IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-6

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of relief following a summary denial of the Appellant's successive motion for post-conviction relief filed under Fla. R. Crim. P. Rule 3.851.

The following symbols will be used to designate references to the record in this appeal:

"ROA"-- record on instant post conviction appeal.

REQUEST FOR ORAL ARGUMENT

Cary Michael Lambrix has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Lambrix, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On March 29, 1983, Mr. Lambrix was charged with two counts of first-degree murder in the February 6, 1983 deaths of Clarence Edward Moore (also known as Lawrence Lamberson) and Aleisha Bryant. Mr. Lambrix pled not guilty and has consistently maintained his innocence of these circumstantial charges. His first trial ended with the declaration of a mistrial on December 17, 1983, when the jury failed to reach a verdict after deliberating for some eleven hours.

Mr. Lambrix's second trial, presided over by Judge Richard M. Stanley, resulted in the jury finding Mr. Lambrix guilty on both counts of the indictment. Following an abbreviated penalty phase on February 27, 1984, the jury recommended death with regard to both convictions, 10-2 as to Moore and 8-4 as to Bryant.

On March 22, 1984, Judge Stanley imposed two death sentences. On direct appeal, this Court affirmed both the convictions and sentences. *Lambrix v. State*, 494 So. 2d 1143, 1146 (Fla. 1986). Mr. Lambrix's case has subsequently had a lengthy post conviction history which was recently detailed in *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010), *cert. denied* 131 S.Ct. 917 (2010). Mr. Lambrix would rely upon the chronological history of the case and summary of prior claims raised as

contained therein.[1]

Several collateral actions are currently pending before the Florida Supreme Court. *Lambrix v. State*, FSC Case No. SC10-1845 is a challenge of this court's July 2010 summary denial of Mr. Lambrix's fourth rule 3.851 motion raising claims based upon newly discovered evidence and *Brady/Giglio* violations as well as several collateral claims relevant to proceedings conducted before the lower court. In June 2011, Mr. Lambrix initiated an original petition for writ of habeas corpus, *Lambrix v. Buss*, FSC Case No. SC11-1138, arguing entitlement to retroactive application of *Holland v. Florida*, 130 S.Ct. 2549 (2010) to allow Mr. Lambrix to initiate and pursue a new "original" state post conviction action raising all collateral claims, including those subjected to procedural bars, in a single, collective collateral action. Mr. Lambrix recently filed a motion to consolidate Case No. SC11-1138 and Case No. SC10-1845. As noted else where in the instant brief, jurisdiction was relinquished by this Court for a limited evidentiary hearing in Case No. SC10-1845, which took place on January 30, 2012. Counsel has filed a

[1] The disposition of all previous claims raised in postconviction proceedings can be found in these opinions: *Lambrix v. Dugger*, 529 So. 2d 1110 (Fla. 1988); *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988); *Lambrix v. Dugger*, Case No. 88-12107-Civ-Zloch (S.D. Fla. May 12, 1992); *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994); *Lambrix v. Singletary*, 72 F.3d 1500 (11th Cir. 1996); *Lambrix v. Singletary*, 83 F.3d 438 (11th Cir. 1996); *Lambrix v. Singletary*, 117 S.Ct. 380 (1996); *Lambrix v. Singletary*, 520 U.S. 518 (1997); and *Lambrix v. State*, 698 So. 2d 247 (Fla. 1996); *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010).

separate motion to again relinquish jurisdiction and to allow for supplemental briefing in that case.

A new Rule 3.851 motion was filed in state circuit court on July 13, 2011. It alleged the following:

> 1. Newly discovered evidence provided for the first time in July 2010 by Mr. Lambrix's ex-wife, Kathy Marie Martin and the recent quasi-judicial ruling rendered by the Board of Veterans Appeals on April 19, 2011, both further corroborated by a October 2010 neurology consultation report by Thomas M. Hyde, M.D., Ph.D., establishes that Mr. Lambrix is an honorably discharged military veteran who has suffered a substantial physical injury and resulting disability while serving his country in the United States Army; (See: Appendix A: Affidavit of Kathy Marie Martin; Appendix B: Decision of the Board of Veteran Appeals, and Appendix C: Report of Dr. Hyde)(fn2 [in original] Dr. Hyde is a medical doctor whose specialty is behavioral neurology. He is fully qualified to opine and testify at an evidentiary hearing as to the presence of mitigation as well as to the link between the newly discovered evidence concerning the service related disability and the evidence provided to the federal courts in 1991-92 concerning Mr. Lambrix's history of substance abuse and mental health mitigation);
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> 2. This substantial mitigating evidence was not previously available, and could not have been previously discovered through due diligence, as the information necessary to establish this mitigation was dependent upon locating Mr. Lambrix's ex-wife and her willingness to cooperate and come forth. Ms. Martin was unavailable at the time of Mr. Lambrix's capital trial as she had divorced Mr. Lambrix in 1981, then moved to North Florida, remarried and changed her name. From 1982 until 2004 Ms. Martin was a fugitive, having violated her

> own felony probation, deliberately concealing her whereabouts.

Concurrent with the filing of the Rule 3.851 motion, counsel also filed Defendant's Motion to Disqualify Judge and the entire Twentieth Judicial Circuit. ROA 143-152. That motion was later denied by the lower court as legally insufficient. ROA 168. A Writ of Prohibition, Case No. SC11-1845, was also filed with this Court on related issues and at present it is still listed as pending.

Following a case management conference on September 30, 2011, the lower court entered an order summarily denying the newly discovered evidence claim below, finding that the Kathy Martin affidavit was not newly discovered evidence and that the claim was procedurally barred. The lower court also held that Mr. Lambrix had not used due diligence in filing the claim below. This appeal now follows.

STANDARD OF REVIEW

Mr. Lambrix has presented several issues which involve mixed questions of law and fact. Thus, a *de novo* standard applies *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

SUMMARY OF THE ARGUMENTS

ARGUMENT I

The lower court erred when it denied Mr. Lambrix's timely and legally sufficient motion to disqualify the then presiding circuit court judge and the other judges on the Twentieth Judicial Circuit where Mr. Lambrix's motion established that he had "an objectively reasonable" fear of judicial bias in this case.

ARGUMENT II

The lower court erred when it summarily denied Mr. Lambrix's successive Fla. R. Crim. P. 3.851 motion predicated on newly discovered evidence related to the consequences of a disabling injury suffered while in military service. The lower court failed to undertake an appropriate cumulative review of available mitigating evidence and other relevant evidence presented at Mr. Lambrix's capital trial and prior post conviction proceedings when it made the findings that there was no newly discovered evidence and that the claim below also failed because of lack of due diligence and procedural bar.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. LAMBRIX'S TIMELY AND LEGALLY SUFFICIENT MOTION TO DISQUALIFY JUDGE GREIDER AND THE ENTIRE TWENTIETH JUDICIAL CIRCUIT

One of the most basic and fundamental constitutional rights that any person in our nation inherently possesses is the inalienable right under both the Florida and federal constitutions to be heard before a fair and impartial tribunal free from even the appearance of undue bias or influence. *In re Murchison,* 349 U.S. 133 (1955). "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there cannot possibly be a full and fair hearing.

As this Court plainly recognized in *Wickham v. State*, 998 So. 2d 593 (Fla. 2008) and *Steinhorst v. State*, 636 So. 2d 498 (Fla. 1994), this fundamental right to be heard before a fair and impartial tribunal undoubtedly extends to capital post conviction proceedings. See also, *Holland v. State*, 503 So. 2d 1250 (Fla. 1987), adopting *Michel v. Louisiana,* 350 U.S. 91, 93 (1955) ("Due process clause guarantees a defendant 'a reasonable opportunity to have the issues as to the claimed right heard and determined by the state court"); *Jones v. State*, 740 So. 2d 520, 523 (Fla. 1999), quoting *Skull v. State,* 569 So. 2d 1251, 1252-53 (Fla. 1990) ('Due process in context of capital post conviction proceedings 'embodies a

fundamental conception of fairness that derives ultimately from the natural rights of all citizens.") *Steele v. Kehoe*, 747 So. 2d 931, 934 (Fla. 1999), relying upon *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964) (recognizing that due process right to fair review applies to post conviction proceedings).

Indeed, as this Court has long recognized, in capital cases the trial judge "should be especially sensitive to the basis for the fear (of alleged bias) as the defendant's life is literally at stake," *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983). In *Arbelaez v. Butterworth*, 738 So. 2d 326, 331 (Fla. 1999), quoting *Monge v. California*, 524 U.S. 731, 118 S Ct. 2246, 2252-2253 (1998), this Court emphasized why our courts should be "especially sensitive" to fairness in capital cases, as "our adversarial system of criminal justice depends entirely upon the procedural fairness and integrity of the process. This Court and the United States Supreme Court have held that the integrity of the process is of unique and special concern in cases where the state seeks to take the life of the defendant."

Upon the initiation of a successive postconviction motion and before the lower circuit court, Mr. Lambrix simultaneously served upon the lower court an action entitled "Defendant's Motion to Disqualify Judge and the Entire Twentieth Judicial Circuit" ROA 143-152. As required by Rule 2.330 of the Florida Rules of Judicial Administration, this timely submitted motion to disqualify was support by Mr. Lambrix's affidavit, attesting to his "fear that I cannot receive a fair hearing

before Judge Christine Greider," and further that "I cannot receive a fair hearing before any judge in the Twentieth Judicial Circuit."

The facts supporting this timely motion and attested to by Mr. Lambrix were and are legally sufficient to compel disqualification. As was specifically articulated in the Motion to Disqualify (quoting from pages 2-3):

> 2. This instant motion is timely. Mr. Lambrix has previously filed motions for disqualification of Judge Greider in prior post conviction proceedings, which motions were summarily denied as untimely by Judge Greider. The allegedly improper denial of these prior motions is pending on appeal at the Florida Supreme Court in *Lambrix v. State*, FSC Case No. SC10-1845. In that pending appeal Mr. Lambrix has specifically argued that Judge Greider improperly denied the prior motions to disqualify and further that Judge Greider failed to disclose her own personal relationships with parties having a vested interest in the outcome of Mr. Lambrix's case;
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> 3. Additionally, the pending appeal questions the actions of Chief Judge A. Keith Cary in sua sponte reassigning Mr. Lambrix's case during the prior proceedings from Judge Corbin to Judge Greider, knowing that prior to her appointment to the bench, Judge Greider had worked as an assistant state attorney with members of the Twentieth Judicial Circuit State Attorney's office that Mr. Lambrix has alleged were involved in prosecutorial misconduct in his capital;
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> 4. Judge Greider's personal and professional relationships as a former state attorney working for elected State Attorney Steve Russell and Chief Deputy State Attorney Randall McGruther, who prosecuted Mr. Lambrix and testified in his post conviction case in response to alleged issues of prosecutorial misconduct, justifiably raises fear in Mr. Lambrix's mind as to

> whether Judge Greider can be impartial in this case, necessitating her disqualification;
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> 5. Judge Greider also failed to disclose her relationship with Twentieth Judicial Circuit staff attorney Nicole Forrette, who had a pre-existing legal relationship with Mr. Lambrix which she apparently concealed, creating a substantial conflict of interest. Given Ms. Forrette's position and influence with the court and the Twentieth Judicial Circuit bench as a staff attorney, this conflict of interest requires the disqualification of Judge Greider and the other members of the circuit court bench in the Twentieth Judicial Circuit;

The necessary factual allegations are contained within the motion to disqualify. And attested to by Mr. Lambrix they were and are legally sufficient to establish a "well founded fear" mandating disqualification. As this Court has consistently recognized, these asserted facts must be accepted as true. *Doorbal v. State*, 983 So. 2d 464, 465 (Fla. 2000); *Cave v. State*, 660 So. 2d 705, 708 (Fla. 1995) and *Jimenez v. State*, 997 So. 2d 1056, 1072-73 (Fla. 2008).

If a timely submitted motion to disqualify is legally sufficient, "the judge shall proceed no further." Fla. Stat. § 38.10 (1995). Rule 2.330 of the Rules of Judicial Administration similarly provides that "if the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Fla. R. Jud. Admin. 2.330(f). But Judge Greider failed to comply with applicable law. On August 25, 2011 counsel for Mr. Lambrix submitted to the lower court "Defendant's Motion Seeking Order from the Court

Directing the Clerk, or In the Alternative, the Chief Judge or the Florida Supreme Court to Reassign the Case." ROA 371-374.

The August 25, 2011 motion argued that pursuant to the mandatory, non-discretionary language contained in Fla. R. Jud. Admin. 2.330(j):

> The judge **shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion** as set forth in subdivision (c). If not ruled on within 30 days of service, the motion **shall be deemed granted** and the moving party may seek an order from the court directing the clerk to reassign the case" (emphasis added).

In the instant circumstances, service of the motion to disqualify was on Tuesday, July 12, 2011. ROA 374. Thirty days from that date was Thursday, August 11, 2011. Therefore, because no ruling on the motion to disqualify was made by the end of the thirtieth day, counsel believed the motion to disqualify was deemed granted pursuant to Fla. R. Jud. Admin. 2.330(j) as of August 12, 2011 and the case should be reassigned.

On August 24, 2011, having received no order on the motion to disqualify, and ascertaining via the online Glades County Circuit Court docket (Glades County Circuit Court Case Progress Docket # 221983 CF000012XXAXMX) that no order had been docketed as of August 24, 2011, counsel filed the motion to reassign case. ROA 371-373.

Once a judge is legally disqualified from a case, the court lacks jurisdiction

to enter further orders. However, although no order was served upon Mr. Lambrix on the July 12, 2011 Motion to Disqualify, Judge Greider continued to issue numerous other orders, each received by Mr. Lambrix's counsel. On August 5, 2011, Judge Greider entered an order granting the State's Motion for An Extension of Time ROA 343. Then on August 18, 2011, notwithstanding the court's lack of jurisdiction, an Order Setting a Case Management Conference was entered setting a hearing for September 2, 2011 in Labelle, Florida. ROA 368-370. On August 26, 2011, apparently again without having jurisdiction over this matter, another order was entered, changing only the location of the case management conference from Labelle, Florida to Punta Gorda, Florida. ROA 377-379.

At the scheduled case management conference before Judge Greider on Friday, September 2, 2011 in Punta Gorda, Florida, undersigned counsel argued the motion seeking an order directing the clerk to reassign case as required under Fla. R. Jud. Admin. 2.330(j). ROA Vol. IV, p. 1-26. Only at that time did the Court inform the parties that she had entered an Order on July 18, 2011 denying Mr. Lambrix's July 12, 2011 Motion To Disqualify Judge and the Entire Twentieth Circuit. The Court then provided Mr. Lambrix's counsel with a copy of the Order which included a certificate of Service by the Clerk of Court dated July 21, 2011. ROA 375[2]. The certificate of service included facially correct addresses for both

[2] The original Clerk date stamp is overstamped with a date of August 31,

undersigned CCRC South counsel and for Mr. Lambrix. The Court also advised counsel that it had entered orders denying the August 24, 2011 Motion To Reassign the case and the August 30, 2011 Motion To Stay Proceedings – although the Court did not have copies of these two orders in court. Counsel advised the Court that none of the three orders had been received by counsel at the CCRC address in Ft. Lauderdale as of that date.

Following the attempted case management conference in Punta Gorda, Florida, counsel returned to the CCRC South office in Ft. Lauderdale, Florida later on the same date, September 2nd, and discovered that a copy of Judge Greider's Order on the Motion To Disqualify had been received in the office that same day, attached to a cover letter from the Glades Clerk, dated August 26, 2011, informing counsel that "the July 18, 2011 order was mailed to all parties involved on 7/21/11." However, examination of the copy of the "Order Denying Defendant's Motion To Disqualify Judge and the Entire Twentieth Judicial Circuit as Legally Insufficient" provided by the Clerk and allegedly rendered on July 18, 2011, and served on July 21, 2011 did not have a clear and legible date/time stamp – virtually every other order received by counsel does have a legible date/time stamp.[3] The

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2011, two days before the hearing.

[3] Two versions of the order appear in the instant record, at ROA 163 and 375. The version attached to the Clerk letter of August 26, 2011 noted herein is not of record. It is an attachment to the Writ of Prohibition, SC11-1845, filed in this

collective circumstances of no Order being received by counsel until September 2, 2011 in open court and the absence of a legible time/date stamp except on one copy in the record on appeal compels Mr. Lambrix to question when the July 18, 2011 Order was actually rendered and whether it was served on July 21, 2011, as the Glades Clerk has stated. In any case, counsel for Mr. Lambrix never received a copy until September 2, 2011, thus he was not properly served. The failure to properly serve Mr. Lambrix's counsel provides further support for Mr. Lambrix's "well founded fear" that he cannot and will not receive a fair and impartial hearing before Judge Greider or any Judge In the Twentieth Judicial Circuit. Mr. Lambrix's July 12, 2011 Motion To Disqualify was legally sufficient as a matter of law, and no action should have been taken by Judge Greider other than reassigning the case. ROA 143-152.

On September 21, 2011, counsel submitted the Petition for Writ of Prohibition noted *supra*, and also filed a Motion to Stay Proceedings in the lower court, which was also attached to the Writ. ROA. 380-83. In the Writ of Prohibition, Mr. Lambrix sought an immediate Order from this Court disqualifying

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Court and still pending in connection with the disqualification issue in the instant case below. Counsel never saw the Order at ROA 163 that appears to be date stamped JUL 21 until the instant record was served. The version of the order that appears at ROA 375 with an overstamp date stamp of 2011 AUG 31 was an attachment to the Court's order at ROA 376 (Order Denying Defendant's Motion To Reassign the Case).

Judge Greider and the Entire Twentieth Judicial Circuit. As this Petition remained pending, on December 2, 2011, Judge Greider summarily denied Mr. Lambrix's pending Rule 3.851 motion without an evidentiary hearing. See Order Denying Defendant's Fifth Rule 3.851 Motion at ROA 435-475. Once again, service of this order was also inexplicably delayed and was not received in counsel's office until December 14, 2011, effectively depriving Mr. Lambrix of any opportunity to timely file a motion for rehearing. Mr. Lambrix had previously pursued the issue, arguing for the disqualification of Judge Greider in a prior Rule 3.851 motion which Judge Greider also summarily denied.

The appeal in that case, No. SC10-1845, is also still pending before this Court and was recently returned to circuit court for further evidentiary development. In that case, Mr. Lambrix has argued that Judge Greider improperly denied a similar Motion to Disqualify, which required that her summary denial of Mr. Lambrix's successive Rule 3.851 *Brady/Giglio* and newly discovered evidence of innocence claims must be reversed. (See Claim IV in SC10-1845).

In the related pending case, on January 4, 2012, this Court *sua sponte* entered an order relinquishing jurisdiction back to the state court for the specific purpose of convening an evidentiary hearing on Mr. Lambrix's pled allegations of judicial bias and disqualification of Judge Greider and the entire twentieth Judicial

Circuit.[4]

On January 30, 2012, Judge Greider held a limited evidentiary hearing on aspects of Mr. Lambrix's allegations supporting his motion to Disqualify in the prior case. Judge Greider denied Mr. Lambrix's motions for discovery, struck herself from the defense witness list , and prohibited counsel from any contact prior to the hearing with the main material witness, Nicole Forrette who is assigned to Mr. Lambrix's case, and was and is a staff attorney for Judge Greider. Counsel was prohibited from pursuing and obtaining relevant and readily available discovery that would have conclusively substantiated Mr. Lambrix's pled allegations that Ms. Forrette had engaged in conduct requiring disqualification of Judge Greider and the entire Twentieth Circuit. See ROA 496-545.

At the January 30, 2012 evidentiary hearing Mr. Lambrix presented the

[4] After this Court's January 4, 2012 Order of Relinquishment in SC10-1845, undersigned counsel submitted a Motion for Clarification of Order, as this Court had erroneously characterized Judge Greider as a "successor judge" under Fla. R. Jud. Admin. 2.330, allowing Judge Greider to preside over the ordered evidentiary hearing on allegations relevant to disqualification. This was and is factually incorrect, as Mr. Lambrix's prior Motion to Disqualify Judge Corbin was denied by Judge Corbin while he was still assigned to the case. About a month after that denial, the Chief Judge of the Twentieth Judicial Circuit inexplicably *sua sponte* replaced Judge R. Thomas Corbin with Judge Christine Greider. Since no prior motion to disqualify any Judge was ever granted in Mr. Lambrix's case, the Motion To Disqualify Judge Christine Greider and the Entire Twentieth Judicial Circuit should be considered an original, not successor, motion, and Judge Greider should be prohibited from making any factual determinations raised in the Motion to Disqualify. *Jimenez v. State*, 997 So. 2d 1066, 1072-73 (Fla. 2008); *Doorbal v. State*, 983 So. 2d 464-65 (Fla. 2000).

testimony of witnesses Michael Hickey, Lynne Pavelchak, and Mr. Lambrix, who was forced to testify via telephone in contradiction to Fla. R. Crim. P. 3.851(g) because Judge Greider refused to allow him to be physically present in Court. The transcript of the hearing was included in the current record as Vol. VII, pages 1-109.

Both Mr. Hickey and Ms. Pavelchak testified regarding numerous communications that they previously had with Nicole Forrette via email. During their testimony several pages of emails were offered as evidence to substantiate their testimony that they believed their communications were with Nicole Forrette in January 2008. ROA. 513-519 (attached to Judge Greider's Order filed on February 9 and served by the Glades Clerk on February 10, 2012). The emails included Ms. Forrette's instructions that monetary payment for her services should be mailed to her private residence address in Lehigh Acres, Florida.

Mr. Lambrix testified as to his own subsequent communication via correspondence with Ms. Forrette in 2008 regarding Ms. Forrette's solicitation for monetary payment in exchanges for providing Mr. Lambrix legal advice and assistance. Mr. Lambrix testified that at the time he believed Ms. Forrette was employed as an Assistant State Attorney in the Twentieth Judicial Circuit.

Nicole Forrette then testified that she had been employed since 2006 as a Staff Attorney for the Twentieth Judicial Circuit and has never worked for the

State Attorney's office. Ms. Forrette conceded that during her years as a judicial staff attorney she has worked with Judge Christine Greider and has been assigned to work on Mr. Lambrix's case with judges in the circuit. However she denied having any communication with Mr. Lambrix, or his representatives Michael Hickey and Lynne Pavelchak at any time. She admitted that the email address on all the email exchanges introduced at the hearing were from or to her personal email address in January 2008 and at present . She also agreed that the residence address in the email record was her private residence address in January 2008. She could not provide any explanation as to how the email exchanges appeared to be to and from her personal email account, or why the solicited monetary payment was instructed to be sent to her residence address. She did testify that she was unaware of her email account being hacked or otherwise used by a third party without her authorization during the relevant period of 2008. Further, although Ms Forrette categorically denied placing ads soliciting legal work on Craig's List or any other electronically communicated posting forum on the internet, she did admit to doing some outside legal work beyond the scope of her official duties.

As impeachment evidence, Mr. Lambrix's counsel introduced into evidence at the hearing three current internet postings that appeared to be soliciting legal work in Ms. Forrette's behalf, including her contact information, but once again she was unable to provide any explanation for the current postings. It appears that

either the testimony and supporting evidence presented through Mr. Lambrix, Mr. Hickey and Ms. Pavelchak was manufactured and false, which the trial court made no findings about, or staff attorney Forrette perjured herself. Given the importance of the instant appeal to preserving Mr. Lambrix's rights, preserving the integrity of the judicial process, and the significance to Mr. Lambrix's attempt to disqualify the 20th Judicial Circuit of Ms. Forrette's position as a staff attorney working for Judge Greider on Mr. Lambrix's case, Mr. Lambrix has moved this Court to again relinquish jurisdiction in Case No. SC10-1845 to allow for proper discovery, to get the facts and to allow for a full and fair hearing on the judicial disqualification issue in that case. The implications for the instant appeal are self-evident, and once the facts are obtained appropriate action will be undertaken by counsel for the appellant as is appropriate.

Ms. Forrette was the final witness at the hearing. Her surprise denial of the allegations that served as the foundation of Mr. Lambrix's Motion to Disqualify Judge Greider and the Entire Twentieth Judicial Circuit resulted in counsel filing a renewed motion for discovery in the circuit court on February 20, 2012. ROA 543-545. The motion again requested a discovery order or discovery subpoenas from the court, this time requesting discovery from Google and Craig's List to support the allegations made by Mr. Lambrix concerning her email account that had been denied by Ms. Forrette, noting that "If the Court has granted the motion for

discovery prior to the evidentiary hearing, then counsel would have been aware of Ms. Forrette's prospective testimony denying all and could have sought this material for presentation at the evidentiary hearing." ROA 544. On April 9, 2012, undersigned counsel for the first time received a copy of an Order entered on February 28, 2012 by Judge Greider dismissing the renewed motion for discovery based on lack of jurisdiction.[5]

This Order was not filed or docketed until March 5, 2012. The order stated that "the thirty (30) day period of relinquishment expired on February 3, 2012. This Court lacks jurisdiction to consider Defendant's Motions." The same order also dismissed on the same jurisdictional grounds Mr. Lambrix's Motion to Re-enter her Order signed on February 1, 2012 and his Motion for Rehearing of the February 1, 2012 Order.

In other words, pursuant to the logic of Judge Greider's order, Mr. Lambrix had only two days after she signed the order on February 1, 2012, or until February 3, 2012, to move for rehearing or for anything else related to her order. And this was an order that was not served by the Glades Clerk until February 10, 2012 and not seen by counsel until February 15, 2012.

The records that Mr. Lambrix was seeking through the renewed motion for

[5] This document is Page 4 of what the Glades Clerk served as Volume VI of the record on appeal in *State v. Lambrix*, SC12-6.

discovery would conclusively establish whether or not Nicole Forrette had placed an ad on Craig's list soliciting legal work while employed as a staff attorney for the judges in the Twentieth Judicial Circuit and then subsequently exchanged the email communications with Mr. Hickey and Ms. Pavelchak that were testified about at the hearing. Judge Greider's February 1, 2012 order denying relief after the evidentiary hearing made a factual determination, apparently based solely upon her own staff attorney's testimony, that Mr. Lambrix's allegations of unethical misconduct were "unsupported." The order made no attempt to address the credibility of witnesses Michael Hickey, Lynne Pavelchak, of Mr. Lambrix. ROA. 507-530. The lower court's order did not appear on this Court's docket in the relinquished case, SC10-1845, until March 7, 2012.

Mr. Lambrix was deprived of the opportunity to submit a timely motion for rehearing both by the delay in the Glades Clerk in serving the February 1, 2012 Order on February 10, 2012 and by the lower court's actions in finding that Mr. Lambrix's window of time for filing any substantive motion, including rehearing in circuit court, ended on February 3, 2012 with the time of relinquishment, two days after the rendition of Judge Greider's Order. This is a facial violation of Fla. R. Crim. P. 3.851.

The collateral proceedings conducted upon relinquishment in pending case SC10-1845 must be considered in this instant appeal. Mr. Lambrix is not required

to conclusively prove in this Court or elsewhere that there was misconduct by Twentieth Judicial Circuit staff attorney Nicole Forrette or Judge Greider. Mr. Lambrix is required to show that a reasonable person would believe under the circumstances that he or she cannot receive a fair and impartial review and disposition of his case. The applicable standard only requires that Mr. Lambrix articulate a "well founded fear" as to why he believes that Judge Greider and the 20th Judicial Circuit Court cannot remain objective and render an impartial disposition of his capital post conviction case.

Therefore the salient question before this Court (and the lower court as well) in both SC10-1845 and in the instant case, SC12-6, both predicated on the same grounds, is whether Mr. Lambrix submitted a legally sufficient and objectively reasonable motion to disqualify that articulated a "well-founded fear that he would not receive a fair and impartial review of his successive post conviction motion before Judge Greider, or any other judge in the 20th Circuit. See *Krawczuk v. State*, __ So. 3d __ (2012), SC10-680 & SC11-10, slip opinion at 6, April 12, 2012. ("The facts and reasons given for the disqualification of a judge must tend to show 'the judge's undue bias, prejudice, or sympathy").

Given the above pled facts supported by the record, Mr. Lambrix has established "an objectively reasonable" fear of judicial bias in this case.[6] The

[6] If necessary, Mr. Lambrix is prepared to submit the record of the January

undisputed facts are as follows. Judge Greider was previously employed as an Assistant State Attorney for approximately nine years prior to her appointment to the bench. During her period as a state attorney she worked directly under and has had a long established relationship with, the very members of the local state attorney's office previously alleged to have engaged in prosecutorial misconduct in Mr. Lambrix's capital case. Chief Judge G. Keith Cary *sua sponte* replaced Judge R. Thomas Corbin by reassigning Judge Christine Greider to Mr. Lambrix's case.

Mr. Lambrix has alleged that a person he originally believed to be an assistant state attorney, who now turns out to have instead been a staff attorney for the judges in Twentieth Judicial Circuit who were assigned his case, solicited monetary payment from representatives acting in Mr. Lambrix's behalf in return for her legal advice to them. Evidence presented in the form of testimony and documentary evidence supports Mr. Lambrix's allegation as pled in his timely filed motion to disqualify. Mr. Lambrix himself further testified that Nicole Forrette then abused her position to compel prison officials to search Mr. Lambrix's cell in an attempt to confiscate evidence supporting Mr. Lambrix's allegation.

Although the issue before the Court is arguably limited to the question of

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30, 2012 evidentiary hearing in SC10-1845 relevant to the allegations supporting disqualification to this Court by separate Motion To Take Judicial Notice. However, the Glades Clerk has already submitted the same document as Vol. VII, pages 1-109, in the record of the instant Case No. SC12-6.

whether Judge Greider improperly denied Mr. Lambrix's Motion to Disqualify as legally insufficient, the manifest interests of justice require that this Court take judicial notice of all the evidence presented at the January 30, 2012 evidentiary hearing ordered by this Court in case No. SC10-1845 on this same issue – the disqualification of the lower court.

The record in that case establishes that Judge Greider has had a relationship with Nicole Forrette, who serves as a judicial clerk to the judges in the 20th Circuit and in that role works on capital cases including being assigned to Mr. Lambrix's case. Despite this Court's Order relinquishing jurisdiction in SC10-1845 to convene an evidentiary hearing to get the facts, virtually every action taken by the lower court, from denying the opportunity for any discovery including any contact or deposition of Ms. Forrette to entering an order dismissing the motion for rehearing, based on a lack of jurisdiction, served to prohibit counsel from developing and presenting evidence in support of Mr. Lambrix's allegations requiring disqualification. Add to this list the botched service of order after order, the failure to allow Mr. Lambrix to appear in person at the hearing and the court preventing any questioning of witness Forrette pursuant to the Fla. Rules of Jud. Admin. and the result is that Mr. Lambrix's "well founded fear" of judicial bias has only been amplified and underlined by these proceedings below in SC10-1845.

The result is that Mr. Lambrix's motion to disqualify was and is legally

sufficient and the improper denial of disqualification served to deny him of his state and federal due process constitutional rights requiring automatic reversal of the summary denial of Mr. Lambrix's successive post conviction motion in SC10-1845 and in the instant appeal,

For the purpose of preserving the record for the purpose of exhaustion of state remedies, Mr. Lambrix does submit that the improper denial of his motion to disqualify deprived him of his substantial federal constitutional rights to a fair and impartial hearing under the Fifth and Fourteenth Amendment of the United States Constitution and applicable Federal law. See *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242 (1980); *Caperton v. A.T. Massey Coal. Co., Inc.*, 129 S.Ct. 2252, 2259 (2009), quoting, *In re Murchison*, 349 U.S. 133, 136 (1955).

ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S TIMELY PLED CLAIM BASED UPON NEWLY DISCOVERED EVIDENCE THAT HIS DEATH SENTENCES ARE CONSTITUTIONALLY UNRELIABLE AND THAT HE IS INNOCENT OF THE DEATH PENALTY, ENTITLING HIM TO RELIEF FROM THE SENTENCES OF DEATH UNDER THE EIGHTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Introduction

On July 12, 2012, through counsel, Appellant timely submitted a successive Rule 3.851 motion arguing entitlement to relief from his the two death sentences

based on substantial newly discovered evidence. He argued that if that evidence had been available at the time of trial, the outcome at sentencing would have likely been different. See *Riechman v. State*, 966 So. 2d 298, 316 (Fla. 2007); *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001). ROA. 1-142. Appellant also pled that the newly discovered evidence, when properly reviewed under a cumulative analysis, establishes that Mr. Lambrix is actually innocent of death pursuant to *Sawyer v. Whitley*, 505 U.S. 333 (1992) and *Porter v. McCollum*, 130 S.Ct. 447 (2009). On the same date Mr. Lambrix also served a timely Motion to Disqualify Judge Greider and Entire Twentieth Judicial Circuit for the reasons noted *supra* in Argument I. ROA. 143-152.

The State thereafter filed a response dated August 11, 2011. ROA. 344-367. The lower court held a case management conference on September 28, 2011. ROA. Vol. V. 1-20.[7] Counsel advised the court at the beginning of the hearing that Mr. Lambrix would be unable to appear telephonically because of a pending execution at Florida State Prison, where he is incarcerated. Counsel also advised that a Writ of Prohibition had been filed with this Court pursuant to the pending motion to

[7] A previously scheduled case management conference was held on September 2, 2011, but no argument concerning the claims took place. Issues related to Appellant's motion to disqualify and a subsequent Emergency Motion to Stay Proceedings took up most of the short hearing. Counsel also supplied the court and the other parties with a copy of Dr. Thomas Hyde's second report concerning Mr. Lambrix and the presence of statutory and non-statutory mitigation. ROA. 380-383; Vol. IV. 1-26.

disqualify, but that this Court had not yet ordered any action. Id. 5-6. Although the written record is silent, upon reason and belief, counsel states that staff attorney Nicole Forrette was present in court on September 28, 2011.

Thereafter, Judge Greider summarily denied Mr. Lambrix's new evidence Rule 3.851 motion on December 2, 2011. ROA. 435-442. There were attachments to the Order. ROA 443-475. The order failed to acknowledge and apply the correct legal standard and unreasonably misconstrued alleged facts. The actual service of the December 2, 2011 order was inexplicably delayed, thereby effectively depriving Mr. Lambrix of the opportunity to timely submit a motion for rehearing, leaving only the option of seeking review in this Court.

The motion below presented substantial newly discovered evidence that was not previously available. The motion was based in part upon an affidavit obtained from Mr. Lambrix's ex-wife, Kathy Marie Martin, that provided information and evidence establishing the nature and extent of Mr. Lambrix's physical disability resulting from a 1978 service connected injury. ROA. 28-32. The affidavit also helped to establish how that injury resulted in a substantial escalation of Mr. Lambrix's substance abuse following his honorable discharge from the Army. That history of self medication was based in the effort to manage the chronic and debilitating pain that he was experiencing due to the 1978 injury.

For reasons pled in the Rule 3.851 motion and corroborated by the Martin

affidavit, Ms. Martin was not available as a witness anytime prior to the date that she provided the affidavit on July 13, 2010. See *Davis v. State*, 26 So. 3d 519 (Fla. 2009) (recognizing that for the purpose of newly discovered evidence, a witness is not available until the witness is willing to provide the relevant information and to testify); *Riechmann v. State*, 966 So. 2d 298 (Fla. 2007)(recognizing that when a witness deliberately makes themself unavailable, then only when that witness chooses to become available can the newly discovered evidence based upon the witness's proposed testimony be deemed available).

In summarily denying Mr. Lambrix's claim of entitlement to relief from the sentences of death based upon this newly evidence, Judge Greider reduced to irrelevancy the substantial wealth of mitigation that Mr. Lambrix's sentencing jury never heard and completely ignored the cumulative weight of the newly discovered evidence in direct contradiction of *Porter v. McCollum*, 130 S.Ct. 447 (2009); *Sears v. Upton,* 130 S.Ct. 3259 (2010) and *Jefferson v. Upton*, 130 S. Ct 2217 (2010).

Under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and the comparable counterpart under the Florida Constitution, a sentence of death may only be imposed upon a capital defendant if and only after the defendant is afforded a sentencing process that "channels the sentencer's discretion." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) to "genuinely narrow

the class of persons eligible for the death penalty . . . and reasonably justify the imposition of a more severe sentence on the defendant compared to those found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 875 (1983), quoting *Gregg v. Georgia*, 428 U.S. 153, 95 (1976).

Further, for the process to be constitutionally reliable, the Courts must allow the consideration of any relevant mitigating evidence that might lead the sentencer to decline to impose a sentence of death. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Supreme Court has consistently demanded a "heightened reliability in the adjudicative process leading to a death sentence." See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"), quoting *Lockett v. Ohio*, 438 U.S. at 604; See also, *Gregg v. Georgia*, 428 U.S. at 189 ("where discretion is afforded a sentencing body on a matter so grave as to the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

As this Court has itself consistently recognized, "death is different" and "the integrity of the process is of unique and special concern in cases where the State seeks to take the life of the Defendant," *Arbelaez v. Butterworth*, 738 So. 2d 326, 331 (Fla. 1999), quoting, *Monge v. California*, 524 U.S. 731, 118 S.Ct. 2246,

2252-53 (1998); *State v. Dixon*, 238 So. 2d 1 (Fla. 1973). Because of this, this Court recognizes our society's moral constraint in limiting imposition and execution of the death penalty to only "the worst of the worst." *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) ("the death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist"). For that reason, a capital defendant must be afforded a reasonable opportunity to present and have considered "all relevant mitigating evidence." See *Roper v. Simmons*, 125 S.Ct. 1181, 1183, n. 94 (2004) (constitutionality of the death penalty requires that the defendant be afforded "wide latitude" in presenting mitigating evidence); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987), quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) ("sentencer may not refuse to consider, or be precluded from considering any relevant mitigating evidence"); see also *Eddings v. Oklahoma*; *Lockett v. Ohio*.

Of course these constitutional safeguards intended to "genuinely narrow" the class of defendants eligible for a sentence of death and thereby render a constitutionally reliable sentence are dependent upon the defendant having a fair and reasonable opportunity to actually present the relevant mitigating evidence in the first place, as well as a fair and reasonable opportunity to challenge the State's evidence supporting the application of the statutory aggravators in each case.

If and when substantial newly discovered evidence is developed after a

sentence of death has been imposed and that evidence is significant enough to undermine confidence in the imposition of the sentence, then a full and fair evidentiary process is constitutionally mandated to determine whether the alleged new evidence may have rendered the jury's recommendation and subsequent imposition of death by the trial court to be constitutionally unreliable. See, e.g., *Sochor v. Florida*, 504 U.S. 527 (1992) (The Eighth Amendment requires that death sentence be inherently reliable). This evidentiary process did not occur in Mr. Lambrix's case due to the summary denial.

a. The lower court erred when it summarily denied Appellant's claim below of newly discovered evidence.

This Court has held, in *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001), that newly discovered evidence in the context of the penalty phase of a capital trial is defined as "evidence establishing that the sentencing phase 'probably would have produced a different result at sentencing," quoting *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991); see also, *Henyard v. State*, 992 So. 2d 120 (Fla. 2008) (capital defendant seeking to vacate sentence of death upon alleged newly discovered evidence must establish that the new evidence would probably yield a less severe sentence).

In order to qualify as newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel, at the time of trial, and it must appear that the defendant, or his counsel, could not have known (of the

evidence) by the use of due diligence." *Wright v. State*, 857 So. 2d 861, 870-71 (Fla. 2003), quoting *Jones v. State*, 591 So. 2d at 916. At the pleading stage, the court must accept the defendant's allegations of due diligence as true. *Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009), relying upon *Swafford v. State*, 679 Sp. 2d 736, 739 (Fla. 1996) (concluding that at the pleading stage, counsel's claim that an affidavit amounted to newly discovered evidence combined with a statement that counsel was unable to locate a witness because no address was available, was sufficient for the purpose of demonstrating that an evidentiary hearing was required).

In Mr. Lambrix's case below, the first reason that the lower court summarily denied the Appellant's successive Rule 3.851 motion was that "Defendant has not demonstrated that this information could not have been discovered through the exercise of due diligence at the time of trial." ROA. 439. For the reasons recently stated by this Court, the lower court's basis for summary denial was clear error. See *Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009) (Error where "the statements made during the *Huff* hearing in conjunction with the assertions in the motion established a prima facie case of diligence sufficient to require an evidentiary hearing"). To support its erroneous finding, the lower court made a factual determination that Mr. Lambrix and his trial counsel were aware at the time of trial that he had sustained an injury in 1978 during his stint of military service and that

trial counsel presented evidence at the penalty phase concerning that injury. ROA. 439. This finding completely ignored the allegations in Mr. Lambrix's Rule 3.851 motion supporting the materiality of the new evidence (See ROA 9-11):

> 5. Shortly after Mr. Lambrix was convicted on both counts of first degree premeditated murder as charged in the indictment, the sentencing phase of Mr. Lambrix's trial began. As the record reflects, the only mitigating evidence Mr. Lambrix's trial counsel presented was the testimony of Mr. Lambrix's natural father, Donald Lambrix, Sr., stepmother Consuelo Lambrix, brothers Donald Lambrix, Jr. and Jeffrey Lambrix, and Mr. Lambrix's younger sister, Janet Lambrix;
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> 6. Mr. Lambrix's trial counsel attempted to convince the jury to spare Mr. Lambrix's life by establishing that he was a good person who participated in the Boy Scouts, was a Catholic altar boy and enlisted in the Army at age 18 shortly after being married. Trial counsel elicited testimony of how Mr. Lambrix was physically injured while serving in the military and how it affected Mr. Lambrix's subsequent behavior. But the state completely impeached this limited testimony by establishing that none of the testifying family members at the penalty phase had spent any amount of time with Mr. Lambrix for at least several years, thus they were unable to testify about Mr. Lambrix's personality, behavior or actions around the time of the two murders;
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> 7. Trial counsel recognized that Mr. Lambrix's physical injury while serving in the military and the manner in which the injury subsequently effected Mr. Lambrix's life in the years leading up to the alleged crime would have provided substantial mitigation – but trial counsel simply did not have available the evidence that would have established this substantial mitigation and compelled the jury to recommend a life sentence rather that death on the two convictions for first degree

murder;[8]

8. The only person who could have conclusively established this substantial mitigation at trial was Mr. Lambrix's ex-wife Kathy Marie Martin – but she had fled the area several years earlier and her whereabouts were not known. After leaving the military service, Mr. Lambrix and Ms. Martin, who were still legally married, first moved to Illinois and later to Texas, having only minimal contact during that time with members of the Lambrix family. Thus it was not surprising that the State quickly impeached the penalty phase testimony of the family members by establishing that they actually did not spend much time with Mr. Lambrix for years.

9. Although Mr. Lambrix himself could have provided testimony concerning the extent of his military injury and the resulting disability, including a description of how the chronic physical pain from the injury resulted in a substantial escalation in self-medication and chronic substance abuse, he was prevented from doing so by actions of the trial court and trial counsel. He has argued in prior post conviction proceedings that he was improperly prohibited from testifying at the trial. Although he did testify in post conviction proceedings in April 2004, at the State's insistence that testimony was limited to a narrow range of issues then before the Court. (See Appendix D: Post conviction testimony of Cary Michael Lambrix);

10. Kathy Marie Martin deliberately made herself unavailable at the time of Mr. Lambrix's sentencing phase proceedings and continued to be unavailable until July 2010 when she agreed to meet with post conviction counsel's investigator and to provide the affidavit incorporated herein

[8] Mr. Lambrix has consistently maintained his innocence of the charges of alleged premeditated murder and nothing in the instant action should be construed as conflicting with his consistently pled claim of guilt phase innocence.

> 11. Ms. Martin is now prepared to provide testimony at an evidentiary hearing consistent with the facts attested to in her attached affidavit. Her testimony will provide substantial support for statutory and non-statutory mitigation that trial counsel unsuccessfully sought to establish at the sentencing phase due to Ms. Martin's unavailability
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> 12. Ms. Martin's testimony will establish that after suffering a substantial physical injury while serving in the U.S. Army in late 1978, Mr. Lambrix was honorably discharged due to his inability to continue to perform his duties. After leaving the military, Mr. Lambrix continued to suffer extreme physically debilitating pain which directly led to Mr. Lambrix substantially escalating his use of alcohol and illicit drugs in an attempt to manage this pain
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> 13. Because of the physical disability resulting from the military injury, Mr. Lambrix was unable to sustain employment. These circumstances led to Ms. Martin divorcing Mr. Lambrix in April 1981, although they subsequently reconciled a few months later, until Mr. Lambrix was incarcerated in September 1981 (Mr. Lambrix has almost continuously been incarcerated since late 1981);

This Court has long recognized that at the pleading stages of a Rule 3.851 post conviction proceeding, specifically pled allegations as to the exercise of due diligence must be accepted as true. *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996). Mr. Lambrix specifically alleged that Kathy Marie Martin made herself unavailable prior to July 13, 2010, and this allegation is supported by Ms. Martin's affidavit, attached to the motion, which details her reasons for refusing to communicate Mr. Mr. Lambrix or counsel. ROA 8, 28-32.

The lower court's order suggests that there was a failure of due diligence of Mr. Lambrix's part, yet his motion was filed on July 13, 2011, the one year anniversary of the Martin affidavit in comport with *Glock v. State*, 776 So. 2d 243, 251 (Fla. 2001). ROA 1, 32. And that is not the end of the story, because the evidence necessary to corroborate Ms. Martin's affidavit was not available until April 19, 2011, when a formal disability decision from the Board of Veterans Appeals was issued to Mr. Lambrix. That decision was also attached to the Rule 3.851 motion ROA. 34-42. It recognized for the first time that Mr. Lambrix did suffer a substantial injury while serving in the U.S. Army in late 1978, entitling him to legal recognition of a service connected disability that originated when he was injured and hospitalized at Fort Sill, Oklahoma in November 1978. That determination was based on medical records and a contemporary neurological evaluation supporting the finding that he has continuously suffered chronic and debilitating physical pain with a resulting disability.

Post conviction counsel made every reasonable effort to develop and obtain supporting evidence to corroborate the Martin affidavit. Dr. Thomas Hyde, a medical doctor specializing in neurology, conducted a complete physical and neurological evaluation of Mr. Lambrix on June 25, 2010. He later reviewed extensive medical records, both from Mr. Lambrix's military service and from twenty-six years of incarceration in the Florida Department of Corrections. He also

reviewed the Martin affidavit. His report of October 10, 2010 was attached to the Rule 3.851 motion. ROA. 25, 44-48.[9]

The information in the Martin affidavit, Dr. Hyde's report, and the determination of disability by the Department of Veterans Affairs was never heard by the jury at Mr. Lambrix's trial. The jury never heard about the extent of Mr. Lambrix's 1978 injury while serving in the U.S. Army or how the chronic and debilitating pain associated with the injury contributed to the escalation of his alcohol and substance abuse in an attempt to self-medicate. The findings of the lower court were clearly erroneous where the sentencing jury never heard any evidence as to the extent of Mr. Lambrix's military injury, resulting physical disability, or about how his substance abuse escalated following his military injury and honorable discharge until the time of his arrest for the two capital murders in

[9] Dr. Hyde found that Mr. Lambrix "suffered from a significant injury to his lower back as a result of a fall during basic training in the U.S. Army in 1978. he has suffered from debilitating pain since that time, and like many individuals without access to health care, turned to illicit substances and alcohol to 'self-medicate.' His current examination is consistent with chronic lower back pain secondary to post-traumatic changes in the lumbar-sacral spine with probable nerve root impingement." ROA at 48. His report was provided to the Department of Veterans Affairs as part of the disability determination process. Dr. Hyde also provided a second letter report dated August 16, 2011, which was filed in open court at the aborted first case management conference on September 2, 2011. ROA. 461-62. He opined that there were strong mitigating factors that should be considered, including a finding that at the time of the offense, Mr. Lambrix's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

the instant case. *See* Written Proffer of Dr. Sharon Maxwell, at ROA 258-284; Dr. Peter Macaluso, Letter Report at ROA 177-177.

The trial record of Mr. Lambrix's sentencing phase reflects that the jury heard virtually no evidence that provided an accurate portrayal of Mr. Lambrix's character or the existing mitigation that could have been presented if trial counsel had made a reasonable effort to develop a life history. There can be little doubt that trial counsel recognized that evidence about the military injury and its impact would have provided substantial mitigation before the jury if it had been properly investigated and presented. Trial counsel did call members of Mr. Lambrix's immediate family to testify about the circumstances of his honorable discharge from the military following an injury which happened while he was on duty.

What is significant is that each of these family members testified as to their very limited knowledge of the military injury suffered by Mr. Lambrix. The lower court attached to her Order denying relief excerpts from the testimony of Cary Lambrix's brother Jeff Lambrix, his father Donald Lambrix, and his brother Donald Lambrix, Jr. ROA. 463-475. His brother Jeff s knowledge was limited to "Honorable discharge, I believe, something medical." ROA 465. His father testified that he believed Mr. Lambrix was discharged after a head injury that resulted in medical complications. ROA 467. Brother Donald, Jr. testified that his understanding was that Cary had a medical accident during basic training where he

injured his back and head. ROA 470. Their testimony further reflects that none of these family members had any significant contact with Mr. Lambrix after his 1978 injury and discharge. They had no personal knowledge of how Mr. Lambrix's military injury and disability subsequently affected Mr. Lambrix's life or how it may have contributed to the escalation of his substance abuse after he left the military until the time of the crimes that Mr. Lambrix was sentenced to death for.

The State impeached the witnesses before the jury on their lack of personal knowledge and contact with Mr. Lambrix during the relevant time period. The jury heard little about the extent of the military injury or its consequences. There was no attempt to develop the military related disability and its consequences as part of a case in mitigation. The lower court attached part of trial counsel's argument to the jury at the penalty phase to its order. ROA. 471. The argument reflects the lack of investigation and development cited herein: "You heard that he had a severe head injury while he was in the Army and that he fell several flights of stairs and was in the hospital for several days because of this." ROA. 471. That was it. The jury heard no evidence about the extent and consequences of the injury because the only person who knew the details was the person who was closest to Mr. Lambrix at the time, his ex-wife, who made herself unavailable to trial counsel. For that reason, Mr. Lambrix's trial counsel was unable to develop and present the substantial mitigation at issue in the instant action.

In summarily denying the Rule 3.851 motion below the lower court failed to appreciate that the newly discovered evidence in this case is not simply about the injury Mr. Lambrix suffered in 1978. His sentencing jury never heard any testimony or evidence relating to his post military service life following the injury and discharge, the time when his self-medication accelerated his substance abuse disorder in an attempt to manage the pain from the service related disability. In denying relief, the lower court relied in part on the failure of Mr. Lambrix's prior claim that trial counsel was ineffective for failing to develop and present evidence of Mr. Lambrix's substance abuse and alleged intoxication at the time of the offense.

Yet Mr. Lambrix's trial counsel could not possibly have made a strategic decision to not present evidence related to the Martin affidavit, Dr. Hyde's findings and the VA disability decision because they were unaware of the information which flowed from the unavailable ex-wife witness Martin. That is why the lower court's reliance on this Court's findings in *Lambrix v. State*, 534 So. 2d 1151, 1154 (Fla. 1988) and the Eleventh Circuit's findings in *Lambrix v. Singletary*, 72 F.3d 1500, 1504 (11th Cir. 1996) is misplaced. In both instances the Courts concluded that it was not unreasonable for trial counsel to forgo the presentation of substance abuse in deference to a strategy of presenting evidence of Mr. Lambrix's good character. But this deference to trial counsel's alleged strategy fails when counsel

fails to investigate or is otherwise unaware of the evidence at issue. See *Williams v. Taylor*, 529 U.S. 362, 396-99 (2000); *Wiggins v. Smith*, 539 U.S. 510, 519 (2003).

The lower court's reliance upon these prior rulings in Mr. Lambrix's case is misplaced where Mr. Lambrix was prepared to present below the testimony of trial counsel, who would have testified that had he known of the substance of the Kathy Marie Martin affidavit at the time of the trial, he would have presented that information to the sentencing jury and further would have developed and presented the evidence necessary to corroborate Ms. Martin's testimony, including evidence substantiating Mr. Lambrix's history of substance abuse and resulting organic brain disorder, all information that the sentencing jury was completely unaware of.

For these reasons the lower court's summary denial of Mr. Lambrix's successive Rule 3.851 motion upon the finding that "As the information is not newly discovered evidence, the current motion is untimely" is clearly in error and the conclusion that "since this information was already presented, although not with the thoroughness Defendant now wishes, this motion is successive and procedurally barred" is unfounded, relying on the lower Court's erroneous belief that the information Kathy Marie Martin is prepared to present was previously presented at the sentencing phase and therefore cumulative.

The members of Mr. Lambrix's family who testified at the penalty phase admitted they were not in contact with Mr. Lambrix after his discharge and were

unable to cast any light on how the military injury and resulting disability, to the extent they even knew what it was, actually impacted upon his post military service life including but not limited to the increasing escalation of self-medicating substance abuse leading up to and including the period of time encompassing the instant offenses for which Mr. Lambrix was sentenced to death.

b. The lower court unreasonably misconstrued interpretation and application of *Porter v. McCollum*, 130 S.Ct. 447 (2009).

For the specific purpose of preserving this sub claim for presentation to the federal courts, Mr. Lambrix objects to the narrow interpretation of *Porter v. McCollum*, 130 S.Ct. 447 (2009) by the Florida courts, including the lower court's view in the instant case that *Porter* is "wholly distinguishable" in its application to Mr. Lambrix's case based on the specific facts and circumstances of Mr. Porter's Korean (not Vietnam) war veteran status and history. ROA. 439-40. Mr. Lambrix is a legally recognized disabled veteran. He did suffer an injury that has left him physically disabled – a fact that his sentencing jury was unaware of. Although several of his family members testified at the penalty phase that he suffered some sort of injury while in the military service, the family members were not aware of the extent of his injury or of its consequences to his post service life.

Mr. Lambrix readily concedes that his military service record and the origin of his physical disability does not compare to the extreme hardship and gruesome combat condition during the Korean War endured by Mr. Porter as reflected in the

Porter opinion. Any sentencer would be remiss to not give greater weight to the mitigating aspects of military service in wartime combat as opposed to an injury suffered during basic training in the peacetime army.

Yet Mr. Lambrix enlisted as a volunteer and attempted to honorably serve his county until he was injured on the job. After being injured, and hospitalized he was honorably discharged because he was incapable of completing military training due to the injury.

The *Porter* opinion is not limited exclusively to the nature and circumstances of the trauma experienced by Mr. Porter during the Korean War.[10] To the contrary, the United States Supreme Court recognized that a sentencing jury must have the information about the military service and the trauma incurred therein before considering how that interacts with the additional evidence in mitigation that must be weighed in the sentencing calculus. That includes how the ex-soldier's ability to adjust to civilian life is impacted by the consequences of his military service.

Mr. Lambrix's post conviction motion pointed out some of the comparative issues between his case and Mr. Porter's case (ROA 12-13):

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[10] "Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his **abusive childhood**, his heroic military service, and **the trauma he suffered because of it, his long term substance abuse**, and his impaired mental health and mental capacity." *Porter* at 449 (emphasis added) .

18. Although the circumstances of Mr. Lambrix's military service are substantially different – unlike Porter, Mr. Lambrix did not serve in wartime – like Porter, he enlisted in the service at a young age and thereafter suffered a substantial injury that significantly affected his post-service life. As attested to by Ms. Martin and corroborated by additional evidence, immediately following his Honorable discharge from the military, Mr. Lambrix continued to suffer substantial physical pain that impeded his ability to be gainfully employed

19. Like Porter, Mr. Lambrix's post-service substance abuse substantially escalated resulting in numerous minor run-ins with the law. Mr. Lambrix's only prior felony conviction before the instant case was for writing a bad check to obtain funds to support his family while he was unemployed in late 1980. Only after his military injury and resulting disability did Mr. Lambrix have several arrests for operating vehicles while intoxicated, arrests which point to the significance of his escalating pain-management substance abuse

20. As in *Porter v. McCollum*, Mr. Lambrix was charged and convicted on two contemporaneous counts of capital, premeditated murder. In both *Porter* and Mr. Lambrix's case no mitigation was found and their death sentences relied upon identical aggravators (cold calculated and premeditated [CCP]; heinous, atrocious and cruel [HAC]; and previously convicted of [contemporaneous] violent crime)

21. Even with the substantial aggravation and no recognized mitigation, the United States Supreme Court unanimously vacated Mr. Porter's sentences of death, making it clear that had the jury heard about Mr. Porter's military service and how the trauma of his war experiences significantly affected his post service life, the result would probably have been different and Mr. Porter would not have been sentenced to death;

As in *Porter,* Mr. Lambrix's sentencing jury heard virtually nothing of how Mr. Lambrix's military injury and subsequent physical disability impacted and affected his post-service life, and how his substance abuse was significantly escalated following his discharge from the military and continuing up to the events that transpired on the night of February 6, 1983 when Aleisha Bryant and Clarence Moore died. As Mr. Lambrix pled below (ROA 15):

> 27. There is no question that Mr. Lambrix's substance dependency played a crucial role in the events that transpired that night. Mr. Lambrix met Clarence Moore and Aleisha Bryant at a local bar and was drinking heavily all night. In fact, only hours before the deaths of Moore and Bryant, Glades County Deputy Sheriff Ron Council personally spoke with Mr. Lambrix at the bar, and as reflected in the attached affidavit, Deputy Council concluded that Mr. Lambrix was intoxicated; (Appendix F: Affidavit of Ronald Council);
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> 28. Evidence presented by the State at trial establishes that even after deputy Council talked to Mr. Lambrix, Mr. Lambrix purchased a bottle of whisky and continued drinking. State key witness Frances Smith described Mr. Lambrix as "high" and the testimony of Billy Williams established that at least half of the bottle of whisky had been consumed in the few hours after Deputy Council spoke with Mr. Lambrix, and before the deaths of Moore and Bryant. This evidence substantiates Mr. Lambrix's previously submitted affidavit describing how the tragic deaths of Moore and Bryant were the result of an intoxicated inspired practical joke that evolved into a spontaneous physical confrontation; (Appendix G: Affidavit of Cary Michael Lambrix);

As noted supra, a fair reading of *Porter* is that relief was not exclusively

dependent on Mr. Porter's wartime combat experiences, but rather the weight of the mitigation was determined upon how the combination of his childhood trauma and subsequent military service experiences affected his post service life. The Supreme Court emphasized that the collective mitigation as considered in the Florida courts had been "discounted to irrelevancy" in violation of the Constitution. *Porter* at 455. Mr. Lambrix deserves to have the collective mitigation in his case, including the newly discovered evidence described herein, analyzed under a *Porter* standard rather than the unreasonable standard applied by the lower court which has deprived him of applicable Due Process under the Fifth and Fourteenth Amendments, and subjecting him to an unconstitutionally unreliable sentence of death in violation of *Strickland v. Washington, 4*66 U.S. 668 (1984) and the Eighth Amendment of the United States Constitution.

c. The lower court failed to provide Mr. Lambrix with an evidentiary hearing to resolve disputed facts.

In his successive post conviction motion Mr. Lambrix moved the lower court for an evidentiary hearing as required under Fla. R. Crim. P. 3.851(f)(5)(B) and *Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213, 1219 (Fla. 2001) (encouraging courts to liberally construe claims of newly discovered evidence). ROA 24. This Court has stated that when it reviews a summary denial of a successive Rule 3.851 motion by a trial court, "[W]e will accept the factual allegations of the movant as true to the extent that they are not

refuted by the record and affirm the ruling if the motion, files, and record conclusively demonstrate that the movant is entitled to no relief." *Davis v. State*, 26 So. 3d 519, 529 (Fla. 2009).

In reviewing the summary denial of Mr. Lambrix's successive motion, this Court must take into account the lower court's conclusory findings that Mr. Lambrix failed to exercise due diligence in locating witness Kathy Marie Martin, whose June 13, 2010 affidavit provided the basis for the claim of newly discovered evidence. The lower court's finding was in direct contradiction to Mr. Lambrix's specifically pled allegation that the witness was previously unavailable, an allegation that was additionally supported by Ms. Martin's attached affidavit. ROA 8, 28-32, 439. To the extent that the lower court premised its summary denial upon a finding that Mr. Lambrix failed to exercise due diligence, this was clear error that must be reversed. Mr. Lambrix should have been provided with an evidentiary hearing. See *Davis v. State* 26 So. 3d at 529 ("This court is guided by the principle that courts are encouraged to liberally view the allegations to allow evidentiary hearings on timely raised claims that commonly require a hearing").

The lower court also concluded that Mr. Lambrix's alleged new evidence is cumulative to the evidence presented at his penalty phase, and that thus "the information is not newly discovered evidence, the current motion is untimely . . .and procedurally barred.' ROA 441. This is error. As provided above, the lower

court erroneously applied an unreasonably narrow interpretation of Mr. Lambrix's allegations. Contrary to the lower court's narrow interpretation, this new evidence Rule 3.851 motion was not and is not intended to present evidence that Mr. Lambrix suffered a physical injury while serving in the U.S. Army in late 1978. That limited fact was arguably established through the testimony of the Lambrix family members at the penalty phase.

The lower court failed to recognize that the newly discovered evidence is that evidence which the jury did not hear – specifically the manner in which Mr. Lambrix's military injury and recognized subsequent permanent physical disability impacted his post service life, and especially the manner in which this injury and disability resulted in chronic and disabling pain. The impact on Mr. Lambrix's life was stark. He was unable to sustain employment. The injury and disability and pain resulted in self medication, an escalation in an already established substance abuse disorder, factors which directly contributed to the crimes for which Mr. Lambrix was convicted and sentenced to death.

A factual dispute regarding the materiality and weight of this evidence exists that can only be resolved by a full and fair evidentiary hearing. At that time Mr. Lambrix must be provided the opportunity to present all witnesses listed below that possess information and evidence relevant to the extent of Mr. Lambrix's physical disability and the manner and means in which the newly established physical

disability directly contributed to the alleged escalation of his prior substance abuse disorder and ultimately to the alleged crime. See ROA 5-7: 15-16.

The lower court's failure to provide the Appellant with a full and fair hearing as a means in which to produce and present evidence supporting the claims pled below deprived Mr. Lambrix of his protected constitutional rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, and comparable provisions of applicable Florida law.

d. The lower court failed to conduct the constitutionally mandated cumulative review of Mr. Lambrix's alleged newly discovered evidence and the evidence previously presented at his capital trial and prior post conviction proceedings in violation of applicable Florida and federal law.

Mr. Lambrix argued in his Rule 3.851 motion that upon presentation of newly discovered evidence, the court is constitutionally obligated to conduct a cumulative review of the alleged newly discovered evidence and the evidence presented at trial and in Mr. Lambrix's prior post conviction proceedings. ROA 22. See *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *McLin v. State*, 827 So. 2d 948, 959 (Fla. 2002); *Lightbourne v. State*, 742 So. 2d 238, 247-48 (Fla. 1999); *Swafford v. State*, 679 So. 2d 736, 739-40 (Fla. 1996); *Gunsby v. State*, 670 So. 2d 920, 924 (Fla. 1996).

In *Lightbourne* this Court stated:

> As we recently held in *Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1997) . . . the court is required to 'consider

> all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was 'introduced at trial' in determining whether the evidence would probably produce a different result on retrial. 'This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a *Brady* claim. See, *Kyles v. Whitley*, 514 U.S. 419, 436 (1996)("The fourth and final aspect of . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item"); See also, *State v. Parker*, 721 So. 2d 1147, 1151 (Fla. 1998)(conducting cumulative analysis).

Lightbourne at 247-48. Although arguably this cumulative analysis can only be conducted after the court first recognizes that the evidence presented in a successive Rule 3.851 is newly discovered, for the reasons provided herein, the evidence Mr. Lambrix has proffered into the record was newly discovered evidence, and therefore he was entitled to cumulative review. See *Riechmann v. State*, 966 So. 2d 298, 316 (Fla. 2007) quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) ("the trial court must 'consider all newly discovered evidence which would be admissible,' and 'evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial'"); and also quoting *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) ("The trial court should also determine whether this evidence is cumulative to the other evidence in the case").

At trial, Mr. Lambrix's sentencing jury heard very little about Mr. Lambrix's

unique individual character beyond the limited testimony from family members that had had little contact with him for years. Their testimony was that he was a good person who avoided violence and grew up serving as an altar boy at the Catholic Church, and who participated in the Boy Scouts, and often helped others. While in high school Mr. Lambrix joined the JROTC and met his high school sweetheart, Kathy Marie Martin. At 18, Mr. Lambrix and Kathy Marie (Martin) married and soon thereafter Mr. Lambrix voluntarily enlisted in the Army, following his two older brothers into the service.

Although the limited testimony provided at Mr. Lambrix's sentencing phase established that Mr. Lambrix had suffered some sort of physical injury during military basic training that resulted in a subsequent honorable discharge, Mr. Lambrix's family members were unable to testify about how the resulting disability impacted his post service life. The jury heard no testimony or evidence pertaining to Mr. Lambrix's employment difficulties, his escalating substance abuse related to self-medication, and how these factors contributed to the events that resulted in the death of the two victims in the instant case.

Under the required cumulative analysis review, this Court should now review the minimal mitigation presented at trial along with the evidence and issues Mr. Lambrix has raised in his long history of post conviction proceedings. Mr. Lambrix raised claims below that trial counsel rendered ineffective assistance of

counsel during the penalty phase due to their failure to adequately investigate, develop, and present the evidence necessary for a proper presentation to the jury and the judge including statutory and non-statutory mitigation.

This Court should recall that Mr. Lambrix's initial Rule 3.850 motion was filed when he was under active death warrant and scheduled for execution in October 1988. There was no review by the lower court until days before the scheduled execution, at which time the circuit court entered a two page order summarily denying the initial motion on the grounds that the interests of justice would not be served by further delay. Mr. Lambrix's original post conviction counsel appealed to this Court both the summary denial and a motion to amend that had been denied. This Court affirmed the summary denial in a four (4) to three (3) opinion, and sua sponte granted a 48 hour stay of execution to allow for time for Mr. Lambrix to seek federal review. *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988). See also, Affidavit of Billy H. Nolas, July 30, 1991, ROA 329-336.

After the expedited filing of a handwritten federal habeas petition, the District Court entered a stay of execution and then subsequently, in 1991, held an evidentiary hearing in federal court on the claims related to ineffective assistance of counsel. The district court denied these claims in May of 1992, and Mr. Lambrix entered an appeal to the Eleventh Circuit Court of Appeals.

Shortly after Mr. Lambrix's appeal was filed in the Eleventh Circuit, the

Espinosa v. Florida, 505 U.S.1079, 112 S.Ct. 2926 (1992) opinion was issued by the United States Supreme Court, and upon the state's motion, Mr. Lambrix's case was relinquished to this Court for the purpose of addressing his *Espinosa* claim. This Court denied relief, finding that his direct appeal counsel failed to raise the preserved issue on appeal. *Lambrix v. Singletary*, 641 So. 2d 847, 848 (Fla. 1994). Subsequently, the United States Supreme Court accepted certiorari review and by a 5 to 4 decision affirmed the denial of relief under *Espinosa*. *Lambrix. v. Singletary*, 518 U.S. 520 (1997).

Thereafter the Eleventh Circuit affirmed the lower district court's decision denying Mr. Lambrix's claim that trial counsel failed to provide effective assistance pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) when they failed to investigate, develop and present the available evidence in mitigation. *Lambrix v. Singletary*, 72 F.3d 1500, 1504 (11th Cir. 1996). The Eleventh Circuit presumed that if trial counsels' strategy was to focus on Mr. Lambrix's good character and to not present evidence of his traumatic history of child abuse and substance abuse, such a decision was reasonable. Mr. Lambrix's trial counsel never testified that such was their chosen strategy.

The Eleventh Circuit decision denying the penalty phase ineffectiveness claim preceded the United States Supreme Court's decision in *Williams v. Taylor*, 539 U.S. 362 (2000). That case stands in contrast to the finding of the Eleventh

Circuit that the unsupported presumption of a reasonable strategy by trial counsel to forgo the presentation of substantial statutory and non-statutory mitigation in order to focus only on Mr. Lambrix's good character met the *Strickland* tests.

The record in Mr. Lambrix's case is comparable to the circumstances in *Williams v. Taylor*, *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Porter v. McCollum*, 130 S.Ct. 447 (2009). In each case the lower state and federal courts narrowly construed *Strickland* to allow an assumption that trial counsel made a strategic decision not to develop and present substantial mitigation consisting of childhood abuse and trauma that evolved into a juvenile and adult history of chronic substance abuse. In each of these cases the United States Supreme Court ultimately rejected this unfounded presumption of trial counsel's strategy and clarified that trial counsel cannot make a reasonable strategic decision involving the presentation of mitigation that they did not investigate and were unaware of.

Trial counsel for Mr. Lambrix made no effort to investigate, develop and present any mitigation beyond the presentation of a few family members and asking them to say something good about Mr. Lambrix – and that was it. Mr. Lambrix's sentencing jury never heard any evidence about the horrific abuse Mr. Lambrix experienced at the hands of a violent, alcoholic father. They never heard about how he was pandered into sexual prostitution at a young age. They never heard about the connection between the childhood trauma and the subsequent

escalation into chronic substance abuse and organic brain disorder. And they never heard any details about the substantial injury that Mr. Lambrix incurred during his training in the U.S. Army and its consequences: a lifelong disability that has caused chronic and debilitating pain that resulted in self-medication for pain management and that also rendered him virtually unemployable. These factors all directly contributed to the circumstances that resulted in the tragic deaths of the two victims in the instant case.

A proper cumulative review of both the newly discovered evidence and the previously pled ineffective assistance of counsel penalty phase post conviction claims will establish that Mr. Lambrix's sentences of death are constitutionally unreliable and that the newly discovered evidence in conjunction with the evidence developed and presented in prior post conviction proceedings will result in a different outcome. See *Terrell Johnson v. Secretary, DOC* 643 F.3d 907 (11th Cir. 2011); *Richard Cooper v. Sec. DOC*, 646 F.3d 1328 (11th Cir. 2011) (vacating sentences of death upon finding that Florida courts' findings denying IAC/penalty phase claim was unreasonable and contrary to *Williams v. Taylor*, *Wiggins v. Smith* and *Porter v. McCollum*).

In conducting the cumulative review, this Court should look to two prior claims. First, the claim that Mr. Lambrix was prohibited from testifying at his own trial in his own defense. Second, that trial counsel rendered ineffective assistance

of counsel at the penalty phase when they failed to properly investigate, develop and present the wealth of substantial statutory and non-statutory mitigation that existed in Mr. Lambrix's case beyond the "good boy" testimony presented at trial.

i. Mr. Lambrix was unconstitutionally prohibited from testifying.

Mr. Lambrix had a fundamental constitutional right to testify in his own behalf at his capital trial, including at the penalty phase. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (recognizing fundamental right to testify); *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987); *Lott v. State*, 931 So. 2d 807, 817-20 (Fla. 2006); *Deaton v. State*, 635 So. 2d 4, 8 (Fla. 1993). In prior post conviction proceedings, Mr. Lambrix specifically raised the claim that he was unconstitutionally prohibited from testifying at trial when trial counsel requested that the trial court instruct Mr. Lambrix that if he insisted on taking the stand to testify in his own defense against the advice of trial counsel, the trial court would allow trial counsel to withdraw and Mr. Lambrix would not be appointed substitute counsel and would be required to represent himself.

Mr. Lambrix's initial Rule 3.850 motion including this claim was summarily denied in the circuit court and that denial was affirmed by this Court in *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988). Mr. Lambrix raised this claim in an original habeas petition in the federal courts. The Eleventh Circuit recognized the factual foundation of the claim, acknowledging that Mr. Lambrix did explicitly assert his

desire to testify at his first trial, only to have trial counsel compel the trial court to instruct Mr. Lambrix that if he insisted on testifying against trial counsel's advice, the trial court would allow trial counsel to withdraw, forcing Mr. Lambrix to represent himself. *Lambrix v. Singletary*, 72 F.3d 1500, 1508 (11th Cir. 1996).

These coercive and constitutionally intolerable circumstances forced Mr. Lambrix to be deprived of his fundamental right to testify at his second trial. Mr. Lambrix's first trial, where he was so instructed by the court, ended in a hung jury without a verdict at the guilt phase. The Eleventh Circuit denied Mr. Lambrix's claim of being denied the right to testify when it found that the record of Mr. Lambrix's second trial was silent as to this issue, apparently relying on *Parke v. Raley*, 506 U.S. 20, 29 (1992) to deny relief based on the assumption that Mr. Lambrix voluntarily relinquished his asserted right to testify at the second trial. (Federal habeas court can assume waiver of fundamental right in silent record). The Eleventh Circuit simply assumed that Mr. Lambrix changed his mind:

> **[15]** Lambrix argues that we should hold that he was also denied the right to testify at his second trial. He asserts that he was still feeling coerced not to testify because the second trial commenced only two months after a mistrial was declared in the first, and he was being represented by the same attorney. 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.
>
> **[16]** Lambrix also argues that his counsel did not inform him that he had the right to testify at his second trial, and did not make him aware that the ultimate decision on whether to exercise that right belonged to him. Under *United States v. Teague,* 953 F.2d 1525, 1534 (11th Cir.1992), a defense attorney renders ineffective assistance if he fails to adequately inform his client of the right to testify, and that failure prejudices the defense. Lambrix's claim that he was unaware of his right to testify is dubious considering the evidence he has adduced concerning his attempt to assert that right in his first trial. Moreover, after receiving an evidentiary hearing on this issue before the district court, Lambrix adduced no evidence supporting his allegation that counsel failed to adequately inform him of the right to testify. Therefore, Lambrix has simply failed to show that some action or inaction by counsel deprived him of "the ability to choose whether or not to testify in his own behalf." *Id.*

Lambrix v. Singletary at 1508. In *State v. Beach,* 592 So. 2d 237, 239 (Fla. 1992) and *State v. Kelly,* 999 So. 2d 1029, 1036-37 (Fla. 2008), this Court specifically rejected the application of the assumption of a waiver from a silent record under *Parke v. Raley,* and made it clear that under state court review, *Boykin v. Alabama,* 395 U.S. 248, 242 (1989) continues to apply, prohibiting the presumption of a waiver of a fundamental constitutional right from a silent record. This Court has made it very clear that in regards to the fundamental right to testify that:

> Since *Torres-Arboledo,* 'this court has repeatedly refused

> to require an on-the-record waiver' of the right to testify (citations omitted). At the same time, we have demanded that the record at least 'support a finding that such waiver was knowingly, voluntarily, and intelligently made." *State v. Lewis*, 838 So. 2d 1102, 1103 (Fla. 2002); quoting *Deaton v. State*, 635 So. 2d 4, 8 (Fla. 1993).

Lott v. State, 931 So. 2d 807, 818 (Fla. 2006). Although Mr. Lambrix was deprived of his fundamental right to testify under applicable state law when he was forced at his second trial to choose between his Sixth Amendment right to counsel and his right to testify, the issue before this Court under cumulative analysis is how this deprivation impacted Mr. Lambrix's penalty phase sentencing. Mr. Lambrix was himself aware of the extent of his military injury and resulting disability was certainly aware of how the chronic pain that he suffered resulted in an escalation of self medication and substance abuse that culminated in the events that resulted in the deaths of Clarence Moore and Aleisha Bryant. See ROA 108-116, Affidavit of Cary Michael Lambrix, November 25, 1998, Appendix G. (July 13, 2011 Rule 3.851 Motion) & ROA 51-86, Evidentiary Hearing Testimony of Cary Michael Lambrix April 5, 2004, Appendix D.

By depriving Mr. Lambrix of the ability to take the stand during the penalty phase, the jury heard virtually no testimony or evidence of the available mitigation in Mr. Lambrix's case. The previously unavailable affidavit of Kathy Marie Martin that was pled below as newly discovered evidence would have corroborated Mr. Lambrix's proffered testimony and affidavit. ROA 28-32. Had the testimony of

Ms. Martin and Mr. Lambrix been heard by the sentencing jury, there is a reasonable probability that the outcome of Mr. Lambrix's sentencing would have been different, thereby entitling Mr. Lambrix to relief.

ii. Mr. Lambrix was deprived of the Sixth Amendment right to effective representation at the penalty phase.

Because of trial counsel's failure to investigate and prepare. Mr. Lambrix's jury never heard the evidence that would have established powerful statutory and non-statutory mitigation relevant to the traumatic experiences Mr. Lambrix suffered while growing up, which lead Mr. Lambrix to leave home at the age of 15 in circumstances where living on the streets and working for a travelling carnival was better than living at home.

In addition to being afforded an opportunity to present evidence of Mr. Lambrix's military injury and resulting physical disability, Mr. Lambrix must be allowed to present the expert witness testimony that the jury should have heard, including the numerous experts who have evaluated Mr. Lambrix prior to Dr. Hyde's 2010 evaluation and who provided testimony at the evidentiary hearing in federal court relating to Mr. Lambrix's history of substance abuse.

As reflected in the witness list included in Mr. Lambrix's Rule 3.851 motion these would include the testimony of Dr. Hyde, Dr. Sharon Maxwell-Ferguson (ROA 258-284)(detailed written proffer of testimony concerning abuse during infancy, detailed life history, substance abuse beginning at age 14, alcohol

dependency), psychologist Dr. Brad Fisher, substance abuse specialist Peter M. Macaluso, M.D. who examined and interviewed Mr. Lambrix on November 18, 1988 (ROA 175-177), and Robert T.M. Phillips, M.D., as each of these expert witness's conclusions regarding Mr. Lambrix's substance abuse leading up to and during the time of the alleged crime are now significantly enhanced by the newly discovered evidence of how Mr. Lambrix's military injury and resulting disability caused a substantial escalation of Mr. Lambrix's substance abuse.[11]

In addition to the expert depositions, reports and testimony, part of the Court's cumulative review should include the lay testimony that should have been heard by the jury as reflected in the depositions and statements made by those potential witnesses, information that was never heard by the jury, even when some of the family members did testify at the penalty phase. The information that was included in Appendix E of the Rule 3.851 motion that should be considered in any cumulative review includes 1988 Affidavits from Mr. Lambrix's step-mother (ROA 178-180) confirming Mr. Lambrix's alcoholic blackouts; from his sister Elena (ROA 182-183) confirming alcohol problems and no contact with Cary's attorneys; from his brother Charles (ROA 184-185) who described Cary as a

[11] Mr. Lambrix's Rule 3.851 motion included numerous Appendices. The original Appendix E. was replaced under a Notice of Filing on July 25, 2011 with an expanded Appendix E that is found at ROA. 169-339. The replacement Appendix E. contains information supporting substantial statutory and non-statutory mitigation.

"cheap drunk" and confirmed that Cary's attorneys never asked about a drinking problem; and from his brother Jeff who also confirmed a drinking problem (ROA 186-188). There are later affidavits from 1990 that are included in Appendix E from Mr. Lambrix's birth mother (ROA 198-208) detailing the long history of paternal family violence, abuse, and neglect and confirming that Cary's attorneys never talked to her about the abuse; from his aunt Virginia Brown (ROA 209-211) confirming the family violence abuse and torture; from his aunt Ella Umland (ROA 212-215) confirming parental physical violence and abuse directed at Cary; and, from his sister Debra Lambrix (ROA 216-223) confirming family violence, alcohol abuse, Cary's substance abuse, and the failure of trial counsel to talk to her before trial.

There are additional affidavits from 1991 from another sister, Mary Lambrix (ROA 237-247) confirming serious family violence and abuse ("Growing up in our house was pure hell for me and most of my siblings') and Cary's serious drug problems; from another sister, Janet Wheeler (ROA 248-252) about abuse ("Cary got beaten much more often, really every day, and he got it much worse too. He always had black and blue marks on his legs and back.") and Cary's drug problems ("I've seen Cary often when he was so drunk he didn't know what he was doing, where he was, or even who he was"); from his brother Jeff who stated that no attorney talked to him or asked him in any great detail about the family (ROA 253-

257); from his niece, Ella Battensby (ROA 285-290) who confirmed a history of physical and sexual abuse at the hands of Mr. Lambrix's father and stepmother Consuela; from another niece, Angela Johnston (ROA 291-295) confirming Ella's accounts; from a friend of Cary's, Jeff Barger, (ROA 296-297), confirming physical abuse of Cary by his father; same by former neighbor Charlotte Blumenberg (ROA 298-299); and from a friend, James Coleman, (ROA 312-315), with an account of Cary being nearly beaten to death by his father at age 17 and confirming escalating Mr. Lambrix's substance abuse.

None of this evidence which graphically describes the extreme physical and mental abuse Mr. Lambrix suffered throughout his childhood and teenage years was heard by Mr. Lambrix's jury. The evidence noted *supra* of Mr. Lambrix's military service and resulting physical disability which led to substantial escalation of substance/alcohol abuse was also noted in the lay witness accounts. If presented along with the cumulative evidence of Mr. Lambrix's traumatic childhood that the jury never heard, it would have established overwhelming mitigating circumstances.

Trial counsel's performance was deficient pursuant to *Strickland* and the resulting prejudice was that the jury never heard the information noted herein. If they had, the results of the penalty phase would have been different.

e. Under *Sawyer v. Whitley*, Mr. Lambrix is actually innocent of death because the death sentence is constitutionally unreliable and cumulative consideration establishes that Mr. Lambrix is not eligible for death.

Cumulative error analysis by this Court also requires a review of the statutory aggravators that were applied in Mr. Lambrix's case. The procedural bars that have been previously attached to the challenges of the unconstitutionally vague and misleading heinous, atrocious and cruel aggravator and the CCP aggravator should now be set aside under the manifest injustice doctrine in light of the newly discovered evidence pled below along with cumulative review of the previously pled post conviction ineffective assistance of counsel at the penalty phase claims previously adjudicated as noted herein. See *State v. McBride*, 848 So. 2d 287, 291-92 (Fla. 2003) and *Baker v. State*, 878 So. 2d 1236 (Fla. 2004). Mr. Lambrix pled this issue below as follows:

> 33. Further under the cumulative analysis doctrine this Court must also now conduct a review of Mr. Lambrix's previously pled claims relevant to the application of the numerous aggravating circumstances applied to this case in support of the imposed sentences of death;
>
> 34. The sentencing judge found five statutory aggravating circumstances but on direct appeal the Florida Supreme Court found that Judge Stanley's reliance on pecuniary gain was unfounded, leaving only four aggravators: HAC, CCP, Prior Violent Felony, and under sentence of imprisonment *See Lambrix v. State*, 494 So. 2d 1163 (Fla. 1986); (Appendix H: Findings In Support of Sentence of Death);

35. Mr. Lambrix has previously pled that the statutory aggravating circumstances of HAC and CCP were based on unconstitutionally vague and misleading jury instructions. In *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994), the Florida Supreme Court found this claim procedurally barred due to appointed counsel's failure to preserve and raise it upon direct appeal. This finding was affirmed by the federal court in *Lambrix v. Singletary*, 72 F3d. 1500 (11th Cir. 1996) and review was granted specifically on this issue before the Supreme Court which by a marginal 5 to 4 vote upheld the lower court procedural bar. *Lambrix v. Singletary*, 518 U.S. 520 (1997)

36. In light of the newly discovered evidence presented herein, and consistent with the manifest injustice doctrine applicable to collateral review: *See Henry v. Santana*, 36 FLW S191 (FSC April 28, 2011)(emphasizing that writ of habeas corpus is guided by correcting manifest injustice as "it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice"); *Harvard v. Singletary*, 733 So. 2d 1020, 1025 (Fla. 1999)(recognizing that the court will remain vigilant to ensure that a manifest injustice does not occur); Mr. Lambrix is now entitled to have this previously attached procedural bar set aside, and both the HAC and CCP aggravators recognized as being unconstitutionally applied to this case;

37. Further, Mr. Lambrix is entitled to overcome previously attached procedural bars and present conclusive reliable scientific evidence that the evidence the State relied upon at trial to convince the jury that Mr. Lambrix acted with premeditated intent, and which the sentencing judge specifically relied upon to support the imposition of sentences of death was in fact false evidence presented in violation of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959) *See also Johnson v. State*, 44 So. 3d 51,

53-55 (Fla. 2010); *Guzman v. State*, 868 So. 2d 498, 507 (Fla. 2003)("The knowing use of [false evidence] involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process")

38. Specifically, to support a finding of HAC and CCP the court relied upon the State's evidence that Mr. Lambrix deliberately placed deceased Aleisha "face down in a pond" to ensure that she would die. Mr. Lambrix never had an opportunity at trial or the prior evidentiary hearings to conclusively prove that this highly prejudicial testimony and evidence was false – and that the State knew this was false. In post conviction proceedings Mr. Lambrix has been prohibited from presenting reliable scientific evidence to prove this testimony was false when Mr. Lambrix's original post conviction counsel failed to raise this *Giglio/Napue* claim in Mr. Lambrix's original post conviction appeal, resulting in application of procedural bar

39. Mr. Lambrix specifically pleads herein innocence of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992). *See also Dugger v. Adams*, 489 U.S. 401, 412, n. 6 (1984)(A fundamental injustice occurs when a defendant can demonstrate that he "probably is actually innocent of the [death] sentence"); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991)(If a defendant establishes that he is ineligible under law for the death penalty, he is entitled to relief")

40. In Florida, a defendant is ineligible for the death penalty unless at least one statutory aggravator applies. *Barclay v. Florida*, 463 U.S. 939, 954 (1983). However, even when only one aggravating factor is present and there is substantial mitigating evidence, the defendant is also ineligible for the death penalty in Florida. *See e.g. DeAngelo v. State*, 616 So. 2d 440, 443-44 (Fla. 1993); *Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989);

41. Our judicial system has consistently recognized

that the death penalty is reserved only for the worst of the worst. *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996)("the death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist."). The state's use of false evidence to establish and rely upon the statutory aggravators of HAC and CCP has resulted in a manifest injustice as absent these aggravating circumstances Mr. Lambrix would have been ineligible for the death penalty

42. Absent the reliance upon this false evidence, there would have been no credible evidence to support a finding of HAC and CCP aggravators. The State's key witness Frances Smith readily admits she did not actually see or hear anything that transpired that night leading up to and resulting in the deaths of Moore and Bryant, and that immediately before Mr. Lambrix went outside with Moore and Bryant they were "laughing, joking and playing around" without any animosity

43. In support of Mr. Lambrix's specifically pled claim of actual innocence of death, Mr. Lambrix must be afforded an opportunity to present the testimony of Susan-Johnson Deller (the actual owner of the property in question at the time of the alleged murders). As reflected in her attached affidavit, contrary to the trial testimony of Frances Smith, no pond existed on the property in the pasture area. (Appendix I: Affidavit of Susan Johnson Deller). Further, Mr. Lambrix is prepared to present reliable, scientific evidence to corroborate her affidavit. Mr. Lambrix is prepared to present testimony at an evidentiary hearing from Steve Wistar and Richard Thompson to show that prior to the early morning hours of February 6, 1983, no significant rainfall occurred in the vicinity of the crime scene that would have caused any significant amount of water to collect, and that given the geographical contours of the property if any significant amount of water had collected in the pasture area in question, the area where the two bodies were recovered would have flooded first as that was the lowest

part of the pasture. Had any significant amount of rainfall caused ponding in the pasture area prior to the deaths and burial of Moore and Bryant, then their bodies would not have been able to have been buried in that area of the pasture. (Appendix J: Report of Steve Wistar & Appendix K: Report of Richard Thompson);

44. Both because of the unconstitutionally vague and misleading jury instructions used to influence the jury's recommendation of death in both the HAC and CCP aggravators, and the knowing use of material false evidence to support application of the HAC and CCP aggravators, upon cumulative review the court must find and recognize that the HAC and CCP aggravating circumstances were improperly applied and relied upon;

45. Further, Mr. Lambrix is entitled to recognition that the statutory aggravator of "previously convicted of a violent felony" was improperly applied to this capital case. Although Mr. Lambrix concedes that the Florida Supreme Court has recognized the validity of this aggravating circumstance by application of contemporaneous convictions and Mr. Lambrix was contemporaneously convicted of two capital murders (Moore and Bryant) as the record plainly reflects, at Mr. Lambrix's sentencing phase the State itself specifically instructed the jury that this aggravator does not apply and that the jury should not consider it. The jury was not instructed on this statutory aggravator, and the Court clearly erred in subsequently *sua sponte* applying this aggravator after the State clearly waived it and the jury was not instructed upon it;

46. The only arguably valid statutory aggravator in this case was that Mr. Lambrix was under sentence of imprisonment at the time of the alleged offense. Mr. Lambrix concedes that at the time of the alleged crime he was serving the final few months of a two year state sentence for his only prior felony conviction – a "bounced" check written from his own bank account

while Mr. Lambrix was unemployed and otherwise unable to provide support and subsistence for his children;

47. In light of the newly discovered evidence of substantial mitigation not heard by the jury including Mr. Lambrix's military service and resulting physical disability, as well as how this service related disability substantially escalated Mr. Lambrix's substance abuse which contributed significantly to the events that transpired that night leading up to and resulting in the tragic deaths of Moore and Bryant, Mr. Lambrix is entitled to have the current sentences of death vacated under *Porter v. McCollum*;

48. As the Florida Supreme Court recognized in *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001), "newly discovered evidence" in the context of a sentencing phase of a capital trial is defined as "evidence establishing that the sentencing phase probably would have produced a different result," quoting *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). *See also Riechmann v. State*, 966 So. 2d 298, 316 (Fla. 2007)(newly discovered evidence in conjunction with the cumulative weight of evidence raised in the numerous post conviction proceedings established the nature of the evidence would probably yield a less severe sentence, entitles capital defendant to relief from the imposed sentence of death); *Henyard v. State*, 992 So. 2d 120 (Fla. 2008), relying on *Riechmann v. State*, 966 So. 2d at 316 (accord);

49. This court is obligated to conduct a cumulative review of this newly discovered evidence presented herein and the evidence presented at trial and in the prior post conviction proceedings. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *Gunsby v. State*, 670 So. 2d 920, 924 (Fla. 1996); *Swafford v. State*, 679 So. 2d 736, 739-40 (Fla. 1996); *Lightbourne v. State*, 742 So. 2d 238, 247-48 (Fla. 1999). *See also, McLin v. State*, 827 So. 2d 948, 959 (Fla. 2002), relying upon *Cherry v. State*, 659 So. 2d

1069, 1074 (Fla. 1995) and *Harvey v. State*, 656 So. 2d 1253, 1257 (Fla. 1995);

50. For this reason, this court must now consider the additional statutory and non-statutory mitigation previously argued that the trial and sentencing jury never heard or considered. *See* Appendix E Cumulatively, Mr. Lambrix's evidence shows that had the jury heard all the evidence there is a reasonable probability that the jury would have returned recommendations of life and not death. *See Porter v. McCollum*; *Williams v. Taylor*; *Wiggins v. Smith*. In light of the sum total of cumulative evidence any contrary conclusion would be unreasonable under *Sears v. Upton*, 130 S. Ct __ (2010) and *Jefferson v. Upton*, 130 S.Ct. __ (2010);

51. Under the *Sawyer v. Whitley*, 505 U.S. 333 (1995) innocence of the death penalty doctrine and the manifest injustice doctrine , Mr. Lambrix is now entitled to present and be heard upon the previously procedurally barred claims relevant to the improper imposition and application of numerous statutory aggravating circumstances as provided *supra*, including a full and fair opportunity to present reliable scientific evidence to establish that the State knowingly relied upon the use of false and misleading testimony to establish the application of the HAC and CCP statutory aggravators in this case, and that the trial court improperly and *sua sponte* applied the statutory aggravator of previously convicted of a violet felony after the State specifically waiver the use of this aggravator, and the jury was specifically instructed not to consider the use of this aggravator;

52. Upon cumulative review of the above, the facts and evidence will now establish that in light of the newly discovered evidence, Mr. Lambrix is entitled to recognition of significant statutory and non-statutory mitigation of such substantial weight that it renders him statutorily and constitutionally ineligible for the death

> penalty, especially in light of the improper and unconstitutional application of the above statutory aggravating circumstances. The only applicable aggravator, that Mr. Lambrix was under sentence of imprisonment for writing a bad check at the time of the instant offense, remains standing;
>
> 53. Under Florida law governing imposition of the death penalty, in light of the significant weight of mitigation and the absence of all but one valid statutory aggravating factor, Mr. Lambrix is legally innocent of the death penalty under *Sawyer v. Whitley*, and entitled to reduction of both death sentences to life sentences. Accordingly, Mr. Lambrix has presented a colorable claim of actual innocence of the death penalty under *Sawyer v. Whitley* and the manifest injustice doctrine , and he is entitled to full and fair consideration of these constitutional errors that contributed to and resulted in Mr. Lambrix being unconstitutionally sentenced to death, exempt from any otherwise applicable procedural bars.

ROA. 17-23. The death sentences imposed upon Mr. Lambrix are constitutionally unreliable and in violation on Mr. Lambrix's Fifth, Eighth, and Fourteenth Amendment rights. See *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Porter v. McCollum*, 130 S.Ct. 447 (2009).

CONCLUSION

Mr. Lambrix requests relief in the form of an evidentiary hearing before an unbiased judge. The circuit court erred in denying Mr. Lambrix an evidentiary hearing on his claims below, finding that the proffered new evidence was not newly discovered and that Mr. Lambrix had not exercised due diligence where the evidence, the files, and the records in the case do not conclusively show that Mr. Lambrix is entitled to no relief.

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CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Carol M. Dittmar, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, this 16th day of April, 2012.

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

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