APPELLANT'S INITIAL BRIEF

CASE NO. SC19-635

THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MERYL McDONALD

Appellant,

v.

STATE OF FLORIDA

***Appellee*.**

On Appeal From:
CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT COURT CASE NO. CRC94-02958CFANO

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Mr. McDonald, respectfully requests oral argument on this appeal. Mr. McDonald believes oral argument will be beneficial to this Court in its resolution of the case.

STATEMENT OF THE ISSUES

I. Whether the circuit court erred in summarily denying the Appellant's newly discovered evidence claim arising from a case-specific FBI letter that established that an FBI hair and fibers analyst presented false testimony during the underlying trial?

II. Whether the circuit court erred in summarily denying the Appellant's *Giglio v. United States* claim that was based on the State's presentation of the false trial testimony of the FBI hair and fibers analyst?

STATEMENT OF THE CASE AND FACTS

A. Facts, Course of Proceedings, and Disposition in the Lower Tribunal

The Trial and Direct Appeal

On or about April 27, 1994, Appellant, Meryl McDonald (hereinafter referred to as "Appellant") along with co-Defendant, Robert Gordon (hereinafter referred to as "Gordon"), and Denise Davidson were indicted for first degree murder. On or about June 6, 1995, before the Honorable Susan Schaeffer, Circuit Judge, Appellant and his co-Defendant Gordon began their joint jury trial. (R, P520) On June 15, 1995, both Appellant and Gordon were found guilty of murder in the first degree for the killing of Dr. Louis A. Davidson on January 25, 1994. (R, P520) The following day on June 16, 1995, the jury recommended death for both Appellant and Gordon by a vote of nine to three. (R, P520) The Sentencing Court followed the recommendation of the jury on November 16, 1995, and sentenced Appellant to death. (R, P520) The Florida Supreme Court upheld both Appellant's conviction and death sentence on direct appeal in McDonald. McDonald v. State, 743 So. 2d 501 (Fla. 1999). The mandate was issued on October 18, 1999. (R, P520)

The Prior Post-Conviction Proceedings and Other Evidence Presented in Earlier Collateral Proceedings

McDonald timely filed his first Motion for Postconviction Relief filed pursuant to Florida Rule of Criminal Procedure, Rule 3.851 on December 15, 2000. (R, P520) An evidentiary hearing was conducted on November 29, 2001 and November 30,

2001. (R, P520) On February 10, 2003, the Trial Court entered an Order denying Appellant's first Motion for Postconviction Relief. The Florida Supreme Court affirmed that decision on November 2, 2006. McDonald v. State, 952 So. 2d 484 (Fla. 2006).

On March 12, 2002, McDonald filed another Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure Rule 3.851. (R, P521) On June 12, 2002, Appellant's Motion for Postconviction Relief was summarily denied. (R, P521) Again, the Florida Supreme Court affirmed this Trial Court's decision on May 28, 2013. McDonald v. State, 117 So. 3d 412 (2013)

Appellant filed his second successive Postconviction Motion, which again was summarily denied by the Trial Court by way of order on February 27, 2014. (R, P521) The Florida Supreme Court affirmed the summary denial of the second successive Postconviction Motion filed by Appellant on June 23, 2017. McDonald v. State, SC14-973, 2017 WL 2709773 (Fla. June 23, 2017), reh'g denied, SC14-973, 2017 WL 3764370 (Fla. Aug. 31, 2017) and cert. denied sub nom. McDonald v. Florida, 138 S. Ct. 746 (2018). (R, P521)

On September 4, 2015, during the pendency of the appeal of the second successive Postconviction Motion, Appellant's Counsel filed the Fourth Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Florida Rule of Criminal Procedure Rule 3.851. (R,

521) This particular Motion is the subject Motion of this appeal. The State filed its response on September 24, 2015. (R, 521) The Trial Court held a case management conference on October 16, 2015 subject to the requirements of Florida Rule of Criminal Procedure Rule 3.851(f)(5)(B). Ultimately, the Trial Court on October 26, 2015 entered an order abating the Motion until jurisdiction returned to the Trial Court from the Florida Supreme Court. (R, P541)

As noted by the Court in its Order Denying Appellant's Fourth Successive Motion to Vacate Judgments of Conviction and Sentence, Appellant filed pro se amendments and additional pro se filings throughout the proceedings in this matter. (R, P541) Ultimately, these were all stricken. (R, P541)

Pursuant to Florida Rule of Criminal Procedure, Rule 3.851(f)(5)(B), a case management conference was conducted on March 4, 2019. (R, P493) During the case management conference, counsel for Appellant adopted Appellant's most recent pro se filing by reading relevant portions of his pro se filing into the record during the hearing. (R, P500 - 502) Appellant requested the Trial Court grant Appellant an evidentiary hearing. (R, P503) During the case management conference, Appellee cited to Appellant's co-defendant Gordon's raising of the same issue concerning forensic hair analysis and the Florida Supreme Court's affirming of the trial court's denial of post-conviction in Gordon.[1] (R. 504, L11-15)

[1] Gordon v. State, 2016 WL 6462391 (Fla. 2016)

The Case-Specific FBI Letter and the Facts Underlying the Instant Post-Conviction Motion

On September 8, 2014, Norman Wong, Special Counsel for the United States Department of Justice notified Appellant and Appellant's Counsel that the United States Department of Justice (hereinafter referred to as the "Department of Justice") previously notified Appellee "that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." (VR, P577-578) Specifically, the letter indicated:

> [w]e have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science and were, therefore, invalid: (1) the examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others – this type of testimony exceeded the limits of the science; and (2) the examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association – this type of testimony exceeded the limits of the science… We take no position regarding the materiality of the error in this case. (R, P579)

Attached to the report from the United States Department of Justice was the transcript of Agent Allen's trial testimony in this matter. (R, 650-710)

The report also notes the Department of Justice's findings were also forwarded to The Innocence Project and the National Association of Criminal

Defense Lawyers (hereinafter referred to as "NACDL") (R, 580) The Innocence Project and NACDL, subsequently, conducted an independent investigation of Agent Allen's findings and issued a written report to the Department of Justice noting it found additional errors in Agent Allen's findings and falsities in Allen's expert testimony. (R, 582-583) The Innocence Project and NACDL analysis found that Agent Allen's report and testimony included additional falsities. (R, 583) The supplemental report identified the following "inappropriate statement" in Agent Allen's laboratory report "[a]ccordingly, this hair is consistent with coming from RUDOLPH BOWEN, the identified source for the K7 hairs." (R, 583) The supplemental report further identified "inappropriate statements" by Agent Allen during his trial testimony at "pg 1278, ln 6-9; pg 1288, ln 3-13. pg 1256, ln 10-15 – Error 2; pg 1295, ln 18-25 – Error 1" (R, 583) These are in addition to the findings by the Federal Bureau of Investigations (hereinafter referred to as the "FBI") that Agent Allen was found to have committed an Error Type 1 - "[t]he examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of the science." (R, 581) Additionally, the FBI noted Agent Allen was found to have committed an Error Type 2:

> [t]he examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the

> positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association. This type of testimony exceeds the limits of the science. (R, 581)

In light of above-referenced correspondence and reports, Mr. McDonald on September 4, 2015 filed his Fourth Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. (R, 551) Within said Fourth Successive Motion, Mr. McDonald made a claim relating to newly discovered evidence concerning the FBI crime laboratory, specifically the false and misleading testimony from Agent Allen of the FBI and the introduction of inadmissible scientific evidence which formed the basis for Agent Allen's false and misleading testimony. The relevant background of the claim and timeline with which Mr. McDonald became aware of the claim were outlined above. Mr. McDonald's claim relating to newly discovered evidence was filed pursuant to Jones standard for a new trial. Jones v. State, 709 So. 2d 512 (Fla. 1998)

While not specifically delineated as a second claim in Appellant's Fourth Successive Motion, Appellant's Fourth Successive Motion also noted the impact of the cumulative error of the admission of the improper use of Agent Allen's report against Appellant. (R, P568-571) Mr. McDonald's Fourth Successive Motion also included a Giglio claim concerning the prosecution's use of false evidence and false testimony in its prosecution of Mr. McDonald. (R, 568) Mr. McDonald's claim also included an argument concerning the necessity of the conviction to be set aside,

when there is reasonable likelihood that a conviction was obtained by knowing use of false or perjured testimony pursuant to Agurs. United States v. Agurs, 427 U.S. 97, 103 (1976) Additionally, the Fourth Successive Motion includes reference to Agent Vick, whose testimony "concerned the FBI DNA analysis of the sweatshirt which found that a bloodstain on the gray sweatshirt was the blood of the victim in the case, Dr. Davidson." (R, 571-572) This particular segment of the Motion argues that "[w]hen new evidence is uncovered that demonstrates that the court's prior resolution of an issue in a capital case is in error, not only is the new evidence cognizable in a Rule 3.851 motion, relief indeed may issue." (R, 572)

On April 5, 2019, the circuit court entered a Final Order Denying Defendant's Fourth Successive Motion to Vacate Judgments of Conviction and Sentence; Directions to Clerk. (R, 520 - 529) The circuit court found "the FBI letter satisfies the first prong of Jones. The facts contained in the letter were not known to McDonald or his counsel at the time of trial, and could not have been discovered by the use of diligence because it did not exist." (R, 526-527) The circuit court though that Mr. McDonald did not satisfy the second prong of Jones "because he fails to demonstrate that the evidence is of such a nature that it 'would probably produce an acquittal on retrial." (R, 527) The trial court continued:

> [a]lthough the misstatements or exaggerations reported in the FBI letter with respect to the forensic hair analysis pertain to McDoanld, the hairs found on the sweatshirt were chemically treated or colored, consistent with the

sample of McDonald's dyed hair. (See Jury Trial Transcript: p. 1260) Thus, the hair collected from the sweatshirt, which was collected from Gordon and McDonald's motel room and which contained the victim's blood, was visually indistinguishable from McDonald's, even if it could not have been scientifically described as microscopically identical.

Moreover, the hair evidence was not the only means of supporting the conviction in this case. Agent Allen testified that the trace evidence recovered from the sweatshirt included multiple fibers.[2] (See Jury Trial Transcript: p. 1244-45). Agent Allen testified that when he examined and compared the fibers found on the sweatshirt to those taken from the cashmere belt that was used to bind the victim, the woolen fibers were the "same size, same shape, same type of fiber, nylon material as those taken from the belt." (See Jury Trial Transcript: p. 1275) Agent Allen also testified that he microscopically examined carpet fibers removed from the sweatshirt; when compared to the carpet fibers collected from the victim's residence he concluded that "there was no microscopic difference" between the two samples. (See Jury Trial Transcript: p. 1276)

In addition, as detailed by the Florida Supreme Court's opinion, the State present 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 date of the murder, Denise Davidson called McDonald's beeper fifty times during a period of two and a half hours.

[2] The court notes that the FBI letter only addresses Agent Allen's findings concerning the hair analysis conducted and testified to at trial. There is no mention about the conclusions rendered from the fiber removed from the sweatshirt.

> 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. (R, 527-528)

It is worth noting though that despite not conducting a full evidentiary hearing on the newly discovered evidence identified above, the trial court reached the conclusion in a footnote that the FBI letter only dealt with Agent Allen's testimony

concerning hair analysis and did not have any impact on Agent Allen's findings or testimony concerning the fiber analysis from the sweatshirt.

With respect to Mr. McDonald's Giglio claim, the trial court found "there is no basis to conclude that the State knowingly presented false evidence at the trial in violation of Giglio." (R, 528) The trial court characterized Mr. McDonald's "reliance on the letter dated July 28, 2014 to establish a Giglio violation is erroneous." (R, 528) The trial court continued;

> McDonald's trial, and thus Agent Allen's testimony, occurred in 1994. The FBI did not investigate the hair analysis evidence presented at McDonald's trial or issue their findings until 2014. Therefore, the State could not correct testimony based upon information contained in a letter written and sent to the State nearly twenty years after the end of McDonald's trial. (R, 529)

Mr. McDonald timely filed a Notice of Appeal on April 13, 2019. (R, 531)

This appeal follows.

B. Standards of Review

As to Issue I, when the lower court denies a Rule 3.851 motion with a hearing, this Court's review is *de novo*, accepting "the movant's factual allegations as true, and we will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim or that there is no issue of material fact to be determined." Long v. State, 118 So. 3d 798, 806 (Fla. 2013) citing Amendments to Fla. Rules of Crim. Proc. 3.851, 3.852 & 3.993, 772 So. 2d 488, 491 n. 2 (Fla. 2000).

"However, to the extent there is any question as to whether a Rule 3.851 movant has made a facially sufficient claim requiring a factual determination, [this Court] will presume that an evidentiary hearing is required." Id. "In other words, '[this Court] must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.'" Id. quoting Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001).

As to Issue II, this Court has held that a mixed standard of review is applicable to Giglio claims, which present mixed questions of law and fact. Johnson v. State, 44 So. 3d 51, 65 (Fla. 2010). Any factual findings made by the trial court are entitled to due deference. Id. Questions of law or the applications of the facts to law, however, are reviewed *de novo*. Id.

SUMMARY OF THE ARGUMENTS

Mr. McDonald is entitled to a new trial based on the newly discovered evidence of the false testimony of FBI hair and fibers analyst Chris Allen. While the circuit court properly found that the false testimony, as documented in the case-specific FBI correspondence, met the timeliness component of the newly discovered evidence test, it erred as a matter of law in summarily reasoning that the evidence was not of nature that it would probably produce an acquittal on retrial. As Mr. McDonald established in his post-conviction motion, the case against him was purely circumstantial. The testimony of Agent Allen was critical to that alleged circumstantial links against Mr. McDonald. Given the significance of the newly discovered evidence proving Agent Allen's testimony to have been false, the record clearly did not conclusively refute Mr. McDonald's post-conviction claim.

Notwithstanding the circuit court's error in finding that the false testimony evidence would not affect the outcome of a new trial, the circuit court further erred in failing to conduct a cumulative analysis of the newly discovered evidence as required under this Court's recent holdings in Swafford and Hildwin. Pursuant to the holdings in these cases, the circuit court was required to consider Mr. McDonald's newly discovered evidence in the context of **all** the evidence that was presented at his trial, as well as **all** the evidence that has been uncovered during other post-conviction proceedings, including the evidence presented in previous

proceedings regarding the false testimony of fellow FBI Agent Vick. Had the circuit court conducted the requisite cumulative analysis it would have realized the newly discovered evidence creates a reasonable doubt as to Mr. McDonald's guilt.

Finally, the circuit court further erred in summarily denying the Giglio claim arising from the State's presentation of Allen's false testimony during trial. The falsity of Allen's testimony is indisputable at this point in light of the correspondence and reports issued by the FBI, Department of Justice, NACDL and Innocence Project. Mr. McDonald, furthermore, argues that Agent Allen's knowledge of the falsity and limitations of his testimony must be imputed on Appellee given that Allen, as a law enforcement officer, was an agent of the State of Florida In the alternative, however, the record does not conclusively refute Mr. McDonald's claim that the State knowingly presented the false report and testimony of Agent Allen. As a result, the circuit court erred as a matter of law in failing to conduct an evidentiary hearing and in denying Mr. McDonald's Giglio claim on its merits.

ARGUMENTS AND CITATIONS TO AUTHORITY

I. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. MCDONALD'S NEWLY DISCOVERED EVIDENCE CLAIM ARISING FROM THE FALSE TESTIMONY OF AGENT ALLEN

The circuit court erred in failing to conduct an evidentiary hearing on Mr. McDonald's newly discovered evidence claim regarding the false testimony of Agent Chris Allen. While the court properly held that the FBI correspondence and report surrounding Agent Allen constituted newly discovered evidence and that the claim was timely-filed as a result thereof, the court erred as a matter of law in finding that the evidence would not probably result in an acquittal at a retrial. See Wyatt v. State, 71 So. 3d 86 (Fla. 2011) In Wyatt, the Florida Supreme Court recognized "a newly discovered evidence claim predicated upon a case-specific letter from the FBI discrediting the CBLA testimony offered at trial is not procedurally barred if timely raised." Id. at 99. While Wyatt dealt specifically with CBLA or comparative bullet lead analysis, the Florida Supreme Court's holding supports Mr. McDonald's claim concerning the fiber and hair analysis report and testimony of Agent Allen. Mr. McDonald's claim was predicated on Jones. This Court previously held in Jones the two (2) requirements necessary for a criminal defendant to succeed on a claim of newly discovery evidence. Id. First, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Id.

at 521 citing Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994) Secondly, "the newly discovered evidence must be of such natural that it would probably produce an acquittal on retrial." Jones at 521 citing Jones, 591 So. 2d 911 (Fla. 1991)

The record before the circuit court certainly did not conclusively refute Mr. McDonald's entitlement to relief on the instant issue. On the contrary, given the limited circumstantial nature of the evidence presented against Mr. McDonald, coupled with the great significance of Allen's testimony to the State's case, the newly discovered evidence at issue certainly weakens the State's case to such an extent that it gives rise to a reasonable doubt as to Mr. McDonald's guilt in this matter. In finding that the new evidence concerning Allen's false report and testimony would not have affected the outcome of the trial, the circuit court failed to conduct a cumulative analysis of the potential effect of all of the evidence that might be presented at a retrial in this case, including the evidence concerning fellow FBI Agent Vick and/or the DNA testing issues, previously raised by Mr. McDonald before this Court. Given those facts, the circuit court erred as a matter of law in denying relief on the instant issue. Mr. McDonald, consequently, asks this Court to review this issue *de novo* and to ultimately reverse the circuit court's denial of relief.

A. The Record did not Conclusively Refute the Merits of the Instant Issue

In light of the newly discovered evidence regarding Allen's false report and testimony, an evidentiary hearing is necessary. Indeed, the Department of Justice and FBI found Allen's actions to be egregious enough to warrant a detailed investigation and preparation of a report to the State twenty (20) years after Mr. McDonald's case. Furthermore, the Department of Justice and FBI were so concerned with Agent Allen's actions that they even involved NACDL and the Innocence Project in the analysis of Agent Allen's widespread errors and malfeasance in his reports and testimony and the impact on the due process of defendants across the United States. As the Department of Justice and FBI were apparently not familiar with the full facts of this case, they could not take a position as to the materiality of Allen's false testimony. Mr. McDonald, in turn, sought an evidentiary hearing at which he could establish the falsity of Agent Allen's testimony through expert testimony and demonstrate that this newly discovered evidence would create a reasonable doubt as to Mr. McDonald's guilt. Instead, the circuit court reached the merits of Mr. McDonald's newly discovered evidence claim without the benefit of any further record development. The record before the court did not conclusively refute Mr. McDonald's newly discovered evidence claim or support the circuit court's conclusion that the newly discovered evidence would not have affected the outcome of the trial.

As set forth above, the State's case against Mr. McDonald consisted of only circumstantial evidence. The State's case relied on the purported connection between Mr. McDonald and co-defendant Robert Gordon and the corresponding link of physical evidence on the sweater that was alleged to be tied to McDonald. Agent Chris Allen's testimony was the link in the chain upon which the State based its purported link of Mr. McDonald to the charged crimes. Indeed, that evidence was perhaps the strongest evidence the State presented against Mr. McDonald in this case. Without a full evidentiary hearing, it is impossible to fully comprehend the significant impact of the false and misleading testimony offered by Agent Allen.

Furthermore, while the circuit court reasoned the FBI correspondence only addressed the false testimony of Allen as it related to the hair testing, the court failed to recognize that falsity of Allen's testimony also bears on the credibility of all his findings and testing. Once again, an evidentiary hearing was required to allow Mr. McDonald the opportunity to demonstrate the now incredible nature of Agent Allen's testing and testimony with regards to **both** the forensic hair **and** fiber analysis. The record before the court simply did not support the circuit court's blind assertion that the newly discovered falsities in Agent Allen's trial testimony bore only on the hair testing and could have no impact on the fibers testing evidence. In the end, the newly discovered evidence of Allen's false testimony vastly diminishes

the credibility and competence of Agent Allen's testimony as to both the hair and the fibers testing he conducted.

Outside of the physical evidence in question allegedly implicating McDonald, the remaining evidence is wholly insufficient to create even a prima facie case of guilt against him. The remaining evidence came largely from the alleged communications between McDonald and Denise Davidson, payments allegedly sent from Davidson, the shoe of McDonald's found in the hotel room, and the testimony of co-defendant Susan Shore. This evidence was wholly circumstantial, at best. The Susan Shore testimony, moreover, only circumstantially linked Mr. McDonald to the offense. Ms. Shore's testimony, even as weak as it was, must be viewed with great skepticism given that Ms. Shore was testifying pursuant to agreement with the State, wherein she received significant benefit for her testimony. In the end, the case against Mr. McDonald was purely circumstantial and rested greatly on Agent Allen's testimony. But for Agent Allen's testimony, the case against Mr. McDonald would not have resulted in a guilty verdict.

Given the significance of the hair and fiber evidence to the State's case, coupled with the magnitude and extent of Agent Allen's false testimony, the newly discovered evidence at issue is "of such nature that it would probably produce an acquittal on retrial." Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014) quoting Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Likewise, the newly discovered

evidence weakens the State's case against Mr. McDonald to such an extent that it gives rise to a reasonable doubt as to Mr. McDonald's culpability and guilt in this matter. Id. citing Jones, 709 So. 2d at 526. The presentation and use of the false scientific evidence and testimony, likewise, prejudiced Mr. McDonald to the extent that it deprived him of his state and federal constitutional rights to due process and to a fair trial and caused irreparable harm to him. The circuit court, consequently, erred as a matter of law in summarily denying relief on the instant issue.

B. The Circuit Court Failed to Conduct a Cumulative Analysis of the Evidence in Determining the Potential Impact of the Newly Discovered Evidence at a Retrial

Notwithstanding the impact of the newly discovered evidence of Agent Allen's false testimony by itself, the circuit court wholly failed to consider the impact of the Allen false testimony evidence in conjunction with all other newly obtained evidence that would be available to Mr. McDonald at a retrial. As the circuit court recognized, Mr. McDonald's newly discovered evidence claim arising from the Allen-related FBI letter and report met the timeliness element of the newly discovered evidence test. After making that finding, the circuit court's inquiry into the potential effect of the newly discovered evidence did not, however, end with the analysis of the Agent Allen-related evidence in a vacuum, it must be reviewed as to the totality of the evidence. Instead, the court, in making its determination, was also bound to consider the weight and potential effect of the newly discovered evidence

in conjunction with the combined weight and potential effect of any other newly discovered evidence that might be admitted in a retrial, even if that evidence might have been procedurally barred from making up a post-conviction claim for relief. See Jones, 709 So. 2d at 521; Swafford v. State, 125 So. 3d 760 (Fla. 2013); Hildwin, supra, 141 So. 3d 1178.

In Swafford, this Court held that, in evaluating post-conviction claims based on newly discovered evidence, courts must consider the **cumulative** effect of **all** of the evidence that would be admissible at a retrial. "In determining the impact of newly discovered evidence," the Swafford Court ruled, courts "must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'" Swafford, 125 So. 3d at 776 quoting Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999). Courts must also consider the materiality and relevance of the evidence, and any inconsistencies in the newly discovered evidence. See Id. at 767-68, 777-78.

In Hildwin, which followed shortly after Swafford, this Court reaffirmed the cumulative analysis holding of Swafford. Moreover, the Court held that, in evaluating the impact of newly discovered evidence on the "total picture" and "all of the circumstances of the case," courts cannot turn a blind eye when the defendant's newly discovered evidence undermines a central pillar of the theory that the State made center-stage at trial, even if it appears possible that the State could

have convicted the defendant if it had decided to pursue a different theory and did not use the evidence that was later discredited by the defendant's newly discovered evidence. See Hildwin, 141 So. 3d at 1181, 1183-92.

In concluding that the newly discovered evidence of the false testimony of Agent Allen would probably not produce a different result in a retrial, the court failed to discharge its duty under Swafford because it relied exclusively on the trial evidence presented against Mr. McDonald. The court's cumulative analysis was required to include **all** of the evidence that was presented at the original trial and **all** of the evidence uncovered during post-conviction proceedings, including any evidence that was previously excluded as procedurally barred, which would include the evidence presented in the prior post-conviction actions surrounding the Lynch bloodstain testing and the false testimony of FBI Agent Vick. Gordon v. State, 97 So. 3d 823 (Fla. 2012) The circuit court failed, however, to conduct that cumulative analysis when it denied Mr. McDonald relief on the instant issue.

Although this Court has already considered the claims made by Mr. McDonald's co-defendant, Robert Gordon, in Gordon. Id. The circuit court, in fact, failed to even address Agent Vick's evidence in its analysis of the Allen false testimony evidence, as previously raised by co-defendant Gordon. Id. The testimony of Agent Vick was false to the extent of, at the very least, the fact that he did not conduct the testing he testified to having completed at trial. The falsity of

that testimony is, moreover, largely indisputable because it was casually told to Dr. Rene Herrera when he conducted his investigation at the FBI testing facility. Furthermore, if the June 29th FBI report was, in fact, a fraud, as Mr. McDonald has asserted during prior post-conviction proceedings, then the great majority of Vick's testimony would have been false. Regardless of whether Vick's testimony was partially false or mostly false, the bloodstain evidence about which Agent Vick falsely testified pyramided upon and bolstered Agent Allen's hair and fiber evidence.

Mr. McDonald has previously brought scientific evidence testing issues before this Honorable Court indicating the FBI DNA expert had not yet completed the necessary processing of the DNA as of the date of his trial testimony. McDonald v. State, 117 So. 3d 412 (Fla. 2013) Although this Court denied Mr. McDonald's Postconviction Motion concerning the DNA testing, the cumulative effect of the hair fiber and the DNA testing requires an evidentiary hearing. There have already been findings concerning the testimony of Agent Vick's testimony offered against Gordon, Mr. McDonald's co-defendant. As such, now that the testimony of **both** Allen, Vick, and the DNA expert could be shown to be false at a retrial, the record clearly does not conclusively refute Mr. McDonald's entitlement to relief on the instant claim.

Under the circumstances, the jury verdict and the court's subsequent imposition of the death sentence in this case were very likely the result of Agent

Allen's false testimony, as well as on the potentially fraudulent FBI report surrounding the bloodstain testing and the false testimony of Agent Vick and the DNA testing as previously raised by McDonald before this Honorable Court in 2013. Given the circuit court's decision not to conduct an evidentiary hearing, coupled with its failure to address the procedurally-barred new evidence in its summary order, this Court has no record upon which to conduct the cumulative Swafford analysis of the newly discovered false testimony. Mr. McDonald respectfully submits that Agent Allen's false testimony evidence, by itself, gives rise to a reasonable doubt as to his culpability. However, when considered in conjunction with the other new evidence that would be available at retrial, but which was previously found to be time-barred for post-conviction purposes, there can remain no doubt that the newly discovered evidence creates a reasonable doubt as to Mr. McDonald's alleged culpability.

It is also worth noting Appellee's reliance on the Florida Supreme Court's denial of Gordon's claim for post-conviction relief regarding the same issue is misplaced. Gordon v. State, 2016 WL 6462391 (Fla. 2016) Most importantly, this Court specifically noted in its brief written opinion concerning the summary denial of Gordon's Successive Motion to Vacate and Set Aside Judgment and Sentence of Death Based on Newly Discovered Evidence that "the hair comparison testimony at issue pertained to Gordon's co-defendant." Id. Given this Honorable Court's prior

analysis, that the hair analysis evidence was focused primarily on Appellant; thus any errors with Agent Allen's testimony and analysis were only amplified as to Mr. McDonald, since the testimony was directed against him at trial**.**

II. THE CIRCUIT COURT FURTHER ERRED IN SUMMARILY DENYING MR. MCDONALD'S *GIGLIO V. UNITED STATES* CLAIM ARISING FROM AGENT ALLEN'S FALSE TRIAL TESTIMONY

As the FBI and the DOJ firmly recognized in their case-specific correspondence to Mr. McDonald, Agent Allen undoubtedly presented false testimony when he testified at Mr. McDonald's trial. The testimony of Agent Allen was false to the extent of, at the very least, the fact that he rendered scientific opinions that went beyond the limits of science, as set forth above. It defies logic to conclude that Agent Allen, as a scientist and analyst employed by the FBI, could not have known that the testimony he was presenting was false. Agent Allen knew the limitations of his testing and the science behind it, yet he elected to ignore it and present false testimony against Mr. McDonald and other criminal defendants across the United States.

The pertinent question, therefore, is whether Allen's knowledge of the falsity of his testimony, was imputed on the State by virtue of the fact that Allen, himself, was an agent of the State. As Mr. McDonald established in his successive Rule 3.851 motion, Allen's own knowledge of the falsity of his testimony extends to the State by virtue of the fact that Allen was an agent of the State. In Jones, this Court

held "[t]he State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." Jones, 709 So. 2d 512, 520. However, whether or not Allen's testimony was imputed on the State, the record simply did not conclusively refute Mr. McDonald's claim regarding the knowing presentation of Allen's false trial testimony. As offered in Mr. McDonald's Fourth Successive Motion, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 445 U.S. 209, 220 (1982) Mr. McDonald, consequently, seeks *de novo* review and a reversal of the circuit court's summary denial of relief. *See supra* Statement of the Case at B.

A. The *Giglio* Standard

In Giglio *v. United States*, 405 U.S. 150 (1972), the Supreme Court found that the Constitution forbids a prosecuting body from using knowingly false testimony against a defendant. Giglio v. United State, 405 U.S. 150, 153-154 (1972); see also Pyle v. Kansas, 317 U.S. 213 (1942); Napue v. Illinois, 360 U.S. 264 (1959); State v. Burton, 314 So. 2d 136 (Fla. 1975); State v. Crews, 477 So. 2d 984 (Fla. 1985); State v. Glosson, 462 So. 2d 1082 (Fla. 1985); Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986); State v. Glover, 564 So. 2d 191 (Fla. 5th DCA 1990); Meek v. State, 801 So. 2d 287 (Fla. 4th DCA 2001). To establish a Giglio violation, a defendant must show the following: "(1) the testimony given was false; (2) that the

prosecutor knew the testimony was false; and (3) that the statement was material." Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001) citing Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998); see Craig v State, 685 So.2d 1224, 1227 (Fla. 1996); Routly v. State, 590 So. 2d 397 (Fla. 1991). The "Giglio standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant." Guzman v. State, 868 So.2d 498, 507 (Fla. 2003) This Court previously noted that the Giglio standard of materiality is "more defense friendly" Id. at 507. Once a defendant has proven that a prosecutor knowingly presented false testimony at trial, burden then shifts to the State to prove that the false evidence was not material. Id.

Concerning the "knowingly" element of *Giglio*, the Eleventh Circuit has found that "[i]t is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge will be imputed to state prosecutors." Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984)(citations omitted)(emphasis added). Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's credibility rather than directly upon [the] defendant's guilt." Brown v. Wainwright, 785 F.2d 1457, 1465 (1986).

B. The Instant Case

In the instant case, the State's presentation of Allen's false testimony satisfied all three prongs of the Giglio test. First, the State clearly presented false testimony.

The FBI, Department of Justice, the Innocence Project, and NACDL all recognized that Agent Allen knowingly rendered scientific opinions that went beyond the limits of science. Mr. McDonald's motion, on its face, established the falsity of Allen's testimony based on the case-specific FBI correspondence and associated reports. Nevertheless, to the extent that any question may remain as to the falsity of Agent Allen's testimony, the record certainly did not conclusively refute Mr. McDonald's claim that Agent Allen presented false testimony.

Second, as to the question of whether the State knew the testimony to be false, Mr. McDonald respectfully submits that Agent Allen's knowledge that he was presenting false testimony must be imputed on the State given that Agent Allen, as a law enforcement agent, was an agent of the State. In denying relief on this claim, the circuit court relied on this Court's decision in Wyatt. Wyatt, 78 So.3d 512. In Wyatt, this Court upheld the denial of relief on the defendant's Giglio claim stemming from the false testimony documented in that letter after reasoning that the "the prosecutor could not correct false testimony based on information contained in a letter written and issued to the State over fifteen years after the conclusion of Wyatt's trial." Id. at 102.

While recognizing the Court's holding in Wyatt, Mr. McDonald respectfully submits that the knowledge of law enforcement must be imputed on the State's prosecutors with respect to Giglio claims. This Court has recognized a similar

principal must apply to Brady claims. See Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993) (holding "[i]t is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose. See, e.g., Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir.1984)"); Scott v. State, 657 So. 2d 1129, 1131-32 (Fla. 1995) (relying on the Garcia holding). As the knowledge of Agent Allen is imputed on the State's prosecutors, then this second prong of the Giglio test was clearly satisfied in the circuit court. However, even in the event this Court finds to the contrary, the record before the circuit court did not conclusively refute Mr. McDonald's assertion that the State had knowledge of Allen's false testimony at the time of trial. As a result, an evidentiary hearing was necessary to address the question of the State's knowledge as to the falsity of Agent Allen's testimony.

Finally, turning to the third and final prong of the *Giglio* test, Agent Allen's testimony was material to the State's case, particularly given the lesser standard of materiality applicable to Giglio claims. As set forth in the preceding section, the hair and fiber "matching" evidence about which Agent Allen falsely testified was primarily directed against Mr. McDonald and was crucial to his conviction. The false testimony of Agent Allen, therefore, certainly contributed to the jury's verdict against Mr. McDonald.

Based on the foregoing, the State's presentation of the false testimony of Agent Allen constituted a Giglio violation that deprived Mr. McDonald of his right to due process as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. The circuit court, in turn, erred as a matter of law in summarily denying Mr. McDonald relief on this issue.

CONCLUSION

Based on the foregoing, Mr. McDonald respectfully requests that this Honorable Court reverse the circuit court's order denying his successive motion for post-conviction relief and remand this case to the circuit court with instructions to order a new trial or, in the alternative, to conduct an evidentiary hearing on Appellant's Fourth Successive Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at capapp@myfloridalegal.com, on this 8th day of July, 2019.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief is formatted in compliance with Florida Rule of Appellate Procedure 9.210.

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