IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16 - _____

CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE JONES, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The present habeas corpus petition is being filed under death warrant by Mr. Lambrix in this case. The petition preserves claims arising under decisions of the United States Supreme Court and puts forth substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Mr. Lambrix was deprived of appropriate review where this Court misconstrued and misinterpreted the record resulting in his convictions and death sentences being obtained and affirmed on appeal in violation of fundamental constitutional guarantees.

Citations to the Record shall be:

(R.) -- Record on Direct appeal;

(PCR.) -- Record of Post-Conviction Appeal (where necessary)

(Supp-PCR.) -- Supplemental Record of Post-Conviction Appeal (where necessary)

All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright,* 474 So. 2d 1162, 1163 (Fla.

1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." FLA. CONST. Art. I, § 13.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied the direct appeal. *See*, *e.g.*, *Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Lambrix requests oral argument on the claims asserted in the present petition.

ARGUMENT I

MR. LAMBRIX WAS DENIED HIS RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE JURY VERDICT AT THE SENTENCING PHASE OF HIS TRIAL WAS NOT UNANIMOUS AND THE JURY'S SENSE OF RESPONSIBILITY WAS DILUTED BECAUSE OF INADEQUATE JURY INSTRUCTIONS. HIS EXECUTION SHOULD BE STAYED PENDING THE DECISION IN *HURST V. FLORIDA*. TO THE EXTENT THAT DIRECT APPEAL COUNSEL FAILED TO RAISE THESE ISSUES, MR. LAMBRIX WAS ALSO DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Introduction

Habeas consideration is proper in circumstances where fundamental misconstruction of the record has occurred. See *Parker v. Dugger*, 498 U.S. 308, 321 (Fla. 1991) ("The Florida Supreme Court did not conduct an independent review here, in fact, there is a sense in which the court did not review Parker's sentence at all.") ("The Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in the case nor in reliance on the trial judge's findings based on that record, but in reliance on some other nonexistent findings"). Here, this Court misconstrued and misinterpreted the record of Mr. Lambrix's case. For that reason, habeas consideration is proper for two different reasons: (i) this Court misconstrued the fact that the prior conviction aggravating factor was withdrawn by the State and was never presented to the jury, and, (ii) this Court

erroneously believed that *Caldwell* error was not raised on initial postconviction review under warrant, where, in fact, it was raised as best as could be under the exigent circumstances of the 1988 litigation under warrant.

This Court holds a constricted view of the United States Supreme Court's Sixth and Eighth Amendment precedents regarding the role of juries in capital sentencing. The United States Supreme Court's pending decision in *Hurst v. Florida*, No 14-7505, which was argued October 13, 2015, may impact this Court's conception of the constitutionality of Florida's death penalty scheme. If the United States Supreme Court determines that the role of the jury in Florida's capital sentencing procedure is inconsistent with the Sixth and/or Eighth Amendments, this Court is likely to revisit Mr. Lambrix's case. Mr. Lambrix therefore seeks a stay of execution pending the United States Supreme Court's guidance in *Hurst*.

The *Caldwell* issue

The *Hurst* case invokes both the Sixth and Eighth Amendments. This Court has long held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) is not applicable to the Florida death penalty scheme. *See Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In *Darden* the Court held that under Florida's sentencing scheme the jury was not responsible for the sentence and that *Caldwell* was inapplicable in Florida. *See also Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986); *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987). However, during oral argument in *Hurst*, Justice Ginsburg

directly raised concerns about whether Florida's capital sentencing scheme comports with the Eighth Amendment principles set forth in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *See* Appendix 1. Justice Scalia also expressed concern about Florida's compliance with *Caldwell*.

The history of Mr. Lambrix's case shows that the Eighth Amendment concerns surrounding the pending *Hurst* decision apply equally to Mr. Lambrix. Mr. Lambrix's conviction and sentence became final with this Court's affirmance of his convictions and sentences on September 25, 1986, **after** *Caldwell* had become controlling Eighth Amendment precedent. *Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986). (No petition for certiorari was filed with the United States Supreme Court). Mr. Lambrix's first opportunity to raise the *Caldwell* claim was during the postconviction proceedings. In a November 21, 1988 Supplement in Support of Motion to Vacate Judgment and Sentence, Mr. Lambrix raised a fully pled *Caldwell* claim. The claim stated *inter alia* that the jury "was substantially misled and misinformed, by the trial prosecutor's comments and arguments, and the court's comments at trial and sentencing as to its proper role at trial and sentencing." *See* Appendix 2 at 3-10.

> 9. Mr. Lambrix's sentencing jury, however, was erroneously led to believe that their role was of little significance. Prior to and at the commencement of the sentencing phase of Mr. Lambrix's trial, the judge effectively informed the jury that the decision they were to make would be essentially meaningless, as the <u>final</u>

> decision as to what punishment shall be imposed rested with the judge. The jury was told that it was the judge, not they, who had the "responsibility" for the "final decision" with regard to punishment.
>
> 10. This theme had been established early on in the proceedings: during voir dire, trial, and then at sentencing, by the prosecutor and the court. The jury's view as merely "advisory", merely a "recommendation": this is what the jury heard – their role was far, far less significant (under this view) than what the law required.
>
> 11. The prosecutor and the judge at Mr. Lambrix's trial thus led the jury into believing that the judge was the sole sentencer, and that he was free to impose whatever sentence he wished. As in Caldwell, the responsibility-diminishing remarks in Mr. Lambrix's case "were quite focused, unambiguous, and strong." 105 S. Ct. at 2645. But the comments here when a step further – they were much more systematic than those in Caldwell, and they were made by both the prosecutor and the judge.
>
> 12. Caldwell teaches that, given comments such as those provided by the judge, prosecutor, and even defense counsel to Mr. Lambrix's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden here. A stay of execution and Rule 3.850 relief are appropriate.

As the 1988 Supplement claimed, the trial record reflects multiple *Caldwel*l problems. During *voir dire* the Assistant State Attorneys made the following comments during their inquiries of the juror pool:

> MR. MCGRUTHER: If the jury should return a verdict of guilty in the first degree, on either count, then it's at that point that the jury would begin retiring after hearing the possible additional evidence, and additional

> instructions by the Court. Then at that point, the way the Judge's instructions – again, and make a recommendation to the Court as to whether or not to impose a death sentence or mandatory life imprisonment, which are both permissible convictions of a murder in the first degree.

R. 1492-93. Defense counsel also expressed his concern about the direction of the State's comments in remarks to the jury pool during voir dire:

> MR. JACOBS: Do you all understand that it may never get to that? Whether or not you have to make a recommendation to the Judge as to the death sentence or life imprisonment? . . . We're not negotiating the fact that your recommendation, if you are called to make one, would have great weight with His Honor, Judge Stanley. Do you understand that? It's very, very important. It's not saying that there is something to take – to be taken lightly.

R. 1530. During a bench conference presiding trial Judge Stanley weighed in on his view during discussion of a cause challenge to Juror Proctor:

> THE COURT: He indicated he could not find the defendant guilty if there was a possibility of the death penalty; and one thing that you neglected to mention when you were talking to him, which I could have gotten to it if it hadn't gotten to where it did – regardless of what the jury does, the final decision, if he is found guilty of first degree murder – the jury making a recommendation, and that is the Court makes the final decision on a sentence.

R. 1578. The systematic comments by the prosecution continued throughout the *voir dire* process:

> MR. GREENE: …then we go to phase two; and then it is your job then to make a recommendation to the Judge for either life imprisonment or the death penalty. Do you have any questions along that line?

R. 1585.

> MR. MCGRUTHER: …[I]f in fact the verdict is guilty as charged of the first degree murder of two counts or one count of them, then you will go back and possibly hear additional evidence and arguments and additional instructions from the Court, and then you will make a recommendation to the Judge regarding whether you as a juror would recommend either the sentence of the death penalty or the sentence of life imprisonment without possibility of parole for 25 years. That's a recommendation, and it does carry great weight with the Court; however, the sentencing function is always that of the Judge. The Judge will decide what the actual sentence will be. Everybody understand that?

R. 1633-34.

> MR. GREENE: Judge Stanley - - as he gives the instructions before the deliberation that the possible sentencing in this case is such and such . . . will also tell you right afterwards … that is the Court's decision and exclusive province to impose any possible sentence in a case – it's not the jury's job to impose a sentence. You give a possible recommendation in a case like this, but it's all this is. It's a recommendation. Do you understand?

R. 1672.

> MR. GREENE: If you did in fact come back with a guilty of one or both counts of first degree murder, then we go to the penalty phase. At that point, the jury makes a recommendation to the Judge Stanley as to life imprisonment or death penalty. Could you vote for the death penalty if you were convinced by the evidence and the instructions as the Judge gave you?

R. 1730.

> MR. GREENE: It's important that you realize it is not your job to impose a sentence. You make recommendations, and perhaps later on the Honorable Judge Stanley will impose the actual sentence.

R. 1753. At the onset of the guilt phase Judge Stanley directly instructed the newly seated jury that "It is the Judge's job to determine what a proper sentence would be if the Defendant is guilty." R. 1820. Judge Stanley again addressed the jury at the beginning of the penalty phase hearing on February 29, 1984 with the following comments on his sentencing responsibility:

> THE COURT: Final decision as to what punishment shall be imposed rests solely with me, the judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed on the Defendant.

R. 2569. The State also commented to the jury during the penalty phase argument. Argument by the State included the following:

> MR. MCGRUTHER: The laws of Florida require that you now consider whether or not to recommend he be imprisoned for life imprisonment term, 25 years mandatory on each count – the Judge may run that, the Judge of course being the sentencing arm of the Court, he may run those concurrently, may be run at the same time, or he may run those consecutively, meaning one at the expiration of the first. The other recommendation you can make would be that [C]ary Michael: Lambrix be that he forfeit his life for his crimes. Ladies and Gentlemen, we are here today because you follows the law as was set out by this Court in the guilty phase, which ended on Monday.

R. 2638. The defense also was guilty of the same kind of argument:

MR. JACOBS: The prosecutor has told you what he wants. He wants Cary dead. That is what he said. But he can't do it alone. There has to be a recommendation from you recommending the death penalty for the judge to consider.

MR. MCGRUTHER: Objection, Your Honor. The Court does the actual sentencing.

THE COURT: The Court does the actual sentencing. The jury does not.

MR. JACOBS: Your Honor, we indicated that the recommendation would be for you to consider.

THE COURT: For me to consider, yes.

MR. JACOBS: That is what we said, Judge. You are deciding whether or not to recommend life or death at this time. And regardless of what Mr. McGruther said – and he is persuasive – regardless of that, yours is not merely just any old advisory opinion. Judge Stanley is looking to you twelve for guidance. He's told you and he will tell you again that your recommendation will carry great weight as to what his sentence will be. And it will figure substantially into his consideration as to what the final outcome and the sentence in this case will be. If you err in that recommendation, you make a mistake, there is no authority on Earth that can bring you back an hour, a day, a week, a month, a year from now. No authority on Earth that can bring you back together again if you err. You must be sure before you sign that advisory opinion today.

R. 2654-56. Thereafter the Court gave the jury these instructions:

THE COURT: As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating

> circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

R. 2662. The Court further instructed:

> THE COURT: In these proceedings it is not necessary that the advisory sentence of the jury be unanimous… Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

R. 2665. The Court also instructed:

> THE COURT: With regard to the effect of your recommendation of life or death, the Court hereby instructs you that although your recommendation is considered to be advisory, your recommendation of death upon conviction of first degree murder is entitled to a great weight. On the other hand, in order for the Court to impose a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ.

R. 2670-71. Judge Stanley again addressed the jury after jury foreman, Mr. Bailey, Juror #3, read the "advisory sentences" of a 10-2 recommendation for death regarding Count One, the murder of Aleisha Dawn Bryant and an 8-4 recommendation for death regarding Count Two, the murder of Clarence Edward Moore, Jr. R. 2680:

> THE COURT: Ladies and Gentlemen of the jury, I am going to ask each of you individually concerning the advisory sentence. It is not necessary that you state how you personally voted or how any other person voted but only if the advisory sentence as read was correctly stated.

R. 2680. Then the Court asked each of the twelve jurors, "[D]o you agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the foreman of the jury," as to each of the two counts. Thus the jurors, for the twenty-fourth time, heard the term "advisory sentence" during their final acts as members of the jury. R. 2681-86. Thus the record is replete with evidence of systemic error.

Following the summary denial of Mr. Lambrix's initial Rule 3.850 motion under death warrant, Mr. Lambrix appealed the denial to this Court. The execution date had been set for November 30, 1988. On November 28, 1988, counsel for Mr. Lambrix filed with this Court "Appellant's Emergency Motion for Stay of Execution on Appeal of the Denial of his Motion for Fla. R. Crim. P. relief" *See* Appendix 3. The Emergency Motion also stated, "In light of the substance and complexity of the claims involved, the stakes at issue and the untenable circumstances under which Mr. Lambrix's counsel has been forced to litigate this action, Mr. Lambrix also respectfully requests that the Court allow a proper, orderly and reasonable schedule for the filing of briefs." Appendix 3 at 1. The motion also notes that "[t]ime constraints have made it impossible for undersigned counsel to properly brief Mr.

Lambrix's claims." Appendix 3 at 25. The time constraints noted therein were caused not only by the impending scheduled execution date of November 30, 1988, but also by the fact that postconviction counsel was simultaneously representing another client, Amos King, with the same scheduled execution date, as well as other CCR clients.[1] *See* Appendix 3 at 25. The Emergency Motion appended Mr. Lambrix's original Rule 3.850 motion as well as the Supplement in which the *Caldwell* claim was pled.

In the "Emergency Motion," only two claims were briefed. This Court addressed only the issues which had been briefed and failed to rule on the *Caldwell* claim. This Court did not request any additional briefing, This Court specifically found that "Lambrix's motion asserted a number of claims. However his appeal only addresses two both of which are related to his consumption of alcohol." *See Lambrix v. State*, 534 So. 2d 1151, 1152 (Fla. 1988). This Court granted a stay of execution until December 2, 1988, and denied the two claims that had been briefed. Rule 9.140 of the then applicable Florida Rules of Appellate Procedure provided:

> RULE 9.140 APPEAL PROCEEDINGS IN CRIMINAL CASES
>
> (g) Appeals from Summary Denial of Motion for Post Conviction Relief Under Fla. R. Crim. P. 3.850:

[1] Amos King was eventually executed by the State of Florida on February 26, 2003.

> An appeal from an order denying relief under Fla. R. Crim. P. 3.850 without a hearing should be considered as prescribed by Rule 9.110. The clerk of the lower tribunal shall forthwith transmit to the court as the record conformed copies of the motion, order, motion for rehearing, and order thereon, with a certified copy of the notice. **No briefs or oral argument shall be required**…. The court may request a response from the State before ruling. (emphasis added).

Thus the drafters of this rule appear to have contemplated that the Court reviewing a summary denial of a Rule 3.850 motion will do a complete review without the benefit of briefs. Neither the Circuit Court nor this Court found any procedural bar on the claims that were not briefed. This Court did not deem the claims within the appendices to the Emergency Motion to be waived.

This Court's holding in *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990), does not cut against Mr. Lambrix's argument herein. In *Duest* this Court found that:

> Duest also seeks to raise eleven claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present argument in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to have been waived.

Duest, 555 So. 2d at 852. *Duest* differs in several respects from the instant cause. Unlike in *Duest*, in *Lambrix* this Court did not make any specific findings of a waiver. Furthermore, *Duest* was briefed following an evidentiary hearing, not after a summary denial, so Fla. R. App. P. 9.140 was inapplicable in *Duest*. Thus, the

Caldwell issue was properly before this Court, but this Court did not rule on the merits or find that there had been a waiver or a procedural bar.

Subsequent to this Court's affirmance of the summary denial under warrant, Mr. Lambrix lodged a petition for writ of habeas corpus on November 30, 1988 and on December 1, 1988, filed a handwritten "Statement Regarding Exhaustion and Renewed Application for Stay of Execution" in the Federal District Court for the Southern District of Florida. Appendix 4.[2] The District Court granted a stay.

The petition included the *Caldwell* claim. The State alleged that the *Caldwell* claim was procedurally defaulted because it had not been briefed on the merits in the Florida Supreme Court. However, the District Court declined to find it procedurally defaulted because of Rule 9.140, and reached the merits of the *Caldwell* claim in the 1992 final order denying the habeas corpus petition. Appendix 5 at 58-64. Thereafter the *Caldwell* claim was appealed to the Eleventh Circuit and denied as meritless. The Eleventh Circuit failed to specifically address the *Caldwell* claim, but disposed

[2] "The state high court majority erroneously stated in its opinion that only two of Mr. Lambrix's Rule 3.850 claims were presented on his appeal to that court. This was plain error. Given the time constraint, Mr. Lambrix had no opportunity to brief the claims for relief presented in the Rule 3.850 motion. He did however present an application for a stay of execution pending appeal (attached hereto) which explained that all of the issues presented in the Rule 3.850 motion and its supplement were being taken up on appeal before the state high court. *Id.* at pp. 25-26. The motion to vacate and supplement were in fact appended to the stay application. All the issues were presented to the Florida Supreme Court, and that Court erred in failing to consider them and grant relief. The claims are all exhausted, and are all now properly before this Court." Appendix 5 at 6-8.

of it along with a number of other claims which it termed "the sentencing court made miscellaneous erroneous rulings and instructions which deprived Lambrix of a fair and reliable sentencing proceeding." *See Lambrix v. Singletary*, 72 F.3d 1500, 1503 (1996) fn3.

Hurst will inform the Florida courts whether Florida's capital sentencing scheme is in compliance with *Caldwell*. If *Hurst* holds that *Caldwell* applies to Florida, this Court will likely revisit its holdings noted above. *Witt v. State,* 387 So. 2d 922, 931 (Fla. 1980) sets forth the test for whether a case can be applied retroactively under Florida law. Under *Witt,* in determining whether a change in the law should apply retroactively, Florida courts must balance the competing needs for decisional finality with the concern for fairness and uniformity. Pursuant to *Witt*, a change will apply retroactively if it (a) emanates from either the United States Supreme Court or the Florida Supreme Court; (b) is constitutional in nature; and (c) constitutes a development of fundamental significance.

Should the United States Supreme Court rule that *Hurst* is applicable in Florida, as to jury unanimity, the advisory recommendations of Florida juries at the penalty phase or the applicability of *Ring v. Arizona* to Florida, then surely this Court's decision in *Witt* would require merits review based on the errors noted herein.

An analogous situation arose when this Court was limited in its construction of *Lockett v. Ohio*, 438 U.S. 536 (1978). This Court originally held that *Lockett* did not apply to Florida. However, after the United States Supreme Court decided *Hitchcock v. Dugger*, 481 U.S. 393 (1987), this Court revisited its *Lockett* decisions, having realized that it was wrong all along in its Eighth Amendment jurisprudence in this context. The same situation could well happen in the context of *Hurst* and *Caldwell*.

Additionally, this Court should be informed by its prior opinion in *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). In that case Jackson challenged the cold, calculated, and premeditated (CCP) jury instruction as unconstitutionally vague. This Court found that because the claim was preserved for review, it could reach the merits of the claim. *Jackson*, 648 So. 2d at 87.

In *Jackson*, the trial court had denied a request for an expanded jury instruction on CCP. Instead, the trial court gave the then standard instruction which mirrored the language of Fla. Stat. § 921.141(5)(i) and which had been upheld by this Court in *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990). However, this Court was required to revisit the issue in light of the United Supreme Court's holding in *Espinosa v. Florida*, 505 U.S. 1079 (1992). This Court held in *Jackson*:

> Because the challenge to the CCP instruction has been properly preserved in this case and because *Brown* and its progeny can no longer serve as authority for summarily

> denying this claim we must reconsider the constitutionality of the standard CCP instruction.

Jackson, 648 So. 2d at 88. As explained *supra*, just as in *Jackson*, Mr. Lambrix has preserved his claim. And just as in *Jackson*, the claim relates to inadequate jury instructions. If *Hurst* holds that *Caldwell* does in fact apply to Florida, Mr. Lambrix will be entitled to relief. The Eighth Amendment guarantees that persons facing the "most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida* 134 S. Ct 1986 at 2001. Mr. Lambrix must be allowed the fair opportunity to show that *Caldwell* error prohibits his execution. A stay of execution and relief are warranted.

The *Ring* issue

This Court has consistently held that *Ring v. Arizona*, 536 U.S. 564 (2002), does not apply in Florida, and is therefore not retroactive. In *Johnson v. State*, 904 So. 2d 400 (2005) the Court outlined its earlier decisions that *Ring* did not apply to Florida.[3] The Court cited to two earlier opinions in which the United States Supreme Court has repeatedly upheld Florida's capital sentencing scheme. *See Johnson*, 904 So. 2d at 406. Thus, this Court believes that because, prior to *Ring*, the United States

[3] *See Bottoson v. Moore*, 833 So. 3d 693 (Fla. 2002); *Amos King v. Moore*, 831 So. 2d 143 (Fla. 2002). Following this Court's opinion in *Johnson* concerning the non-retroactivity of *Ring*, counsel for Mr. Lambrix did not raise the issue in this Court after Judge Corbin denied the free standing *Ring* Rule 3.851 amendment filed in state circuit court by Dan Hallenberg of CCRC South in 2003.

Supreme Court has upheld Florida's original approach to capital sentencing, decisions such as *Ring* and others describing the significance of the jury's role in sentencing in death penalty cases are irrelevant to Florida's scheme. *See e.g. Hurst v. State*, 177 So. 3d 435, 446 (Fla. 2014).

Hurst may alter this Court's view of the Sixth Amendment. Until *Hurst* resolves the question of whether *Ring* is applicable in Florida, the validity of this Court's view is in doubt. Significantly at oral argument in *Hurst*, the State's advocate conceded that *Ring* does indeed apply in Florida. Appendix 1 at 38, 42. During oral argument, Justice Sotomayor asked whether a unanimous jury verdict is required under the Eighth Amendment. *See* Appendix 1 at 10-11, 25-26, 43-45. Justice Scalia and Justice Ginsburg also had questions about the need for a unanimous jury verdict. *See* Appendix 1 at 12, 45. Justice Kagan asked whether the jury's findings underlying a death recommendation are part of the record and available for review by the appellate courts. *See* Appendix 1 at 49-50. Meaningful appellate review is an aspect of Eighth Amendment jurisprudence. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991).

The penalty phase jury in Mr. Lambrix's case was instructed that its verdict was merely advisory and need not be unanimous. R. 2665. In fact the verdicts in favor of death were not unanimous. They were respectively eight to four (8-4) and

ten to two (10-2). If this Court revisits its holdings that *Ring* does not apply in Florida, Mr. Lambrix may be entitled to relief pursuant to *Hurst.*

The contemporaneous felony aggravator

Even if, *arguendo*, prior violent felonies or contemporaneous felonies are found to deny defendants the benefit of *Ring/Hurst*, Mr. Lambrix would still be entitled to relief. This is because the jury in Mr. Lambrix's case was never instructed on the prior violent felony aggravator or the contemporaneous felony aggravator as they relate to the respective contemporaneous homicides that Mr. Lambrix was convicted of. In fact the State waived that aggravator before the jury:

> And the Defendant was previously convicted of another capital offense for the felony involving violence to some other person. We are not claiming that. You are not to consider that.

See R. 2645. The jury was instructed on the "commission during a robbery" aggravator and also on the pecuniary gain aggravator. *See* R. 2663.[4] The jury was

[4] "One, that the crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment. Next, that the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of a robbery. Next, the crime for which the Defendant is to be sentenced was committed for financial gain. Next, that the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. Next, that the crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. If you find that the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years on each count."

also specifically instructed on the need to avoid improper doubling of these aggravators. *See* R. 2668. Mr. Lambrix was serving out a sentence for writing bad checks when he walked away from his work release prison unit. The jury was specifically told that "The conviction of worthless checks is not an aggravating circumstance to be considered in determining the penalty to be imposed on the Defendant but a conviction of that crime may be considered in determining whether the Defendant has a significant history or prior criminal activity. The jury may determine that the Defendant has no significant history of prior criminal activity." R. 2664.

So, although the jury was instructed implicitly on a nonviolent criminal activity, the prison sentence for writing bad checks, they were not instructed on the prior violent felony/contemporaneous felony, which the jury therefore could not have considered. In fact, Judge Stanley advised the jury that the only aggravating circumstances that the law allowed the jury to consider were those he had instructed them on. R. 2673. ("These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case").

However, Judge Stanley expressly found the aggravator of a contemporaneous felony even though the jury was never given the instruction. R.

2701-03.[5] In his Order the trial court relied on *Amos King v. State*, 390 So. 2d 315 (Fla. 1980) in making this finding. However, in *King* the jury **was** instructed on the contemporaneous felony. *See King*, 390 So. 2d at 320.

Throughout the litigation of this case, this Court has assumed that the jury was instructed on and considered the contemporaneous felony aggravator, when in fact it was not. Relief is warranted.

ARGUMENT II

MR. LAMBRIX'S POSTCONVICTION JUDGE WAS BIASED IN VIOLATION OF THE FOURTEENTH AMENDMENT GUARANTEE TO AN IMPARTIAL TRIBUNAL. THIS COURT FAILED TO CORRECT THAT VIOLATION BECAUSE IT APPLIED THE FLORIDA RULES OF JUDICIAL ADMINISTRATION INSTEAD OF THE CONSTITUTIONAL STANDARD AND MISCONSTRUED THE FACTS CONCERNING THE JUDICIAL REASSIGNMENTS IN THIS CASE.

In 2009, Petitioner filed a petition for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, alleging *inter alia* that the prosecution had violated *Brady* and *Giglio* by failing to disclose that hairs were found on the murder weapon which may match Frances Smith, the State's key witness. The matter was assigned to Twentieth Judicial Circuit Judge Corbin.

[5] Trial counsel did twice object to Judge Stanley's finding on the record during the Judge sentencing hearing. R. 2701; 2703. Appellate counsel failed to raise the issue on direct appeal.

Mr. Lambrix moved to disqualify Judge Corbin on grounds that are not relevant here. On September 10, 2009, Judge Corbin denied the disqualification motion. Thereafter, on October 7, 2009, an Order of Reassignment was entered by G. Keith Cary, Chief Judge, Twentieth Circuit, on his own motion, removing Judge Corbin and reassigning Judge Christine Greider to the case. PCR. 674.

After Judge Greider was assigned to the case, Mr. Lambrix sought her disqualification, both *pro se* and through counsel. Judge Greider denied his requests and summarily denied the Rule 3.851 petition.

On appeal, this Court remanded the matter for a hearing, noting that the "allegations in the [disqualification] motion, if true, raise significant concerns." *Lambrix v. State*, No. SC10-1845, Order at 1 (Fla. Jan. 4, 2012). This Court also ruled that for purposes of Florida Rule of Judicial Administration 2.330(g), Judge Greider was a "successor judge" to Judge Corbin, *id.*, and therefore that she could conduct the hearing and determine whether "she is in fact not fair or impartial in the case." Rule 2.330(g). Following a contested hearing necessitating a determination of the credibility of the witnesses before her, Judge Greider accepted the testimony presented by the State and found that she was not personally biased against Petitioner.

Mr. Lambrix challenged Judge Greider's denial of disqualification both by a petition for writ of prohibition and on appeal of her rulings. In the petition for writ

of prohibition, he pointed out that she had worked as an assistant state attorney, and argued that she should be disqualified under the due process framework set forth in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 668 (2009). *See* Petition for a Writ of Prohibition at 3, *Lambrix v. State*, No. SC11-1845 (Fla. Sept. 23, 2011) (quoting *Caperton* for the proposition that "'[a] fair trial in a fair tribunal is a basic requirement of due process.'"); *see also* Brief of Appellant at 24, *Lambrix v. State*, No. SC12-6 (Fla. April 16, 2012). Mr. Lambrix argued, *inter alia*, that

> 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.

Brief of Appellant at 8-9, *Lambrix v. State*, No. SC12-6 (Fla. April 16, 2012).

In his appeal, Mr. Lambrix pointed out this Court's factual error in its prior ruling that Judge Greider was a successor judge for purposes of Rule 2.330(g), and argued that Judge Greider's refusal to disqualify herself violated both Florida law and his rights under the Eighth and Fourteenth Amendments to the United States Constitution. *See Lambrix v. State*, SC10-1845, Supplemental Initial Brief of Appellant, (Fla. Nov. 15, 2012). In particular, he argued that this Court should apply the due process standards articulated in *Caperton*, and that under those standards the denial of disqualification violated due process. *Id*. at 19-22.

This Court refused to acknowledge its factual error in treating Judge Greider as a successor judge, simply asserting it had "already determined that the trial judge in this case was a successor judge." *Lambrix v. State*, 124 So. 3d at 897. Applying its own law for reviewing a successor judge's decision to deny a disqualification motion, this Court ruled that the record did not "clearly refute[]" Judge Greider's decision. *Id*. at 897-98. Applying its own law set forth in *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000), this Court also ruled that Judge Greider's former employment as a prosecutor was not a ground for disqualification. *Lambrix*, 124 So. 3d at 903-04.

This Court's prior review of Mr. Lambrix's petition—including the issue regarding disqualification of Judge Greider—was fundamentally flawed for two reasons. First, as noted above, this Court treated Judge Greider as a "successor judge" who, under Rule 2.330(g), was tasked only with determining whether she was actually biased. Second, this Court—like Judge Greider—considered only the issue of actual bias without ever addressing the guarantee of an impartial tribunal inherent in the Due Process Clause of the Fourteenth Amendment.

This Court's use of a standard that requires bias *in fact* was contrary to the *Caperton* standard, under which a mere *potential* for bias can be constitutionally intolerable. *Caperton*, 556 U.S. at 879 (constitutionality of judicial bias does not depend on "whether in fact [a judge] was influenced." *Id*. (quotations omitted)).

Thus, failing to apply the constitutional test and misconstruing the reassignment, this Court assessed Mr. Lambrix's judicial bias claim on both the wrong law and the wrong facts. The standard applied was not just inconsistent but entirely contrary to the constitutional standard that should have been applied.

Further, this Court resolved the claim without the benefit of the United States Supreme Court's imminent resolution of *Terrance Williams v. Pennsylvania* (No. 15-5040). *Williams* promises to better describe the constitutional implications of a judge presiding over a case previously prosecuted by an office that employed the judge. Particularly, *Williams* promises to define the Eighth Amendment contours of this issue, in the capital context, where constitutional protections are heightened beyond what would have been called for in *Caperton*. *Certiorari* was granted in *Williams* on October 1, 2015, and oral argument is scheduled for February 29, 2016. In light of these errors and developments in the law, Petitioner requests that this Court grant relief from the rulings of the disqualified judge that presided over his case or grant a stay of execution, pursuant to the accompanying Motion to Stay Execution, pending the resolution of *Williams* by the United States Supreme Court.

This Court Erred in Treating Judge Greider as a "Successor Judge"

Rule 2.330 makes a critical distinction between "initial motions" to disqualify judges and "successive motions" to disqualify so-called successor judges, who are assigned following the disqualification by motion of an initial judge. Rule 2.330(f)

dictates that, when reviewing initial motions, judges "shall not pass on the truth of the facts alleged," but merely review for legal sufficiency: "[i]f the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." However, any subsequent motion for disqualification filed by a defendant faces a more difficult standard:

> If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion.

Fla. R. Jud. Admin. 2.330(g).

This Court stated that Judge Greider was a successor judge, and therefore that the more demanding Rule 2.330(g) standard applied. *Lambrix v. State*, No. SC10-1845, Order at 1 (Fla. Jan. 4, 2012) (quoted in *Lambrix*, 124 So. 3d at 897 n.3); *see also Lambrix*, 124 So. 3d at 897 ("we already determined that the trial judge in this case was a successor judge"). That ruling was clearly erroneous.

While this case was reassigned prior to Mr. Lambrix's motion to disqualify Judge Greider, that assignment was administrative in nature, not a disqualification by motion. The order of reassignment was signed by Chief Judge Cary on October 7, 2009, and states as follows:

> THIS CAUSE comes before the Court ***on its own motion***. The above-captioned case is hereby reassigned to the

> Honorable Christine Greider, who is duly qualified to preside over capital cases pursuant to Fla. R. Jud. Admin. 2.215(b)(10). Judge Greider will review the matter and advise counsel as to how this case might best progress in accordance with the applicable rules of judicial administration and criminal procedure.

(R. Vol. IV p. 674 (emphasis added).) Thus, Judge Greider should not have been treated as a successor judge.

Requiring Mr. Lambrix to meet the actual, "in fact" bias standard of Rule 2.330(g) violated Florida law. Mr. Lambrix was entitled to have his claim considered under the "legally sufficient" standard of Rule 2.330(f), which this Court acknowledged he had met. (Order of Jan. 4, 2012, at 1 (finding that the allegations of the motion "raise significant concerns")). But even if it was consistent with Florida law to apply Rule 2.330(g), that did not answer the separate question whether Judge Greider's disqualification was required by the Fourteenth Amendment.

The right to an impartial tribunal inherent in the Fourteenth Amendment's guarantee of due process requires that a court ask "not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881 (2009) (internal quotations omitted). This Court's application of a subjective, actual bias test rather than the governing objective, potential bias test was inconsistent with *Caperton*.

This Court Erred in Failing to Analyze Whether Judge Greider's Disqualification Was Required by Due Process

The claims of judicial bias Mr. Lambrix previously presented to this Court were constitutional in nature and demanded an analysis pursuant to *Caperton*. Mr. Lambrix's claims of judicial bias relating to Judge Greider appeared in both his appeal from the denial of his Rule 3.851 motion and a separate petition for a writ of prohibition. Petition for a Writ of Prohibition at 3-4, *Lambrix v. State*, No. SC11-1845 (Fla. Sept. 23, 2011); Brief of Appellant at 6-7, *Lambrix v. State*, No. SC12-6 (Fla. April 16, 2012).

Yet, despite Mr. Lambrix's clear invocation of constitutional protections, this Court disposed of Mr. Lambrix's disqualification issue under Rule 2.330 and *Arbelaez*. *Lambrix*, 124 So. 3d at 897-98 (applying Rule 2.330(g)); *id*. at 903-04 (applying *Arbelaez*). *Caperton's* constitutional test was nowhere to be found in this Court's assessment of the claim.

This Court's review under Rule 2.330 and *Arbelaez* was no substitute for due process analysis under *Caperton*. Rule 2.330(g) focuses solely on proof of actual bias, while *Arbelaez* holds that former employment as an assistant state attorney does not even qualify as a legally sufficient basis for a challenge under Rule 2.330(f). In *Arbelaez*, this Court ruled that "[n]either her 'tough-on-crime' stance nor her former employment as a prosecutor was legally sufficient for disqualification." *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000). This Court indicated that a legally sufficient

motion for disqualification must show "a personal bias or prejudice against [the defendant]" with "specific facts other than his subjective fear . . . ." *Id*.

State rules requiring judicial recusal and the constitutional right to an impartial tribunal defined in *Caperton* are distinct protections with distinct standards. *Caperton* concerns itself with any "interests that tempt adjudicators to disregard neutrality," those which simply "might lead [a judge] not to hold the balance nice, clear and true between the State and the accused." *Id*. It demands "a realistic appraisal of psychological tendencies and human weakness." *Id*. at 883-84 (quotations omitted). The constitutionality of judicial bias does not depend on "whether in fact [a judge] was influenced." *Id*. at 879 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). Because "what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision," *id*. (quotations omitted), the constitutional inquiry is an objective one:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Id. at 883.

To make *Caperton's* objective inquiry, courts ask "not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id*. at 881 (quotations omitted). It is potentiality, not actuality that describes the scope of the constitutional protection.

This test must be applied with an eye on its underlying principle that a fair tribunal is essential to due process. *See In re Murchison*, 349 U.S. 133, 136 (1955). This principle "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law," and "preserves both the appearance and reality of fairness." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation and quotations omitted). This guiding principle ensures that the right to an impartial tribunal is "jealously guarded." *Id*. at 242.

The constitutional standard, its focus on the potential for bias, its underlying principles, and its historical development towards more inclusive protections departs greatly from Rule 2.330.

The *Arbelaez* rule against judicial bias claims based on prior employment arose from this line of Florida cases, not the constitutional analysis. As to the judge at issue in *Arbelaez*, this Court ruled that "[n]either her 'tough-on-crime' stance nor her former employment as a prosecutor was legally sufficient for disqualification."

Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000). This Court indicated that a legally sufficient motion for disqualification must show "a personal bias or prejudice against [the defendant]" with "specific facts other than his subjective fear . . . ." *Id.*

Petitioner had a well-grounded claim for disqualification under *Caperton*. As reflected in the Twentieth Judicial Circuit's online biography for Judge Greider, she became a member of the bar in 1986, the year of Mr. Lambrix's direct appeal opinion, and practiced as an assistant state attorney for the nine years preceding her 2006 judicial appointment. *See* Judge Greider's Biography, 20th Judicial Circuit, Circuit Judges, http://www.ca.cjis20.org/home/collier/colljudge.asp?Judge=greider&PgType=2&Display= (last visited January 7, 2016). Thus, Judge Greider was a state attorney during the time of Mr. Lambrix's postconviction proceedings, while her office faced allegations of misconduct from Mr. Lambrix and would have been discussing internally the manner in which to attempt to defeat those allegations.

Judge Greider's online biography also notes that she "served as an Assistant State Attorney for State Attorney[] . . . Steven B. Russell." *Id.*

Trial prosecutor Randall McGruther was at the Office of the State Attorney throughout Judge Greider's tenure, and to this day. Judge Greider denied without a hearing Petitioner's *Brady* claim, which concerned the contents of previously undisclosed FDLE lab records. In the FDLE lab notes it was recorded that in 1982

Assistant State Attorney McGruther had requested that FDLE suspend forensic and other lab testing after learning that FDLE tests of the alleged tire iron murder weapon had found human hairs that failed to match either Lambrix or the two victims. This information was never provided to trial counsel or postconviction counsel by the Office of the State Attorney. Pursuant to *Caperton*, the potential for Judge Greider to not hold the balance perfectly nice and true is undeniable.

Petitioner meets the probability of bias standard under *Caperton*. Under the constitutional standard, the mere probability of bias requires recusal where a judge had a relationship to the prosecutorial office or prosecutorial function in the case. For instance, in *Murchison*, the Supreme Court held that the same judge may not serve as both a "one-man grand jury" and as the trier of contempt charges that he initiated. 349 U.S. at 134 (internal quotations omitted); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (describing *Murchison* as holding that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted"). Such a single-judge grand jury amounts to participation in the "accusatory process," and "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then to try the very persons accused as a result of his investigations." *Murchison*, 349 U.S. at 137; *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (holding that a defendant in criminal contempt proceedings should be tried by "a judge other than the one reviled by the contemnor").

A defining feature of our adversarial system of justice is "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments . . . adduced by the parties." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006). In short, no man should be "a judge in his own case." *Murchison*, 349 U.S. at 136. Here, Judge Greider was asked to assess the conduct of her former colleagues, including matters that may have been discussed internally while she was a prosecutor. Under *Caperton*, she should have been disqualified.

This Court, however, never addressed whether Judge Greider should have been disqualified under *Caperton*. Instead, it considered only whether Petitioner had shown actual bias under Rule 2.330 and *Arbelaez*. Because Petitioner's motion for disqualification was never addressed according to the applicable due process standard, this Court should grant habeas relief. It should also grant a stay to permit it to consider the issue on the merits without the time pressure of an impending execution.

This Court Should Grant a Stay Pending the United States Supreme Court's Decision in *Williams v. Pennsylvania*

Like this case, *Williams v. Pennsylvania* arose in the context of review of *Brady* claims presented in a successive state postconviction petition. In *Williams*, the United States Supreme Court granted certiorari to consider issues very similar to those presented here. In particular, *Williams* presents the question of whether the

Eighth and Fourteenth Amendments are violated where a state court justice sits on a case despite, *inter alia*, his "prior capacity as elected District Attorney [who] continued to head the District Attorney's Office that defended the death verdict on appeal." Petition For Writ of Certiorari at i, *Terrance Williams v. Pennsylvania*, No. 15-5040 (U.S. June 12, 2015). Moreover, in *Williams*, as here, the subject jurist reviewed "a ruling by the state postconviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought death against Petitioner." *Id*. Finally, here, as in *Williams*, these issues arise in a capital case, where the Eighth Amendment affords "heightened" due process protections to ensure the reliability of capital convictions and sentences. *See Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Given that the issues presented and shortly to be decided in *Williams* are so similar to those presented in this proceeding, this Court at a minimum should stay these proceedings so that it has the benefit of the decision in *Williams* before ruling. Declining to issue a stay would be an irreversible mistake if that case creates law which this Court would have found applicable to Mr. Lambrix under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and which would require a finding of unconstitutional judicial bias in this case.

ARGUMENT III

APPOINTMENT OF CLEMENCY COUNSEL AND THE EXECUTIVE CONSIDERATION OF CLEMENCY IN MR. LAMBRIX'S CASE WAS STRUCTURALLY FLAWED, FAILED TO TAKE INTO ACCOUNT ALL THE EVIDENCE OF ERROR IN HIS CASE; AND VIOLATED CONSTITUTIONAL STANDARDS FOR A CAPITAL SENTENCING SYSTEM

The instant state habeas petition is required after the November 30, 2015 warrant for the execution of Cary Michael Lambrix was signed by the Governor of Florida. The warrant explicitly stated that "executive clemency for MICHAEL RAY LAMBRIX, as authorized by Article IV, Section 8(a), of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency is not appropriate".

Thus Cary Michael Lambrix's third experience with the State of Florida's clemency process for death row inmates ended with the signing of the warrant.[6] Mr. Lambrix has had three bites of the clemency apple since he was convicted of two counts of first degree murder and sentenced to death on March 22, 1984. The first was in 1987, when his direct appeal attorney Barbara LeGrande, was appointed as his clemency counsel. In 1987 it was the policy and practice to conduct clemency proceedings upon a death sentenced inmate's conviction and sentence becoming

[6] Letter to Clemency Board from 2015 Clemency lawyer Adam Tebrugge. Appendix 6.

final on direct appeal and denial of certiorari in the United States Supreme Court. Appointing direct appeal counsel as clemency counsel was common practice. If the Governor then determined that clemency was not appropriate, he would sign a death warrant, prompting the inmate to file a motion for postconviction relief and request that the execution be stayed. That is what happened in Mr. Lambrix's case in 1988.

Clemency counsel LeGrande only spoke with Mr. Lambrix briefly before he was interviewed at Florida State Prison on August 28, 1987 by Carolyn Tibbetts, an employee of the Florida Probation and Parole Commission. *See* Appendix 7. (transcript of interview). Mr. Lambrix was asked no questions by Ms. Tibbetts. The "interview" was essentially a monologue directed by attorney LeGrande wherein Mr. Lambrix discussed his life, military service, and Christian beliefs. On December 3, 1987, Ms. LaGrande personally appeared, along with a number of other lawyers engaging in the same process on behalf of other death row inmates, before former Governor Bob Martinez, seeking mercy for Mr. Lambrix. Her statement relied primarily on the inconsistencies of key witness Frances Smith's statements that the jury never heard. She also provided a 22 page "Statement of Facts" with Supporting Facts that was prepared by Mr. Lambrix. The "Statement of Facts" included a detailed history of his case and a specific description of the events of the crime that explained his self-defense account of the events and an explanation of why he mistrusted and failed to cooperate with the Public Defenders assigned to represent

him. *See* Appendix 8. (Transcript of December 3, 1987 hearing; Statement of Facts at 5-7 & 14-15).

Subsequently, Governor Martinez signed Mr. Lambrix's first death warrant on September 28, 1988, and thereafter, Mr. Lambrix filed his initial Fla. R. Crim. P. 3.850 motion. It was summarily denied without an evidentiary hearing. Immediately before this Court denied all collateral relief on November 30, 1988, Mr. Lambrix had lodged a petition for writ of federal habeas corpus under 28 U.S.C. § 2254 in anticipation of this Court's affirmance of the circuit court's summary denial below. Mr. Lambrix obtained a stay of execution based on a handwritten motion filed by CCR counsel in the United States Southern District Court on December 1, 1988, the day before the rescheduled execution.

The federal district court rejected Mr. Lambrix's claims that his trial attorneys were ineffective in failing to present substantial mitigation. *Lambrix v. Singletary*, 72 F.3d 1500 (11th Cir. 1996). While Mr. Lambrix's appeal was pending in the Eleventh Circuit, the U.S. Supreme Court held that Florida's standard jury instruction on the heinous, atrocious, and cruel aggravator was unconstitutionally vague. *Espinosa v. Florida*, 505 U.S. 1079 (1992); *see also Jackson v. State*, 648 So. 2d 85, 90 (Fla. 1994) (Florida's standard cold, calculated, and premeditated jury instruction was also unconstitutionally vague). However, the U.S. Supreme Court rejected Mr. Lambrix's *Espinosa* claim in a 5-4 decision finding that the decision in

Espinosa was not retroactive. *Lambrix v. Singletary*, 520 U.S. 518 (1997). The Eleventh Circuit also found that trial counsel was not ineffective for failing to present mitigating evidence:

> The Eleventh Circuit also found that trial "counsel's investigation for the penalty phase was fairly extensive and certainly was not constitutionally deficient. Even after an extensive investigation, including interviews with witnesses who were in the household at the time of the alleged abuse and neglect, counsel had no indication that evidence of abuse existed. We therefore cannot hold counsel responsible for failure to uncover such evidence. Thus, Lambrix has not shown that counsel's performance was deficient.

Lambrix v. Singletary, 72 F.3d 1500, 1504-06 (11th Cir. 1996).[7]

[7] *But see* the State's argument to the jury concerning the Defense presentation as to mitigation at the penalty phase at trial: "And the final one is kind of a catchall, any other aspect of the Defendant's character, record or any other circumstance of the offense. I believe this is what you heard this morning when the defense put on their evidence. Look at what the Defendant did. They put on, I believe, two brothers, a sister, father and step-mother of the Defendant, all of whom uniformly came up and said, "Hey, he came from a broken home, went to a foster home for a couple months, father and step-mother got married, came back home, lived in that environment, and that he was a good boy." I believe they all said he was a good boy when he was younger. . .I believe this is what you heard this morning. One thing I believe is the uniform and the testimony of all those persons this morning that you may have noticed is that none of them have had any significant contact with the Defendant in many years. And I believe on cross examination by Mr. Greene, they said they really don't know what he was doing during that time. People can change, ladies and gentlemen, and when people aren't around to see them change, all they can testify about is how they knew him before. Are there any mitigating circumstances? I submit to you that there are not. You have heard no evidence on most of them. There is no implication whatsoever that any of the imbibing that evening affected his ability to mediate, to carry out these acts. His family life in and

Lambrix's second bite of the clemency apple commenced in 1998, when in a letter dated April 6, 1998, addressed to the Honorable Dennis Alvarez, Chief Judge of the Thirteenth Judicial Circuit, the Coordinator of the Office of Executive Clemency requested that new clemency counsel be appointed within 30 days. Appendix 9. A second letter was sent on April 16, 1998 to Chief Judge Starnes of the Twentieth Judicial Circuit making an identical request. Appendix 10.

On May 27, 1998, Ms. Barbara LeGrande was re-appointed as clemency counsel by Chief Judge Starnes. Appendix 11. She moved to withdraw based on a conflict of interest, and by Order entered on June 22, 1998 by Chief Judge Starnes, was allowed to do so. Appendix 12. She was replaced by Mark Gruber, another private attorney, by Order entered by Judge Starnes on June 29, 1998. Appendix 13.

Although Mr. Gruber had no experience in capital cases, he prepared a supplemental petition for clemency which he filed in late 1998. *See* Appendix 14. (1998 petition for clemency). Gruber's petition included Mr. Lambrix's affidavit explaining that he acted in self-defense, information that the Mr. Lambrix's trial judge, Judge Stanley, had made comments regarding another death-sentenced inmate, Raleigh Porter, which brought the Judge's impartiality into question. *See Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995); *Porter v. State*, 723 So. 2d 191

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of itself you all heard about this morning, is not, I submit to you, a mitigating factor in this matter." R. 2643-44.

(Fla. 1998).[8] Mr. Gruber was unaware that when Judge Stanley sentenced Mr. Lambrix to death at the second trial, he found an aggravating factor that the State had waived on the record and that the jury never was instructed on.[9] The supplemental clemency petition also included mitigation information that had been developed during the federal proceedings that was not in existence at the time of the 1987 clemency interview of Mr. Lambrix and presentation by Ms. LeGrande.

By early 1999, months after he had filed the supplemental clemency petition in 1998, Gruber left private practice and joined CCRC-Middle, who represented Mr. Lambrix from May 11, 1998 until August 2, 1999, when private registry counsel Ostrander was appointed to replace CCRC Middle on the case. However, Gruber maintained his appointment as clemency counsel until April 2000, although he had moved to withdraw, writing presiding circuit court Judge Corbin on September 9, 1999 and advising him that he was moving to withdraw as clemency

[8] In January 16, 1998 CCRC South had filed a Rule 3.850 motion based on *Porter*. On December 2, 1998, CCRC Middle expanded the judicial bias claim, and added six additional claims in a 211 page amended Rule 3.850 motion. Mr. Lambrix later learned that the former judge made at least two separate comments to the clemency board concerning Mr. Lambrix's case. However, in keeping with the shroud of secrecy surrounding executive clemency in Florida, the parole commission has thwarted Mr. Lambrix's attempts to obtain copies of those statements.

[9] (2) the defendant was previously convicted of another capital felony, section 921.141(5)(b).

counsel. Appendix 15.[10] Judge Corbin failed to enter an order allowing him to withdraw until April 13, 2000. Appendix 16. Thereafter, Gruber was not replaced as clemency counsel for 14 years, until attorney Adam Tebrugge was appointed in 2014.

In 2013, the Florida Legislature passed the Timely Justice Act. The legislation requires the clerk of the Florida Supreme Court to provide a certification to the Governor of any death-sentenced inmate who has completed his or her direct appeal and initial postconviction litigation and appeal in both state and federal court or allowed time for filing a petition for habeas corpus in federal court. Florida Statute §922.052(1) and (2)(a) (2013). On October 4, 2013, the clerk of the Florida Supreme Court provided an initial list of 132 names of death row inmates, including Mr. Lambrix, who appeared to have completed their initial legal challenges in state and

[10] In the letter to Judge Corbin, Gruber related that he had "left private practice and took a position with CCRC earlier this year." He also described what happened when he accepted the appointment as clemency counsel in 1998: "When I accepted this appointment, I contacted the Office of Executive Clemency and was advised that Lambrix was being given a "truncated" clemency consideration, and that my task was to file a clemency statement and await further developments. I didn't hear anything on the matter after that and did not see any benefit to Lambrix in agitating for a result." He also advised the Court that "I contacted the Office of Executive Clemency today and was advised that the clemency proceeding was still pending. I have not been advised of anything in connection with the clemency matter for around a year. Nevertheless, I am submitting a motion to withdraw."

federal court.[11]

None of the issues developed by Mr. Lambrix's successor counsel after 1998 sounded in clemency until attorney Adam Tebrugge was appointed in 2014 to undertake a new appointment as clemency counsel. Mr. Tebrugge prepared a petition setting forth the structural flaws in Mr. Lambrix's legal case. *See* Appendix 17. (2014 clemency petition). These flaws included the fact that substantive and meritorious legal claims were never considered due to procedural bars. Mr. Tebrugge also set forth a case of redemption and provided evidence that Mr. Lambrix has become a contributing member of his community as well as a loving father and grandfather. Despite the complexity of Mr. Lambrix's case and the fact that twenty-eight years have passed since his only interview and clemency hearing, neither was granted. Mr. Tebrugge learned that clemency had been denied only when the death warrant was signed on November 30, 2015. On December 14, 2015, Mr. Tebrugge wrote a letter to the Board of Executive Clemency objecting to the lack of Due Process. *See* Appendix 6 (letter of objection). To date he has received no response.

So, unfortunately for Michael Lambrix, all three bites of the clemency apple offered up by the Executive branch were from the fruit of a poisonous tree. The only

[11] One of the inmates on that list, Roy Swafford, was granted a new trial by the Florida Supreme Court just a month after he was certified as being warrant eligible. *Swafford v. State*, 125 So. 3d 760 (2013).

physical interview or opportunity for a presentation on his behalf, other than in writing, was in August 1987, a year before his postconviction process had really begun. The tortured history of his case is known to this Court and the other arguments in this state habeas filing and in the simultaneous briefing of the summary denial of his under warrant Rule 3.851 motion, Rule 3.853 motion and Motion for a Stay of Execution must be considered in the context of what has never, to date, been allowed to sound in clemency.

The United States Supreme Court has recognized that the importance of the clemency process in a capital case cannot be understated: "Far from regarding clemency as a matter of mercy alone, we have called it the 'fail safe' in our criminal justice system.'" *Harbison v. Bell*, 129 S. Ct. 1481 (2009) *quoting Herrera v. Collins,* 506 U.S. 390, 415 (1993). In that regard, the recent history of clemency consideration for death row inmates in Florida since the early 1980s mirrors Mr. Lambrix's experience that the state constitutional provision for clemency no longer functions as a "fail safe" in Florida's death penalty scheme.

For example, in 1979, former Governor Bob Graham presided over the first execution in the country after the death penalty was reinstated. Gov. Graham steadfastly enforced the law by signing the death warrants for sixteen (16) men who were executed during his two terms in office. However, Governor Graham also commuted the death sentences of six men during his tenure: Leo Alford and Clifford

Hallman (1979); Darrell Edwin Hoy and Richard Henry Gibson (1980); Michael Salvatore (1981); and Jesse Rutledge (1983). Gov. Graham was the last Florida Governor to grant mercy in a capital case.

Once again there is no measure as to whether actual consideration has ever been given to Mr. Lambrix's petitions for clemency. But the raw fact that no death row inmate has received clemency in more than twenty-five years is instructive. Far more death row inmates have died in custody or been exonerated than the zero who have been granted executive clemency. Certainly the other matters referenced in this instant state habeas petition (and in the initial brief concerning long term incarceration, DNA testing of the female victim's clothing and the conflict with counsel) have never been part of Mr. Lambrix's prior clemency petitions or consideration. In practice, whether an inmate will be assigned counsel or have an opportunity for a first or second interview appears to be completely arbitrary in circumstances where Mr. Lambrix was without clemency counsel for fourteen years from 2000-2014.

Even at his sole interview in 1987, the Commissioner asked him no questions. The clemency process in Florida was of no use to Cary Michael Lambrix. It only afforded the executive branch in Florida the opportunity to control the pace of executions independent of the legislative and judicial branches. In *Ohio Adult Parole Authority, et al. v. Woodard*, 523 U.S. 272, 288-89 (1998), Justice O'Connor

reasoned that as long as the condemned person is alive, he has an interest in his life that the Due Process Clause protects.

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.

Id. Mr. Lambrix submits that a system dependent upon coin flipping would provide him with more transparent due process than he has been provided since 1987. Under these circumstances, judicial oversight is warranted.

In *Harbison v. Bell*, 129 S. Ct. 1481 (2009), the United States Supreme Court explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and cognitive impairments that was not presented during his trial or appeals." *Harbison*, 129 S. Ct. at 1494. This analysis presupposed that the clemency proceeding is conducted not just after trial, not just after direct appeal, but after the federal habeas proceedings have been concluded. In Mr. Lambrix's case that was in 1997.

If *Harbison* provides a proper analysis, the 1998 post-habeas clemency petition by Mr. Gruber fell into a bottomless pit for sixteen years. Clemency consideration must fulfill the "fail safe" function for which it is intended, allowing the arbiter of clemency to consider all of the information that was uncovered in the

course of the collateral litigation which may warrant serious clemency consideration. And if the 2014 "re-do" of clemency by Adam Tebrugge was intended to fulfill this function before a warrant ended the process, why was there no interview or formal presentation allowed after twenty-eight years? Clemency counsel's comment about the absence of due process in Florida included in his December 15, 2015 letter of protest to the Florida Commission on Offender Review and the Florida Executive Clemency Board is one shared by postconviction counsel and by Mr. Lambrix:

> But the failure to actually consider clemency in a case where serious errors were never considered by the courts due to procedural bars undermines confidence in the clemency process itself. Because clemency is the final avenue of review available to a death row inmate, the State's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

Appendix 6 at 1. This Court has recognized that a clemency proceeding is "part of the overall death penalty procedural scheme in this state." *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990). However, the clemency proceedings in Mr. Lambrix's case were a mere formality, simply a ceremonial act before a warrant was signed for a second time after twenty-seven years.

Therefore, the death penalty procedural scheme is obviated. When the clemency process is rendered meaningless, as it was here, Florida's death penalty scheme is constitutionally defective. When the clemency process cannot operate as the administrative "fail safe" for the criminal justice system, an act of administrative

equitable mercy, the criminal justice system itself is rendered defective. Mr. Lambrix's two death sentences were returned under a constitutionally defective sentencing scheme and should not stand. For the reasons stated above, this Court should grant a stay of execution, and order further inquiry concerning Mr. Lambrix's argument herein.

CONCLUSION

The errors described above entitle Mr. Lambrix to relief. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). Relief is appropriate. For the foregoing reasons and in the interest of justice, Mr. Lambrix respectfully urges this Court to grant habeas corpus relief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to: Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Ste. 200, Tampa, FL 33607-7013, *Scott.Browne@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com*; via email service at *warrant@flcourts.org* this 11th day of January 2016.

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