IN THE SUPREME COURT OF FLORIDA

Cary Michael Lambrix,
Petitioner

vs.

Neil Dupree, Director, CCRC-South;
Bill Jennings, Director, CCRC-Middle,
and Roger Maas, Director, Commission
on Capital Cases,
Respondents

Case No. ____________

PETITION FOR DECLARATORY JUDGEMENT AND/OR PETITION FOR EXERCISE OF "ALL-WRIT'S POWER"

Comes now, Cary Michael Lambrix, Petitioner (pro se) before this Court by and through the above-styled action, and does now respectfully move this Court for extraordinary relief in the form of Declaratory Judgement and/or exercise of this Court's "All-Writ's Power" pursuant to Fla. Rules App. Proc., Rule 9.030 (A) and 9.100, and the authority specifically cited below. Petitioner submits the following in support of relief sought;

I) JURISDICTION

Petitioner is a death-sentenced prisoner seeking this Court's clarification in the form of Declaratory Judgement and/or exercise of "All-Writ's Power" of what measure of minimal Due Process right's death-sentenced prisoner's have under Fla. Statutes, Chpt. 27 regarding the appointment of post conviction counsel in capital cases; under both the "Due Process" clause's of the Florida and Federal Constitution, as well as established precident's by this Court. See, "V.) Summary of Relief Sought", Infra

This Court has consistently recognized its constitutionally established original jurisdiction to hear all actions at the appellate level, and all types of collateral proceedings (including extraordinary relief) in death penalty cases. See, Fla. Const., § Art. V, 3 (b)(1) and Fla. R. App. Proc., Rule 9.030 (a)(1)(A), and State of Florida v. Fourth District Court of Appeal, 609 So2d 70, 71 (Fla. 1997) ("We now hold that in addition to

our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases"); See also, Orange County v. Williams, 702 So2d 1426 (Fla. 1997) (accord); Sireci v. State, 502 So2d 1221 (Fla. 1987) (recognizing jurisdiction seeking extraordinary relief)

Petitioner seeks Declaratory Judgement pursuant to Fla. Statutes § 86.021 (2008) to compel this Court to address and clarify a statutorily created right that by virtue of this Court's own conflicting caselaw and inaction has left death-sentenced prisoners in Florida uncertain as to whether this statutorily created right[1] has been now reduced to nothing more then a rhetorical "right" that is effectively being used to incidiously circumvent death-sentenced prisoner's constitutionally protected right to meaningful post conviction review of capital convictions and/or sentences, or whether by virtue of statutory construction and legislative intent, this statutorily-created right encompasses some measure of minimal Due Process protection against the systematic policy and practice of appointment of unqualified and incompetent post conviction counsel in capital cases before irreparable injury in the form of procedural defaults occur.

Petitioner is entitled to seek and obtain Declaratory Judgement. See, Olive v. Maas, 811 So2d 644, 648 (Fla. 2002) ("we have noted in the past that 'the purpose of a declaratory judgement is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal remedies", quoting, Santa Rosa County v. Administration Commission, 661 So2d 1190, 1192 (Fla. 1995)

Further, Petitioner respectfully seeks this Court's exercise of "All-Writ Power" pursuant to the Florida Constitution, Art. V, § 3(b)(7); See, State ex rel. Chiles v. Public Employee's Relation Commission, 630 So2d 1093, 1095 (Fla. 1994) ("the all-writ's clause could arguably be invoked as a basis for the courts exercise of jurisdiction over a case involving the Court's exclusive jurisdiction over the practice of law"); Arbaleaz v. Butterworth, 738 So2d 326, 327 (Fla. 1999) ("we have a constitutional responsibility to ensure that the death penalty is administered in a fair, consistent, and reliable manner") As fully pled below, the instant Petition does specifically seek to

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Footnote 1: See, Fla. Statutes, Chpt 27; See also, Spalding v. Duggar, 526 So2d 71, 72 (Fla. 1988) ("we recognize that under Section § 27.702 each defendant under sentence of death is entitled to, as a statutory right, effective legal representation... in all collateral proceedings")

invoke this Court's "constitutional responsibility", Arbaleaz, Id, at 327, "to ensure that the death penalty is administered in a fair, consistent, and reliable manner."

In Lightbourne v. McCollum, 969 So2d 326 (Fla. 2007) this Court recognized its jurisdiction to exercise "All Writs Power" in capital cases for the purpose of addressing the constitutionality of a practice or procedure applicable to the administration of the death penalty. See also, Amendments To Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, 797 So2d 1213, 1215 (Fla. 2001) (recognizing this Court's exclusive jurisdiction to establish rules, and define the law, applicable to practice and procedure before the Courts); Bedford v. State, 633 So2d 13 (Fla. 1994) (invoking this Courts jurisdiction under the "All Writs Power" clause)

Petitioner would respectfully submit that this Court must "liberally construe" this pro se pleading, Haines v. Kerner, 404 US 519, 520 (1972) (per curium); Seccia v. Wainwright, 487 So2d 1156 (Fla. 1st DCA, 1986) and this Court is constitutionally prohibited from dismissal of this Petition if the remedy sought is improper, but another form of extraordinary relief is available. See, Fla. Const., Article V, §2 (A); Skinner v. Skinner, 561 So2d 260 (Fla. 1990) (holding that under Florida Constitution if extraordinary relief sought is not available, but alternative remedy exists, the Court must grant the relief "as if the proper remedy had been sought")

II) WHY SHOULD THIS COURT ADDRESS THIS PETITION?

At the onset, Petitioner would respectfully submit that it is not the nature or intent of this instant Petition to challenge the validity of any established legal precident or prior ruling by any Court.

Rather, Petitioner seeks to move this Court to define and establish what measure of Minimal Due Process protection's exist and are available to death-sentenced prisoners in Florida under the Florida and Federal Constitution's "Due Process Clause" to protect against the arbitrary and fundamentally unfair deprivation of the established constitutional right to pursue "Meaningful" post conviction review by protecting against what has become a systematic policy and practice of appointing statutorily unqualified and woefully incompetent legal counsel to capital (death-sentenced) cases resulting in the inevidible "procedural" default of Meaningful post conviction review. At present, there are virtually no

reasonable means available to death-sentenced prisoners to protect against the incompentency of appointed post conviction counsel before irreparable injury in the form of procedural default of meaningful post conviction review occurs.

As the facts provided herein indisputably establish's, both in past and presently pending post conviction proceedings Petitioner has suffered irreparably as the result of incompetency by appointed post conviction counsel.

The fact is that the statutorily created "right" to appointment of post conviction counsel in capital cases under Fla. Statutes, Chpt 27 has become a constitutionally intolerable "trap for the unwary" due to this Court's own failure to recognize and establish any protection against the appointment of incompetent and unqualified counsel by the Respondents. Equally so, even if the death-sentenced post conviction defendant does become aware that appointed counsel is not providing adequate representation before the incompetency results in a procedural default, there is virtually no means available to the death-sentenced post conviction defendant to compel removal of the allegedly unqualified and/or incompetent counsel before irreparable injury occurs.

At present, this Court is - and has been - speaking with a forked tongue. On one hand this Court plainly recognizes that a statutorily-created right to appointment of counsel automatically encompasses an expectation of effective representation, See, Olive v. Maas, 811 So2d 644, 653 (Fla. 2002) quoting Remeta v. State, 559 So2d 1132, 1135 (Fla. 1990) ("The appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation"); Spalding v. Duggan, 526 So2d 71, 72 (Fla. 1988) ("we recognize that under Section §27.702 each defendant under sentence of death is entitled, as a statutory right, to effective representation ....in all collateral proceedings");

While on the other hand this Court has consistently held that claims of ineffective assistance of appointed post conviction counsel are not cognizable because there never was any "constitutional right" to post conviction counsel in the first place. Tompkins v. State, 33 FLW S897, S901 (Fla. November 8, 2008), quoting Kokal v. State, 901 So2d 766, 777 (Fla. 2005) ("We have repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable"); Lambrix v. State, 698 So2d 247 (Fla. 1996) (Summarily denying successive 3.850 arguing actual innocence upon find-

ing that since no constitutional right to effective post conviction representation exists, post conviction counsel's failure to argue claim was procedurally barred)

This instant Petition is about the fundemental fairness of Florida's capital post conviction process.[2] By established state-sanctioned policy and practice, Florida's administration of capital punishment has become "Death By Default" in which the ultimate decision of who lives and who dies is determined not by the factual circumstances of the case, but by arbitrarily imposed procedural defaults resulting from the systematic appointment of statutorily unqualified and incompetent post conviction representation that effectively, and incidiciously, circumvents death-sentenced prisonor's constitutionally protected right to meaningful post conviction review.

As fully argued within this Petition, even accepting in arguendo that death-sentenced post conviction defendants do not have a constitutional right under the Sixth Amendment to appointment of legal counsel, Murray v. Giarratano, 492 U.S. 1, 10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 554 (1987); Lawrence v. Florida ___ U.S. ___, 127 S.Ct. ___ (2007); Lambrix v. State, 698 So2d 247 (Fla. 1996); Kokal v. State, 901 So2d 766, 777-78 (Fla. 2005), both the "procedural" and "substantive" components of Due Process do establish a constitutionally protected right to protection from a systematic, state-sanctioned policy and practice of effectively circumventing and denying death-sentenced prisonor's of a meaningful opportunity to post conviction review of capital convictions and sentences of death by virtue of the systematic appointment of statutorily unqualified and incompetent post conviction counsel - and the virtual absense of any means to protect against the irreparable injury of procedural default.

At a minimum, fundemental fairness and Due Process requires that this Court recognize and establish a process and/or procedure comparable to that applicable to criminal defendants standing trial, known as a "Nelson" hearing, so that death-sentenced prisonor's who have reason to believe that appointed post conviction counsel is not providing reasonably competent representation, that

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Footnote 2: please see, Section IV, Infra "Exhaustion of State Remedies With Notice of Intent To Pursue Federal Civil Rights Action Under Hill v. McDonough, 127 S.Ct. ___ (2007) challenging fundemental fairness of Florida's capital post conviction process, and death penalty.

capital post conviction defendant can compel the Court to hold a hearing to address allegations of incompetency, and if reason to believe such counsel is not providing reasonably competent post conviction representation is established, the Court is obligated to <u>remove</u> such counsel and provide substitute counsel. <u>See</u>, <u>Nelson v. State</u>, 274 So2d 256, 258-60 (Fla. 4th DCA 1973), adopted by this Court in <u>Hardwick v. State</u>, 521 So2d 1071, 1074-75 (Fla. 1988)

> "If incompetency of counsel is assigned by the defendant... the trial judge should make sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. if reasonable cause for such belief appears, the Court should make a finding on the record and appoint substitute attorney, who should be allowed adequate time to prepare a defense"
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> <u>Hardwick v. State</u>, <u>supra</u>, 521 So2d, at 1074-75

This proposal is reasonable <u>and is entirely consistent</u> with Fla. Statutes, §27.711 (12), which states that "The Court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality (post conviction) representation. The Court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel", as well as this Court's own recognized "constitutional responsibility", <u>See</u>, <u>Arbalaez v. Butterworth</u>, 738 So2d 326, 327 (Fla. 1999) ("we have a constitutional responsibility to ensure that the death penalty is administered in a fair, consistent and reliable manner."

Further, in the interest of <u>fundamental fairness</u>, and protecting the integrity of the judicial process, (<u>see</u> www.southerninjustice.com), this Court must fully review and address upon the pled merits presented herein, <u>Infra</u>, whether even accepting that the Sixth Amendment constitutional right to legal representation does not extend to a right to counsel in capital post conviction proceedings as established in <u>Murray v. Giarratano</u>, 492 U.S. 1, 10 (1989); <u>Lambrix v. State</u>, 698 So2d 247 (Fla. 1996) there is never the less a "substantive" and "procedural" <u>Due Process</u> right to the appointment of reasonably competent legal representation in capital post conviction proceedings that <u>cannot</u> be arbitrarily denied and <u>is entitled</u> to

some discernable form of minimal "due process" protection.

As stated above, in Olive v. Maas, 811 So2d 644, 653 (Fla. 2002) qouting Remeta v State, 559 So2d 1132, 1135 (Fla. 1990) this Court recognized that "the appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation") See also, Spalding v. Duggan, 526 So2d 71, 72 (Fla. 1988) ("we recognize that under Section § 27.702 each defendant under sentence of death is entitled, as a statutory right, to effective representation....in all collateral proceedings")

It defies logic - and offends the most basic notions of fundamental fairness - to even suggest that the legislative intent in establishing a statutorily-created right to post conviction representation in capital cases was to provide nothing more then a pretense of post conviction representation that would effectively circumvent and deny death-sentenced prisonor's their constitutionally protected right to meaningful post conviction review. If by intent, or subsequently established policy and practice, this statutorily created right to post conviction representation is used to systematically deprive death-sentenced prisonors of their protected right to pursue meaningful post conviction review, then this state-created "right" acts as an unconstitutional impediment to meaningful post conviction review.

This Court must assume that the legislative intent in establishing a statutorily created right to legal counsel in capital cases was that reasonably competent post conviction counsel would be provided to facilitate - not obstruct and deny - the death sentenced prisonor's ability to timely pursue the protected right to "meaningful" post conviction review.

Thus, this statutorily-created "right" to post conviction representation in capital cases must be entitled to some measure of minimal Due Process protections to ensure that this statutorily created right is not arbitrarily or unfairly circumvented or denied. Under both the Florida and Federal Constitution, death sentenced prisonors are entitled to minimal Due Process protection of this statutorily created right. See, Lawson v. Woodruff, 134 Fla. 437, 181 So. 81 (1938)

> "the Florida Constitution's due process provisions protect 'against any and all abuses, and arbitrary, discriminatory, or essentially unfair exercise of delegated governmental power, authority, or duty, of any nature or charactor whatsoever."

As the indisputable facts of Petitioner's own capital post conviction history shows, in the past Petitioner has been virtually forced to be represented by incompetent statutorily appointed post conviction counsel in spite of Petitioners attempts to have counsel removed, before irreparable harm could be done this Court refused to take any action; See Lambrix v. Friday, 525 So2d 879 (Fla. 1988) (summarily denying petition for extraordinary relief seeking to prohibit appointment of incompentent post conviction counsel.)

Subsequently, when such "CCR Counsel" did fail to provide competent representation due to their own admitted inability to investigate, develop, and present Petitioners post conviction claims - including evidence substantiating Petitioners claim of actual innocence - this Court affirmed the summary deniel of this post conviction appeal without addressing Petitioners pled and supported claim of innocence, Lambrix v. State, 698 So2d 247 (Fla. 1996)

In recent years a substantial wealth of newly discovered evidence supporting Petitioners long and consistently pled claim of innocence, and collectively showing how the entire wholly circumstantial case of premeditated murder was deliberately fabricated with the intent to wrongfully convict Petitioner has come to light and presented to the state Courts.

But once again Petitioners ability to fully and fairly pursue meaningful post conviction review on this now substantiated claim of actual innocence is being obstructed by the statutory appointment of incompetent post conviction counsel. See, Lambrix v. State, Fla. S.Ct. Case No. SC08-0064

Specifically, as the record of this pending appeal reflects, Petitioner has repeatedly advised both this Court and the lower Court that appointed post conviction counsel was not providing reasonably competent representation. Petitioner even specifically moved the lower Court for a "Nelson" hearing, but was denied.

Not surprisingly, when statutorily appointed post conviction counsel did finally submit Petitioner's "Initial Brief" to this Court (Lambrix v. State, Fla S.Ct SC08-064) the appellate brief failed to adequately present Petitioners claims of deprivation of applicable Federal rights, which unless corrected will automatically procedurally bar Petitioner from subsequently seeking Federal review; see, Baldwin v. Reese, 541 U.S. 27 (2004) (to meet the exhaustion requirement, state

prisoner must have cited a specific federal or constitutional provision to the highest State Court authorized to hear the appeal); Jiminez v. Fla. Dept of Corrections, 481 F.3d 1337, 1342 (11th Cir. 2007) ("A petitioner must alert state court's to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights," Duncan v. Henry, 513 U.S. 364, 364 (1995))

Once again, Petitioner is being provided incompetent post conviction representation that will subsequently result in the deprivation of Petitioner's constitutionally protected right to "Meaningful" post conviction review of Petitioners pled and supported claim of actual innocence - and there is no means available in which to protect against this predictable procedural default.

Under Fla. Statutes § 27.711 (12) ("The Court shall monitor the performance of assigned counsel to ensure that the capital defendant is recieving quality post conviction representation") and Arbalaez v. Butterworth, 738 So.2d 326, 327 (Fla. 1999) ("we have a constitutional responsibility to ensure that the death penalty is administered in a fair, consistent, and reliable manner") this Court is obligated to fully review the instant Petition, and grant the relief requested.

This Court must recognize that absent adequate safeguards and "some assurance that (statutorily appointed) counsel give effective representation" the right to post conviction counsel is meaningless. Olive v. Maas, supra, 811 So.2d, at 653, quoting Remeta v. State, supra, 559 So.2d, at 1135 so that this statutorily-created "right" to legal representation in capital post conviction proceedings doesn't become nothing but a pretense of representation that obstructs and impedes meaningful post conviction review, and violates both the "procedural" and "substantive" compenents of constitutionally protected "Due Process"

Finally, this Court cannot ignore the long recognized maxim of law that "death is different." As this Court recognized in Arbalaez v. Butterworth, supra, 738 So.2d at 331, quoting Monge v. California, 542 U.S. 721, 118 S.Ct. 2246, 2252-53 (1988) and State v. Dixon, 283 So.2d 1 (Fla. 1973):

> "our adversarial system of criminal justice depends entirely upon the procedural fairness and integrity of the process. This Court and the United States Supreme Court have held that the integrity of the process is of unique and special concern in cases where the State seeks to take the life of the defendant"

III) NOTICE OF INAPPLICABILITY OF LOGAN V. STATE, 846 So2d 472 (Fla. 2003)

In Logan v. State, 846 So2d 472 (Fla. 2003) this Court announced the judicially-created rule that pleadings filed by prose defendants who are represented by appointed legal counsel constitute unauthorized "hybrid representation" and are a nullity that can be stricken from the record. Logan, Id, at 479; Davis v State, 789 So2d 978 (Fla, 2001)

However, in Logan this Court specifically recognized that this "unauthorized pleading" rule does not, and cannot, apply to pro se actions challenging the alleged incompetency of appointed legal counsel, as to do so would effectively eliminate any opportunity to protect against the appointment of ineffective legal counsel, such as the procedures this Court adopted in Hardwick v. State, 521 So2d 1071, 1074-75 (Fla. 1988), adopting Nelson v. State, 274 So2d 256, 258-60 (Fla, 4th DCA, 1973)

Commonsense, as well as applicable Due Process, clearly dictate that Logan v. State, supra, cannot apply to pro se actions challenging the incompetency of appointed legal counsel. Clearly, the instant action is specifically intended to challenge the competency of statutorily-appointed post conviction counsel and this Court is statutorily obligated to fully review this instant petition under the plain langauge of Florida Statutes § 27.711(12), which states;

> "The court shall monitor the performance of assighed counsel to ensure that the capital defendant is recieving quality (post conviction) representation. The Court ~~and~~ shall also recirve and evaluate allegations that are made regarding the performance of assighed counsel"

Thus, this Court has a statutorily created nondiscretionary ("shall") duty to "recieve and evaluate" the allegations of incompetent post conviction representation provided in this petition. See also, Arbelaez v. Butterworth, supra, 738 So2d 327 ("we have a constitutional responsibility to ensure that the death penalty is administered in a fair, consistent, and reliable manner")

There is no question that Petitioner is a death-sentenced prisonor presently pursueing post conviction review, and is now specifically challenging the alleged due process deprivation resulting from the failure to be appointed reasonably competent post conviction representation. Thus, the "Logan v. State" rule cannot apply and Petitioner is entitled to full review of the instant petition.

IV) Exhaustion of State Remedies With Notice of Intent To Pursue Federal Civil Right's Action Under Hill v. McDonough

Petitioner respectfully submits that the instant action represents a good-faith attempt to provide the State of Florida[3] a full and fair opportunity to address and correct the specifically stated deprivations of Procedural and/or Substantive Due Process under the Fifth, Eighth, and Fourteenth Amendments of the US Constitution.

If adequate state relief and remedy is not provided, Petitioner provides instant Notice of Intent to initiate and prosecute a Federal "civil rights" action under 42 U.S.C §1983 and pursuant to Hill v. McDonough, 126 S.Ct. __ (2006) specifically seeking prospective relief in the form of Declaratory and Injunctive Relief under the assertion that Florida's collective capital post conviction process is "fundementally unfair" and systematically deprives death-sentenced prisoners of the constitutionally protected right to meaningful post conviction review of capital convictions and/or death sentences.

In Hill v. McDonough, 126 S.Ct. ____ (2006) the U.S. Supreme Court unanimously recognized that Florida death-sentenced prisoners are entitled to use a "civil rights" action in Federal Court as a means in which to challenge an allegedly unfair practice or procedure relevant to the process of administering the death penalty providing that; if successful, such an action does not, and would not, undermine the validity of the capital conviction and/or sentence of death.

Petitioner respectfully submits that if this Court refuses to establish and adopt some form of minimal Due Process protections, and procedures in which to pursue such, to protect against the systematic appointment of incompetent post conviction representation in capital cases before irreparable injury in the form of procedural defaults resulting from objectively ineffective post conviction representation occurs, then Petitioner will seek Federal relief arguing that Florida's refusal to provide minimal Due Process protections to prevent against the arbitrary deprivation of the statutorily-created right

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Footnote 3: Although the State of Florida is not a named Respondent to this instant action, as reflected within the "Certificate of Service" Infra, a copy of the instant Petition has been duly served upon the Attorney General's office, thus adequate notice provided.

to post conviction counsel, See, e.g., Hewitt v. Helms, 459 U.S. 460, 472 (1983) (recognizing that state statutes can create a constitutionally protected liberty interest that cannot be arbitrarily deprived)

Petitioner will further seek Federal Declaratory Relief argueing that given the complexity of capital post conviction proceedings, McFarland v. Scott, 512 US 849, 854-55 (1994) (recognizing that capital post conviction proceedings have evolved into a state of complexity that prevents pro se, unrepresented petitioner from meaningfully pursueing relief), both the "procedural" and "substantive" components of the Due Process Clause establish a Constitutional right to effective post conviction representation under the 5th and 14th Amendments of the U.S. Constitution.

Last, Petitioner will seek Federal Declaratory Relief argueing that the systematic deprivation of reasonably competent post conviction representation in capital cases resulting in what has now become widespread application of statutorily created procedural defaults prohibiting meaningful review of death-sentenced prisoners claims of deprivation of fundamental constitution rights resulting in unjust and illegal convictions and incarceration effectively render's Florida's death penalty process "fundementally unfair" and constitutionally invalid.

For all practical purposes, the failure to establish at least minimal Due Process protections to ensure that death-sentenced prisonor's are afforded a meaningful opportunity to challenge the validity of the capital conviction and sentence of death have effectively created a contemporary death penalty process in which "Death by Default" has become the new judicial standard in ultimately deciding who will live and who will die.

Such a system is by its very nature "arbitrary and capricious", Furman v. Georgia, 408 U.S. 238, 241 (1972) The inconvenient truth is that the failure to ensure that reasonably competent post conviction representation is provided to death sentenced prisonors seeking to challenge the constitutional validity of their capital conviction and/or sentence of death effectively creates a death penalty process in which the constitutional validity of the death sentences is not adequately tested, thereby creating an arbitrary and unfair process that violates the Eighth Amendment.

This Court cannot in good conscience ignore the fact that the only way

to adequately determine the constitutional validity of capital convictions and/or sentences of death is to provide meaningful post conviction review, as claims of the alleged deprivation of the Sixth Amendment right to counsel under Strickland v. Washington, 466 U.S. 668 (1984), as well as substantial constitutional claims of failure to disclose exculpatory evidence, e.g., Brady v. Maryland, 373 US 83 (1963) and use of perjured testimony or false evidence, e.g. Giglio v. United States 405 U.S. 150 (1972) and even claims of actual innocence or fundemental miscarriage of justice, e.g., Schulp v. Delo, 513 U.S. 298 (1995); House v. Bell, 126 S.Ct. 2064 (2006) can only be raised in post conviction proceedings.

As the Supreme Court recognized in Lowenfeild v. Phelps, 484 U.S. 231, 238-39 (1988), the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"; See also, Dobbs v Zant, 506 U.S. 357, 358 (1993) (emphasizing "the importance of reviewing capital sentences on a complete record")

Thus, the capital post conviction process is a fundemental part of the death penalty process, and as a matter of fundemental fairness, under the "substantive" component of the Due Process Clause of both the Florida and Federal Constitution, there must be some minimal "due process" protection of a death-sentenced defendants ability to pursue meaningful post conviction review challenging the constitutionality of the capital conviction and sentence of death by providing some measure and means of reasonably competent post conviction representation.

Anything less creates a death penalty process in which "Death By Default" decides who will live and who will die - and even the innocent will be substantially more likely to be put to death. Such an arbitrary and unfair process is the very defination of cruel and unusual punishment, and violates the most basic notion of "fundemental fairness". As the Supreme Court stated in Rochin v. California, 342 U.S. 165, 169 (1952);

> "Regard for the requirements of Due Process Clause inescapably imposes upon this Court an exercise of judgement upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canon's of decency and fairness which express the notion's of justice of English-speaking peaples even

towards those charged with the most heinous offenses. These standards of justice are not authoratively formulated anywhere as though they were specifics. Due Process of law is a summarized constitutional gaurantee of respect for those personal immunities which, as Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundemental or implicit in the concept of ordered liberty"

Petitioner respectfully submits that procedural and substantive Due Process requires that this Court establish and adopt Minimal Due Process protections to ensure that reasonably competent post conviction representation is provided to death sentenced prisonors.

The refusal to do so will inevidibly compel a broader Federal Constitutional challenge to Florida's death penalty process as a system that effectively advocates "Death by Default" and employ's a systematic policy and practice of providing unqualified and incompetent post conviction representation with virtually no discernable means in which the death-sentenced prisonor can protect against the resulting procedural default of meaningful state and Federal post conviction review prior to irreparable default occurring is by its very nature fundementally unfair and a deprivation of Due Process.

In the interest of exhausting any available state remedies, Petitioner moves this Court to address these stated concerns and provide the remedy of relief as so prayed for within the body of the instant petition.

V.) Petitioner's Case History: Actual Past and Present Prejudice

Nothing can be more offensive to the basic notion's of fundemental fairness and justice itself then a judicial process that effectively advocates the state-sanctioned execution of innocent men and women.

In Arbalaez v. Butterworth, 738 So2d 326, 329 (Fla. 1999) Justice Anstead characterized Florida's death penalty post conviction process as "a state-created hodgepodge system of collateral legal representation plagued with uncertainty and unevenness of representation."

Few capital cases could more graphically illustrate the truth - and consequences -

of Justice Anstead's words more then this Petitioner's own prolonged oddesey through this bizarre and _inherently dysfunctional_ post conviction system. As stated below and _indisputably_ supported by this Court's own records, for over a quarter of a century now Petitioner has consistently asserted _innocence_ of the wholly circumstantial case of alleged "premeditated" (not "felony") Murder.[4]

As the records now before this Court reflect, _See_, _Lambrix v. State_, Florida Supreme Court case # SC08-0064 (Initial Brief, page 1-5)

> "For more then two decades Cary Michael Lambrix has argued that he is innocent of the charges against him. The case against him was wholly circumstantial. There were no eyewitnesses, no physical or forensic evidence and no confession to support the state's case..... A review by this Court of all the collective weight of the new evidence will support a finding upon this Court's _denovo_ review that the states theory of alleged premeditated murder _was fabricated_ with the intent to wrongfully convict Mr. Lambrix. _Mr. Lambrix's case is a legitimate actual innocence case_"

Although Petitioner has consistently presented claims supporting innocence to the Courts, incredibly _not even once_ has any Court addressed these specifically pled assertions of innocence. Virtually everytime Petitioner has attempted to present the claims substantiating Petitioners innocence, review has been circumvented and denied because appointed counsel purportedly failed to properly present the asserted claims to the Court.

To compound this incomprehensible injustice, as the records reflect, _repeatedly_ this incompetent post conviction representation was _virtually forced_ upon this Petitioner, even when appointed counsel explicitly advised the Court that they _could not_ provide reasonably competent post conviction representation - and Petitioner was _denied_ his asserted request to exercise self representation. And when Petitioner subsequently attempted to pursue a "successive"

Footnote 4: _please see_, www.southerninjustice.com (website using Petitioners capital case as the seminal example of "southern injustice", with all trial transcripts and appellate briefs posted online for all to see)

state post conviction appeal, without acknowledging that such incompetent post conviction counsel was virtually forced upon Petitioner, this Court found that successive post conviction appeal procedurally barred upon the determination that Petitioner has no constitutional right to post conviction counsel, so any claims of ineffectiveness were not cognizable. Lambrix v State, 698 So2d 247 (Fla. 1996)

Subsequently, a substantial wealth of newly discovered evidence was brought to light collectively substaniating Petitioner's long pled claim that the wholly circumstantial case of capital, premeditated murder upon which Petitioner was condemned to death for was deliberately fabricated with the intent and purpose of wrongfully convicting Petitioner.

But once again Petitioners ability to timely present this now substaniated claim of innocence has been repeatedly frustrated by an inherently dysfunctional post conviction process, and once again because of the incompetency of statutorily appointed post conviction counsel, Petitioner again faces the threat of procedural default, and subsequent execution in spite of Petitioner's innocence.

The following is a complete (albeit summarized) account of Petitioner's prolonged capital post conviction history, which collectively establish no question of the actual past and present prejudice resulting from this inherently dysfunctional and "hodge-podge" system of capital post conviction representation, and the failure to establish any discernable minimal due process protections "to ensure that quality representation is being provided", Fla Stat. § 27.711 (12); [5]

On March 29, 1983 Petitioner was indicted on two counts of "premeditated" murder (not "felony" murder) by a Grand Jury in Glades County, Florida. An original trial began in December, 1983 - but ended upon the declaration of a mistrial due to a "hung jury" when the jury could not reach a unamimious verdict even after eleven (11) hours of continuous deliberations;

In February, 1984 a retrial commenced, again in rural Glades County (motions to

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Footnote 5: If this Court in anyway doubts, or otherwise questions, the veracity of the nature and/or characterization of any of the previously litigated proceedings referred to herein, then this Court should simply pull the original files/briefs from this Courts own archives, and independently examine the content for itself.

change of venue were denied). Shortly prior to retrial, the State offered to reduce the charges to 2nd Degree Murder, but Petitioner refused. The defense presented no evidence, and both the Court and defense counsel instructed Petitioner that Petitioner would not be allowed to testify[6] in his own defense. Additionally, the trial court prohibited defense counsel from cross-examining the State's "key witness" on the fact that she previously told numerous conflicting stories and failed a state admin. polygraph;[7]

The jury deliberated a little over an hour before returning verdicts of "guilty" on both counts of First Degree (premeditated) Murder. One jury subsequently commented that the only reason it took "so long" was because they couldn't get the coffee pot to work. See, www.southerninjustice.com

A "penalty phase" of the trial followed, resulting in the same jury recommending imposition of the death penalty by votes of 10-2 and 8-4. On March 22, 1984 Judge Richard Stanley sentenced Petitioner to death on both counts, refusing to recognize any of the mitigating evidence presented by Petitioner (i.e., no significant prior criminal history, honorably discharged from the military following duty related disability, responsible father and husband, former Boy Scout and Alter Boy at Catholic Church, ect)

Following appointment of appellate counsel, a "direct appeal" was made to this Court. Counsel assigned to represent Petitioner had virtually no prior experience in capital litigation, and in a subsequent Federal 'habeas' hearing in August, 1991 former Fla. S.Ct Chief Justice Alan Sundberg testified in behalf of Petitioner that the quality of representation provided was the most "ineffective" representation he had ever seen in any capital "direct appeal". No issues challenging imposition of death were raised.

On September, 25, 1986 this Court affirmed both the convictions and sentences of death, Lambrix v. State, 494 So2d 1143 (Fla. 1986). Incredibly, this Court implicitly refused to fulfill this Courts own independent obligation to review the sufficiency of the wholly circumstantial evidence used to convict Petitioner of premeditated murder, or even address whether the evidence was sufficient to convict;[8]

Footnote 6: See, Lambrix v. Singletary, 72 F3d 1500, 1504-05 (11th Cir. 1996)

Footnote 7: See, Lambrix v. State, 494 So2d 1143, 1147-48 (Fla. 1986)

Footnote 8: See, Muehleman v. State, 503 So2d 310, 313 (Fla. 1987) (citing Fla. Stat. §921.141 (4)) (recognizing this Courts Constitutional duty to address sufficiency of evidence)

Petitioner's direct appeal counsel did not file a Motion for Rehearing, and did not pursue a Petition for Writ of Certiorari to the US Supreme Court. Several years later, in a marginal 5 to 4 decision, the US Supreme Court conceded that Petitioner was unconstitutionally sentenced to death- by marginal majority concluded that Petitioner was procedurally barred from relief of these unconstitutionally imposed death sentences because appointed direct appeal counsel did not adequately and timely present the issue on direct appeal;[9]

Following completion of this "direct appeal" process, Petitioner contacted Larry Spalding, director of the "Office of Capital Collateral Representives" (Known as "CCR-Counsel") specifically requesting appointment of post conviction counsel pursuant to Fla.Stat.§27.702 (1985). However, Mr. Spadding explicitly advised Petitioner that the CCR office was "underfunded and understaffed" and that post conviction counsel could not be provided unless/until Petitioner's case became a "priority";

Petitioner waited over a year for the appointment of post conviction counsel, and when counsel was still not provided, Petitioner filed a motion with the original trial Court requesting leave to exercise self-representation, specifically argueing that post conviction counsel was not available, and that unless Petitioner was allowed to file his own "Rule 3.850" post conviction appeal, the deadline to file such would pass and Petitioner would be procedurally barred from post conviction review;

The lower Circuit Court held a hearing on December 9, 1987 at which time the State argued that by the creation of Fla.Stat, Chpt 27 in 1985 all death-sentenced defendants were mandatorily required to be represented by counsel in post conviction proceedings, and Petitioner was statutorily prohibited from exercising self representation. Adopting the States argument, Judge Elmer Friday ordered that by virtue of Fla. Stat §27.701-710 (1985) Petitioner could not exercise self-representation, and any post conviction appellate motions could only be filed by appointed counsel;

Petitioner filed a "Petition for Writ of Prohibition, ect" with this court, requesting that this Court overturn Judge Friday's clearly erroneous decision and prohibit the lower Court from virtually forcing Petitioner to be represented by post conviction counsel that clearly could not provide adequate representation. This Court refused

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Footnote 9: See, Lambrix v. Singletary, 520 US 518 (1997)

to address the Merits of the petition, and summarily dismissed it as "moot", Lambrix v. Friday, 525 So2d 879 (Fla. 1988)

As Petitioners statutory deadline for filing any "Rule 3.50" post conviction relief approached, without any counsel yet assigned, Petitioner took the extraordinary, but arguably necessary, action of filing a "Petition for Writ of Mandamas" with this Court against then-Governor Robert Martinez, requesting that Gov. Martinez sign a "death warrant" to schedue Petitioner's execution, as only then would Petitioner's case become a "priority" so that counsel would be assigned and Petitioners post conviction appeal could be timely filed and reviewed;

In September 1988 Gov. Martinez did sign a "death warrant" scheduling Petitioners execution for November 30, 1988. This Court then dismissed as "moot" the Petition for Writ of Mandamas, Lambrix v. Martinez, 534 So2d 400 (Fla. 1988)

On October 27, 1988 - the absolute last day of the statutory deadline for filing - CCR counsel filed a "Shell Rule 3.850" motion with the original trial court in which CCR counsel advised the court that due to inadequate staff and an "overwhelming" caseload, it was "impossible" for CCR counsel to investigate, develop, and present Petitioners post conviction claims to the court. CCR Counsel asked that the trial court order a stay of execution, and grant additional time for CCR Counsel to fully investigate and present Petitioners post conviction claims, specifically advising the trial court that without additional time, Petitioners right to pursue meaningful post conviction review would be rendered "illusory";

The original trial court delayed any ruling on this original post conviction motion until Petitioner was within days of imminent execution, then in a cursory order, the Circuit Court summarily denied the Motion for additional time, finding only that "the interests of justice would not be served by delaying Lambrix's execution". No claims were addressed upon the merits, and no form of evidentiary, or "Huff" hearing was provided;

As Petitioner was then hours away from imminent execution, CCR Counsel expeditiously appealed the lower Court's summary deniel of post conviction relief to this Court, again argueing that it was "impossible" for CCR Counsel to investigate and present Petitioners post conviction claims. This Court granted a 48

hour "temporary stay" to allow time for this appeal to be heard, but then by a 4 to 3 vote, affirmed the lower Courts summary denial of post conviction relief; Lambrix v. State, 534 So2d 1151 (Fla, 1988)

CCR Counsel then appealed to the Federal District Court on an original Federal habeas, and as Petitioner was being prepared to be executed, the Federal District Court granted and ordered an immediate "indefinate" stay of execution to allow Petitioners Federal habeas to be heard;[10]

At Petitioners request, the Federal Court held a hearing on alleged incompetent representation by CCR Counsel, then subsequently ordered that CCR Counsel be discharged, and substitute post conviction counsel be provided through the then federally-funded "Volunteer Lawyers Resource Center" in Tallahassee, Florida; ("VLRC")

Following the Federal Courts order that Petitioner could not pursue post conviction claims in the Federal habeas that were not fully presented to the State Court, Petitioners 'VLRC' Counsel initiated a "Successive" Rule 3.850 motion for post conviction relief in the State circuit court, arguing entitlement to procedural bars being exempted and set aside under the circumstances in which ineffective post conviction counsel was virtually forced upon Petitioner establishing entitlement to file a belated original post conviction motion. Alternatively, VLRC Counsel argued that Petitioner is "actually innocent" and entitled to a "fundamental miscarriage of justice" exception to the statutorily created procedural bars;

once again the original trial Court summarily denied relief, without providing any form of "Huff" or evidentiary hearing - and without addressing the merits of Petitioners now fully pled claims, including Petitioners actual innocence. Petitioners counsel appealed the denial to this Court, and this Court affirmed the summary denial of relief upon finding that since Petitioner did not have any constitutional right to post conviction representation in the first place, a successive Rule 3.850 motion based upon CCR counsels failure to provide "effective" post conviction

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Footnote 10: Following removal of CCR Counsel, the Federal Court allowed Petitioner's new counsel to file an Amended Habeas, then granted an Evidentiary Hearing, limited to only the claims properly presented in State Court, and relief was subsequently denied, then the denial of relief was affirmed on appeal. Lambrix v. Singletary, 72 F3d 1500 (11thCir. 1996)

representation, and any claims presented therein, were procedurally barred. Lambrix v. State, 698 So2d 247 (Fla. 1996)

Petitioner would note that although the record indisputably supported the assertion that such CCR Counsel was virtually forced upon Petitioner, and Petitioner was prohibited from protecting his own post conviction interests, this Court did not address these circumstances, nor did this Court address Petitioners specifically pled claim that Petitioners actual innocence entitled Petitioner to a successive post conviction appeal under the "fundamental miscarriage of justice" doctrine.

In July 1996 Congress abruptly eliminated all federal funding for "Volunteer Lawyers Resource Center" (VLRC) effectively leaving Petitioner without legal representation. After attempting (unsuccessfully) to obtain pro bono legal representation, Petitioner was compelled to file a "Petition for Writ of Mandamas" with this Court requesting that counsel be appointed. By administrative order, this Court assigned "CCRC-South" to Petitioners case, then dismissed as "moot" the Mandamas petition; Lambrix v Reese, 705 So2d 902 (Fla. 1998)

However, shortly after this Court ordered CCRC-South to provide Petitioner with post conviction representation, CCRC South filed a "Motion to withdraw" due to unspecified alleged "conflict of interest." In the interest of preventing unnecessary delays Petitioner filed a new "Petition For Writ of Mandamas", asking that this Court expeditiously resolve the matter regarding appointment of post conviction counsel. Petitioner's case was re-assigned to "CCRC-Middle", and this Court then dismissed the Mandamas petition as "moot", Lambrix v. State, 727 So2d 907 (Fla. 1998)

During this time, both CCRC-South and CCRC-Middle initiated a new state post conviction motion in the original trial court based upon newly discovered evidence supporting Petitioners long pled claim of actual innocence.

But in late 1998 CCRC-Middle counsel Mark Reinhold and Edward Bosky abruptly resigned from CCRC-Middle, in part because of alleged limitations CCRC-Middle director John Moser placed on their ability to effectively litigate Petitioners "successive" post conviction motion. CCRC Middle did then acknowledge a "conflict of interest" and withdrew from Petitioners case.

Petitioners case was then referred to the "Commission on Capital Cases", and upon

consultation with the "Commission," the Circuit Court appointed "registry" counsel Thomas Ostrander to represent Petitioner. However, shortly after this appointment Petitioner became aware that Mr. Ostrander had virtually no prior experience in capital post conviction proceedings, and in fact, this Court itself had only recently disciplined attorney Thomas Ostrander for failing to provide competent representation in other non-capital cases Mr. Ostrander had been appointed to;

Petitioner immediately moved the trial court to remove attorney Ostrander upon grounds that Mr. Ostrander did not meet the minimal statutory qualifications for appointment as "registry" counsel under Fla. Stat., Chpt 27.711. The trial Court refused to timely do so, so Petitioner filed a "Petition For Writ of Prohibition" with this Court, seeking to prohibit the appointment of Mr. Ostrander. Only then did the lower Court agree to remove Thomas Ostrander, and re-assigned Petitioners case back to CCRC-South. Subsequently this Court dismissed as "moot" the Writ seeking Prohibition. Lambrix v. State, 766 So2d 211 (Fla. 2000)

Since Petitioners case was re-assigned to CCRC-South, Petitioner has repeatedly been compelled to advise the lower Court of the failure to provide reasonably competent representation, and Petitioners case has been "bounced" from attorney to attorney in the CCRC-South office, creating a pathetic "hodge-podge" system of post conviction representation that has repeatedly frustrated litigation. During that time, Petitioners case was bounced through six different CCRC South attorneys (Jennifer Corey, Todd Scher, Dan Hallenberg, Sylvia Gonzalez, William Hennis, and Roseanne Eckert);

Throughout this chaotic and unpredictable circus of "representation" by CCRC-South, a virtual wealth of newly discovered evidence supporting Petitioners long pled claim of actual innocence was developed, and through a series of evidentiary hearings, presented to the Court.

During this time counsel representing the State (Carol M. Dittmar, Asst. Attorney General, and Randall McGruther and Cynthia Ross, Asst State Attorneys) engaged in a campaign of unethically obstructing the development and presentation[11] of crucial evidence

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Footnote 11: Formal complaints alleging unethical misconduct were filed with the Florida Bar against both Asst Attorney General Carol M. Dittmar (Florida Bar File #2008-11,545 (13b) and Cynthia Ross, Asst State Attorney (Florida Bar File # RFA-09-27522).