IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC12-06
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

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Lambrix seeks an oral argument before this Court on the denial of his fifth successive motion for post-conviction relief. However, on November 4, 2009, Lambrix was given an opportunity to argue before this Court on appeal from the denial of a prior successive motion for post-conviction relief after an evidentiary hearing in case number SC08-64. Lambrix has already consumed more than his fair share of this Court's and the State's limited resources. No additional argument is required. The claims raised in Lambrix's fifth successive motion for post-conviction relief were summarily denied as untimely, procedurally barred and meritless. Oral argument would not materially aid the Court in deciding the claims raised herein.

STATEMENT OF THE CASE AND FACTS

This is the appeal from the fifth successive motion for post-conviction relief for death row inmate Cary Michael Lambrix. Lambrix has been on death row since 1984 for the murders of Aleisha Bryant and Clarence Moore.

A. Facts And Procedural History Relating To Lambrix's Fifth Successive Motion For Post-Conviction Relief

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.

Lambrix's convictions and sentences were upheld on direct appeal. Lambrix, 494 So. 2d at 1148.

As summarized by this Court, there were "five aggravating and no mitigating circumstances to the murder of Moore, and four aggravating and no mitigating circumstances to the murder of Bryant." The "five aggravating circumstances found by the trial judge are: (1) the capital felonies were committed by a person under sentence of imprisonment, section 921.141(5)(a), Florida Statutes (1983); (2) the defendant was previously convicted of another capital felony, section 921.141(5)(b); (3) the capital felony was committed for pecuniary gain, section 921.141(5)(f); (4) the capital felonies were especially heinous, atrocious or cruel, section 921.141(5)(h); and (5) the capital felonies were homicides and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i)." Lambrix, at 1148.

This Court upheld the denial of Lambrix's third motion for post-conviction relief. Lambrix v. State, 39 So. 3d 260 (Fla.

2010).[1] Certiorari review of that decision was denied on January 10, 2011. Lambrix v. Florida, 131 S. Ct. 917 (2011). In addition, the Eleventh Circuit Court of Appeals recently denied Lambrix's *pro se* request to file a second or successive federal petition for writ of habeas corpus. In re Lambrix, 624 F.3d 1355 (11th Cir. 2010). In that ruling, the court considered several of the claims that were rejected by the state courts. Lambrix also filed a *pro se* original habeas petition in the United States Supreme Court in February, 2011, which was denied May 23, 2011. In re Lambrix, 131 S. Ct. 2907 (2011). The appeal of Lambrix's fourth successive motion for post-conviction

[1] Prior to that opinion, this Court had denied relief in a number of actions pursued by attorneys for Lambrix as well as in many *pro se* proceedings. 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. State, 698 So. 2d 247, 248 (Fla. 1996), cert. denied, 522 U.S. 1122 (1998); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994) (denial of state habeas); Lambrix v. State, 559 So. 2d 1137 (Fla. 1990) (affirming denial of pro se habeas petition); Lambrix v. State, 534 So. 2d 1151 (Fla. 1988) (affirming summary denial of emergency motion to vacate filed during warrant); Lambrix v. Martinez, 534 So. 2d 400 (Fla. 1988) (mandamus dismissed); Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988) (denial of state habeas petition); Lambrix v. Friday, 525 So. 2d 879 (Fla. 1988) (petition for extraordinary relief dismissed). Federal courts had also considered and rejected Lambrix's numerous claims. Lambrix v. Singletary, 520 U.S. 518 (1997); Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996), reh. denied, 83 F.3d 438 (11th Cir. 1996).

relief, denied July 14, 2010, is pending in this Court, Case No. SC10-1845.

Concurrently with the filing of his fifth successive motion to vacate based on newly discovered evidence, Lambrix filed "Defendant's Motion to Disqualify Judge and the Entire Twentieth Judicial Circuit" on July 13, 2011. In this motion, the entire allegation concerning a staff attorney in the twentieth circuit was, as follows: "Judge Greider also failed to disclose her relationship with Twentieth Judicial Circuit staff attorney Nicole Forrett (sic) who had a pre-existing legal relationship with Mr. Lambrix which she apparently concealed creating a substantial conflict of interest." (V1, 144). On July 18, 2011, the circuit court rendered an "Order Denying Defendant's Motion to Disqualify Judge and Circuit" and the order was filed with the clerk's office on July 21, 2011. Lambrix thereafter filed a motion for a writ of prohibition in this Court, Case No. SC11-1845, alleging that Judge Greider should be removed from his case, and, that since she had failed to rule on his motion within 30 days, she was divested of the ability to take any action on the case. The State filed a response to the writ of prohibition on October 27, 2011. That case remains pending in this Court.

After a case management hearing conducted on September 28, 2011, the trial court issued an order denying Lambrix's Fifth Successive Motion for Post-conviction Relief. The order denying the motion was signed on December 2, 2011. (V5, 435).

B. Facts Relating To Lambrix's Motion To Disqualify Judge Greider In Case Number SC10-1845

On January 4, 2012, this Court ordered a limited remand in Case Number SC10-1845 for the purpose of addressing the merits of Lambrix's claim that judge Christine Greider should be recused because a staff attorney in the twentieth circuit had a previous attorney client relationship with Mr. Lambrix and had worked on his capital case.[2] A hearing was held pursuant to this limited remand in front of Judge Greider on January 30, 2010. In that hearing, the staff attorney, Nicole Forrette, testified that she never had any contact, telephone, e-mail or otherwise, with Lambrix or anyone acting on his behalf. Ms. Forrette denied she received any money or provided any advice or service to Lambrix or those purporting to act on his behalf.

During the hearing, Lambrix attempted to establish that Ms. Forrette did some work on behalf of individuals attempting to assist Lambrix in obtaining public records and to address a

[2] By separate motion filed on April 16, 2012, Lambrix asks this Court to take judicial notice of the transcript of the record developed on remand in Case Number SC10-1845. The State has no objection to the request to take judicial notice.

medical or medication issue with the DOC. Ms. Lynn Pavelchak testified that she first began corresponding with Mr. Lambrix in 1990 when she was in the federal penitentiary. (SV-2, 56) [citation to supplemental volume of transcript in Case No. SC10-1845]. She began exchanging letters with Lambrix as "pen friends." (SV-2, 57). She continued to exchange letters with Lambrix after her release from prison, and, admitted she has spent a lot of time on Lambrix's case. (SV-2, 57-58). At one point, her work on Lambrix's case took about half her time. (SV-2, 58). Lambrix's son lived with her for about six months and after his son left, Pavelchak testified that her contact with Lambrix "eased off." (SV-2, 63).

Lambrix provided Pavelchak a power of attorney in 2005 or 2006 and to her knowledge, has never revoked that power of attorney. (SV-2, 37-38). Pavelchak recognized e-mails she retained regarding an attorney she contacted from Craig's list in an effort to assist Lambrix. Pavelchak asserted the e-mails had to be retrieved from an old computer she had in Ohio.[3] Pavelchak attempted to send them to CCRC but the CCRC filter kicked them out, so, Pavelchak ended up sending the e-mails to

[3] Pavelchak testified those e-mails were recovered in 2010 and by that time, "the hard drive on the computer had been replaced. So my husband had to put the hard drive in another computer and try to retrieve the e-mails off of them." (SV-2, 44).

Michael Hickey, who then forwarded those e-mails to CCRC. (SV-2, 39-40).

The contact with an attorney by e-mail was related to Lambrix's cholesterol medication which was a problem Pavelchak was attempting to address on behalf of Lambrix with the DOC. (SV-2, 41). Upon an exchange of e-mails, Pavelchak testified she sent a $20.00 money order to Nicole Forrette at a Lehigh address. Pavelchak claimed she made a photocopy of the entire money order as well as the e-mails and sent it to Lambrix so he "knew it got done." (SV-2, 43). After sending out the money order, Pavelchak did not have any further e-mail contact with Ms. Forrette. (SV-2, 46).

Michael Hickey, "a futures, stocks and equity trader" in California testified that he has corresponded with Lambrix for several years and had undertaken some legal research on Lambrix's behalf. Mr. Hickey contacted an attorney through Craig's list he believed in February of 2008. (SV-2, 15). He began e-mail correspondence with a person he believed was Nicole Forrette for assistance with a public records issue Hickey was having with the "Eighth Circuit." Hickey wanted help to compel the clerk's office to comply with a records request. (SV2, 17). The attorney offered to help at an hourly rate and, if needed, "write up a mandamus" if I "needed to file one of those." (SV-

2, 17). However, Hickey acknowledged that he never "formally" contracted with Ms. Forrette and no money changed hands as a result of the advice he received. (SV-2, 17). Subsequently, he referred the name and Craig's list add to Lynn Pavelchak. (SV-2, 18).

Hickey admitted that the name of Michael Lambrix never came up in the e-mails he exchanged with Nicole Forrette. (SV-2, 23). Hickey never spoke to Nicole Forrette on the phone or met her in person. (SV-2, 28).

Lambrix testified regarding his apprehension or fear that he could not receive a fair hearing in front of Judge Greider. Lambrix testified that he had a prior "adversarial" relationship with Ms. Forrette and was concerned that she failed to disclose this relationship. Lambrix was also concerned because of the relationship between Ms. Forrette and Judge Christine Greider. (SV-2, 71). Lambrix corresponded with Pavelchak over a number of years and through her, came into contact with Mr. Hickey. (SV-2, 72). In December of 2008, Lambrix asked Pavelchak to look into the Department of Corrections ending his prescription for Lipitor due to budget cuts. (SV-2, 72). Pavelchak allegedly told Lambrix in correspondence of the contact with Nicole Forrette. (SV-2, 73). Upon receiving copies of the correspondence, Lambrix became concerned that Forrette was

working as an assistant state attorney, and, claimed to have written Ms. Forrette a letter to express his concern that "she should not be doing this." (SV-2, 74). Lambrix claimed to have sent this letter to Ms. Forrette's private residence, and, received a reply about two weeks later. However, Lambrix testified that about two weeks after he sent his letter to Ms. Forrette several officers working in the "administrative shift" at Union Correctional came to his cell and specifically asked him for correspondence "with a person by the name of Forrette." (SV-2, 77).

Lambrix admitted that he never met Ms. Forrette, spoke to her on the phone, and, never sent e-mails to her, and never received correspondence from her. (SV-2, 78).

Nicole Forrette testified that she has been employed as a staff attorney in the twentieth judicial circuit since August of 2007. (SV-2, 81). Since becoming a staff attorney she has not done any private work on Florida cases. (SV-2, 82-83). As a staff attorney Ms. Forrette began training on capital cases in the summer of 2009 and now handles all capital post-conviction cases in this circuit. (SV-2, 85). Ms. Forrette testified that her e-mail address was and remains nlforrette@gmail.com. (SV-2, 86). However, she did not recall having any e-mail correspondence with Mike Hickey at his e-mail address. (SV-2,

86). Nor had she ever seen the e-mails referenced during the hearing or corresponded with Mike Hickey. (SV-2, 87). Ms. Forrette did not receive any correspondence from Lambrix at her private residence in February of 2008 or any time thereafter. (SV-2, 89-90). She never called either the state attorney's office or the department of corrections regarding Mr. Lambrix. (SV-2, 93).

Ms. Forrette testified that she never worked for the state attorney's office, never contacted Lambrix by phone, by e-mail, or letter, and never worked for Mr. Lambrix. (SV-2, 94-95). Nor, had she ever been contacted by anyone seeking her assistance in the Lambrix case. (SV-2, 95). Ms. Forrette testified that her address in Lehigh is no secret. (SV-2, 95). Ms. Forrette testified that she did not advertise for legal work on any website, but, she did have a profile on "Linked In" a professional networking site. (SV-2, 102). However, on her Linked In profile, she specifically stated that she was "not looking for work." (SV-2, 102).

Judge Greider issued an order February 1, 2012, finding that the "significant concerns raised by the Defendant's allegations regarding the Staff Attorney are refuted or unsupported by the evidence and testimony presented at the evidentiary hearing." (V5, 508).

Any additional facts necessary for resolution of the instant appeal will be discussed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

Lambrix's fifth successive motion raised claims which were untimely, procedurally barred, and, otherwise without merit. The underlying facts surrounding Lambrix's peacetime military slip and fall, and, resulting honorable discharge were known at the time of trial. So too, was Lambrix's drug and alcohol abuse which was the subject of previous post-conviction litigation. Accordingly, the motion was properly denied without a hearing below.

ARGUMENT

ISSUE I

THE LOWER COURT DID NOT ERR IN FAILING TO GRANT THE MOTION TO DISQUALIFY WHERE THE MOTION WAS LEGALLY INSUFFICIENT TO REQUIRE RECUSAL AND OTHERWISE UNFOUNDED AND WITHOUT MERIT.

A. Preliminary Statement On Applicable Legal Standards

As this Court stated in Riechmann v. State, 966 So. 2d 298, 317-318 (Fla. 2007):

> In considering a motion to disqualify, the trial court is limited to "determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged." *Rodriguez v. State,* 919 So. 2d 1252, 1274 (Fla. 2005); Fla. R. Jud. Admin. 2.330(f). In determining legal sufficiency, the question is whether the alleged facts would "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Rodriguez,* 919 So. 2d at 1274.

Further, "[a]llegations in a motion to disqualify are reviewed under a *de novo* standard as to whether the motion is legally sufficient as a matter of law." Peterson v. Asklipious, 833 So. 2d 262, 263 (Fla. 4th DCA 2002) (citing § 38.10, Fla. Stat. and Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000)).

B. Timeliness Of The Order Denying Recusal

Lambrix initially complains that the judge was untimely in ruling on his motion. Yet, Lambrix ultimately admits that an order was entered in a timely fashion, but, that he simply did not receive it. Lambrix nonetheless remains suspicious

regarding the timeliness of the order, and, somehow asserts this suspicion constitutes another reason to believe Lambrix cannot receive a fair hearing before Judge Greider. Lambrix's argument lacks any merit. The so-called botched service (appellant's brief at 23), would not seem to cast any doubt upon Judge Greider, but, appears to be a criticism of the Twentieth Circuit's Clerk's Office.

Lambrix has not cited, and Appellee is unaware of any case law which suggests his failure to receive a copy of an order properly entered by a judge, for whatever reason, renders the order untimely.[4] It is a matter of record that the judge timely denied Appellant's motion to disqualify on July 18, 2011 and that order was filed with the clerk on July 21, 2011 -- well within the 30-day time limit provided by Florida Rule of Judicial Administration 2.330(j). (V1, 168: Order Denying Defendant's Motion to Disqualify Judge And The Entire Twentieth Judicial Circuit As Legally Insufficient). Thus, any complaint by Lambrix that the judge's order denying his recusal motion was untimely is refuted by the record and clearly without merit.

[4] If Lambrix's argument is accepted, a judge properly and timely rejecting a recusal motion would be disqualified simply because his copy of the order was lost in the mail. Fortunately, such an absurd proposition has no support in the law.

C. Petitioner's Motion To Disqualify Was Facially Insufficient And Properly Denied By The Court Below.

At the outset, the State notes that Lambrix previously filed a motion to disqualify Judge Greider on July 21, 2010 to prevent her from hearing a prior motion for post-conviction relief. This motion alleged virtually the identical grounds that Lambrix has asserted here as grounds for disqualification. Consequently, the instant claim would seem to be redundant and its outcome will likely be determined in the case already pending in this Court, wherein Lambrix challenges the denial of the motion to disqualify. See State's Answer Brief in case number SC10-1845, pgs. 43-46. Further, this Court ordered a limited remand in that case in order to allow Judge Greider to address the merits of Lambrix's claim regarding his relationship with a staff attorney. Lambrix has requested this Court take judicial notice of the hearing and the State offers no objection to the judicial notice motion. Nonetheless, the State maintains that the motion in this case was legally insufficient to warrant a hearing, much less the disqualification of Judge Greider.

Lambrix offers little argument as to the legal sufficiency of the motion filed by counsel. Although he provides a non-controversial discussion asserting that death penalty litigation is a serious matter, he provided very little substantive

argument as to the actual allegations allegedly giving rise to his fear of judicial bias. An examination of those reasons clearly indicates the instant claim is without merit.

As to legal sufficiency, the motion generally asserted the following grounds for disqualification: 1) that Judge Greider must be disqualified because she previously worked as an Assistant State Attorney; 2) that a circuit staff attorney, Nicole Forrette, had some connection to his criminal case; and 3) that Judge Greider, has in the past made a variety of rulings adverse to Mr. Lambrix. None of these allegations were facially sufficient to require recusal. Notably, Lambrix has not cited any authority compelling disqualification on similar facts.

As this Court has held, a motion for disqualification is facially insufficient unless it "establish[es] a well-grounded fear on the part of the movant that he will not receive a fair hearing." Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000). In Arbelaez, this Court found that the mere fact that a trial judge had been employed at a prosecutor's office during the time that a defendant's case was prosecuted was insufficient to meet that standard. Id. There was no allegation that Judge Greider was ever personally involved in the Lambrix prosecution in any manner. Thus, the fact that Judge Greider had been employed by the state attorney's office did not present a facially

sufficient basis for a motion to disqualify.

As for Nicole Forrette, employed as a staff attorney in the Twentieth Judicial Circuit, Lambrix failed to specifically identify the nature or extent of his former "legal relationship" with Ms. Forrette. (V1, 144, paragraph 5). In this motion, the entire allegation concerning a staff attorney in the twentieth circuit was, as follows: "Judge Greider also failed to disclose her relationship with Twentieth Judicial Circuit staff attorney Nicole Forrett (sic) who had a pre-existing legal relationship with Mr. Lambrix which she apparently concealed creating a substantial conflict of interest." (V1, 144). Lambrix, failed to provide any facts concerning what this "legal" relationship was, in what capacity, or, that he had even met or communicated with Ms. Forrette. This conclusory and unsupported claim is facially insufficient to warrant disqualification. See Moore v. State, 820 So. 2d 199, 206 (Fla. 2002); Arbelaez, 775 So. 2d at 916; Barwick v. State, 660 So. 2d 685, 693 (Fla. 1995). If, as the motion alleged, Lambrix had a legal relationship to Ms. Forrett, it was his responsibility to specifically allege what this legal relationship was, its duration, and at least some specific facts so that a conflict might be discerned. His failure to do so rendered the motion legally insufficient. Accordingly, the motion was properly denied.

D. The Hearing On Remand In Case #SC10-1845 Failed To Show That Staff Attorney Nicole Forrette Had Any Attorney Client Relationship With Lambrix Or Otherwise Was Privy To Privileged Attorney Client Communications.

On January 4, 2012, this Court ordered a limited remand in order for Judge Greider to address allegations made in Lambrix's motion to recuse Judge Greider in case number SC10-1845. A hearing was held on January 30, 2012 concerning the nature and extent of the legal relationship alleged in Lambrix's motion to disqualify Judge Greider. During this hearing, Lambrix presented no evidence to establish he ever had an attorney client relationship with Nicole Forrett, that he ever discussed the merits or substance of his case with her, or, that he had even met her. Instead, Lambrix offered a partial trail of internet correspondence with an attorney, neither he, or his associates had ever met or even spoken to on the phone. The rather vague association was entirely by e-mail, and, was not accompanied by any filing, signed pleading, or other documents identifying attorney Forrette. Moreover, the only payment allegedly made or sent to Ms. Forrette for some vague assistance on a medical matter, was for a total of $20.00. Interestingly enough, neither Lambrix nor his representative, Ms. Pavelchak, have any receipt for this money order. Judge Greider issued an order on February 1, 2012, finding that the "significant

concerns raised by the Defendant's allegations regarding the Staff Attorney are refuted or unsupported by the evidence and testimony presented at the evidentiary hearing." (V5, 508).

Ms. Lynn Pavelchak never met Ms. Forrett in person, never talked to her by phone, and all of her alleged communication was through e-mail. (SV-2, 66). Pavelchak claimed to have sent Ms. Forrette a money order for $20.00 to her address in Lehigh for her advice on Lambrix's medical issues with the DOC. (SV-2, 67). However, as noted, no receipt or copy of that money order was produced at the hearing.

Similarly, James Hickey acknowledged that he never "formally" contracted an individual by the name of Nicole Forrett and no money changed hands as a result of the advice he received on a public records issue. (SV-2, 17). Hickey admitted that the name of Michael Lambrix never came up in the e-mails he exchanged with Nicole Forrette. (SV-2, 23). Hickey never spoke to Nicole Forrette on the phone or met her in person. (SV-2, 28).

Even this rather vague, impersonal, and completely e-mail legal association was denied in its entirety by Ms Forrette. She testified that she had no website, did not practice law on the side, with one exception for out of state clients referred to her by her family, and had never met, associated with, or,

corresponded with Lambrix or anyone acting on his behalf.[5] (SV-2, 94-96). Nor, had Ms. Forrette ever worked for the State Attorney's Office in the Twentieth Judicial Circuit as Lambrix alleged in his motion to recuse in case number SC10-1845.[6] (SV-2, 83). Ms. Forrette was clear and emphatic, she had no relationship, much less an attorney client relationship with either Lambrix or anyone acting, or purporting to act on his behalf.

Lambrix's assertion that vague, unauthenticated e-mails establish a legal relationship or that Nicole Forrette "abused her position to compel prison officials to search Mr. Lambrix's cell in an attempt to confiscate evidence supporting Mr. Lambrix's allegation" were simply unsupported and, incredible. (Appellant's Brief at 22). Moreover, Lambrix was given a fair opportunity to present evidence and testimony in support of his allegation of a prior legal relationship with Nicole Forrette. However, the testimony of Lambrix and two people associated with him, failed to establish that Ms. Forrette had any legal

[5] Ms. Forrette is also admitted to practice law in New York.

[6] The sworn allegation that Nicole Forrette had previously worked for the state attorney's office was verifiably false, and, as Judge Greider noted, could easily have been verified by counsel prior to filing the motion for disqualification.

relationship with Mr. Lambrix.[7] Even assuming for a moment the vague e-mail contacts alleged by Ms. Pavelchak and Mr. Hickey are true [as the State denies], no attorney client relationship ever existed with Lambrix and no privileged communications were exchanged. Thus, such a relationship cannot give rise to a well grounded fear that Lambrix would not receive a fair hearing in this case. Accordingly, after the hearing on limited remand in Case SC10-1845, not only is Lambrix's motion legally insufficient to warrant recusal or disqualification, a review of the facts introduced during that hearing failed to support his allegation of any legal relationship with Ms. Forrette, much less a relationship which creates a "substantial conflict of interest" as alleged in his recusal motion. Thus, the motion was without merit and properly denied by the court below.[8]

[7] See R. Regulating Fla. Bar 4-1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client ..."); 4-1.9(b) (stating that a lawyer who has formerly represented a client in a matter shall not thereafter "use information relating to the representation to the disadvantage of the former client except ... when the information has become generally known.").

[8] Lambrix has not offered any argument to support his motion to disqualify the entire judicial circuit. Such an unsupported speculative claim cannot support the remedy he seeks.

ISSUE II

SUMMARY DENIAL OF LAMBRIX'S FIFTH SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF WAS PROPER WHERE IT WAS UNTIMELY, PROCEDURALLY BARRED, AND MERITLESS.

A. Preliminary Statement On The Procedural Posture Of This Case And Applicable Legal Standards

Neither the State nor this Court should be forced to repeatedly litigate meritless challenges to long final convictions and sentences. Huffman v. State, 813 So. 2d 10, 11 (Fla. 2000) ("If Huffman has abused the judicial process to the point that the lower courts have sanctioned him by prohibiting further filings, we conclude that he has no right to continue to file procedurally barred or successive petitions or postconviction motions."). Lambrix is consuming a disproportionate share of this Court's and the State's resources through his repetitive filings and litigation tactics. See Tate v. State, 32 So. 3d 657, 658 (Fla. 1st DCA 2010) (noting that the defendant's repetitive and rambling filings have not been found to have any merit and that "the court's conscientious review of those filings has consumed an inordinate amount of our limited resources."). Moreover, the statutory right to counsel is limited to the provision of counsel for authorized court pleadings only; counsel is not permitted to file frivolous or successive post-conviction challenges. Olive v. Maas, 811 So.

2d 644, 654-55 (Fla. 2002); §§ 27.702(1), 27.711(1)(c), Fla. Stat. Thus, neither the due process right to access to the courts, nor the corresponding statutory right of counsel to pursue any and all available and authorized judicial remedies, provide an unlimited right to file abusive, successive, and frivolous pleadings in the circuit court or in any court, either through counsel or *pro se*.

In Walton v. State, 3 So. 3d 1000 (Fla. 2009), this Court provided the following standard of review of a summarily denied post-conviction motion:

> A successive rule 3.851 motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief. *See* Fla. R.Crim. P. 3.851(f)(5)(B). This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief.

B. The Trial Court Properly Denied Lambrix's Motion Because It Raises Untimely, Procedurally Barred, And, Meritless Claims.

The instant motion is comprised of claims which are clearly untimely. Pursuant to Fla. R. Crim. P. 3.851(d), motions for post-conviction relief must be filed within one year of when the defendant's conviction and sentence became final unless they are based on newly discovered evidence or a newly recognized,

fundamental constitutional right that applies retroactively. See Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence."); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (To qualify as newly discovered evidence, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence [and] to prompt a new trial, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.") (citations omitted). As discussed below, the "newly discovered evidence" in the form of an affidavit of Lambrix's ex-wife and the Veteran's Administration's recognition of a service related disability was information known to Lambrix and his counsel at the time of the penalty phase and earlier post-conviction proceedings.

On December 2, 2011, the trial court issued an order denying Lambrix's successive motion for post-conviction relief, stating, in relevant part:

> 5. Defendant argues that newly discovered evidence establishes that Defendant is "an honorably discharged military veteran who has suffered a

substantial physical injury and resulting disability while serving his country in the United State's Army." He believes that if information about the injury and how the effects of the chronic pain from that injury led him to substance abuse had been presented to the jury, it would have compelled the jury to recommend a life sentence. Defendant cites Porter v. McCollum, 130 S. Ct. 447 (2009) for the premise that failure to allow a jury to hear evidence of physical disability sustained during military service renders the sentence constitutionally unreliable. Defendant believes that if this evidence was admitted, it would eliminate all but one of the aggravating circumstances found at trial, the mitigating factors would then outweigh the aggravating circumstances, and his death sentence would no longer be proportional. The alleged newly discovered evidence consists of: an affidavit from Defendant's ex-wife, Kathy Marie Martin, sworn to on July 13, 2010; a decision granting "service connection" for Defendant's injury by the Board of Veteran Appeals, dated April 19, 2011; and a report by privately retained defense expert Dr. Thomas M. Hyde, dated October 2010, with a subsequent letter dated August 16, 2011.

6. "Newly discovered evidence must meet two requirements in order for a court to set aside a conviction or death sentence. First, [Defendant] must show that the evidence could not have been discovered with due diligence at the time of trial. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994). Moreover, "any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001). Second, [Defendant] must show that the evidence would probably produce an acquittal or a lesser sentence on retrial. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). In considering whether this evidence would affect the outcome at the guilt or penalty phase of a trial, courts consider whether the evidence would have been admissible at trial, the purpose for which the evidence would have been admitted, the materiality and relevance of and any

inconsistencies in the evidence, and the reason for any delays in the production of the evidence. Jones v. State, 709 So. 2d 512, 521-22 (Fla. 1998)." Cherry v. State, 959 So. 2d 702 (Fla. 2007).

7. The affidavit by Ms. Martin indicates that Defendant had an accident while in basic training, and was discharged on December 29, 1978 due to this injury without completing basic training. She details Defendant's struggles to maintain employment despite the pain of his injury, and his attempts to manage the pain with drugs and alcohol. After both were arrested for writing worthless checks, Ms. Martin divorced Defendant in April 1981. Ms. Martin's family subsequently refused contact with Defendant, and she did not choose to return contacts by representatives of Defendant until prior to signing the affidavit. A copy of the affidavit is attached.

8. The Board of Veteran Appeals decision indicates Defendant served on active duty from November 1, 1978 to December 29, 1978. He fell down a flight of stairs in November 1978, which led to his low back disorder. Defendant was discharged shortly thereafter, receiving no end of service examination. After an evaluation in June 2010 by a privately retained defense medical examiner, the Board of Veteran Appeals subsequently granted service connection for Defendant's injury. Dr. Hyde's report reiterates all of the above information, as well as includes Defendant's recitation of his history. Dr. Hyde opined that Defendant suffers from "a significant injury" to his lower back as a result of his fall down the stairs during basic training, that he has suffered from "debilitating pain" since, and "turned to illicit substances and alcohol to 'self- medicate'." Copies of the Board of Veteran Appeals decision and Dr. Hyde's report are attached.

9. Defendant has not demonstrated that this information could not have been discovered through the exercise of due diligence at the time of trial. Defendant was certainly aware at the time of trial that he had sustained injury during his military service. Defendant concedes in his motion that trial

counsel was aware that Defendant had been injured while in military service, and that this information was presented at trial. Defendant merely claims, as he has previously, that although he could have provided testimony concerning the disability, he was prevented from doing so by the actions of counsel and the trial court. This claim has been denied. *See* Lambrix, 72 F.3d at 1508. The record shows that Defendant's two brothers and his father testified during the penalty phase regarding Defendant's accident during basic training, his back and possibly head injury, his honorable discharge, and his problems thereafter. Relevant portions of the penalty phase transcript are attached. The information from Ms. Martin, the Board of Veteran Appeals, and Dr. Hyde is cumulative to the information presented at trial, simply provides more details, and merely corroborates Defendant's own knowledge. The fact that the Board of Veteran Appeals has, 33 years after the accident, preliminarily determined that Defendant's back injury from that accident is service related is not newly discovered evidence. None of the information provided in Defendant's motion is new, and none of the documents constitute newly discovered evidence.

10. To the extent that Defendant cites Porter v. McCollum, 130 S. Ct. 447 (2009), the Court finds that *Porter* is wholly distinguishable from the facts of the instant case. The defendant in *Porter* served on the front lines of Vietnam, had extensive combat experience, and "served honorably under extreme hardship and gruesome conditions," from which a jury could find "mitigating the intense stress and mental and emotional toll that combat took on Porter." Id. at 455. Unlike Mr. Porter, Defendant never completed basic training. He never served in combat, and never suffered from any extreme hardship or gruesome experiences, intense stress, or mental or emotional toll from combat which would be mitigating.

11. Of the specific evidence Defendant mentions, none would result in acquittal or a lesser sentence. Even had the additional details relating to Defendant's injury been presented at trial, and even had Ms. Martin testified, such information would have

no reasonable likelihood of changing the outcome of the trial. That Defendant suffered a back injury during basic training and chose to abuse drugs and alcohol in self medication for his pain would not change the outcome, as there was sufficient evidence that Defendant committed the two murders for the jury to find Defendant guilty and to recommend the death penalty, and such additional mitigating evidence would not have outweighed the aggravating factors. The Florida Supreme Court found that "We do not believe the introduction of the proffered testimony concerning Lambrix's alcoholism would probably have resulted in life imprisonment rather than a sentence of death." Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1998). The Eleventh Circuit also found trial counsel's strategy of downplaying Defendant's substance abuse in order to focus on good character was reasonable. Lambrix v. Singletary, 72 F.3d 1500, 1504 (11th Cir. 1996). Defendant presented evidence regarding his substance abuse during trial and during postconviction proceedings, and was not found to be sufficiently mitigating so as to outweigh the aggravating circumstances. Evidence regarding the background of Defendant's drug and alcohol abuse, that they resulted from, or were exacerbated by, the back injury during his uncompleted basic training, would not be increase the weight of that mitigation so as to outweigh the aggravating factors. Such information, if introduced at a new trial, would not be likely to result in a lesser sentence. Defendant has failed to meet either requirement for a claim that his conviction and sentence should be set aside because of newly discovered evidence. As the information is not newly discovered evidence, the current motion is untimely. Further, since this information was already presented, although not with the thoroughness Defendant now wishes, this motion is successive and procedurally barred. Aldridge v. State, 503 So. 2d 1257, 1258 (Fla. 1987); Buenoano v. State, 708 So. 2d 941, 951 n.8 (Fla. 1998); Grossman v. State, 29 So. 3d 1034, 1042 (Fla. 2010); Jennings v. State, 782 So. 2d 853, 860 (Fla. 2001).

(V5, 437-41).

Lambrix was not entitled to an evidentiary hearing below. The motion, the response, and record in this case conclusively establish that Lambrix is not entitled to relief. Accordingly, summary denial was appropriate and should be affirmed on appeal.

(i) Affidavit Of Lambrix's Ex-Wife

The affidavit from Lambrix's ex-wife purporting to document Lambrix's service related injury and drug and alcohol abuse does not constitute newly discovered evidence. Nothing new is presented in the affidavit. Lambrix misconstrues this Court's opinion in Davis v. State, 26 So. 2d 519, 528 (Fla. 2009), to require the trial court to accept allegations of diligence contained in a defendant's motion for post-conviction relief. In Davis, this Court was addressing witness recantation and the State's only argument was that the "defense counsel had "years" to find the witness." 26 So. 3d at 528. In this case, it is not that Lambrix had years to find this witness, it is that the substance of this witness's potential testimony has been known to the defense for years, and, indeed, was largely presented at the original penalty phase and previous post-conviction litigation. A claim of newly discovered evidence does not mean a newly discovered witness who could support a previously raised claim. If that were the standard, there would never be an end to post-conviction litigation. A defendant like Lambrix would

simply discover or uncover an additional witness every year or two to support previously presented claims.

Information relating to Lambrix's service related injury and drug and alcohol abuse were known at the time of trial by Lambrix and his trial counsel. Indeed, failure to present such evidence in the penalty phase was the subject of prior post-conviction proceedings and a federal evidentiary hearing. To the extent Lambrix contends that the disability had an impact upon or was relevant to his drug and alcohol abuse, this too cannot be considered newly discovered evidence. Lambrix was well aware of his drinking and drug use at the time of trial. This issue was litigated in Lambrix's first motion for post-conviction relief and the denial of relief was affirmed on appeal. This Court noted the following in rejecting an ineffective assistance of counsel claim:

> With respect to the penalty phase, there is no doubt that testimony of Lambrix's relatives concerning his history of alcoholism as well as expert testimony of his chemical dependency would have been admissible. The question here is whether it would have made any difference. This was a double murder in which this Court approved the finding of four and five aggravating circumstances respectively. The five aggravating circumstances were: (1) the capital felony was committed by a person under sentence of imprisonment; (2) Lambrix was previously convicted of another capital felony; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was especially heinous, atrocious, and cruel; and (5) the homicide was committed in a cold, calculated, and

> premeditated manner without any pretense of moral or legal justification. Despite the fact that character testimony was presented during the penalty phase, the court found no mitigating circumstances with respect to either murder. We do not believe the introduction of the proffered testimony concerning Lambrix's alcoholism would probably have resulted in life imprisonment rather than a sentence of death.

Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988). Since the underlying facts of this claim, Lambrix's alcohol and drug abuse were known to Lambrix at the time of trial and were subject to an adverse ruling in a prior post-conviction proceeding, this claim cannot qualify as newly discovered evidence. Further, it is also barred by the doctrine of *res judicata*. See Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).[9]

[9] Further, this claim was the subject of an evidentiary hearing in federal court. In Lambrix v. Singletary, 72 F.3d 1500, 1504 (11th Cir. 1996), the court affirmed the denial of habeas relief on the basis of ineffective assistance of penalty phase counsel. The court stated, in part:

> After an evidentiary hearing, the district court found that counsel was aware of Lambrix's history of alcohol abuse; however, the district court also found counsel's failure to present evidence of chemical dependence at sentencing [FN7] was the result of counsel's tactical decision to downplay the evidence of chemical dependency in order to focus on evidence of Lambrix's good character. As the district court noted, counsel could have reasonably determined that evidence of chemical dependence would be detrimental rather than beneficial in the sentencing phase, and that such evidence would undermine counsel's apparent strategy of painting the crime as a mere aberration in the life of a generally upstanding individual. (footnote omitted).

In addition, this claim is also procedurally barred, as found by the court below, since the underlying facts were in fact presented and litigated in previous post-conviction litigation. Lambrix cannot again present this claim in a successive motion. See Jennings v. State, 782 So. 2d 853, 860 (Fla. 2001) ("Furthermore, since appellant previously alleged his use of LSD, any claim regarding his use thereof should have been raised in his first postconviction motion and is now procedurally barred.) The same is true for any impact of Lambrix's service related accident, purportedly discussed in the affidavit. As noted by the trial court, this was known at the time of trial by Lambrix and his family members. See King v. State, 597 So. 2d 780, 782 (Fla. 1992) (claims properly barred because they could have been, should have been, or were raised in a prior proceeding).

In sum, any claim based upon this affidavit from Lambrix's ex-wife, does not constitute newly discovered evidence and was time barred. See e.g. Blanco, 702 So. 2d at 1252 (To qualify as newly discovered evidence, **the asserted facts** must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence [and] to prompt a new trial, "the newly discovered evidence must be of

such nature that it would probably produce an acquittal on retrial.") (emphasis added) (citations omitted). Indeed, it is not even clear under what theory Lambrix attempted to offer this evidence below. Certainly, it would not support an ineffective assistance of counsel claim. As Lambrix's ex-wife noted in the affidavit, she was unavailable and unwilling to cooperate at the time of trial and prior post-conviction proceedings. (V1, 28-32). Consequently, counsel cannot be considered ineffective in failing to find or utilize her as a witness in the penalty phase.

(ii) Veteran's Affair's Recognition Of A Service Related Injury And The Doctor's Report In Support Of That Disability

The VA's preliminary recognition of a disability for a back injury Lambrix suffered while serving in the peacetime army more than thirty years ago, does not constitute newly discovered evidence. The facts underlying this claim were known to Lambrix at the time of trial, and certainly during the prior twenty years of post-conviction litigation. As the foregoing history illustrates, Lambrix has extensively litigated various post-conviction claims in state and federal court over the past two and a half decades.

Obviously, Lambrix was aware of his back injury from falling down stairs and the fact he was discharged from the

army, as well as any pain or discomfort it caused him. Indeed, as recognized by the court below, general testimony concerning this injury was presented in mitigation during the penalty phase.[10] (TR. V15/2589-2654, 2659-2661). Consequently, the VA preliminary recognition of this injury, more than thirty years after the fact, does not constitute newly discovered evidence. Lambrix's claim is merely an attempt to supplement or enhance information previously known and developed at trial and prior post-conviction proceedings.

Further, any attempt to buttress Lambrix's argument by the affidavit of Dr. Hyde does not constitute newly discovered evidence. Lambrix previously alleged his counsel was ineffective in failing to utilize a mental health expert on his behalf during the penalty phase. There is no explanation why this claim could not have been raised previously in one of Lambrix's prior motions for post-conviction relief. Jones v. State, 591 So. 2d 911, 913 (Fla. 1991) ("A defendant may not raise claims of ineffective assistance of counsel on a piecemeal

[10] Indeed, to the extent Lambrix is attempting to present simply additional evidence in support of testimony presented in the penalty phase, such cumulative evidence does not warrant an evidentiary hearing and should be summarily denied. See Valle v. State, 705 So. 2d 1331, 1334-35 (Fla. 1997) (affirming trial court's summary denial of ineffective assistance claim based on allegation that trial counsel failed to present cumulative evidence); Whitfield v. State, 923 So. 2d 375, 380 (Fla. 2005) (same).

basis by filing successive motions."); Jennings, 782 So. 2d at 859 (same). Indeed, this Court affirmed the denial of Lambrix's fourth successive motion for post-conviction relief in 2010. Lambrix v. State, 39 So. 3d 260, 271 (Fla. 2010)

The fact that a doctor issues a new report in support of Lambrix's claim of a service related disability, does not entitle Lambrix to relitigate prior motions for post-conviction relief. If Lambrix's tactics were condoned, there would never be an end to post-conviction litigation. A defendant would simply retain a new expert every few years and raise a claim based upon that expert's opinion based upon facts that were known, or should have been known and discovered at the time of trial or the time the initial motion for post-conviction relief was filed. Neither Dr. Hyde, nor his recently authored report, qualifies as newly discovered evidence. See Grossman v. State, 29 So. 3d 1034, 1042 (Fla. 2010) (affirming summary denial of a successive motion for post-conviction relief by a defendant who claimed the report of his newly retained mental health expert constituted newly discovered evidence).

Lambrix is not entitled to an evidentiary hearing on diligence when it is clear, from the record, that he has not been diligent and that his claims cannot qualify under the newly discovered evidence exception of Rule 3.851. The facts

underlying Dr. Hyde's opinion have been known, or should have been known to Lambrix and prior counsel. Since the underlying facts could clearly have been uncovered with due diligence prior to 2010, Dr. Hyde's report and opinion do not constitute newly discovered evidence. Further, since this report arguably would simply bolster or augment his previously made and rejected ineffective assistance of penalty phase counsel claim, it is procedurally barred from review in a successive motion. See Aldridge v. State, 503 So. 2d 1257, 1258 (Fla. 1987) (a defendant may not raise "somewhat different facts" to support an ineffective assistance of counsel claim in a successive motion and such a claim is procedurally barred from review); Buenoano v. State, 708 So. 2d 941, 951 n.8 (Fla. 1998) (a defendant cannot continue to raise ineffective assistance of counsel claims in a "piecemeal fashion" by filing successive motions).

Lambrix now asserts that his case is in some way like Porter v. McCollum, 130 S. Ct. 447 (2009). However, Lambrix's brief service in the peacetime military has nothing in common with the defendant in Porter. Porter experienced extensive, hard, frontline combat in the Korean War, and suffered post-traumatic stress syndrome as a result. Lambrix, never served in combat, and, fell down stairs and hurt his back in a brief and unremarkable stint in the service. See Reed v. Secretary,

Florida Dept. of Corrections, 593 F.3d 1217, 1249 (11th Cir. 2010) (noting that the defendant's extensive combat service was critical to the Supreme Court's decision in Porter). Porter provides no support for Lambrix's argument.

In addition to those facts clearly distinguishing Porter from this case, this Court has recently rejected the notion that Porter requires re-examination of previously rejected ineffective assistance of counsel claims. In Walton v. State, 77 So. 3d 639, 644 (Fla. 2011), this Court rejected any suggestions that Porter constituted a fundamental change in the law which might support a successive motion to vacate, stating:

> The trial level postconviction court here properly denied Walton's second successive postconviction motion because the decision in *Porter* does not constitute a fundamental change in the law that mandates retroactive application under *Witt*. Walton filed his motion well after the one-year deadline for postconviction motions under rule 3.851. Walton's claim that *Porter* applies retroactively is incorrect and insufficient as a matter of law for a successive motion because the decision in *Porter* does not concern a major change in constitutional law of fundamental significance. Rather, *Porter* involved a mere application and evolutionary refinement and development of the *Strickland* analysis, i.e., it addressed a misapplication of *Strickland*. *Porter*, therefore, does not satisfy the retroactivity requirements of *Witt*. *See generally Witt*, 387 So. 2d at 924–31.
>
> Further, in the proceedings below, collateral counsel essentially asked the postconviction trial court to reevaluate Walton's claims of ineffective assistance of counsel that had been litigated in his

> prior postconviction motion in light of the decision in *Porter*. This is not a permitted retroactive application as articulated in *Witt*, which allows a limited retroactive application only to changes in the law that are of fundamental constitutional significance.

Finally, despite the obvious and immense procedural hurdles to reaching the merits of this claim, it is clear that no relief is warranted. As noted, the jury was aware that Lambrix was discharged after a brief stint in the peacetime army after an accident. The subsequent recognition of a service related disability, some thirty years after the fact, adds little, if anything and does not constitute newly discovered evidence as noted, above.

Assuming for a moment this evidence qualifies as newly discovered, it is clear it would not lead to a different sentence. Lambrix's case is highly aggravated, with a double homicide with multiple and weighty aggravators applicable to each murder. As noted by this Court in Lambrix, 494 So. 2d at 1148: "The five aggravating circumstances found by the trial judge are: (1) the capital felonies were committed by a person under sentence of imprisonment, section 921.141(5)(a), Florida Statutes (1983); (2) the defendant was previously convicted of another capital felony, section 921.141(5)(b); (3) the capital felony was committed for pecuniary gain, section 921.141(5)(f);

(4) the capital felonies were especially heinous, atrocious or cruel, section 921.141(5)(h); and (5) the capital felonies were homicides and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i)." The brutal nature of the murders alone, would overwhelm any of the information Lambrix seeks to present in the successive motion. Accordingly, summary denial would be appropriate even in the absence of the clear procedural and time bars applicable to Lambrix's claim.

C. Cumulative Error Allegation

Lambrix finally asserts that his current claim warrants revisiting his previously rejected claims under a cumulative error analysis. This argument lacks any merit. Untimely, procedurally barred, and meritless claims do not warrant a cumulative analysis. Troy v. State, 57 So. 3d 828, 844 (Fla. 2011) ("However, where the allegations of individual error are procedurally barred or meritless, a claim of cumulative error also fails."); Gore v. State, 24 So. 3d 1, 15 (Fla. 2009) (stating that "because Gore's individual claims of error are without merit, any cumulative error analysis would be futile."). As noted above, there is no valid error present to "cumulate" with previously litigated claims in prior proceedings. Indeed, such an analysis would be particularly inappropriate here, where

the claims Lambrix attempts to cumulate, are procedurally barred as issues which either have been, or could have been raised in previous post-conviction motions. The affidavits attached to the successive motion, with the exception of Lambrix's ex-wife, were created for the most part in the early 1990's.[11] Such claims now are both untimely and procedurally barred from consideration in this, Lambrix's fifth successive motion for post-conviction relief.

While the State notes that no cumulative analysis is warranted under the circumstances, it will briefly address some of the allegations made by Lambrix in his brief.

Initially, the State notes that Lambrix failed to adhere to the pleading requirements for a successive motion, specifically Rule 3.852 (e)(2)(B), which requires a defendant to set forth "the disposition" of previous claims raised in post-conviction proceedings. Indeed, Lambrix's cumulative error claim was nothing more than a misleading stew of previously rejected claims. As such, it was facially insufficient.

Lambrix's contention that he was prevented from testifying is an old one, and, one that does not gain strength from

[11] One is an affidavit from 2004, but this too, cannot qualify for newly discovered evidence.

repetition. Lambrix, 72 F.3d at 1508.[12] Any consideration of this claim now is both time barred and procedurally barred.

Lambrix's contention that his previously rejected ineffective assistance of penalty phase counsel claim must be revisited was not a heavily aggravated case is unsupported, and, has been rejected by this Court. In affirming summary denial of his prior ineffective assistance of counsel claim, the court recognized that this was a highly aggravated double homicide. The court stated:

> With respect to the penalty phase, there is no doubt that testimony of Lambrix's relatives concerning his history of alcoholism as well as expert testimony of his chemical dependency would have been admissible. The question here is whether it would have made any difference. This was a double murder in which this Court approved the finding of four and five aggravating circumstances respectively. The five aggravating circumstances were: (1) the capital felony was committed by a person under sentence of imprisonment; (2) Lambrix was previously convicted of another capital felony; (3) the capital felony was committed for pecuniary gain; (4) the capital felony

[12] As the Eleventh Circuit held in Lambrix, 72 F.3d at 1508:

> ...However, there is simply no evidence in the record that Lambrix was coerced not to testify in his second trial. Two months is sufficient time for Lambrix and counsel to discuss a new trial strategy which would permit Lambrix to testify on his own behalf, or for Lambrix to request other counsel who would allow him to exercise this right. Without evidence that Lambrix was subject to continued coercion, we cannot assume that Lambrix's apparent acquiescence to a trial strategy in which he did not testify was anything but voluntary.

> was especially heinous, atrocious, and cruel; and (5) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Despite the fact that character testimony was presented during the penalty phase, the court found no mitigating circumstances with respect to either murder. We do not believe the introduction of the proffered testimony concerning Lambrix's alcoholism would probably have resulted in life imprisonment rather than a sentence of death.

Lambrix, 534 So. 2d at 1154. The aggravators in this case include two of the most weighty under Florida's capital sentencing scheme, HAC and CCP. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (stating that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme...").

Finally, Lambrix's belated claim of childhood abuse was previously litigated in federal court. In rejecting this claim, the Eleventh Circuit noted the following:

> Lambrix also argues that counsel's investigation was inadequate because counsel failed to learn of Lambrix's childhood experiences of sexual abuse, physical abuse, and neglect. Lambrix proffers the affidavits of family members and friends, including some of the witnesses that counsel called during sentencing, who swear they would have been happy to testify as to Lambrix's abused childhood if they had only been asked.[FN8] However, when counsel conducted the penalty phase investigation, there is no indication that Lambrix or Lambrix's relatives gave counsel reason to believe that such evidence might exist. *Cf. Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (ineffective assistance where counsel

had evidence that certain mitigating circumstances might exist but failed to investigate further); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) (ineffective assistance where defendant informed counsel that mitigating evidence existed and counsel failed to investigate). Moreover, although there was ample extant documentary evidence of Lambrix's alcohol and drug problems, Lambrix does not point us to any documentary evidence of Lambrix's abuse or neglect that would have been readily available to counsel at the time. *Cf. Middleton*, 849 F.2d at 494 (counsel on notice of mitigating evidence when readily available records from various reform schools, family court, youth services, and prison health services chronicled defendant's childhood of brutal treatment, neglect, physical, sexual and drug abuse, low I.Q. and mental illness). In fact, in his interview with Dr. Whitman, Lambrix denied any physical or sexual abuse by his parents.[FN9]

FN8. The district court refused to hear this, or any, evidence of sexual and physical abuse. As originally brought to the state courts, and before the district court below, Lambrix's claim that he received ineffective assistance during the penalty phase was based solely upon counsel's failure to uncover and present drug and alcohol dependency evidence. For the first time at the evidentiary hearing before the district court, Lambrix attempted to claim that counsel's performance was also deficient for failure to discover available evidence of sexual and physical abuse and neglect. Reasoning that this was an attempt to raise an entirely new factual theory which significantly altered Lambrix's ineffective assistance claim, the district court refused to hear the sexual and physical abuse evidence. *See Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992) ("[A] habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously."). Because we dispose of Lambrix's ineffective assistance claim on other grounds, we do not address Lambrix's claim that the district

> court erred in failing to permit a "full and fair" hearing on the sexual and physical abuse evidence.
>
> FN9. There is no evidence that Lambrix ever denied the sexual abuse that he now alleges by a neighbor. However, during the sentencing hearing, Lambrix's brother portrayed the particular neighbor as a good influence in Lambrix's life, i.e., as an elderly person who Lambrix occasionally helped out with work around the house and yard. Thus, counsel had no indication that this particular neighbor might have abused Lambrix.

Lambrix v. Singletary, 72 F.3d at 1505-1506.

Lambrix's assertion that he is innocent of the death penalty or that a "manifest injustice" exception permits an open sesame to his previously rejected and untimely claims, is patently without merit. Lambrix quotes verbatim his lower court claim, citing Sawyer v. Whitley, 505 U.S. 333, 346 (1992) to contend that his prior challenges to the aggravators must be revisited. (Appellant's Brief at 63-64). The lack of argument accompanying this claim alone is sufficient to reject it. See Pagan v. State, 29 So. 3d 938, 957 (Fla. 2009) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." (quoting Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990))).

In any case, it is clear under Sawyer v. Whitley, that a defendant must show that but for constitutional error, the sentencing jury could not have found any aggravating factors and thus, the defendant was ineligible for the death penalty. Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (en banc). Lambrix's challenges to the aggravating circumstances have previously been rejected by this Court.

This Court resolved this claim in 1994, when it stated, in part:

> In the instant case, Lambrix properly raised and preserved his *Espinosa* objection at trial. The record reveals that, although Lambrix failed to object specifically to the vagueness of the instruction on the heinous, atrocious or cruel aggravating factor, he did request a limiting instruction based on the definition of the aggravator found in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). However, Lambrix did not raise the issue of the trial court's failure to include this special instruction on his direct appeal and, consequently, Lambrix's *Espinosa* claim is procedurally barred. *Cf. Henderson v. Singletary*, 617 So. 2d 313 (Fla.) (claim was procedurally barred because it was not raised on appeal even though the defendant had preserved the issue at trial by both objecting to the instruction and requesting an expanded instruction), *cert. denied*, 507 U.S. 1047, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993).
>
> Because appellate counsel failed to anticipate the United States Supreme Court decision in *Espinosa* and raise the *Espinosa* claim on direct appeal, Lambrix next argues that appellate counsel was ineffective. Although this present ineffective assistance of counsel claim is based on a different issue, Lambrix has already raised numerous claims alleging

ineffective assistance of appellate counsel in a previous habeas petition. *See Lambrix v. Dugger*, 529 So. 2d 1110 (Fla. 1988). Because ineffective assistance of counsel claims have been considered and rejected in a previous petition, Lambrix is procedurally barred from raising such claims again in a subsequent habeas petition. *See Aldridge v. State*, 503 So. 2d 1257 (Fla. 1987) (defendant procedurally barred from raising an ineffective assistance of counsel claim when such a claim has been raised previously even though the current claim is based on a different issue). Furthermore, even if this issue was not procedurally barred, we find that appellate counsel was not ineffective under the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because this Court would have rejected Lambrix's *Espinosa* claim on direct appeal. [FN1] *See Henderson*, 617 So. 2d at 317 ("[T]he failure to raise a claim that would have been rejected at the time of the appeal does not amount to deficient performance.").

> FN1. The claim would have been rejected because the trial court used the standard jury instruction on the "heinous, atrocious or cruel" aggravating factor and because the United States Supreme Court had not yet rendered its *Espinosa* decision.

We find that the remaining issues raised by Lambrix are also procedurally barred.[FN2] The petition for a writ of habeas corpus is denied.

> FN2. Lambrix has also raised the following claims: (1) invalid aggravating circumstances were presented to Lambrix's jury including "cold, calculated and premeditated," "committed during a robbery," and "pecuniary gain," (2) Lambrix's death sentence is unconstitutional because this Court has failed to apply a consistent limiting construction of the "especially heinous" aggravating factor, (3) ineffective assistance of counsel, and (4) the State failed to prove premeditation beyond a reasonable doubt.

Lambrix v. Singletary, 641 So. 2d 847, 848-849 (Fla. 1994). See also Lambrix v. Singletary, 520 U.S. 518, 537-538 (1997) (conclusively resolving the HAC instruction claim against Lambrix). Under any view of the facts, these murders were heinous, atrocious, and cruel, and cold, calculated and premeditated.

In sum, the instant motion is an untimely and frivolous attempt to litigate issues that either were, or should have been litigated previously. For all of the foregoing reasons, the instant successive motion for post-conviction relief should be summarily denied.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William M. Hennis, III, Litigation Director, Capital Collateral Regional Counsel - South, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301-1100, this 11th day of May, 2012.

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,

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com
COUNSEL FOR APPELLEE