judge, and no ruling was entered on the State's objections; instead, counsel for Lambrix was advised that if he desired to reschedule the deposition and hearing, he should do so in writing (V2/238-39). No further hearing was held on this issue and ultimately, in December, 1998, Lambrix filed an amended postconviction motion (V2/282-494). Lambrix repeated his request to question Judge Stanley in a new amended motion filed in January, 2001 (V5/1433), but thereafter took no further action to secure any deposition.

Against this background, Lambrix now asserts that the State advanced "a constellation of roadblocks," which he does not identify or enumerate, which thwarted his efforts[15] at every turn (AIB, p. 74). He concludes that his current inability to further investigate any potential bias due to Judge Stanley's death amounts to a prejudicial due process violation, compelling a new trial.

The record in this case reveals a great deal of unfortunate delay for a variety of reasons, and Lambrix's insistence that he bears absolutely no responsibility for any of the delay is

[15] Lambrix's claim to have "repeatedly and diligently" sought to depose Judge Stanley provides no record citation, and has no support in the record (AIB, p. 75).

easily refuted by the record. In fact Lambrix has contributed appreciably to the delay. He did not fully present all of his current postconviction claims, placing any discovery issues properly before the court, until January 10, 2001. When his initial attempt to depose Judge Stanley in 1998 was unsuccessful, he made no attempt to reschedule Stanley's deposition, even after being advised by Judge Pack that it would be appropriate to do so. He filed numerous *pro se* pleadings, which the court below specifically found to have confused the issues and delayed the timely progress of this case. The multiple changes in attorneys representing Lambrix and his frequent and equivocal requests for new and different counsel suggests that he was unable to develop and maintain a satisfactory working relationship with the attorneys involved in his case, creating delay which obviously cannot be solely attributed to the State. The circuit court's October 6, 2000 Order attributed unnecessary delay in this case to both parties; the only delay attributed to the State was due to the filing of "unauthorized" pleadings, such as the motion to dismiss (V5/1101), and the multiple judicial reassignments early in the case did not help either (V5/1100-01). Thus, Lambrix's suggestion that the State conspired to delay these proceedings until Judge Stanley was not available as a tactic to thwart

Lambrix's attempt to secure postconviction relief is without merit and unwarranted.

Moreover, even if the delay is attributed solely to the State, no due process violation is shown in the absence of bad faith. Lambrix's claim is, at most,[16] comparable to one that suggests due process may be violated where the prosecutor has substantially interfered with a defendant's right to present evidence, or has knowingly or negligently failed to preserve potential defense evidence. Under such circumstances, the due process clause is only implicated when the defendant can establish that the State has acted in bad faith. Thus, his due process claim fails both factually and legally.

In order to establish a due process violation, Lambrix needs to demonstrate both that the State has acted in bad faith in interfering with his right to present evidence to support his postconviction claim, and that the State's actions resulted in substantial, actual prejudice to his case. Arizona v. Youngblood, 488 U.S. 51 (1988). In Youngblood, the United States Supreme Court explained that such due process claims require a showing of bad faith on the part of the government,

[16] Because due process requirements are considerably reduced following a conviction (see, Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Kokal v. State, 901 So. 2d 766, 778 (Fla. 2005)), it is not clear that Lambrix's claim is even comparable to one of pre-indictment delay; however, the State offers the analysis applied in those cases for the sake of argument herein.

distinguishing a State's failure to preserve potentially useful evidence from the failure to disclose material, exculpatory evidence. Id., at 57-58; see also Merck v. State, 664 So. 2d 939, 942 (Fla. 1995); Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990).

Other cases confirm that bad faith on the part of the State must be established to sustain any due process claim on these facts. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (defendant must show government acted in bad faith; that is, that the government was aware of the exculpatory value of the lost evidence and made a conscious effort to prevent the defense from securing the evidence, to show due process violation based on allegations that the State acted improperly by deporting witnesses that the defense alleged could have provided exculpatory evidence); United States v. Chaparro-Alcantara, 226 F.3d 616, 623-24 (7th Cir.), cert. denied, 531 U.S. 1026 (2000); United States v. Wadlington, 233 F.3d 1067 (8th Cir. 2000) (prosecutor's use of two potential witnesses during grand jury proceedings rendered them "unavailable" for the defense but did not amount to a due process violation); United States v. Thompson, 130 F.3d 676, 687 (5th Cir. 1997) (recognizing that the defendant bears the burden of showing that the government's actions substantially interfered with a witness' decision

regarding whether to testify or the content of any testimony), cert. denied, 524 U.S. 920 (1998).

Moreover the prejudice necessary for a finding of due process cannot be speculative, but must be actual and substantial. Rogers v. State, 511 So. 2d 526, 531 (Fla. 1987) (defendant's burden of establishing actual prejudice from pre-indictment delay is not met by speculative allegations of faded memories or the disappearance of purported alibi witnesses), cert. denied, 484 U.S. 1020 (1988); Jarrell v. State, 756 So. 2d 1102, 1103 (Fla. 1st DCA 2000); United States v. Crouch, 84 F.3d 1497, 1515 (5th Cir. 1996) (prejudice must not only be actual, but must be substantial).

Thus, Lambrix's claim fails because he has not identified any improper State action or misconduct committed in bad faith which has prevented him from investigating and presenting a valid postconviction claim. Similarly, as to prejudice, Lambrix has not identified with any particularity any possible information or potential evidence of which he has been deprived. All he can do is speculate that if he had had the opportunity to depose Judge Stanley, he may have been able to discover or create some indication of bias to support his current allegations. Clearly, a due process violation cannot be established by such speculation.

None of the cases cited by Lambrix command the finding of a due process violation on the facts of this case. In Scott v. State, 581 So. 2d 887 (Fla. 1991), a pre-indictment delay which materially and adversely affected the defendant's ability to present a defense amounted to a due process violation. The Court held that balancing the defendant's clear prejudice against the lack of any need for the delay compelled the finding of a due process violation. In Jones v. State, 740 So. 2d 520 (Fla. 1999), a new trial was awarded following postconviction proceedings regarding the defendant's claim that he was not competent to be tried; although the Jones opinion states that due process may be denied when a trial court fails to act promptly after the Florida Supreme Court remands for a postconviction evidentiary hearing, it is evident that relief was granted on the merits of Jones' competency claim and not as a distinct remedy to any independent due process violation occasioned by the delay in conducting the evidentiary hearing. Jones can easily be distinguished, as that case languished dormant for twelve years after the Florida Supreme Court ruled that Jones had made a strong preliminary showing of incompetence at trial, entitling him to a hearing; the egregious facts of that case are hardly comparable to the case at bar. And the language quoted by Lambrix from Seymour v. State, 738 So. 2d 984

(Fla. 2d DCA 1999), is not persuasive since that case was premised on the denial of the defendant's constitutional right to a speedy trial, and not on independent due process grounds.

The remedy which Lambrix seeks, to be relieved of his burden of proof and to be awarded a new trial based on a claim of judicial bias for which specific facts are not even alleged, let alone proven, is not warranted.

C. Parole Commission Records

Lambrix also asserts that he was denied the opportunity to develop this claim because he was not provided with records from the Florida Parole Commission [FPC] relating any statements provided to the Commission by Judge Stanley. Although Lambrix filed a request for these records below, and FPC filed an objection, it was taken under advisement and never resolved (V41/8085,8089-8107,8125). Since Lambrix did not make any attempt to secure a ruling below, he has abandoned his request, and this Court must find this claim procedurally barred.

In addition, the Commission's objections were appropriate and should have been expressly granted on the merits. This Court has recognized that neither Florida public records laws nor Brady compel disclosure of these records. Asay v. State, 649 So. 2d 859 (Fla. 1994), cert. denied, 516 U.S. 1017 (1995) (holding that Brady "has no application to clemency proceedings

in Florida"); Roberts v. Butterworth, 668 So. 2d 580, 582 (Fla. 1996); Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993) (judicial order for release of clemency records violates state constitutional separation of powers). As recognized in Asay, any documents generated years after Lambrix's trial and sentencing cannot provide exculpatory material constitutionally required to have been disclosed prior to trial.

Lambrix asserts that Asay does not apply because his request was specific, seeking only judicial comments, rather than the general request construed as a fishing expedition in Asay. However, as Lambrix admits he has no other evidence of judicial bias and he cannot identify the content of any statements he seeks, he is in fact on a fishing expedition. More importantly, that was not the basis of this Court's holding in Asay; clemency records are not subject to release under Rule 3.852 because they are not public records, and information developed after trial cannot be found to violate Brady.

For these reasons, this Court must deny this claim as abandoned and without merit.

D. Prejudice

In concluding, Lambrix faults Judge Stanley for failing to reveal a bias that did not exist. As there has been no showing of bias, there was simply nothing to disclose. Even if there

had been some disclosure of Judge Stanley's personal support of the death penalty, disqualification would not be warranted based on the authorities cited and discussed above.

Lambrix flips his burden of showing constitutional error to the State, asserting that the lack of evidence that Judge Stanley's bias in Porter dissipated prior to the Lambrix trial requires a new trial (AIB, p. 79). This argument only acknowledges that Lambrix has no actual evidence of bias himself.

Lambrix also notes that the two other defendants sentenced to death by Judge Stanley have since been released from death row. However, considering that both of these defendants received jury recommendations for life sentences, it is hardly surprising that the death sentences have since been vacated. Furthermore, the fact that Judge Stanley did not override every life recommendation he received in capital cases specifically refutes Lambrix's general claim of sentencing bias (V9/1709).

That two other capital cases involved the imposition of death sentences overriding jury life recommendations does not suggest that Judge Stanley was biased against Lambrix; to the contrary, it demonstrates the immateriality of any possible judicial bias. In order to prevail on a claim of newly discovered evidence, Lambrix must demonstrate that any

constitutional error was material to his conviction and sentence; that is, that absent the error, he would have been acquitted or sentenced to less than death. Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996). Although the State recognizes that judicial bias involves the rare structural error which cannot be subject to a harmless error analysis, this does not relieve the defendant of establishing the element of materiality necessary for relief. The fact that a jury of his peers and countless appellate judges have approved of the sentences imposed by Judge Stanley in this case clearly refutes any allegation of materiality in this case.

Finally, it must be noted that, to the extent Lambrix suggests that any possible judicial bias would entitle him to a new trial as well as a new sentencing proceeding, this argument was squarely rejected in Porter. See Porter, 723 So. 2d at 198-199 (rejecting plea for new trial, noting "The issue upon which we have determined Judge Stanley to lack the necessary impartiality involves only the sentencing phase of appellant's trial"); accord, Zeigler v. State, 452 So. 2d 537, 540 (Fla. 1984).

For all of these reasons, the trial court's summary rejection of Lambrix's judicial bias claim is well supported by the record, and must be affirmed.

ISSUE V

WHETHER THE EIGHTH AMENDMENT REQUIRES SUSPENSION OF PROCEDURAL BARS.

Lambrix's last claim asserts that he is entitled to a new trial because he is actually innocent; because justice requires relief from his wrongful conviction; and because the application of procedural bars in this case violates the Eighth Amendment to the United States Constitution. In this issue, Lambrix presents legal issues, to be considered *de novo*. Henyard, 992 So. 2d at 125; Coney, 845 So. 2d at 137 (Fla. 2003) (pure questions of law discernible from the record are subject to *de novo* review).

Initially, it must be noted that this issue should be denied under the law of the case doctrine. In a prior postconviction appeal, Lambrix offered the same constitutional claim alleging actual innocence and a manifest injustice. See Lambrix v. State, Florida Supreme Court Case No. 86,119, Initial Brief of Appellant, pp. 21-28. Since his Brady and newly discovered evidence claims were rejected below, he cannot offer any evidence of his alleged innocence beyond what was previously considered by this Court and rejected in 1996.

Moreover, even if considered on the merits, the claim was properly denied previously, and must be rejected again. Lambrix asserts that his claims are subject to review, even if untimely, under the fundamental miscarriage of justice exception because

he can allegedly demonstrate that he is "actually innocent" pursuant to Schlup v. Delo, 513 U.S. 298 (1995) and Sawyer v. Whitley, 505 U.S. 333 (1992). In Schlup, the Court noted that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare," and must be supported by "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." 505 U.S. at 324. 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 presented at trial. Since the State presented evidence at trial which would have directly refuted his theory of defense -- including Frances Smith's testimony as to his actions on the night of the killings and his statements to her that he had killed both victims, and testimony that Lambrix told Deborah Hanzel that he committed the murders and had been motivated by his desire to get Moore's car (DA-R. 2210,2211,2213,2445,2449)-- Lambrix cannot show that no reasonable juror would have convicted him of first degree murder, and he has not established that his conviction is a miscarriage of justice under the precepts of Schlup.

Lambrix's reliance on circumstantial evidence cases where this Court has deemed evidence to be insufficient to support a first degree murder conviction does not establish his innocence. The "actual innocence" standard does not require the mere showing of a reasonable doubt; it demands evidence of such a nature that no reasonable juror would have convicted a defendant. Even if a reasonable doubt were sufficient, however, Lambrix could not establish such doubt given the strength of the State's case against him. See Cochran v. State, 547 So. 2d 928 (Fla. 1989) (jury not required to accept any theory on which the State has produced conflicting evidence). Therefore, Lambrix has not offered a colorable claim of innocence warranting consideration of the merits of his claims.

Lambrix has similarly failed to satisfy the test of Sawyer v. Whitley, 505 U.S. 333 (1992); under this decision, a defendant must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. In this case, a jury recommended two death sentences, and the trial judge found five aggravating factors as to Moore and four as to Bryant: heinous, atrocious or cruel; cold, calculated and premeditated; under sentence of imprisonment; prior violent felony conviction (based on the contemporaneous murders); and pecuniary gain (as to

only). Judicial opinions have repeatedly upheld the applicability of all these factors. Lambrix, 494 So. 2d at 1148); Lambrix, 72 F.3d at 1508. Even if Lambrix's current claims had merit, his convictions and sentences are not unreasonable in fact or law.

Lambrix contends that the prior opinion in this case was overridden by this Court's opinion in Jimenez v. State, 33 Fla. L. Weekly S 805 (Fla. June 19, 2008). This is a curious contention, asserted without any explanation; in fact, Jimenez entered the same ruling citing the same principle of law as the prior Lambrix opinion, and the two cases are entirely consistent.

Lambrix's self-serving testimony, twenty years after his conviction, which is entirely contrary to everything he told his defense team at the time, falls far short of the showing of innocence required for suspension of the applicable procedural bars; it is neither "new" nor "reliable." In House v. Bell, 547 U.S. 518 (2006), the Court found that the Schlup standard had been met, where there was new DNA testing which revealed that the victim's husband was the source of semen on her clothes which previously was believed to have been the defendant's. The only other forensic evidence tying the defendant to the crime was bloodstains that were shown to have possibly been

contaminated. House also presented two witnesses that testified that the husband had confessed to the murder and other witnesses that described the husband's suspicious behavior, including the attempted construction of a false alibi and a history of spouse abuse. The motive which the State had offered for the murder, House's attempt to have sex with the victim, disappeared when the DNA established the semen to be from the husband. On these facts (which the Court determined were still insufficient to establish any theoretical, freestanding claim of innocence so as to preclude execution under Herrera v. Collins, 506 U.S. 390 (1993)), the Court found that House had provided ample evidence of his possible innocence to require consideration of his otherwise procedurally-barred claims of constitutional error. Clearly, Lambrix's self-serving testimony is not comparable to the evidence of innocence provided in House.

To the extent Lambrix relies on Hanzel's alleged recantation and the alleged sexual encounter between Smith and Daniels as demonstrating his innocence, he was provided an evidentiary hearing and failed to prove his allegations. Since his assertion of innocence fails factually, this Court must deny relief on this issue.

CONCLUSION

WHEREFORE, the Appellee State of Florida respectfully requests that this Honorable Court affirm the Order denying postconviction relief entered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to William M. Hennis, III, Capital Collateral Regional Counsel - South, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida this 9th day of February, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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