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

REPLY BRIEF OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Lambrix respectfully reasserts his request for oral argument in this case. The oral argument previously provided by this Court in *Lambrix v. State*, SC10-0064, on November 4, 2009, did not address the specifically pled issues presented in the instant briefing. Most notably, in the instant appeal Mr. Lambrix challenges this Court's erroneous interpretation and application of the United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009).

REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

Mr. Lambrix will rely upon the statement of the case and facts provided by this Court in *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010), but objects to the State's distorted summary presented in the Answer Brief. The State's recitation of the facts provides an inadequate background to support an explanation of why constitutional violations of the Eighth amendment occurred. That history is fully detailed in the Petition for Writ of Habeas Corpus currently pending before this Court as *Lambrix v. Tucker*, Case No. SC11-1138. The State has continued to argue that all of Mr. Lambrix's claims of alleged ineffectiveness of trial counsel pursuant to *Strickland v. Washington*, 466 U.S. 688 (1984) are procedurally barred for failure to raise and exhaust in the state courts, with the sole exception of the issues considered in *Lambrix v. State*, 534 So. 2d at 1153, specifically trial counsel's ineffectiveness "(1) in failing to develop additional evidence that would

have entitled him to obtain an instruction on voluntary intoxication, and (2) in not introducing evidence of Lambrix's alcoholism during the penalty phase of the trial."[1] Mr. Lambrix requests that this Court consider the postconviction history of Mr. Lambrix's case in the context of the facts of his previously pled postconviction pleadings.

ISSUE I

Mr. Lambrix would respectfully rely upon the comprehensive argument provided in the Initial Brief now before this Court and will only briefly address points of fact and law that the State has stated in error.

A. Florida Rule of Judicial Administration 2.330(j)

The State argues that Mr. Lambrix's motion for reassignment of the judge pursuant to Florida Rule of Judicial Administration 2.330(j) was properly denied although the State fails to dispute Mr. Lambrix's assertion that the lower court did not serve the Order Denying Motion to Disqualify until well after the 30 days contemplated by the rule. The State's argument that Judge Greider timely rendered an Order denying Mr. Lambrix's Motion to Disqualify within 30 days is

[1] This continues to be true despite the subsequent holdings in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Porter v. McCollum*, *Sears v. Upton*, 130 S. Ct. 3259 (2010), *Johnson v. Sec'y Dep't of Corrs.*, 643 F. 3d 907 (11th Cir. 2011), *Cooper v. Sec'y Dep't of Corrs.*, 646 F. 3d 1328 (11th Cir. 2011), *Evans v. Sec'y Dep't of Corrs.*, 2012 WL 1860802 (11th Cir. May 23, 2012), and *Pope v. Sec'y Dep't of Corrs.*, 2012 WL 1672183 (11th Cir. May 15, 2012).

fundamentally flawed because merely signing an order is meaningless unless the court fulfills its ethical and statutory duty to ensure that the order was and is timely served upon all parties. As provided in the Initial Brief, the Order was not received by any party until August 31, 2011. Although the State implies that the copy allegedly mailed on July 21, 2011 was apparently lost in the mail, the fact that no party allegedly served received a copy supports the conclusion that this Order was not served upon any party until August 31, 2011.

The State asserts that Mr. Lambrix cannot provide any case law support for the proposition that failure to timely serve an order warrants the relief intended under Rule 2.330(j), yet the State has not provided any case law contrary to that position. For that reason, this Court must address this issue and provide guidance. As argued in the Initial Brief at pages 12-19, the lower court has consistently failed to timely serve orders upon Mr. Lambrix, resulting in substantial prejudice by depriving him of the recognized right to seek rehearing or other relief.

Rule 2.330(j) is very clear – when a lower court fails to issue an order on a motion to disqualify within 30 days of the motion, the party seeking disqualification is automatically entitled to a grant of disqualification and the case must be reassigned. This rule would be meaningless if only after a party actually invokes the rule, the Rule 2.330(j) motion is denied upon the claim that an order was merely signed – but not served upon any party until after the 30 day time

period has run. A signed order by the lower court is meaningless if it is not served shortly after it is rendered. The lower court and the clerk of court must ensure that orders are timely served on the parties. When counsel for Mr. Lambrix did not receive any order on the Motion to Disqualify and a search of the docket did not reveal that an order had been entered, Mr. Lambrix properly and in good faith invoked Rule 2.330(j) and was entitled to the relief noted therein: the disqualification of Judge Greider and the reassignment of the case to a judge outside the Twentieth Judicial Circuit.

B. Legal Sufficiency

The State's Answer argues that the lower court properly denied Mr. Lambrix's Motion to Disqualify Judge Greider and the Entire Twentieth Judicial Circuit as legally insufficient. The motion is of record and speaks for itself. (R. 143-52.) It establishes what is necessary, namely that Mr. Lambrix had a well-founded fear that he could not receive a fair and impartial hearing before Judge Greider or any other Judge in the Twentieth Judicial Circuit.

Mr. Lambrix's allegations outlining the basis and foundation of his fear must be accepted as true. *See Cave v. State*, 680 So. 2d 705, 708 (Fla. 1995) ("A motion to disqualify is legally sufficient if the facts alleged demonstrate that the moving party has a well grounded fear that he or she will not receive a fair trial at the hands of the judge"); *Jimenez v. State*, 997 So. 2d 1056, 1072-73 (Fla. 2008)

("motion to disqualify is legally sufficient if the facts alleged, which are assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair hearing before the judge"). This Court has held that standard applicable to capital postconviction proceedings. *Wickham v. State*, 998 So. 2d 593 (Fla. 2008); *Steinhorst v. State*, 636 So. 2d 498 (Fla. 1994).

The elements of Mr. Lambrix's "well founded fear" were specifically pled. (R. 144-45.) Contrary to the State's misplaced argument, Mr. Lambrix has not argued that Judge Greider should be disqualified simply because she was previously employed as an Assistant State Attorney in the Twentieth Judicial Circuit. Rather, the basis of his fear is the undisputed relationship that Judge Greider has with members of the State Attorney's office including Steve Russell and Randall McGruther who were directly involved in the prosecution of Mr. Lambrix and his subsequent postconviction processes. The State does not dispute that Mr. Lambrix's motions in circuit court included allegations that the 20th Circuit state attorney violated *Brady v. Maryland* by concealing FDLE files containing exculpatory evidence supporting Mr. Lambrix's claim of actual innocence. The previously unprovided laboratory files and notes included information that assistant state attorney McGruther had ordered that the FDLE end testing of certain forensic evidence.

Shortly after she was assigned to Mr. Lambrix's case by Chief Judge G.

Keith Cary, replacing Judge R. Thomas Corbin, for no discernable reason, Judge Greider entered an order summarily denying both the *Brady* claim and Mr. Lambrix's Pro Se Motion to Compel DNA Testing which was orally adopted by counsel. That case is on appeal as SC10-0064 before this Court.

Thus, along with the allegations concerning the judicial clerk that were noted in this Court's remand Order of January 2012, Mr. Lambrix's well founded fears also included several other aspects: (1) concern about the undisputed relationship of his new judge, Judge Greider, with the very members of the state attorneys office that were implicated in the misconduct plead with regard to the newly discovered FDLE records; (2) the curious circumstances that have never been explained as to how she came to replace the longtime judge on his case, Judge Corbin, and then shortly thereafter denied his both his *Brady* claim and DNA motion without any evidentiary development. The presumption of bias under all these circumstances mandated disqualification. *See Wickham*, 998 So. 2d 593; *Steinhorst*, 636 So. 2d 498.

C. Assistant State Attorney or Judicial Clerk

The State's Answer acknowledges that this Court's remand order in Case No. SC12-0064 included a statement expressing "serious concerns" about the allegations concerning circuit court judicial assistant Nichole Forrett and the alleged conflict that Mr. Lambrix has alleged should have resulted in the

disqualification of Judge Greider. In both the statement of the facts and the body of the Answer Brief the State acknowledges that Mr. Lambrix presented witnesses in support of his allegations at the January 30, 2012 evidentiary hearing.

The Answer argues that Mr. Lambrix "failed to specifically identify the nature or extent of his former legal relationship with circuit court judicial assistant Nicole Forrette, and that the hearing on remand in Case No. SC10-0064 "failed to show that staff attorney Nicole Forrette had any attorney/client relationship with Mr. Lambrix." This conclusory argument is based upon an unreasonable review of the record. At the evidentiary hearing the State's objected to a request for Ms. Forrette's email records from February 4, 2008 and that objection was sustained.

Two witnesses, Lynne Pavelchak and Michael Hickey, both with no reason to lie or to subject themselves to possible perjury charges, testified at the evidentiary hearing that they communicated by e-mail with a person who identified herself as Nicole Forrette and both identified copies of that e-mail communication in corroboration of their testimonies. Neither the lower court nor the State are accusing these witnesses of lying. Neither the lower court nor the State provide any explanation for why these two citizens would have faked copies of e-mails substantiating their communication with Forrett at her admitted e-mail address concerning her doing legal research for them.

The transcript of the January 2012 evidentiary hearing indicates that both

Hickey and Pavelchak testified that they responsed to an online ad on Craig's List placed by Nicole Forrette which was an offer to do legal services for a fee. (R. Vol. VII. 17-20; 66-67.) Forrette testified that she never placed an ad on Craig's List and never communicated with either Hickey or Pavelchak. (R. Vol. VII. 94-95.) Someone was not telling the truth. Ms. Forrette acknowledged that the email address on the copies of e-mail documents introduced through Hickey and identified by both Hickey and Pavelchak was hers. Forrette also testified that the mailing address provided to Pavelchak for sending a $20.00 payment for services rendered, which was included in one of the email responses allegedly from her, was her private address in February 2008. Ms. Forrette had no explanation for these self-evident identifiers.

Ms. Pavelchak testified that she told Ms. Forrett Mr. Lambrix's name in the context of negotiating a fee for doing legal work and she subsequently mailed a $20.00 money order to Ms. Forrett in return for her work on Mr. Lambrix's case. (R. Vol. VII. 44, 67.) The State's Answer implies that that because of the relatively insignificant amount of money, $20.00, that Pavelchak testified that she sent to Forrette in return for work in Mr. Lambrix's behalf, any alleged attorney/client relationship was not material. Whether an attorney is retained pro bono, for a one dollar fee or at a million dollar retainer is basically of no consequence in the instant circumstances.

Ms. Forrette must have realized that when she denied doing any legal work while working as the judicial clerk for the Twentieth Circuit . . . except for two non Florida civil cases she did some work on possibly using her New York bar license. The trial court sustained the State's objection to a question to Ms. Forrette about whether she had talked with her employers after being hired in August 2007 about the policy about doing outside legal work. She did testify that she had failed to inform her employers about the outside legal work she did do. (R. Vol. VII. 82, 88-89.) If Ms. Forrett solicited and received monetary payment for legal work for Ms. Pavelchak in Mr. Lambrix's behalf, ethically she entered into an attorney client relationship. It is very important to remember that even the appearance of bias should be enough to result in disqualification. When Mr. Lambrix filed his pro se motion to disqualify Judge Greider in 2010 the lower court knew how long Nicole Forrette had been assigned to his case even if Mr. Lambrix did not. He did not know until that day in court that Nicole Forrette was not an assistant state attorney but a judicial clerk working for his judge.

The State argues that Mr. Lambrix failed to produce any evidence that Ms. Forrette's self-serving denial of an attorney/client relationship was untrue. But the State does not and can not dispute that the lower court's actions on remand and before prohibited Mr. Lambrix from seeking or obtaining the discovery necessary to establish and further substantiate Mr. Lambrix's claims and to impeach the

Forrette testimony.

The evidence below establishes what Mr. Lambrix has alleged – that he cannot and will not receive a fair hearing before Judge Greider or any judge within the Twentieth Judicial Circuit because the staff attorney's relationship with all the judges involved in capital postconviction cases compels them to protect her, and consequently, as reflected by the facts and evidence in this case, to unreasonably deny Mr. Lambrix the ability to pursue discovery that would further substantiate the allegations of judical bias in support of disqualification.[2] During the evidentiary hearing the lower court continually prevented inquiries into the clerk's knowledge by sustaining objections to questions regarding the clerk's involvement in Mr. Lambrix's case and her communications concerning the allegations, relying on Florida Rule of Judicial Administration 2.420 as the basis for her rulings. Establishing the truth of the allegations would have been relatively simple had the lower court agreed to allow pre-hearing discovery or discovery subpoenas directed to obtain computer records from Craig's List, Google and the clerk's own email

[2] Ms. Forrette testified that she started working as a staff attorney for the judges in the Twentieth Circuit in August 2007 after having first worked for the Public Defender but not as an Assistant State Attorney. She testified she was working for the judges in February 2008, the time when the contacts testified to by Hickey and Pavelchak took place. She stated that she began training on capital postconviction cases in her staff attorney job in the summer of 2009, and apparently has since been assigned to all capital postconviction cases including Mr. Lambrix's case. She was on his case when she made an appearance in his case on May 27, 2010. (R. Vol. VII. 80-102.)

account. (R. 543-45.) In light of the importance of establishing the truth pursuant to this Court's remand order, it was unreasonable for Judge Greider to refuse to allow any pre-hearing or post-hearing discovery of any kind.

Mr. Lambrix does not need to conclusively prove that the judicial assistant engaged in unethical conduct, rather the issue before this Court is whether these circumstances establish a well grounded fear requiring disqualification. The undisputed facts are that Nicole Forrette was employed as a judicial clerk in the Twentieth Circuit since August 2007, and was subsequently trained to work on capital postconviction cases and was assigned to Mr. Lambrix's case between summer 2009 and May 2010. Two different independent witnesses testified that in February 2008, they independently had contact with Ms. Forrette about doing private legal work. Ms. Pavelchak testified that she told Ms. Forrett Mr. Lambrix's name and she mailed a $20.00 money order to Ms. Forrett in return for her work on Mr. Lambrix's case. (R. 44, 67.) Mr. Lambrix made specific allegations in his motion to disqualify that Ms. Forrette engaged in unethical conduct. These allegations resulted in this Court's remand.

Mr. Lambrix also testified at the evidentiary hearing. (R. Vol. VII. 70-78.) He testified that his cell was shaken down by officers at Union Correctional two weeks after he wrote to Ms. Forrette at her Lehigh Acres address and that the officers told him they were looking for correspondence with someone named

Forrette.

The record recited herein reflects that Judge Greider unreasonably prohibited Mr. Lambrix from deposing Nicole Forrette or pursuing any discovery which would have further substantiated Mr. Lambrix's pled claims. When Ms. Forrette did testify, denying any communication with either Hickey or Pavelchak, counsel's subsequent motion for rehearing and renewed motion for discovery were denied based on the lower court's finding that the relinquishment had ended although the time for rehearing had not run pursuant to Fla. R. Crim. P. 3.851(f)(7). At virtually every stage of the proceedings Judge Christine Greider unreasonably obstructed and deprived Mr. Lambrix of the ability to obtain, develop and present the evidence that would have substantiated his allegations below. The actions and conduct of Judge Greider and her staff attorney, Nicole Forrette, establish a substantial and well founded fear that Mr. Lambrix cannot and did not receive a fair and impartial hearing before Judge Greider. These facts, supported by the record, are more than legally sufficient to mandate disqualification. This Court must now grant relief by recognizing that Mr. Lambrix was entitled to have his motion for disqualification below granted. Judge Greider and the entire Twentieth Judicial Circuit should now be disqualified and all actions taken by Judge Greider since she replaced Judge Corbin should be vacated and the case remanded to another Circuit for further proceedings.

ISSUE II

The State's Answer is critical of Mr. Lambrix's litigation of the issues in his case, arguing that he is consuming a disproportionate share of this Court's time and the resources of the State of Florida due to what it describes a repetitive filings and litigation tactics, finally describing the instant appeal of the summary denial of his successive Rule 3.851 motion below predicated on newly discovered evidence as frivolous and abusive. (Answer at 21-22.) As Mr. Lambrix noted in the instant addendum to the Facts, Mr. Lambrix's case history is actually a story about how circumstances since his original conviction have conspired to obstruct his ability to ever file an original Rule 3.850/3.851 motion.

There is simply insufficient space to respond to these charges in a twenty-five page pleading, but counsel will be happy to do so in a supplemental brief or at oral argument. The following comments will have to suffice for the present.

A. Mitigation, Newly Discovered Evidence and *Porter*

The State's focus on the "Fifth postconviction motion" actually says more about State action than about the merits of Mr. Lambrix's claims. Specifically, Mr. Lambrix's first Rule 3.850 motion was a shell filed under warrant by counsel who had been on the case for only weeks; the second Rule 3.850 was filed by new counsel while back in state court to argue the applicability of *Espinosa* to this Court at the State's request; the third Rule 3.851 motion was filed by CCRC based

on *Brady* and newly discovered evidence including Deborah Hanzel's recantation and key witness Frances Smith's story that she had sex with the state attorney investigator during the pendency of the case investigation; the fourth Rule 3.851 motion was based on newly discovered FDLE lab records and reports that the State conceded on the record had not been supplied to trial counsel or postconviction counsel. This Court denied a motion to relinquish jurisdiction to allow all the *Brady*/new evidence claims contained in motions three and four to be considered together. Mr. Lambrix argued that they were material to his actual innocence claim, but he never got an evidentiary hearing. The appeal on the fourth motion is still pending with this Court as SC10-1845. It also includes a disqualification motion issue. Finally, this instant appeal concerns the "Fifth" postconviction motion that sounds in the wake of *Porter v. McCollum*, 130 S. Ct. 447 (2009), and includes what has been argued below as newly discovered evidence that could not have been previously pled. Mr. Lambrix's hands are clean despite the State's protestations.

The materiality of *Porter* to Mr. Lambrix's case is not predicated on the fact that both men are military veterans. Rather, as in *Porter*, Mr. Lambrix's sentencing jury heard almost nothing about his history of childhood abuse, family issues, substance abuse, or relevant aspects of military service and the aftermath. Mr. Porter's jury made a unanimous recommendation of death and the lower court, as

in Mr. Lambrix's case, found no mitigation. The 1996 Eleventh Circuit opinion in Mr. Lambrix's case that the State hangs its hat on, *Lambrix v. Singletary*, 72 F. 3d 1500 (11th Cir. 1996) was issued years before *Williams v. Taylor*, 529 US 362 (2000); *Wiggins v. Smith*, 539 US 524 (2003) and *Porter v. McCollum* established that if counsel fails to investigate available mitigation and in fact was unaware of its existence, then the failure to present that evidence in mitigation cannot be attributed to strategic decision making. Mr. Lambrix's original postconviction counsel failed to raise substantial mitigation including childhood abuse with the result that it was subsequently procedurally barred. *See Lambrix v. Singletary*, 72 F. 3d. 1500. This Court should consider the extraordinary circumstances related herein surrounding the original state postconviction proceedings in Mr. Lambrix's case and consider setting aside the previously attached procedural bars for the reasons argued in SC11-11385 based upon *Holland v. Florida* and under *Martinez v. Ryan.*

The manifest injustice doctrine mandates that this Court revisit the procedurally barred claims and not be bound by the law of the case doctrine:

> Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehleman v. State*, 3 So.3d 1149, 1165 (Fla. 2009) (alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous) (quoting *Parker v. State*, 873 So.2d 270, 278

> (Fla.2004)); *see State v. J.P.*, 907 So.2d 1101, 1121 (Fla.2004) (same); *Parker v. State*, 873 So.2d 270, 278 (Fla.2004) (same); *see also Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla.2001) ("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.' " (quoting *Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla.1965))).

See State v. Akins, 69 So. 3d 261, 268 (Fla. 2011).

The newly discovered evidence argued below and in the Initial Brief is not cumulative to the evidence that was presented at the extremely limited penalty phase at his original trial. Every family member who testified at that penalty phase was compelled by the State on cross-examination to concede that they did not know how Mr. Lambrix's military injury during basic training actually impacted on his post service life, including the escalation of substance abuse that eventually was detailed at the federal district court evidentiary hearing concerning the limited issues revolving around voluntary intoxication and the failure of trial counsel to present evidence of Mr. Lambrix's alcoholism at the penalty phase. All the family members who testified at trial admitted they had little contact with Mr. Lambrix from the time of his military discharge in 1978 to the time of the 1983 murders and subsequent trial that resulted in two death sentences.

That is precisely the reason why the information provided by Mr. Lambrix's former wife, Kathy Marie, is so critical. She was unavailable for years and the

testimony she could provide at an evidentiary hearing, based on her affidavit, is the testimony that none of Mr. Lambrix's other family members could possibly have provided. That is the information about how the military injury and the related escalation of self medication and substance abuse impacted Mr. Lambrix's life and marriage. Dr. Hyde's evaluation which relied on the ex-wife's information provided the VA with the additional information they needed to make the disability determination many years after the events. The lower court's final order denying the claim below is nothing more than a wholesale adoption of the State's response to the Rule 3.851 motion. (R. 344-67; 435-75.) The order completely ignores the specific facts argued in the 3.851 motion as to why the new evidence could not have been previously discovered. Mr. Lambrix's sentencing jury heard virtually nothing about how after Mr. Lambrix suffered an injury while serving in the military, resulting in a physical disability that resulted in self medication and a process where Mr. Lambrix's substance abuse substantially escalated. (R. 28-32, Affidavit of Kathy Marie Martin; R. 44-48, Dr. Hyde's report; R. 34-42, Department of Veterans Affairs Appeal.)

Mr. Lambrix's sentencing jury heard virtually none of the "particularized characteristics" of Mr. Lambrix's life history that collectively far exceed even that recognized in *Williams v. Taylor*, 529 US 362 (2000); *Wiggins v. Smith*, 539 US 524 (2003) and *Porter v. McCollum*, 130 S.Ct. 447 (2009). Mr. Lambrix's

allegations of due diligence below should have been accepted as true and an evidentiary hearing held where the ex-wife and neurologist Dr. Hyde would have testified. Information about Mr. Lambrix's new VA disability status could also have been presented. This Court needs to find that this evidence is, in fact, newly discovered evidence that is not cumulative to information presented at trial at the penalty phase. There must then be a cumulative review of the new evidence and all the other mitigation previously presented to determine whether all the evidence considered collectively undermining confidence in the outcome by establishing a reasonable probability that there would have been a life sentence. *Jones v. State*, 591 So. 2d 911 (Fla. 1991).

Mr. Lambrix's entire penalty phase consisted of nothing more than trial counsel calling upon several members of Mr. Lambrix's family and simply asking them if they had anything good to say about Mr. Lambrix – and that was it. Mr. Lambrix's trial counsel had virtually no prior experience representing a capital defendant, and made no effort to prepare for the penalty phase. As this Court recently stated in *Walker v. State*, 37 FLW S291, S293 (Fla. April 19, 2012):

> "In evaluating alleged deficiency during the penalty phase, this Court has recognized that 'an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence.' *State v. Reichmann*, 777 So.2d 342, 350 (Fla. 2000). In the pnalty phase of a trial, 'the major requirement…is that the sentence be individualized by focusing on the particularized characteristics of the individual.'" *Cooper v. Sec'y, Dept of Corrections*, 646 F.3d 132B, 1354 (11th Cir. 2011) (quoting,

> *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987). "Therefore, it is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood," *Id*. (quoting, *Porter*, 130 S.Ct. at 455). We have specified t hat "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence, and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Blackwood v. State*, 946 So.2d 960, 974 (Fla. 2006), (quoting *Wiggins v. Smith*, 539 US 524 (2003). (emphasis original)

Because of trial counsel's complete failure to investigate and prepare for the penalty phase, Mr. Lambrix's jury never heard the virtual wealth of evidence that if presented would have not only established powerful statutory and nonstatutory mitigation relevant to the traumatic experiences Mr. Lambrix suffered while growing up, as well as irrefutable evidence that would have prohibited the application of both the "cold, calculated, and premeditated" and the "heinous, atrocious, and cruel" (CCP/HAC) statutory aggravators.

Had Mr. Lambrix's trial counsel made even minimal effort to look into Mr. Lambrix's life history, evidence of the extreme physical and emotional abuse Mr. Lambrix suffered throughout his childhood and teenage years would have been heard by Mr. Lambrix's jury. The composite exhibit of affidavits from family members and friends graphically describing the horrific abuse Mr. Lambrix routinely suffered and the expert reports and testimony describing Mr. Lambrix's history of substance abuse leading up to, and contributing to the time of the alleged crime were all included as appendicies to the pending state habeas petition SC11-

1138.[3]

The Eleventh Circuit ruling in *Lambrix v. Singletary* that trial counsel adopted a reasonable strategy when they presented the limited testimony of a few family members to the effect that "Cary was a good boy" was erroneous and if left standing would result in a manifest injustice pursuant to *Williams, Wiggins, Sears v. Upton, Jefferson v. Upton*, as it reduces to irrelevancy the mitigation that was never heard by the jury and ignores the fact that trial counsel made no investigations prior to the penalty phase and thus could not have made a reasonable strategic decision not to present the mitigation evidence now put forward as newly discovered because trial counsel did not know it existed.

Trial counsel did present very minimal mitigation evidence through family members, but in sentencing Mr. Lambrix to death the trial court completely ignored this evidence. (Appendix 1, Order Supporting Sentence of Death.) *See Hurst v. State*, 819 So.2d 689, 697 (Fla. 2002) (citing *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990) ("A trial court's written order must carefully evaluate each mitigating circumstance offered by the defendant, decide if it has been established, and assign it a proper weight.")). The evidence presented did establish numerous statutory mitigators of (1) insignificant criminal history (Mr. Lambrix's only prior

[3] Counsel filed a pending motion to consolidate that petition and the instant appeal on April 2, 2012. Counsel requests that the Court take judicial notice of the materials related to mitigation in the appendicies of the habeas petition.

conviction was for a "bad check"); (2) Mr. Lambrix's age (22 years old); (3) Mr. Lambrix was acting under extreme emotional or psychological duress), as well as numerous non-statutory aggravators – (1) Mr. Lambrix was honorably discharged from the military following a duty-related accident that left him physically disabled; (2) Mr. Lambrix was a loving and responsible husband and father who often helped others; (3) Mr. Lambrix was an Alter Boy at his Catholic Church, and participated in both the Boy Scouts and the JROTC program.

The trial court's order completely disregarded all of Mr. Lambrix's mitigation, finding "no mitigation" without any explanation whatsoever. But Mr. Lambrix's trial counsel made no attempt to object to the trial court's unreasonable disregard of this established mitigation. By trial counsel's failure to preserve this issue, Mr. Lambrix's direct appeal counsel was prohibited from presenting relevant sentencing phase claims upon direct appeal, and; in fact, virtually no issues relevant to Mr. Lambrix's penalty phase were raised on direct appeal. *Lambrix v. State*, 494 So.2d 1151 (Fla. 1986).

The Answer Brief contends that the substance of the Kathy Marie affidavit was known to Mr. Lambrix and that information was largely presented to the jury at trial. (Answer at 28.) Contrary to the State's misrepresentation, the substance of the affidavit was never presented at the penalty phase. If this information had been available during the prior postconviction proceedings when substance abuse

mitigation was being argued, Mr. Lambrix would have been entitled to relief. Mr. Lambrix could not have testified to this information at his trial. He was prohibited from presenting this evidence through his own testimony by being deprived of the fundamental right to personally testify. Even the State recognizes that the depth and breadth of the procedural bars applied in Mr. Lambrix's case resulted in virtually all mitigation never being heard by the sentencing jury or addressed by any state or federal court other than the limited areas concerning intoxication considered by the federal courts. (Answer Brief at 42.) The State's Answer wants to have it both ways. One the one hand, the State argues that the new evidence was previously presented and on the other, they acknowledge that the jury at trial never heard a word of it, but since Mr. Lambrix did not testify at the penalty phase and prior postconviction counsel dropped the ball it is all procedurally barred in conformity with *Lambrix v. Singletary*. The Answer ridicules the notion that Mr. Lambrix was prevented from testifying. (Answer at 39.)

Actually the state courts have never addressed the claim concerning Mr. Lambrix being prevented from testifying by the actions of trial counsel and the trial court., and the Eleventh Circuit only addressed the claim in the context of the guilt phase. Even if there was a waiver of Mr. Lambrix's right to testify, as the Eleventh Circuit found, there is nothing of record to indicate that there was any testimonial waiver concerning the penalty phase. This issue was subsequently raised in Mr.

Lambrix's Federal habeas, but Mr. Lambrix was denied relief when the Eleventh Circuit assumed that Mr. Lambrix had "apparently acquiesced" to not testifying, although this assumption of a waiver is not supported by the record. *See Parke v. Raley*, 506 U.S. 20, 29 (1992). Yet this Court explicitly articulated in *State v. Kelly*, 999 So. 2d. 1029, 1036-37 (Fla. 2008), relying upon *State v. Beach*, 592 So. 2d 237, 239 (Fla. 1992), that the Florida Courts prohibit application of *Parke v. Raley*, and cannot assume a waiver of a fundamental constitutional right from a silent record as the Eleventh Circuit did in *Lambrix v. Singletary*, 72 F.3d at 1508.

This Court must consider the extraordinary circumstances surrounding the original postconviction proceedings in this case and set aside the procedural bar pursuant to *Martinez v. Ryan* ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective") and *Holland v. Florida* (as argued in the pending state habeas SC11-1138) so that all the mitigation can be considered in a cumulative analysis.

B. Weighty Aggravators?

In the weighing process, the trial jury also had to considering the aggravating factors, which the Answer describes in stark terms. The Answer mocks

Mr. Lambrix's honorable attempt at military service as compared to the Korean war combat service outlined in *Porter v. McCollum*. There has never been a claim that Mr. Lambrix was a war hero or anything other than an average soldier who got hurt while on duty in the peacetime Army. But what is revealing is what the Answer does not say regarding the comparison of the two cases. Both involved double homicides. In both cases the trial judge found no mitigation and the same five aggravating factors. And unlike the divided jury recommendation in Mr. Lambrix's case, the jury recommendation in Mr. Porter's case was 12-0 for death.

This Court has repeatedly emphasized that "the evidence must show that the victim was conscious and aware of impending death" before HAC can apply. *Hernandez v. State*, 4 So. 3d 642, 669 (Fla. 2009) (citing *Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004)). Mr. Lambrix's trial counsel knew that there was virtually no evidence as to the specific circumstances under which Clarence Moore and Aleisha Bryant died. Nothing suggested the level of "heightened premeditation", or that "the killing was the product of cool and calm reflection, and not the act prompted by emotional frenzy, panic, or a fit of rage," *Franklin v. State*, 965 So.2d. 79, 98 (Fla. 2007) (citing *Jackson v. State*, 648 So.2d. 85, 89 (Fla. 1994)), and so the CCP aggravator should not have been permitted. Further, there was virtually no evidence that either Moore or Bryant "unnecessarily suffered" or were even aware of pending death, so the HAC aggravator should not have been

permitted. But Mr. Lambrix's trial counsel made no attempt to challenge these clearly improper statutory aggravators, or to present readily available evidence that would have established that the CCP and HAC aggravators are not applicable. The issue is not whether there was sufficient aggravation to support a sentence of death. Rather, the question is whether, in light of the substantial mitigation that Mr. Lambrix's jury never heard, there is a reasonable probability that the jury may have returned a life recommendation where their original votes for death were 10 to 2 and 8 to 4. The State's reliance on the finding of the CCP (cold, calculated and premeditated) and HAC (heinous, atrocious and cruel) aggravators is misplaced, as neither is supported by the evidence. This Court need only review the sentencing order and Findings In Support of Sentence of Death (Appendix 1) to see that there is no evidentiary support for the application of these two factors. Neither was proven beyond a reasonable doubt. The trial court's application of CCP and HAC was based upon speculation and theory, not fact.

CONCLUSION

Mr. Lambrix requests 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, files and records in the case do not conclusively show that Mr. Lambrix is entitled to no relief.

Respectfully presented,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, this 4th day of June, 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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