

(1965). In Olden v. Kentucky, 488 U.S. 227 (1988), the Supreme Court reaffirmed that a defendant has a right to inquire into any matter which may throw doubt on a witness' credibility. The defendant must be afforded the opportunity to conduct meaningful cross-examination that places the witness in his proper setting and tests the weight and credibility of his testimony. Smith v. Illinois, 390 U.S. 129, 132 (1968).

Mr. Lambrix's ability to exercise the right to cross-examination was dependent on his receiving the effective assistance of trial counsel. In this case, where the convictions and sentences were based on wholly circumstantial evidence and the testimony of Frances Smith, the outcome was dependent on the credibility of her testimony. Without proper cross-examination the State's case went essentially unchallenged. The total failure of trial counsel to adequately cross-examine and impeach key state witnesses "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 689 (1984). Mr. Lambrix suffered prejudice as a result of trial counsel's deficient performance, since the failure to subject the prosecution's case to meaningful adversarial testing resulted in Mr. Lambrix being wrongly convicted and condemned to death. Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986) (failure to impeach key state witnesses with available evidence was ineffective assistance of counsel).

A. Trial Counsel Failed to Impeach Frances Smith with Prior Inconsistent Statements

The State acknowledged in its opening statement to the jury that Frances Smith's testimony was the "hub" of its case. R. 1825. Her credibility would make or break the State's case. Unknown to the jury, however, Ms. Smith gave numerous conflicting statements to police officers about whether she was with Mr. Lambrix, and even about whether she knew him at the time of the homicides. If these statements had been brought to the attention of the jury, they would have undermined her credibility as a witness and cast doubt on whether she had actually witnessed any of the events she related.

At trial, in cross-examining Ms. Smith, counsel attempted to question her about statements she made to police when apprehended driving the car owned by Lamberson. The trial court limited counsel's attempt to question Ms. Smith on these statements, ruling that if counsel continued the questioning, the State could bring out the fact that Ms. Smith was arrested for aiding and abetting the "escape" of Mr. Lambrix.¹² This restriction of cross-examination was the primary issue raised on direct appeal. In affirming the conviction, this Court found that no error occurred, as trial counsel was attempting to impeach the witness by way of a prior inconsistent statement without opening any doors that would be harmful to his case. See Lambrix v. State, 494 So. 2d 1143, 1148 (Fla. 1986). That is, had trial counsel impeached Ms. Smith

¹²Mr. Lambrix was never tried or convicted of "escape."

with her prior statements, the State could have shown on redirect that the statements were given in connection with Ms. Smith's arrest for aiding and abetting Mr. Lambrix's "escape" from a work release center, revealing that Mr. Lambrix was a "fugitive". Id.

Unfortunately, counsel presented this issue both in trial court and on direct appeal to this Court in an entirely mistaken light. Trial counsel were apparently unaware that the statement counsel wanted to use to impeach Ms. Smith was not taken in conjunction with Ms. Smith's arrest for aiding and abetting Mr. Lambrix's alleged escape. Trial counsel completely failed to investigate the origin of each of Ms. Smith's statements. She gave numerous statements at the time of her arrest, on February 9, 1983. But her crucial statement was taken several days later and had no relationship to the arrest for aiding and abetting. Because of these facts, impeachment with the statement could not have opened any doors.

After Ms. Smith was arrested while driving Lamberson's car, several sheriff's deputies questioned her about her ties to Mr. Lambrix and about the vehicle itself. Ms. Smith gave conflicting stories to the police. Appendix 5. Suspecting that the car was stolen, the investigating officers informed Detective Mizell of the Grand Auto Theft Unit. He then traced the vehicle's ownership and contacted Lamberson's mother, Elaine Banner, in Key Largo, Florida, who advised him that the Hendry County Sheriff's Department was looking for the vehicle in connection with the missing person investigation on Aleisha Bryant.

custody and therefore out of any possible danger -- contradict her trial testimony and would have made her unworthy of belief.

Trial counsel obviously realized both the importance of Ms. Smith's credibility and the need to use her statements to discredit her. Counsel tried to get the statement into the record (R. 2319-25), but retreated when the State and the court threatened to admit evidence of Mr. Lambrix's status as a "fugitive" if Ms. Smith was impeached. Had counsel known of the circumstances in which the Mizell statement was taken, and then advised the court that the Mizell statement was not related to Ms. Smith's "aiding and abetting" arrest, but was taken in conjunction with the "missing person" investigation that evolved into the instant charges, it is clear that the trial court would have allowed the impeachment without opening any doors.

Trial counsel's inexcusable failure to properly investigate the origin and circumstances of this statement resulted in the failure to properly impeach the state's key witness with readily available evidence. This failure to adequately and effectively cross-examine Ms. Smith resulted in her testimony and thus the State's case going essentially unchallenged. This error is identical to that in Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986), where the failure to impeach key state witnesses with available evidence deprived the petitioner of effective assistance of counsel, mandating that the convictions be set aside.

Moreover, reasonably competent counsel would have opened the very doors at issue here. Impeaching Ms. Smith's credibility with

the numerous conflicting statements she gave to at least three different police officers¹³ was of paramount importance to the defense, as trial counsel apparently realized. At the same time, voir dire examination had already established that virtually every juror on the panel had been exposed to pre-trial publicity relating to the case in the form of news stories that placed great weight on Mr. Lambrix's status as an "escaped prisoner" at the time the alleged murders took place.¹⁴ Accordingly, there could not be any reasonable strategic decision not to impeach Ms. Smith through the use of the statements, because the value of impeaching her credibility significantly outweighed the risk of opening doors that were clearly already wide open.

If anything, in light of the fact that the jury was already aware of Mr. Lambrix's alleged status as an "escaped prisoner," reasonably competent counsel would have made a point of bringing out the fact that Mr. Lambrix did not "escape" from a prison, but had walked away from a work-release center just two weeks before he was due to be paroled for his only prior felony -- a bounced check.

¹³In her statements, Ms. Smith first denied knowing Mr. Lambrix and then denied being with him in LaBelle at the time of the homicides. See App. 6.

¹⁴The community was so small that one venireperson, a local elementary teacher, noted that even her students discussed the case in the classroom. R. 1722. Several of the jurors who tried Mr. Lambrix's case expressed reservations about whether they could put aside the pretrial publicity to which they had been exposed, R. 1471-73, and one of the jurors who served on the jury had already formed the opinion, after reading extensive newspaper coverage of the offense, that the crime was senseless. R. 1522. Four of the jurors were related to or associated with members of the small town's only law enforcement agency.

In the instant case, Mr. Lambrix was tried in a small, rural community that was saturated with media reports and word of mouth concerning his status as an "escaped fugitive." Thus, there could be no reasonable strategy for allowing that false perception to go unchallenged, and counsel rendered ineffective assistance by not impeaching Frances Smith with her statements to the police.

B. Trial Counsel Failed to Cross-Examine Deputy Sheriff Ronald Council Concerning Mr. Lambrix's Degree of Intoxication and Failed to Effectively Cross-Examine Other Witnesses

At trial, State witness Deputy Sheriff Ronald Council testified that only a few hours prior to the time of the homicides, he saw and spoke to Mr. Lambrix at a local bar and that at that time Mr. Lambrix was in the company of the victims and key State witness Frances Smith. As established by Deputy Council's affidavit, on the night of the alleged murders and in fact only hours prior thereto, it was Deputy Council's observation and opinion as a law enforcement officer that Mr. Lambrix was intoxicated. App. 4; see also ROA 361 (evidentiary hearing testimony of Ronald Council). As also established by Deputy Council's affidavit and the record, at no time did trial counsel ever question Deputy Council as to whether Mr. Lambrix was intoxicated. Had trial counsel so questioned Deputy Council, he would have testified that on the night of the alleged murders, he considered Mr. Lambrix to be intoxicated. App. 4.

This readily available yet inexcusably ignored evidence was highly important. As the record shows, trial counsel attempted to develop a voluntary intoxication defense. ROA 352-53, Deposition

of Robert Jacobs. Counsel questioned Ms. Smith about the amount of alcohol consumed by Mr. Lambrix that night, establishing that he consumed a considerable amount. When questioned about whether Mr. Lambrix was intoxicated, however, Ms. Smith became vague and would only say that he acted "high" but that she "could never tell" if he was drunk or sober. R. 2300-01. As a result, the trial court ruled that the evidence was insufficient to support an instruction on voluntary intoxication.

For the reasons discussed in Argument V, infra, had trial counsel elicited from Deputy Council his belief that Mr. Lambrix was intoxicated, the court would have been required to instruct the jury on voluntary intoxication. And upon receiving that instruction, there is a reasonable probability that the jury would have given the testimony of Deputy Council -- a law enforcement officer trained to identify intoxication -- great weight and would have concluded that Mr. Lambrix was intoxicated and consequently lacked the intent necessary for a first-degree murder conviction. Mr. Lambrix has established both deficient performance and prejudice, and therefore is entitled to a new trial.

In considering the totality of counsel's performance, this Court should also consider Mr. Lambrix's claim in the original Rule 3.850 action relating to counsel's failure to adequately and effectively cross-examine state key corroborating witnesses, Debra Hanzel, Preston Branch and John Chezem. Mr. Lambrix submits that that claim was properly presented and he respectfully requests this Court to consider it with respect to the totality of counsel's

performance relating to the cross-examination of the key state witnesses. See PR. 63-70.

Given the numerous crucial deficiencies in counsel's cross-examination, it is clear that counsel entirely failed to subject the prosecution's case to meaningful adversarial testing and the resulting verdict becomes presumptively unreliable. Strickland, supra; Cronin, supra, 466 U.S. at 658-61. The deficient performance and resulting prejudice, which included taking away from Mr. Lambrix the opportunity to present a reasonable hypothesis of innocence, deprived Mr. Lambrix of his right to effective counsel. Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986). As in Smith, trial counsel's failure to conduct proper cross-examination resulted in the denial of counsel, requiring that this Court grant relief.

ARGUMENT V

MR. LAMBRIX WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT A VOLUNTARY INTOXICATION DEFENSE

A similar claim was presented in the original Rule 3.850 proceeding. But this Court should not summarily reject it as successive. Critical facts in support of this claim, including Deputy Council's belief that Mr. Lambrix was intoxicated, were not discovered by CCR because of its inability to conduct an adequate and competent investigation. Moreover, this Court should now examine trial counsel's performance in its entirety, particularly because this claim, and Mr. Lambrix's other arguments, implicate a fundamental miscarriage of justice. Unless relief is granted, a

man who is actually innocent of first-degree murder will be executed. Such a "quintessential miscarriage of justice," Schlup, 130 L.Ed.2d at 834, would be repugnant both to the United States and to the Florida Constitutions. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Given that fact, and the fact that Mr. Lambrix did not receive competent assistance from collateral counsel, this Court should consider the merits of this claim.

Under Florida law, voluntary intoxication is a defense to specific intent offenses such as first degree murder. Gardner v. State, 484 So. 2d 91, 92-93 (Fla. 1985). A defendant has a right to an instruction on the voluntary intoxication defense if there is any evidence of voluntary intoxication at the time of the alleged offense. Evidence that Mr. Lambrix was intoxicated at the time of the offense was available both from the State's key witness, Frances Smith, and from another State witness, Deputy Ronald Council. Trial counsel were sufficiently aware of this defense to request instructions on voluntary intoxication at both of Mr. Lambrix's trials. T. 12/8/83 at 7; R. 2470. Despite the fact that the trial court denied the requested instruction at the first trial for lack of evidence, counsel never attempted to develop or present any of the readily available evidence at the second trial. The inevitable result was that the instruction was once again denied at the second trial.

There was ample evidence available to trial counsel relating to Mr. Lambrix's intoxication and its effects on his ability to form specific intent. Friends and family have attested to Mr.

Lambrix's longstanding history of dependence on alcohol and drugs, and the similar histories of most members of his family. See, e.g., Apps. 13, 15, 16, 26, 27, 28, 29. After being provided with this and other available information, expert addictionologist Peter Macaluso, M.D., found that Mr. Lambrix is chemically dependent, is the product of a chemically dependent family, and that he has an organic brain syndrome and a diminished tolerance for the effects of alcohol. As a result of his impairments and the amount of alcohol he had consumed on the night of the offense, he lacked the ability to form specific intent. Similarly, expert psychiatrist Robert T.M. Phillips, M.D., found that Mr. Lambrix suffers from alcohol dependence, psychoactive substance abuse, and an organic mental disorder. Dr. Phillips also concluded that Cary Michael did not have the capacity to form specific intent.

Moreover, compelling evidence relating to Mr. Lambrix's dependence on and addiction to alcohol, and his intoxication at the time of the offense was in fact known to trial counsel prior to trial, but was inexplicably ignored. Pretrial psychiatrist William Whitman learned from Mr. Lambrix of his father's alcoholism, his own history of alcohol dependence from an early age, and his drinking on the day of the offense. Dr. Whitman arrived at an initial impression, based on the limited information he had been provided prior to trial, that Mr. Lambrix suffers from alcoholism and alcohol dependency. See App. 7.

In addition to all of this lay and expert testimony, direct evidence of Mr. Lambrix's intoxication on the night of the offense

was available to trial counsel. As discussed in Argument IV, supra, Deputy Sheriff Ron Council observed Mr. Lambrix, Frances Smith, and the two victims in a bar the night of the offense, and testified at trial. But trial counsel never asked Deputy Council whether Mr. Lambrix was drunk or sober. When he was asked, it was Mr. Council's opinion that Mr. Lambrix was intoxicated. App. 4. It was precisely such evidence of intoxication that this Court held was lacking from Mr. Lambrix's initial Rule 3.850 motion. Lambrix v. State, 534 So. 2d 1151, 1154 (Fla. 1988). Had CCR been able to provide competent representation, it would have found and presented this evidence, requiring remand for an evidentiary hearing.

This evidence shows that Mr. Lambrix was alcohol dependent, that he ingested enough alcohol on the night of the offense to render him intoxicated, that he was in fact intoxicated, and that as a result he was incapable of forming the specific intent necessary for a conviction of first degree murder. This evidence was available to counsel and could have been presented at trial, had trial counsel not acted unreasonably. In the court below, the State argued that counsel was relying on a defense of innocence, and that because innocence and intoxication are inconsistent defenses, counsel had no reason to investigate or present intoxication evidence. State's Response at 17-25, ROA 194-201. Unfortunately for the State, this theory is inconsistent with the record. Lead trial counsel Robert Jacobs testified clearly that counsel would have presented additional evidence in support of the voluntary intoxication defense, that counsel attempted to show

that Mr. Lambrix was drinking heavily, and that expert testimony regarding chronic chemical dependency would have been relevant to specific intent. Jacobs Deposition, ROA 316-38, 348, 352-53. There is no indication that counsel decided not to investigate for evidence of voluntary intoxication in the belief that such evidence would have been inconsistent with an innocence defense. Counsel's failure to investigate and present evidence in support of the voluntary intoxication defense was simply deficient performance.

Moreover, the readily available evidence was certainly sufficient to meet the standard required under Gardner, supra, for an instruction on the voluntary intoxication defense, particularly in conjunction with the testimony of key State witness Frances Smith that on the night of the offense, Mr. Lambrix was "taking turns drinking beer and mixed drinks," R. 2201, "drinking pretty good," R. 2290, that he "acted" high, and had previously stated that he was high. R. 2301.

Had trial counsel investigated, developed and presented the evidence that Mr. Lambrix was intoxicated, it is clear that the trial court would have been required to instruct the jury on the defense of voluntary intoxication. Had the jury been so instructed, there is a reasonable probability that they would have returned a verdict of not guilty or would have found Mr. Lambrix guilty of a lesser offense. Mr. Lambrix has established both prongs of Strickland v. Washington, 466 U.S. 668 (1984), and is entitled to relief.

ARGUMENT VI

MR. LAMBRIX WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO CONDUCT JURY SELECTION IN A REASONABLY COMPETENT MANNER

Jury selection is a critical phase of any trial, particularly in a capital case. Properly conducted voir dire exposes bias and potential prejudice on the part of prospective jurors, enabling counsel to make challenges for cause and to exercise peremptory challenges intelligently. See Dennis v. United States, 339 U.S. 162, 171-72 (1950); Jordan v. Lippman, 763 F.2d 1265, 1279 (11th Cir. 1985); see generally ABA Standards for Criminal Justice, Standard 4-7.2. In the instant case, the voir dire conducted by trial counsel was woefully deficient. The most glaring deficiency was the failure to challenge biased jurors peremptorily or for causes. Counsel also failed to preserve for appeal the erroneous denial of cause challenges and failed to recognize and challenge a juror who had been in the venire for Mr. Lambrix's first trial, but who claimed not to have any prior experience as a juror.¹⁵

In order to insure that the defendant is tried by an impartial jury, defense counsel has a duty to expose potential bias on the part of jurors and then challenge biased jurors for cause and make intelligent use of peremptory challenges to the extent such cause challenges are denied. In the instant case, counsel failed either to expose or to use as the basis for peremptory and/or cause

¹⁵These issues should have been raised by CCR in Mr. Lambrix's first Rule 3.850 motion, but were not because CCR was unable to provide Mr. Lambrix competent post-conviction representation. Because CCR was prejudicially ineffective, this Court should now consider the merits of this claim.

challenges potential bias on the part of several jurors who sat on the jury that convicted Mr. Lambrix and sentenced him to death.

First, when questioned about his prior knowledge of the case, juror Snyder stated, "I usually think the police do their work right." When asked if he could keep an open mind despite his belief that the police usually arrest the right person, the most he could say was that he thought he would. R. 1471-72. Standing alone, those statements would have provided a basis for a challenge for cause. Excusal for cause is proper if there is a basis for reasonable doubt that the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the court's instructions. Hamilton v. State, 547 So.2d 630 (Fla. 1989); see Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994) (juror who had personal feelings favoring police but would try to be impartial should have been excused for cause). Juror Snyder's responses raised a reasonable doubt concerning his impartiality. Competent defense counsel would have explored juror Snyder's bias further, challenged him for cause and, if the cause challenge was denied, exercised a peremptory challenge.

Second, juror Winburn admitted during voir dire that he was the stepfather of Glades County Deputy Sheriff Allen Green. R. 1629. Deputy Green was a police officer in the small, rural community where Mr. Lambrix stood trial. He assisted in processing the crime scene and at the time of trial he was under active investigation by the FBI for allegedly assaulting and injuring Mr. Lambrix while Mr. Lambrix was in custody awaiting trial. Although

counsel knew of the pending investigation against juror Winburn's stepson, they did not question Mr. Winburn about it, nor did they take any other action to expose this obviously powerful source of potential bias. Reasonably competent counsel would have taken the appropriate measures to remove this juror from the panel.

Third, juror Walsh revealed that she was the roommate of a Glades County Sheriff's Department employee who worked at the small (two-cell) county jail where Mr. Lambrix was held while awaiting trial. R. 1526. Although she denied that fact would prejudice her, counsel never inquired further to discover whether she received any extrajudicial information concerning the case from her roommate or coworkers of her roommate. Considering that the trial took place in a small, close knit rural community, it was incumbent upon counsel to inquire further and, if appropriate, to exclude juror Walsh by cause or peremptory challenge if necessary.

The presence of a single biased juror on the panel that convicted Mr. Lambrix and sentenced him to death would deprive him of a fair trial. Here, as a result of counsel's failure to perform competently, Mr. Lambrix went to trial with three biased or potentially biased jurors. Had counsel simply challenged any of these three jurors for cause, the trial court would have been required to strike each of these three jurors from the panel.

Williams v. State, 638 So. 2d at 978. Prejudice is clear.

Counsel's performance at voir dire was deficient in other respects that should be considered by this Court. The trial court denied cause challenges to two jurors, Collins and Lanier, who had

formed fixed opinions that Mr. Lambrix was guilty. R. 1531-35 (Collins); R. 1646-47, 1660-61 (Lanier). Counsel was forced to use peremptory challenges on both jurors. R. 1615, 1709. Counsel, however, failed to take the necessary steps to preserve the issue for appeal. See Trotter v. State, 576 So. 2d 691 (Fla. 1991). Moreover, juror Maxine Hough, who served at the retrial, was present during the voir dire prior to Mr. Lambrix' first trial. App. 2, T. 12/1/83, 13; Apps. 8, 9. At voir dire on Mr. Lambrix's retrial, Ms. Hough did not reveal those facts when questioned, R. 1725, 1754, although Ms. Hough had seen prospective jurors who admitted any knowledge of the previous trial excused for cause, R. 1512-13, 1595, and subsequently a prospective juror who had been on the venire at the first trial was excused. R. 1758. Her failure to reveal her presence at voir dire for the first trial raises a presumption that she was neither impartial nor honest, requiring a new trial. Minnis v. Jackson, 330 So.2d 847, 848 (Fla. 3d DCA 1976); United States v. Perkins, 748 F.2d 1519, 1531 (11th Cir. 1984); United States v. Columbo, 869 F.2d 149 (2d Cir. 1989); Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984).

Competent counsel would have made sure that they had available the venire list from the first trial, so that they could intelligently exercise cause challenges and if necessary peremptory challenges against members of that venire. Counsel's failure in this regard deprived Mr. Lambrix of the effective assistance of counsel to which he was entitled. Counsel's performance fell below an objective standard of reasonableness, and Mr. Lambrix was

prejudiced thereby. If counsel had performed adequately, Ms. Hough would have been excused for cause or Mr. Lambrix would have been in a position to challenge her peremptorily and preserve the issue for appeal.¹⁶

Mr. Lambrix was tried, convicted and sentenced to death by a jury that included jurors who could not put aside their predisposition against Mr. Lambrix, who were exposed to highly prejudicial information concerning him, who were under investigation for assaulting him, and who gave deceptive answers during voir dire. Mr. Lambrix was deprived of his fundamental sixth amendment right to be tried by a fair and impartial jury, and counsel's failure to ensure that he was tried by an impartial jury violated his equally fundamental right to the effective assistance of counsel. Retrial is required.

¹⁶A similar claim was raised by Mr. Lambrix in a pro se habeas petition that this Court previously rejected. Lambrix v. Dugger, 559 So. 2d 1137 (Fla. 1990). It is restated here so that this Court can review counsel's performance in its entirety.