IN THE SUPREME COURT OF FLORIDA

MERYL McDONALD,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC19-635
L.T. No. CRC94-02958 CFANO

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "DAR" followed by the appropriate page number. References to Appellant's first postconviction proceeding will be cited as "PCR-1" followed by the appropriate page number. References to the second postconviction proceeding will be cited as "PCR-2" followed by the appropriate volume and page number. References to the third postconviction motion will be cited as "PCR-3" followed by the appropriate page number. References to the fourth postconviction motion will be cited as "PCR-4" followed by the appropriate page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal of the denial of postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Meryl McDonald is a Florida prisoner under sentence of death. In 1994, a grand jury indictment charged five individuals –- Meryl McDonald, Robert Gordon, Susan Shore, Denise Davidson, and Leonardo Cisneros -- with first-degree murder in Dr. Louis A. Davidson's death.[1] In 1995, McDonald and Gordon were tried jointly for the murder in the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida.

Trial and Direct Appeal:

The joint trial of defendant McDonald and co-defendant, Robert Gordon, was held from June 6, 1995 through June 15, 1995, before the Honorable Susan Schaeffer, Circuit Judge. The jury

[1] The police investigation of Dr. Davidson's murder focused on the victim's wife, Denise Davidson, as she and the victim were engaged in a bitter divorce and custody battle. (DAR V23/402-08; V25/642-44, 660). Police surveillance of Denise Davidson led to discovery of 21 money transfers from Denise to Meryl McDonald's girlfriend and co-defendant Gordon both before and after the murder. (DAR V25/729-30, 734, 738, 744-47, 749-53, 760-70, 777-794). Also, Denise had purchased and activated a cellular phone on December 17, 1993, which was in the possession of Gordon and McDonald. (DAR V25/686; V33/1841-42, 1861). Phone records established that the phone was used between December 27 and January 27, 1994 to call the victim's house 66 times (all hang up calls); the Bayfront Medical Center eleven times; Denise Davidson's home over 200 times; and Denise's place of employment, Dooley Groves, 86 times (DAR V25/662-87; V33/1861-66, 1900-01; Ex. 27, 35). In addition, Denise's home telephone records indicated 232 calls were made from her house to a pager used by both defendants (Gordon and McDonald) during January, 1994. (DAR V25/669-70).

recommended death for each defendant by a vote of nine to three, and both McDonald and Gordon were sentenced to death for the contract killing of Dr. Davidson.[2] McDonald v. State, 743 So. 2d 501, 502 (Fla. 1999) (McDonald I).

On direct appeal, this Court affirmed McDonald's conviction for first-degree murder and death sentence, noting that the facts adduced at trial were fully set out in the opinion affirming co-defendant Gordon's conviction and sentence. See McDonald I, 743 So. 2d at 502, n.1, citing Gordon v. State, 704 So. 2d 107, 108-10 (Fla. 1997). The facts adduced at their joint trial also were summarized by the federal district court:

> Mrs. Davidson, who was in a bitter custody battle and divorce with her husband, Dr. Louis A. Davidson, hired McDonald and Gordon to kill her husband. Mrs. Davidson was engaged to another co-defendant, Leonardo Cisneros. McDonald and Gordon made several preparatory trips from Miami to Tampa in late December 1993 and early January 1994. On January 24, 1994, McDonald and Gordon hired Susan Shore to drive them from Miami to Tampa to allegedly "visit a friend" and "pickup a piece of paper." Upon arriving in Tampa, they met with both a lady, whom Shore later identified as Mrs. Davidson, and someone named "Carlos," whom Shore later identified as Cisneros. McDonald, Gordon, and Shore checked into a motel.

[2] McDonald, Gordon, Denise Davidson (the victim's ex-wife), and Leonardo Cisneros (her fiancee) were indicted for the murder of Dr. Davidson. Denise Davidson was tried separately and convicted of first-degree murder and sentenced to life imprisonment, as recommended by the jury. Her conviction and sentence were affirmed in Davidson v. State, 706 So. 2d 298 (Fla. 2d DCA 1997) [Table]. Cisneros escaped arrest and remains a fugitive.

Early the next morning, January 25, 1994, Shore drove McDonald and Gordon to the apartment complex "where their friend lived." While waiting for "their friend" to arrive (Dr. Davidson worked the night shift at a local hospital), McDonald left saying that he was going jogging and Shore played catch with Gordon. When Dr. Davidson pulled into the parking lot a short time later, Gordon told Shore, "Here is my friend. You can go sit in the car now." Gordon approached and talked to Dr. Davidson while Shore sat in the car and read a newspaper. Shore saw Gordon follow Dr. Davidson toward an apartment. Gordon returned to the car about twenty to twenty-five minutes later and McDonald returned five to ten minutes after Gordon. McDonald told Gordon that "he had the piece of paper." McDonald patted his stomach, which caused a "crinkling" sound.

Shore testified that as they drove back to the motel, McDonald used his cell phone to call Cisneros and said "he had it." Cisneros met them at the motel, briefly talked with McDonald and Gordon, and returned again later with Mrs. Davidson. Shortly thereafter Shore, McDonald, and Gordon drove back to Miami.

Later that day Dr. Davidson's fiancee found the body blindfolded, bound, gagged, hogtied, and lying face down in a bathtub full of bloody water. The body was tied with a vacuum cleaner cord and a cashmere belt. There was no indication of forced entry. Shoe prints were visible on a tiled floor in the apartment. A few of Dr. Davidson's personal items and a money clip with several hundred dollars were missing. Although the apartment had been ransacked, $19,300 in cash and some credit cards remained.

The police began a surveillance of Mrs. Davidson shortly after Dr. Davidson's murder. Using the name "Pauline White," Mrs. Davidson made numerous trips to a Western Union where she sent twenty-one money transfers, both before and after the murder. Nineteen transfers were retrieved by Gordon and two were retrieved by McDonald's girlfriend. Telephone records show numerous contacts among the codefendants both before and after the murder, including Mrs. Davidson's fifty calls to McDonald's beeper during a period of two and a half hours

> on the day of the murder. Several employees at the apartment complex identified McDonald and Gordon as both visiting the management office the week before the murder and receiving a copy of the floor plan to Dr. Davidson's apartment.
>
> Physical evidence recovered from the motel where McDonald, Gordon, and Shore stayed included a sweatshirt and a pair of tennis shoes. The tennis shoes had the same sole pattern as the shoe prints found in Dr. Davidson's apartment. Flecks of human blood were found on the shoes, but the sample was too small to match. Testing showed that the sweatshirt contained fibers from both the carpet in Dr. Davidson's apartment and the cashmere belt used to tie his hands, as well as hairs similar to McDonald's hair. The DNA found in bloodstains on the sweatshirt matched Dr. Davidson.
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> (PCR-2 V2/196-98).

Prior State Postconviction Proceedings:

During the prior postconviction proceedings, the trial court granted McDonald's request to proceed *pro se*. Capital Collateral Regional Counsel-Middle (CCRC-M) remained as standby collateral counsel. McDonald raised sixteen postconviction claims.[3] An

[3] McDonald alleged the following sixteen postconviction claims: (1) trial counsel was ineffective with regard to the jury selection; (2) there was no waiver of defendant's rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); (3) trial counsel was ineffective for failing to challenge the hair evidence; (4) trial counsel was ineffective for failing to challenge the carpet fiber evidence; (5) the State's cashmere fiber testimony was false and trial counsel was ineffective for not challenging it; (6) trial counsel was ineffective with regard to the bloodstain evidence; (7) trial counsel was ineffective by failing to raise an argument concerning the contamination of the sweatshirt; (8) trial counsel was ineffective by failing to challenge the shoe print and tennis shoes evidence; (9) trial counsel was ineffective for failing to keep Susan Shore from

evidentiary hearing was granted on the following claims: #(6) ineffective assistance of counsel/blood stain evidence; (11) IAC/severance & joint trial; (12) IAC/alibi; and (14) speedy trial, although a legal issue, either side was permitted to inquire of defense counsel. McDonald v. State, 952 So. 2d 484, 489 (Fla. 2006) (McDonald II). An evidentiary hearing was held on November 29 and 30, 2001. On February 10, 2003, the trial court entered a 50-page written order denying postconviction relief. (PCR-2 pp. 2292-2341).

On postconviction appeal, this Court denied McDonald's request to represent himself and CCRC-M resumed their representation of McDonald. CCRC-M raised thirteen issues on appeal and filed a Petition for Writ of Habeas Corpus. Of the thirteen issues identified by CCRC-M, this Court rejected several of the issues as procedurally barred:

> . . . CCRC raises several claims on appeal that it asserts were not adequately presented below because

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testifying; (10) State witnesses lied about identification issues; (11) trial counsel was ineffective for not pursuing a severed trial; (12) trial counsel was ineffective for failing to investigate and present an alibi defense; (13) trial counsel was ineffective for failing to object to an improper closing argument by the prosecutor; (14) trial counsel was ineffective for failing to file a motion for a speedy trial; (15) the trial court lacked jurisdiction because the autopsy failed to establish the cause of death; and (16) when the claims are examined collectively, trial counsel provided ineffective assistance of counsel. McDonald II, 952 So. 2d at 488-489.

McDonald failed to raise them when he was allowed to represent himself during the postconviction proceedings. Because we conclude that the circuit court properly allowed McDonald to represent himself, these claims may not be raised for the first time on appeal. [n2] Similarly, some of the other claims now asserted by CCRC are procedurally barred because they were not raised below. [n3] . . . Finally, we reject several other claims that present merely conclusory arguments insufficient to state an issue. [n4] . . .

> n2 As set out in CCRC's brief, these claims include issues (8) through (12): (8) (trial counsel was ineffective for failing to challenge physical evidence); (9) (trial counsel was ineffective for failing to challenge the expert shoe imprint testimony); (10) (trial counsel was ineffective for failing to challenge the testimony of a co-conspirator); (11) (trial counsel was ineffective for failing to move to sever); and (12) (trial counsel was ineffective for failing to investigate an alibi defense).
>
> n3 The following claims are procedurally barred because they were not raised by McDonald below: (2) (trial counsel was ineffective for failing to challenge the racial composition of the jury venire), and (3) (trial counsel was ineffective for failing to object to the prosecutor's closing argument concerning the pain and suffering felt by the victim).
>
> n4 Claim (6) (trial counsel was ineffective for failing to challenge the State's fiber testimony) is such a claim. CCRC has only restated McDonald's allegations which were rejected below and has offered nothing to undermine the circuit court's analysis and rejection of this claim. Also, claim (13) (McDonald did not make a knowing, intelligent, and voluntary waiver of his postconviction counsel) is essentially a one-half page restatement of issue (1) raised in CCRC's amended brief.

McDonald II, 952 So. 2d 484, 490.

In McDonald II, this Court affirmed the trial court's denial

of postconviction relief and denied the petition for writ of habeas corpus. The mandate issued on March 28, 2007.

Federal Habeas Corpus Proceedings:

In 2007, McDonald filed a *pro se* federal habeas corpus petition in the United States District Court, Middle District of Florida, pursuant to 28 U.S.C. § 2254. McDonald alleged eighteen grounds for relief. On August 12, 2008, the district court dismissed eight claims for procedural reasons.[4] On May 6, 2011, the district court issued a 59-page order which denied relief on the remaining ten grounds alleged in McDonald's § 2254 petition.[5] (PCR-2 V2/194-252). Those ten habeas grounds consisted of one substantive guilt phase claim (allegedly "false DNA" evidence),

[4] In 2008, McDonald filed a *pro se* habeas/all writs petition in this Court, McDonald v. McNeil, SC08-61, seeking a belated, successive postconviction appeal to raise additional claims which were not presented on his original postconviction appeal [IAC/speedy trial; alleged conspiracy to present false evidence; and alleged intentional loss/destruction of unknown blood stain]. On August 26, 2008, this Court denied the *pro se* habeas/all writs petition in a one-sentence order. McDonald v. McNeil, 991 So. 2d 387 (Fla. 2008) [Table].

[5] The federal district court rejected the State's procedural bar for some of the remaining grounds and the district court's final order stated, in part, ". . . McDonald II's application of procedural default is confusing because of the disparity between claims McDonald pursued in the post-conviction proceeding and those counsel pursued on appeal. Because McDonald proceeds *pro se* in this federal case seeking to overturn his murder conviction and death sentence, the earlier order rejecting some grounds for procedural reasons errs (if there is error) in McDonald's favor." (PCR-2 V2/194-95, fn. 3).

one substantive penalty phase claim (CCP aggravator), and eight claims of ineffective assistance of trial counsel, five of which alleged that trial counsel failed to either object or investigate the admissibility of certain physical evidence (blood, hair, fibers, shoe print, and a sweatshirt). The federal district court ultimately concluded:

> Notwithstanding his claim of innocence, the physical evidence and co-defendant Shore's testimony undisputably prove that McDonald and Gordon fulfilled the contract to execute Dr. Davidson. The facts fully support the trial court's finding of four aggravating factors: (1) the murder was committed during the commission of a burglary/robbery; (2) the murder was committed for pecuniary gain (based on a contract killing); (3) the murder was heinous, atrocious, or cruel (HAC); and (4) the murder was cold, calculated and premeditated (CCP). Having carefully reviewed the entire record, many of McDonald's allegations lack supporting evidence. The allegations of false testimony and faked reports are either innocent — because McDonald misunderstands the evidence — or intentional — to twist or misrepresent the evidence in an effort to deceive. Determining which is unnecessary. Bare allegations, without any factual support, are insufficient to prove that counsel's performance was deficient. McDonald fails to both overcome the state court's factual findings by clear and convincing evidence and the deference required for trial counsel's and the state court's determinations.
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> * * *
>
> The record clearly shows that experienced defense attorneys selected the best possible defense, which was to admit to going to Dr. Davidson's apartment to retrieve a "piece of paper," leave Dr. Davidson unharmed, and blame co-defendant Cisneros (Denise Davidson's boyfriend who fled and has never been arrested) as the person who committed the murder and framed McDonald and Gordon by

> planting evidence in the motel room. The DNA evidence, physical evidence, and Shore's testimony (Shore claimed no knowledge of the murder) supported this strategy. The jury simply rejected the argument.
>
> (PCR-2 V2/248-50).

Following the denial of his federal habeas petition, McDonald filed an application for a certificate of appealability [COA]. The Eleventh Circuit denied McDonald's application for COA and denied his motion for reconsideration. McDonald filed a petition for writ of certiorari, which was denied by the United States Supreme Court on February 27, 2012. McDonald v. Tucker, 565 U.S. 1237 (2012).

Successive Rule 3.851 Motions to Vacate:

McDonald's second successive Rule 3.851 motion to vacate alleged a violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972), and specifically challenged the State's failure to provide FBI reports concerning blood, hair, and shoe print evidence used against him at trial. The trial court's denial of relief was affirmed on appeal. McDonald v. State, 117 So. 3d 412 (Fla. 2013).

McDonald's third successive Rule 3.851 motion alleged that the state failed to disclose an FBI report that would have shown flaws in that agency's analysis of hair and fiber evidence in violation of Brady, and that the State deliberately used the flawed analysis at trial despite knowing it to be false, in violation of

Giglio. The reports at issue, the lower court found, were either known to counsel at the time of trial or were public records available at the time of McDonald's first postconviction motion (PCR-3 V. 2 pp. 198-202). This Court affirmed. McDonald v. State, ___ So.3d ___, 2017 WL 2709773 (Fla. June 23, 2017).

McDonald then received a report from the FBI that was critical of the State's hair and fiber expert and suggested that because some of his testimony "exceeded the limits of science," it was invalid (PCR-4 p. 579). Based on this new information, McDonald filed a *fourth* successive postconviction motion, alleging entitlement to a new trial because of newly discovered evidence and a violation of Giglio. The lower court summarily denied relief because the record refuted McDonald's claims (PCR-4 p. 525). As to the newly discovered evidence the court found that Agent Allen's unreliable testimony regarding his hair analysis was not of such a nature that it would probably produce an acquittal on retrial (PCR-4 p. 528). On the Giglio claim the lower court found that the State did not knowingly present false testimony in McDonald's 1995 trial because the FBI report was not available until 2014 (PCR-4 pp. 528-529). This appeal follows.

SUMMARY OF THE ARGUMENT

McDonald's claim that the FBI's criticism of Agent Allen's expert testimony entitles him to a new trial is without merit. The same information regarding scientific limitations of hair comparison has been available to the defense since the time of his trial and was in fact raised during trial. Appellant's claim lacks materiality because there was ample evidence of McDonald's guilt regardless of Agent Allen's allegedly flawed hair testimony.

McDonald's claim that the State violated Giglio because of Agent Allen's "false" testimony is similarly without merit. While the FBI letter is critical of the value of Agent Allen's testimony, it fails to establish that his statement that the hairs in question were microscopically identical was false. Hair comparison analysis is still a valid scientific field and the majority of Allen's expert testimony would be admissible even if McDonald were to be retried. Finally, as with his first claim, McDonald has not shown materiality as there remains substantial evidence of his guilt if the hair comparison testimony were excluded.

ARGUMENT

ISSUE I

THE CIRCUIT COURT PROPERLY DENIED MCDONALD'S NEWLY DISCOVERED EVIDENCE CLAIM ARISING FROM THE TESTIMONY OF AGENT ALLEN.

McDonald contends that the trial court erred not only in denying relief, but also in failing to hold an evidentiary hearing on his claims alleging newly discovered evidence. The trial court's decision to summarily deny relief was correct, however, because McDonald's claims are affirmatively refuted by the record. Gore v. State, 24 So. 3d 1 (Fla. 2009). The standard of review here is *de novo*. Pardo v. State, 108 So. 3d 558 (Fla. 2012).

A. The Record Conclusively Refutes the Merits of the Instant Issue

A newly discovered evidence claim is controlled by the standard set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991), requiring a defendant to establish: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal on retrial. The trial court followed this standard and concluded that while the July 2014 letter from the FBI was new in that it did not exist at the time of trial, the evidence at issue failed to meet the second

Jones prong, in that it probably would not have produced an acquittal had it been introduced in a retrial of McDonald's case.

The trial court found that because the FBI letter was not drafted until 2014, it therefore met the first prong of Jones. The State argued below, however, that while the letter did not exist at the time of McDonald's 1995 trial, materials critical of hair comparison as substantive testimony most certainly did, as the United States Department of Justice as far back as 1997 released a report prepared by the Office of the Inspector General detailing improprieties in the FBI laboratory specifically with regard to hair comparison analysis. Thus, the State asserted that, even without actual knowledge, the court should find that counsel could have discovered this information with the exercise of due diligence. The release of the 1997 OIG Report generated wide-spread national media coverage, and was especially publicized in the Tampa Bay area as FBI hair analysis was involved in numerous high-profile cases. See, e.g., Sydney P. Freedberg, *Report Highlights More Tainted Testimony*, St. Petersburg Times, May 3, 2001; see also Sydney P. Freedberg, *Good Cop, Bad Cop*, St. Petersburg Times, Mar. 4, 2001; Lyda Longa, *FBI Lab Jeopardizes Local Cases*, The Tampa Tribune, Sept. 20, 2000. Furthermore, the OIG report and the issues surrounding FBI forensic testing were discussed in numerous reported opinions from this Court. See

Buenoano v. State, 708 So. 2d 941, 945 (Fla. 1998) (stating that the Office of the Inspector General issued the report entitled "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and other Cases" in April, 1997); Hannon v. State, 941 So. 2d 1109 (Fla. 2006) (newly discovered evidence claim based on report issued criticizing FBI expert Michael Malone for conducting incomplete tests and exaggerating testimony); Duckett v. State, 918 So. 2d 224 (Fla. 2005) (arguing that State failed to disclose 1997 OIG report regarding FBI hair analysis and that FBI analyst Michael Malone's testimony was not credible); Moss v. State, 860 So. 2d 1007 (Fla. 2003) (discussing Brady claim based on State's alleged failure to disclose OIG report discussing Michael Malone's forensic work); Trepal v. State, 846 So. 2d 405 (Fla. 2003). It is also significant that McDonald advanced a nearly identical claim fifteen years before the instant challenge was filed; the information contained in the 2014 FBI letter is clearly not new. The trial court should have denied relief because Gordon's claim fails to meet the first Jones prong.

The trial court, however, based its denial of relief entirely on its finding that the defendant failed to meet the second Jones prong, which requires the defense to establish that the newly discovered evidence would likely have resulted in acquittal. The

record demonstrates that the court's conclusion in this regard was undeniably correct. While McDonald contends that the trial court should have afforded him an evidentiary hearing, this claim fails for several reasons.

First, while the FBI's letter was critical of Agent Allen's testimony, McDonald has never established that Allen's testimony was false because the hair found on the bloody sweatshirt was in fact identical to McDonald's. To the contrary, Allen's conclusion that hair found on the sweatshirt and that secured from Appellant are indistinguishable even when viewed under a microscope remains a correct statement. It is important to remember that the FBI has never said that Agent Allen's conclusions were false; the thrust of the 2014 letter was to notify the defense that his testimony *overstated the significance* of the fact that hair found on the sweatshirt and that taken from McDonald appeared to be identical. The FBI letter notwithstanding, the record shows that Agent Allen told Appellant's jury of the limitations of hair comparison analysis- it cannot be used to identify someone with the same degree of certainty as can be achieved through fingerprint comparison (DAR V29/1278). Moreover, as the lower court noted, the record supports Allen's conclusion that the hairs are at the very least visually indistinguishable (PCR-4 p. 527). For example, facial and head hair found on the sweatshirt was dyed, just as was

defendant McDonald's facial and head hair (DAR V29/1260).

Second, as the trial court found, the State's hair evidence was a relatively insignificant portion of its case against McDonald. The State's theory of guilt was that Gordon and his co-defendant McDonald were hired by the victim's wife as contract killers. The trial court summarized the State's case as follows:

> In addition, as detailed by the Florida Supreme Court's opinion, the State presented evidence that the victim's estranged wife, Denise Davidson, sent McDonald and Gordon a total of twenty-one Western Union money transfers totaling approximately $15,000.00, with two of the transfers being picked up by McDonald's girlfriend at McDonald's request. Cell phone records reflect that McDonald, Gordon, and Denise Davidson had repeated contact before and after the date of the murder. The cell phone records showed that on the day of the murder, Denise Davidson called McDonald's beeper fifty times during a period of two and a half hours.
>
> Several employees at the victim's apartment complex testified that Gordon and McDonald were in the management office on January 18, 1994, and received a copy of the floor plan to the victim's apartment. The State also presented witness testimony of Susan Shore. Ms. Shore testified that Gordon and McDonald· paid her to drive them from Miami to the victim's residence in St. Petersburg, Florida. Ms. Shore testified that on the morning of the offense, she witnessed McDonald get out of the car to go jogging at ·the victim's apartment complex; later Gordon approached the victim outside of his residence and returned twenty to twenty-five minutes later.
>
> Ms. Shore testified that McDonald returned to the car five to ten minutes after Gordon. Ms. Shore testified that she then drove Gordon and McDonald to the motel room that Gordon and McDonald shared. Ms. Shore testified that Denise Davidson was present at the motel room the day before the offense, as well as on the day

of the offense.

> Physical evidence was presented at trial in the form of the sweatshirt and a pair of tennis shoes recovered from the motel room. The sweatshirt contained the victim's blood and the tennis shoes matched the pattern of shoe prints found inside the victim's residence. The receipts presented at trial indicate that Denise Davidson purchased two sweatshirts, and tennis shoes days before the murder. Based upon the evidence presented, Agent Allen's unreliable testimony regarding his hair analysis was not of such a nature that it would probably produce an acquittal on retrial.

(PCR-4 pp. 527-528).

In addition to the evidence summarized above, Agent Allen also examined both natural and machine-made fibers secured from the same sweatshirt. These included multiple fibers from a fabric belt used to tie the victim’s hands, which was made up of wool, nylon and cashmere (DAR V29/1244). Woolen fibers recovered from the sweatshirt were “the same size, same shape, same type of fiber, nylon material, and have the same color” as those taken directly from the belt (DAR V29/1275). The fibers were described by Chris Allen as having “no microscopic difference” (DAR V29/1276). The fiber evidence, along with the presence of the victim’s blood, established that the sweatshirt found in McDonald’s motel room must have been inside Dr. Davidson’s apartment at or about the time of his death. It is significant that the FBI letter addresses only Examiner Allen’s testimony with regard to hair, and is silent with regard to his testimony identifying fibers found on the

sweatshirt as probably coming from the victim's apartment, specifically the cashmere belt used to restrain Dr. Davidson at the time of his death.

Thus, in spite of Appellant's assertions to the contrary, if we exclude evidence that McDonald's hair was found on a bloody sweatshirt recovered from his motel room, there remains substantial, competent evidence to support the jury verdict, and the trial court correctly concluded that no evidentiary hearing was warranted.

B. McDonald's claim fails even under a Cumulative Analysis

Appellant next asserts that the trial court erred by failing to address the cumulative effect of other available evidence-specifically with regard to testimony of State's witness Michael Vick. Appellant contended in his motion that FBI analyst Vick falsely testified at his trial regarding who conducted the DNA analysis of bloodstains found on clothing recovered from Appellant's motel room. Appellant, however, fails to note that this Court rejected as unfounded this exact claim when it was raised by Appellant's co-defendant Gordon; indeed, this Court found that the record refuted any assertion that Agent Vick lied

in his trial testimony.[6] Gordon v. State, 97 So. 3d 823 (Fla. 2012). Accordingly, as this Court has previously found no merit to this claim, even if the trial court did neglect to incorporate it as part of the "cumulative analysis" discussed in Hildwin v. State, 141 So. 3d 1178 (Fla. 2014), there can be no doubt that consideration of this meritless claim would not have altered the court's denial of relief. This Court should therefore affirm.

[6] "We also conclude that even if his claims were not procedurally barred under the rule, the claims are conclusively refuted by the record and without merit. The preliminary FBI report cited by Gordon, even if not disclosed to him until after his trial, does not establish that the FBI agent who testified as to the DNA match lied at trial. Instead, the report states that the processing was not complete as of that date. In addition, the testimony of Gordon's DNA expert at the evidentiary hearing held in his first postconviction proceeding fails to establish that the State's expert DNA witness who testified at trial lied about personally performing the analysis. Moreover, the defense expert agreed that the analysis correctly matched the bloodstain to the victim." Gordon.

ISSUE II

THE CIRCUIT COURT PROPERLY REJECTED McDONALD'S GIGLIO CLAIM.

McDonald next asserts that the State violated Giglio v. United States, 405 U.S. 150 (1972) by using Agent Allen's testimony in spite of the fact that the State doubtless knew, or at the very least later learned, that it was false. In order for Appellant to prevail on a Giglio claim, he must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. Ventura v. State, 794 So. 2d 553 (Fla. 2001). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Id. The State has the burden to prove that false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. Jones v. State, 998 So. 2d 573, 580 (Fla. 2008).

Initially, we address Appellant's claim that the State knew Chris Allen's testimony was false or failed to correct testimony it learned was false. As has previously been argued with regard to Issue One, the potential flaws with hair analysis have been long known, and McDonald's present argument utterly ignores the fact that he either was aware, or could have been aware through diligent

effort, that hair comparison analysis has been the subject of much critical examination over the years. It is absurd for him to suggest that the State violated Giglio by failing to notify him that a hair comparison expert could have been attacked on such grounds.[7]

Gordon's assertion that the alleged flaws in Agent Allen's testimony which are referenced in the 2014 FBI letter are imputed to the State should be rejected. First, McDonald assumes that the 2014 FBI letter establishes that Allen's testimony was in fact false; the letter, however, fails to support that conclusion, as has been previously argued. At most, the letter criticizes Agent Allen for overstating the significance of his conclusions about the hairs in question. Appellant has never shown that the hairs on the sweatshirt are not consistent with his own hair, i.e., that the substance of Agent Allen's testimony was incorrect. Even if a new trial were granted, the majority of Agent Allen's testimony

[7] The State also notes that McDonald's trial strategy, as revealed by counsel at the postconviction hearing held in 2003, was to blame the murder of Dr. Davidson on the still-at-large fourth partner, Leo Cisneros; Appellant and Gordon entered the victim's apartment solely to retrieve some paperwork (PCR-1 v. 20 p. 3334). This strategy was consistent with the physical evidence. Dr. Davidson's apartment showed signs of a brutal struggle that left the residence bloody and wet; whoever killed him should likewise have been bloody and wet. Prosecution witness Susan Shore, who drove McDonald and Gordon to and from Dr. Davidson's apartment, did not describe either man as being bloody or wet (DAR v. 31 pp. 1628-1629).

would still be used by the State. As this Court noted in Duckett v. State, 148 So. 3d 1163 (Fla. 2014), the science of hair comparison analysis remains valid and is still in use by the FBI.[8] Because McDonald has never established the *first* prong of Giglio, i.e., the State knew or subsequently learned that Agent Allen's testimony was false, the balance of his claim therefore fails. Significantly, the information revealed in the FBI letter was "discovered" by USDOJ investigators who parsed the transcripts of Appellant's trial. In other words, they did exactly what Appellant or any member of his legal team might have been doing since his direct appeal was filed. It is noteworthy that McDonald has advanced a nearly identical claim several times, including long before the 2014 FBI report was drafted.

The record fails to support McDonald's claim that the State knew Chris Allen's testimony was false at the time of trial. To the contrary, Agent Allen affirmatively testified on direct examination by the prosecution that hair comparison is not a positive means of personal identification. Hair analysis can be used to include a person as a possible contributor; according to Agent Allen, Appellant is within the group of persons who could

[8] "Unlike CBLA (comparative bullet lead analysis), the field of forensic hair analysis has not been discredited, and the FBI has not discontinued the use of such analysis." Duckett at 1169.

have produced the hairs found on the sweatshirt (DAR V29/1278).

The State used Agent Allen's testimony in an effort to determine which of the two defendants, Gordon or McDonald, may have worn the sweatshirt. It was not disputed that both men were present in the motel room where the sweatshirt was found. Gordon's hair was not found on the sweatshirt. While Agent Allen testified that Appellant's hair "microscopically matched" hair found on the sweatshirt (DAR V29/1256), he later qualified this statement by saying that he could not identify a specific hair as coming from a specific person- "it is not a positive means of personal identification" (DAR V29/1278). The witness proceeded to explain what specific characteristics he examined, noting in particular the unusual fact that both the head and facial hair found on the sweatshirt had been dyed in the same way as was McDonald's known head and facial hair (DAR V29/1260-1261). The hairs found on the sweatshirt were "indistinguishable" from known hair taken from Appellant (DAR V29/1278). On cross examination, Agent Allen agreed that the value of his testimony was limited, "I can say it is exact match, but I can't say it came from a particular person to the exclusion of everyone else in the world." (DAR V29/1288). In short, both the prosecution as well as the defense knew of the limitations of hair analysis, and this witness informed the jury of those limitations; merely because two hairs are microscopically

indistinguishable does not mean they must have come from the same person. Nothing about the testimony of this witness indicates that the State knew it to be false, and the alleged flaws identified by the FBI's letter were of a type already well known at the time of Appellant's trial. McDonald has not established, therefore, that the State knew or later discovered Agent Allen's testimony was false.

McDonald contends, nevertheless, that the prosecution is charged with constructive knowledge of evidence in the possession of *any* prosecution witness, and in support of this claim he directs us to two cases - Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984) and Guzman v. State, 868 So. 2d 498 (Fla. 2003).

These decisions are factually distinguishable, however, as in both cases the witness in question, a police detective, was deemed a member of the immediate prosecution team, unlike the FBI analyst used here. The degree of involvement and control by the prosecution over a given witness dictates the outcome as to whether undisclosed exculpatory evidence should be imputed.[9]

[9] See, e.g., Moon v. Head, 285 F.3d 1301, 1309 (11th Cir. 2002), where the court declined to impute because, under principles of agency law, state investigators were not under direct supervision of the prosecution and were therefore not part of the immediate prosecution team. See also United States. v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) "Brady, then, applies only to information possessed by the prosecutor or anyone over whom he has authority. A prosecutor has no duty to undertake a fishing expedition in other

The FBI expert used to prosecute McDonald not only worked for a different government agency, he worked for a different government. Clearly, the Florida prosecutor had little authority to supervise and control an FBI analyst employed by the federal government; accordingly, subsequent disclosure of evidence the FBI might have been privy to is not imputed here. Federal courts have noted the significance of this distinction, which turns out to be the controlling factor; in cases where evidence was imputed, there was close collaboration and control over the witness in question.

The Second Federal Circuit found that the question must be addressed on a case-by-case basis with consideration of the extent of interaction and cooperation between the two governments. In United States v. Avellino, 136 F.3d 249 (2d Cir. 1998), a state worker was used as a witness in a federal prosecution, and the court declined to impute. Merely because the prosecution chooses to hire an expert from a different agency does not result in imputing all the information in that agency's possession. To do so, the court said, would place "an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question [and] would inappropriately require

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jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request for information regarding a government witness."

us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." Id. at 255. Accord, Moon v. Head.

In contrast, the Fifth Federal Circuit in United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979), concluded that the knowledge of certain state investigators should be imputed to the federal prosecutor because the state and federal agencies "pooled their investigative energies to a considerable extent" and there was "extensive cooperation between the investigative agencies." There was no evidence of such cooperation and pooling of resources in McDonald's case, however, and this Court could properly conclude that a decision not to impute is consistent with Antone. McDonald has never established, nor so much as alleged, that the FBI analyst in his case had the type of close, collaborative relationship as that described in Antone. It is therefore clear that the prosecution did not violate Giglio.

In terms of materiality, it is significant that Appellant does not challenge the fact that the sweatshirt in question was found in his hotel room. Even if Agent Allen's hair testimony was excluded, the remaining evidence would still show that the victim's blood, as established through DNA testing, as well as fibers identical with those found on the victim, were both found on the sweatshirt recovered from McDonald's hotel room. Even without the

hair, there is ample evidence linking Appellant with the victim, as can be seen by review of the facts set forth in the Florida Supreme Court's opinion affirming co-defendant Gordon's direct appeal of his case. Both Gordon and McDonald lived in Miami, and had no reason to seek out Dr. Davidson on their own; the State argued that Dr. Davidson's estranged wife, Denise, hired and paid Gordon and McDonald to kill her husband. More than one eyewitness saw co-defendant Gordon outside the victim's St. Petersburg apartment the morning of his death, and Susan Shore testified to driving Gordon and McDonald to and from the scene, as well as to seeing Gordon approach the victim and speak with him. The victim's wife, both before and after the murder, sent Gordon and McDonald a total of 19 Western Union money transfers, approximately $15,000. The victim suffered multiple bloody injuries to his head (the likely source of the blood recovered from the sweatshirt), bruising to his face, and several broken ribs. He was hogtied with a cashmere belt, identical fibers of which were found on clothing located in Appellant's motel room, and drowned in his own bathtub. In short, McDonald's link to the victim's murder would not be impacted by the absence of Agent Allen's opinion testimony that hairs found on the sweatshirt matched Appellant's head and facial hair. McDonald has failed to establish materiality.

The record conclusively establishes that Appellant has not

met his burden of establishing a violation of Giglio regarding witness Chris Allen, and the trial court did not err in summarily denying relief. This Court should affirm.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Timothy A. Freeland
Co-Counsel for State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July 2019, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to the following: Jonathan E. Hackworth, Esquire, Hackworth Law, P.A., Post Office Box 4347, Tampa, Florida 33677, **jhack@bhtampa.com.**

This notice is also being served this date via United States mail on Plaintiff, Meryl McDonald, DC#180399, Union Correctional Institution, Post Office Box 1000, Raiford, Florida 32083.

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