IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-64

CARY MICHAEL LAMBRIX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR GLADES COUNTY, FLORIDA

AMENDED AND CORRECTED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of relief following a limited evidentiary hearing on the Appellant's successive motion for post-conviction relief filed under Rule 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PCR" -- record on post conviction appeal.

REQUEST FOR ORAL ARGUMENT

Cary Michael Lambrix has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Lambrix, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

For more than two decades, Cary Michael Lambrix has argued that he is innocent of the charges against him and of the death penalty. The case against him was wholly circumstantial. There were no eyewitnesses, no forensic or physical evidence and no confession to support the State's case of two counts of premeditated first-degree murder. The foundation of the case of capital premeditated murder against Mr. Lambrix was based on and built upon the information and testimony provided at trial in 1984 by his former girlfriend Frances Smith. For over twenty years, Mr. Lambrix has been arguing that the witnesses against him, including Frances Smith, were not credible.

Twenty years after the trials, on April 5, 2004, Frances Smith, testified under oath in open court that she had a relationship of a sexual nature with the lead state attorney investigator during the investigation and the trials. The record shows that the investigator, Miles R. "Bob" Daniels, initiated the charges against Mr. Lambrix, personally supervised the investigation, and developed the trial testimony of Frances Smith. The lower court in the instant case subsequently found that Frances Smith was not a credible witness as to the allegation of a sexual relationship.

The most recent chapter in the litigation of Mr. Lambrix's case began in 1997 when he filed a successive Rule 3.850 motion in which he alleged that his

trial judge's testimony concerning the 1978 resentencing of former death row inmate Raleigh Porter, a case over which the same judge had also presided, revealed newly discovered evidence demonstrating bias. While that motion was pending below, a state witness who had testified at Mr. Lambrix's trial in support of Frances Smith's testimony, Deborah Hanzel, provided an affidavit in which she revealed for the first time that her trial testimony concerning statements attributed to Cary Lambrix had been un-truthful.

During the course of subsequent proceedings Hanzel also revealed that she had been part of a conspiracy to wrongfully convict Mr. Lambrix and sentence him to death. She testified below that she was coerced by Frances Smith and a state agent into lying about what Mr. Lambrix had said to her in order to support Frances Smith's testimony against Mr. Lambrix. It was during the litigation below surrounding the credibility of Hanzel's testimony, that the State's star witness, Frances Smith, first testified under oath in open court that she had illicit sex with Miles R. Daniels, the lead state attorney investigator on the Lambrix case.

Mr. Lambrix has argued that he was deprived of his Fifth Amendment right to testify as a result of coercion. He has argued that he was deprived of his Sixth Amendment right to the effective assistance of counsel at trial. He has argued that he was deprived his Sixth Amendment right to a fair and impartial jury. The case was ultimately tried in a small rural community in Glades County, Florida, before a

jury that included a number of jurors who had ties to parties in the case or who had already heard some of the facts. He has argued that the trial judge who presided over the second trial was biased. He has argued that there never was credible evidence to establish that female victim Aleisha Bryant's death was a homicide. He has argued that there was never any credible evidence that the death of male victim Lawrence Lamberson was a crime of robbery or that the murders were cold, calculated or premeditated; these were the aggravating factors that put Mr. Lambrix on death row.

Mr. Lambrix has consistently argued that he has not been able to obtain relief due to a series of procedural bars that have prevented any State or federal court from reaching the merits of most of his claims. This Court should review the proceedings below in light of the substantial evidence presented below that supports Mr. Lambrix's actual innocence of the crimes for which he was convicted and sentenced to death. Part of that inquiry must be a careful examination and review of the lower court's orders denying discovery and evidentiary development and thereafter making credibility findings that are inconsistent with the evidence in the record.

There are significant findings in the lower court's orders that are simply not supported by competent and substantial evidence, rather the findings are in error and not supported by the record. The lower court made initial credibility findings

as to Hanzel's testimony below without taking into account later evidence and testimony supporting her allegations of conspiracy and collaboration. Omissions in the lower court's order fail to take into account the evidence from the Verizion telephone company documenting the contacts in February and March 1983 between Hanzel and Frances Smith claimed by Hanzel.

The lower court also completely ignored the testimony offered by Cary Michael Lambrix at the evidentiary hearing supporting Hanzel's testimony. In fact the lower court's orders completely ignore the existence of Lambrix's testimony which was subject to cross-examination below.

The lower court also failed to acknowledge that trial counsel provided a detailed affidavit detailing his opinions about the trial judge's bias at trial, including during jury selection, but was never allowed to testify about this area. The order of the lower court states plainly that there was no evidence of bias of the trial court provided below.

The lower court also failed to make any credibility determination as to Deborah Hanzel's testimony in February 2004 or regarding Frances Smith's rebuttal testimony concerning Hanzel's allegations of conspiracy. The lower court found Frances Smith's testimony regarding the sex not credible but the orders below fail to comment on the credibility (or lack of it) concerning Smith's testimony offered by the State to rebut Hanzel.

Finally, there was a curious failure by the lower court to make any direct credibility findings about Investigator Daniels's testimony that there was a plea/proffer understanding or arrangement to drop charges against Frances Smith in return for her testimony against Mr. Lambrix. At the same time the lower court relied on Daniels's testimony and credibility for the finding that there was no sexual contact between witness Frances Smith and Investigator Daniels.

The evidence to support the State's premeditated first degree murder case against Mr. Lambrix was the trial testimony of Frances Smith. Her credibility before the jury was critical in establishing the State's case against Mr. Lambrix. Yet the testimony of this same witness at the evidentiary hearing, admitting a sexual relationship with the lead investigator in Mr. Lambrix's case, was found to be incredible by the lower court.

A review by this Court of all the collective weight of all the new evidence will support a finding upon this Court's *de novo* review that the state's 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.

STATEMENT OF THE CASE AND FACTS

A. 1983 - 1997

On March 29, 1983, Mr. Lambrix was charged with two counts of first-degree murder. His first trial ended with the declaration of a mistrial on December 17, 1983, when the jury failed to reach a verdict after deliberating for some eleven hours.

Mr. Lambrix's second trial, presided over by Judge Richard M. Stanley, commenced on February 20, 1984. On February 24, 1984, the jury found Mr. Lambrix guilty on both counts of the indictment. The penalty phase of Mr. Lambrix's trial was held on February 27, 1984. Mr. Lambrix did not testify at either the guilt or penalty phases of the trial. The jury recommended death with regard to both convictions, 10-2 and 8-4, respectively.

On March 22, 1984, Judge Stanley imposed two death sentences. On direct appeal, this Court upheld both the convictions and sentences and in so doing, labeled Judge Stanley "the ultimate symbol of neutrality" in his performance during the trial. Lambrix v. State, 494 So. 2d 1143, 1146 (Fla. 1986). Mr. Lambrix was subsequently denied collateral relief in both the State and federal courts.[2]

The subsequent procedural history until the instant litigation, which began in

[2]Mr. Lambrix's quest for relief has spanned more than two decades and brought him all the way to the U.S. Supreme Court in a case that set the standard for the denial of relief based on a procedural bar.

1997, can be found in the following opinions denying relief: Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988); Lambrix v. State, 534 So. 2d 1151 (Fla. 1988); Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch (S.D. Fla. May 12, 1992); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994); Lambrix v. Singletary, 72 F.3d 1500 (11th Cir. 1996); Lambrix v. Singletary, 83 F.3d 438 (11th Cir. 1996); Lambrix v. Singletary, 117 S.Ct. 380 (1996); Lambrix v. Singletary, 520 U.S. 518 (1997); and Lambrix v. State, 698 So. 2d 247 (Fla. 1996).

B. 1997 - 2008

Judge Richard M. Stanley, the presiding judge at Mr. Lambrix's second trial in Glades County, testified under oath in Porter v. State, No. 78-199-CF (Fla. 20th Cir. Ct. 1997), regarding comments he made either before or during Mr. Porter's 1978 resentencing proceedings over which he had presided. PCR. 641-680. The hearing had been ordered based on information that Judge Stanley had said that he had agreed to a change of venue in Porter's case because Glades County "had good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch." Judge Stanley was alleged to have said that after that, he would send Porter to the electric chair. Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995). At the Porter hearing, Judge Stanley also admitted that he always sat in court with a "sawed off machine gun laying across [his] lap."

In Porter v. State, 723 So. 2d 191 (Fla. 1998), this Court found that, as a matter of law, Judge Stanley lacked the constitutionally required impartiality and neutrality in Mr. Porter's case at both the original sentencing proceeding and the resentencing proceeding.

On January 16, 1998, Mr. Lambrix filed a Rule 3.850 motion alleging that the new evidence of Judge Stanley’s lack of impartiality warranted relief. An amendment to the motion was filed in December 1998 that included a new claim concerning new potential testimony by trial witness Deborah Hanzel, who had been deposed in September 1998. PCR. 1008. A second amended motion was filed on January 10, 2001 consolidating all claims.

Thereafter, the lower court entered an Order denying the judicial bias claim and an ineffective assistance of collateral counsel claim but granting an evidentiary hearing based on the claim concerning a change in testimony, based on the Hanzel affidavit. PCR. 1159-60. On October 17, 2002, Ms. Hanzel, prosecutor Randall McGruther, and CCRC Middle attorney Ed Doskey all testified concerning the new testimony issue. PCR. 8029-84.

Hanzel testified that, contrary to her trial testimony, Mr. Lambrix never told her that he killed anyone. She indicated that law enforcement investigators made her afraid of Mr. Lambrix by telling her that he would come back and harm her and her children. Based on what investigators told her, Hanzel said she was frightened

into believing that Mr. Lambrix committed the murders. However, she testified that nothing Mr. Lambrix ever said made her afraid of him; it was only what law enforcement told her that caused her to fear him. She also testified at the evidentiary hearing, contrary to her trial testimony, that she did not recall any telephone calls from Mr. Lambrix, however, she maintained that Mr. Lambrix never told her that he killed anyone. PCR. 8057-58; 8038-58.

Before the lower court entered a post-evidentiary hearing order, Mr. Lambrix filed an October 11, 2002 amendment alleging a procedural due process violation under Atkins v. Virginia, 537 U.S. 304 (2002)(Claim IV). PCR. 1321-1355. On June 20, 2003 another amendment, a claim based upon Ring v. Arizona, 536 U.S. 584 (2002), was also filed (Claim V). PCR. 5869-5906.

On July 10, 2003 the lower court entered an order denying the claim concerning the Hanzel recantation after an evidentiary hearing, denied the Atkins claim as being without merit, and ignored the Ring v. Arizona claim completely. PCR. 5793-5869. Mr. Lambrix filed a motion for rehearing.[3]

[3] On October 27, 2003 the lower court considered argument concerning Mr. Lambrix's motion to compel the Florida Parole Commission to turn over to the defendant records concerning comments concerning Mr. Lambrix made by Judge Stanley during clemency investigations in 1987 and 1988 that were material to the judicial bias allegations and Brady concerns. A specific alternative request that the lower court undertake an *in camera* inspection of the records was also voiced by counsel for Mr. Lambrix. PCR. 8085-8126; 8099. No records were provided and no such inspection was ever done.

While rehearing was pending, Hanzel wrote a letter to the lower court indicating that she had failed to tell the truth at the evidentiary hearing. PCR. 6000-02. In the letter, Hanzel also revealed for the first time that Frances Smith told her that Mr. Lambrix told her that he struck the male deceased, Lawrence Lamberson, only after Lamberson first attacked Mr. Lambrix. See id. In December 2003 Hanzel provided an affidavit memorializing these facts. PCR. 5984-86. The lower court *sua sponte* ordered further hearings.

On February 9, 2004, Hanzel testified that Mr. Lambrix never told her that he killed Bryant or Lamberson and she explained that the reason she initially said that he did tell her that he killed two people was due to the fact that Frances Smith asked her to go along with "what she had to say." PCR. 8145-47. Hanzel told the lower court that Frances Smith admitted that she did not know what happened outside the trailer except that Mr. Lambrix told her that he had to hit Lamberson after he "went nuts" and attacked Mr. Lambrix after something happened with Bryant. PCR. 8152.

The State announced its intention to call Frances Smith as a rebuttal witness and the proceedings were continued so the defense could take her deposition.[4] During the deposition in open court on April 5, 2004 Frances Smith revealed that

[4] The deposition was conducted in open court because the State had improperly instructed the witness not to answer questions. PCR. 6304-07 (Order of April 4, 2004).

she and state attorney investigator Daniels had a sexual encounter during the prosecution of the Defendant. PCR. 8273-78; 7823-38 (March 30, 2007 Order).

The defense also called William MacMillen, an employee of Verizon Communications, to introduce telephone records to establish that Frances Smith and Debbie Hanzel had communications early on during the investigation of the case. PCR. 8308-17; 8316. MacMillen affirmed that the records indicated three calls between Hanzel's residence and Frances Smith's residence on February 21, 1983 (17 minute duration), March 3, 1983 (4 minute duration) and on March 5, 1983 (1 minute duration).

Mr. Lambrix then took the stand and explained that victim Lamberson was physically attacking victim Bryant and that Lamberson had been killed as a result of Mr. Lambrix trying to defend both himself and Bryant. PCR. 8317-50. The lower court's final order made no mention of Mr. Lambrix's testimony and made no credibility finding.

In a subsequent status conference on March 30, 2004 the lower court denied a pending defense motion to compel directed to the state attorney requesting production of aerial photos alleged to show ponding on the crime scene property holding that the photos were related to a collateral matter. These photographs had been explicitly promised to the defense at the February 9, 2004 hearing by Assistant State Attorney McGruther. PCR. 8202; 8230.

At the same hearing the lower court refused to hear testimony from Susan Johnson Deller, who owned the land at the crime scene and who had provided an affidavit stating that there was no pond on the property. PCR. 6241-43, 8231-32. These matters were relevant because Frances Smith testified at the second trial that Mr. Lambrix had told her he had placed the female victim face down in a pond and that testimony was argued by the State as proof of premeditation and the CCP aggravator. PCR. 1836.

On November 18, 2004 Appellant filed a consolidated motion based upon newly discovered evidence. This motion included Claim VI: newly discovered evidence that Debbie Hanzel's false testimony at trial was the result of fabrication by Frances Smith and Investigator Daniels; Claim VII: a Brady/Giglio[5] claim based on the new evidence that Frances Smith and Investigator Daniels had a sexual relationship that impacted on the investigation and presentation of evidence in Mr. Lambrix's case to his substantial prejudice; and Claim VIII: a claim that the fundamental miscarriage of justice doctrine requires the review of claims that were previously found to be procedurally barred. PCR. 6781-7019.

A Huff[6] hearing was held on August 19, 2005. PCR. 8444-8540. On June 14, 2006, Mr. Lambrix filed a motion for leave to amend the pending 3.850

[5] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).
[6] Huff v. State, 622 So. 2d 982 (Fla. 1993).

motion, with an attached amendment alleging that the Office of the State Attorney conducted a secret investigation into Frances Smith's allegations of sexual misconduct that involved interviewing witnesses and reviewing Investigator Daniel's flight logs. PCR. 7242-47; 7248-51. Mr. Lambrix also filed a "Memorandum of Law in Support of Allowing the Defendant to prove his Claims" in support of the presentation and relevancy of certain expert witnesses listed on his witness list. PCR. 7218-26.

In a June 20, 2006 order, the lower court denied leave to amend and, over defense objection, severely limited the evidence to be presented at the evidentiary hearing to the "threshold issue" of "whether or not there was an illicit relationship between a key witness for the State, Frances Smith, and state attorney investigator, Robert Daniels, during the investigation and prosecution of Mr. Lambrix" and whether there was a promise of immunity in exchange for the cooperation of Frances Smith. PCR. 7259-65.

After numerous depositions were taken, further evidentiary proceedings were held on July 19-20, 2006. PCR. 8701-9093.[7] Frances Smith testified that she was aware that she was a suspect in the case at the time of the investigation and she

[7] Testimony heard at the final evidentiary hearing was from Frances Smith, Investigator Miles R. Daniels, Doug Schwendeman (Smith's ex-husband), Kinley Engvalson (former trial counsel), The Honorable Robert R. Jacobs II (former trial counsel and now deceased), Tony Pires (a former assistant state attorney), assistant state attorney Randall McGruther and Investigator William McQuinn.

thought the police needed to believe her story. PCR. 8830-31; 8861-62. She testified that she stayed in a hotel in connection with this case and that Investigator Daniels called her to his hotel room where they had sexual intercourse. PCR. 8723-24. She agreed that they probably were drinking. Id. She testified that she was not proud of her actions. PCR. 8725.

Investigator Daniels then testified that it was his understanding that Frances Smith had received consideration from the state attorney in the form of dropped charges after her polygraph examination and promise of truthful testimony. PCR. 8856-58. He testified that Frances Smith also told him - off the record - that the reason that she went to the authorities was because she had been arrested in the car that belonged to Lamberson. PCR. 8865. On cross-examination Investigator Daniels denied that he had sex with Frances Smith during the course of the investigation or during the trials of Mr. Lambrix. PCR. 8891.

The lower court entered an order finding as a fact that there was no sexual encounter between Frances Smith and former SAO Investigator Daniels on March 30, 2007. PCR. 7823-38. After allowing Mr. Lambrix to present argument regarding his entitlement for further evidentiary development, the lower court entered a final order denying post-conviction relief on November 13, 2007. PCR. 7870-85. This appeal follows. The instant Amended and Corrected Initial Brief filed today is offered as a substitute to the Initial Brief filed on October 28, 2008.

SUMMARY OF THE ARGUMENTS

ARGUMENT I: THE STATE WITHHELD MATERIAL EXCULPATORY AND/OR IMPEACHMENT EVIDENCE INVOLVING A SEXUAL RELATIONSHIP BETWEEN WITNESS FRANCES SMITH AND STATE ATTORNEY INVESTIGATOR MILES R. DANIELS IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963), UNDERMINING CONFIDENCE IN THE VERDICTS AND RENDERING THE CONVICTIONS AND DEATH SENTENCES UNRELIABLE. MR. LAMBRIX IS ENTITLED TO A NEW TRIAL. THE LOWER COURT'S FINDINGS WERE AN ABUSE OR DISCRETION AND WERE NOT FOUNDED ON COMPETENT AND SUBSTANTIAL EVIDENCE.

ARGUMENT II: TRIAL WITNESS DEBORAH HANZEL'S TESTIMONY BELOW AT AN EVIDENTIARY HEARING CONSTITUTED NEWLY DISCOVERED EVIDENCE. THE TRIAL COURT'S INITIAL CREDIBILITY FINDINGS AGAINST THIS WITNESS AND APPARENT DISMISSAL OF HER TESTIMONY WERE BASED ON ERRONEOUS FACTFINDING.

ARGUMENT III: THE LOWER COURT'S FAILURE TO ALLOW A FULL AND FAIR HEARING BELOW, INCLUDING EXPERT TESTIMONY SUPPORTING A CONSPIRACY/COLLABORATION TO WRONGFULLY CONVICT MR. LAMBRIX, RESULTED IN PREJUDICE TO MR. LAMBRIX; THE CLAIM BELOW WAS NOT DEPENDENT ON THE ALLEGATIONS OF A SEXUAL RELATIONSHIP.

ARGUMENT IV: THE JUDICIAL BIAS OF TRIAL JUDGE RICHARD M. STANLEY INFECTED THE CASE BELOW TO THE EXTREME PREJUDICE OF MR. LAMBRIX.

ARGUMENT V: MR. LAMBRIX IS ENTITLED TO A NEW TRIAL BASED UPON HIS ACTUAL INNOCENCE OF THE CRIMES FOR WHICH HE WAS WRONGFULLY CONVICTED AND SENTENCED TO DEATH SUBJECT TO THE "FUNDAMENTAL MISCARRIAGE OF JUSTICE" DOCTRINE UNDER FEDERAL LAW AND THE RELATED "MANIFEST INJUSTICE" DOCTRINE UNDER FLORIDA STATE LAW; AND BECAUSE EMERGING EIGHTH AMENDMENT JURISPRUDENCE DEMANDS RELIEF FROM PROCEDURAL BARS.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. In the instant appeal the circuit court denied an evidentiary hearing on many of the claims below, and therefore, as to those claims where no hearing was granted below, the facts alleged by the Appellant must be accepted as true for purposes of this appeal in order to determine whether the Appellant is entitled to an opportunity to present evidence in support of his factual allegations. Peede v. State, 748 So. 2d 253 (Fla. 1999); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The circuit court's legal analysis is subject to *de novo* review by the Court.

ARGUMENT I

THE STATE WITHHELD MATERIAL EXCULPATORY AND/OR IMPEACHMENT EVIDENCE INVOLVING A SEXUAL RELATIONSHIP BETWEEN WITNESS FRANCES SMITH AND STATE ATTORNEY INVESTIGATOR MILES R. DANIELS IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963), UNDERMINING CONFIDENCE IN THE VERDICTS AND RENDERING THE CONVICTIONS AND DEATH SENTENCES UNRELIABLE; MR. LAMBRIX IS ENTITLED TO A NEW TRIAL.

A. FRANCES SMITH WAS THE "HUB" OF THE STATE'S CASE

On February 9, 1983, Frances L. Smith was arrested in Hillsborough County for aiding and abetting after she was caught driving a Cadillac that belonged to one of the two victims in the instant case, Earl Lamberson.[8] She knew that the car belonged to the deceased and that she did not have permission to have it. She did not know whether the deceased had been reported missing or if the car had been reported stolen. PCR 8823-27. She lied and told the arresting Hillsborough County Sheriff's Deputy that she did not know Mr. Lambrix. She knew that the police would have tough questions for her if she admitted to knowing Mr. Lambrix, whom the police had been looking for since he walked away from a work release program where he had been serving time for a bad check charge. PCR. 8823-27.

On February 11, 1983, while she was still in jail, Detective Mizell interviewed Frances Smith regarding a possible grand theft auto charge in connection with the Cadillac. Frances Smith admitted that she had seen Mr. Lambrix at a store and stated that she took him to a bus station. She said that he told her to park the car at Turkey Creek Road and that someone would pick it up. Her statements to Detective Mizell were not truthful.

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[8] Frances Smith is also known as Frances Ottinger-Smith, Frances L. Ottinger, and Frances L. Schwendeman. For purposes of this brief she will be referred to as Frances Smith.

After she bonded out of jail, Frances Smith spoke to her family and then went to see a lawyer. It was after seeing the attorney that she decided to go to the local State Attorney's Office in Tampa where she told FDLE Agent Connie Smith that she had information regarding a double homicide that occurred in southwest Florida. The Lee County State Attorney's Office was contacted and Investigator Miles R. Daniels ("Bob Daniels"), who was also a pilot, flew up to Tampa in order to bring Frances Smith down for a statement. PCR. 8856-57. Frances Smith accompanied Investigator Daniels and other law enforcement personnel[9] to a field in Glades County during what turned out to be a torrential downpour and led them to the buried bodies of Aleisha Dawn Bryant and Lawrence Lamberson (aka Clarence Edward Moore aka "Earl" aka "Chip"). On February 15, 1983, Frances Smith provided a formal statement to Assistant State Attorney Randall McGruther and Investigator Daniels:

> Well, Cary invited them there for spaghetti so I started cooking that and Alicia, she was with me, we were talking and Cary and Earl, they were in the living room it's all right there together, you know, it's a small trailer. And Cary told them then, he said let's walk back and look at my plants and I didn't know why he did that because we don't have any. But Alicia was talking to me and I just let it go and they went outside, and a few minutes later he came back in alone and he told Alicia that Earl wanted him to come out and see him . . .

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[9] Investigator Carla Mitar was present at the scene. At the time, Investigator Daniels was having an affair with her even though he was married to another woman. He and Mitar are now married. PCR. 8893-95.

* * *

> Yes. She grabbed me by the arm and said come on and go out with me and I didn't have any shoes on, I did go out the front door, and I started to go back and get my shoes and Cary told me to stay inside and not let the spaghetti burn, so I stayed in like he told me to, and he was out there a while then he came back inside and he [had] blood all over his arms and his face and all over the front of his shirt and he told me that they were both dead. And when he did that when I saw the blood well I just started screaming, and I backed up from him, he grabbed me and started shaking me and told me to shut up or he'd do me too. So I did, and he went in the bathroom and washed his face and his arms and took his shirt off and he had a tire tool in his hands when he came in, he threw it on the floor and then he took his shirt off, he wrapped his shirt around it and he told me I was going to help bury them. And he put on another shirt and he got a flashlight and we went out back where they were and he told me, well, I held the flashlight while he dug both graves. And then he made me lay down to measure the graves.

PCR. 2133-53. Investigator Daniels prodded the witness for a motive: "Did he, at that time, or has he since, told you why he killed the two of them?" Id. In her statement Frances Smith guessed that perhaps Mr. Lambrix killed the deceased for the car, or perhaps, for a gold necklace. She was also asked by Daniels if she would submit to a polygraph examination, which she reluctantly agreed to do. PCR. 2149. Before the interview concluded, Investigator Daniels gave Frances Smith the opportunity to add anything that she could think of that they had not covered. Her response was "I think we about covered it all." PCR. 2152.

On March 17, 1983, Frances Smith gave another statement to FDLE Agent Connie Smith. At that time, she was still a suspect. The State apparently still did

not have sufficient evidence to go to the grand jury because Agent Smith continued prodding Frances Smith to guess at a motive by suggesting that perhaps, this was a sexually motivated crime. There was never evidence of rape or a gold necklace.

After a mistrial where she testified, Frances Smith again testified at Mr. Lambrix's retrial. PCR. 1791-1949. She testified that on the evening of February 5, 1983, she accompanied Mr. Lambrix to a local bar in Labelle, Florida, where they by chance met Lawrence Lamberson and Aleisha Bryant. PCR. 1803-04. Frances Smith testified that the four of them then spent the remainder of the evening drinking at more than one local bar before returning to the trailer she shared with Mr. Lambrix at sometime near midnight. This trailer was located on a large piece of property known as "Johnson's Ranch." PCR. 1805-19.

Frances Smith went on to testify that upon arriving at the trailer she began cooking spaghetti in the kitchen while Mr. Lambrix and the two alleged victims sat in the adjacent living room area "playing and teasing" with each other. PCR. 1819, and that both Mr. Lambrix and Lamberson continued drinking from a bottle of whiskey. At some point thereafter, according to Frances Smith, Mr. Lambrix went outside with Lamberson, apparently to show Lamberson some plants, only to return alone about 20 minutes later. According to Frances Smith, Mr. Lambrix then told her that Lamberson wanted her to come outside. Frances Smith testified that she remained inside cooking as Mr. Lambrix went outside with Ms. Bryant. PCR.

1819-23.

According to Frances Smith, from 35 to 45 minutes after Mr. Lambrix went outside with Ms. Bryant, he returned to the trailer alone. This time Mr. Lambrix was "had blood on him, on his face and on his arms and front of his shirt" and said to her "they were both dead" PCR. 1824, 1918. Frances Smith testified that Mr. Lambrix threw a tire tool on the floor and took off a Fort Lonesome t-shirt that she had bought for him. PCR. 1825. She also stated that Mr. Lambrix "got me and started shaking me and told me he would do me too." PCR. 1825. She stated that when she asked him what happened, Mr. Lambrix eventually "said he hit Mr. Lamberson in the head with the tire tool and he said he choked Aleisha. And after that, he stomped her in the head." PCR. 1827.

Frances Smith then testified that Mr. Lambrix then told her she was going to help him to bury the two bodies, which she stated that she did do. PCR. 1827. She identified a shovel as the one used in the burial. PCR. 1832. She then described the burial process. PCR. 1832-43. She also claimed that Mr. Lambrix took a gold necklace from Lamberson's neck and went through his pockets. PCR. 1835. She said Mr. Lambrix "acted happy" during the burial process. PCR. 1836. She testified that when she first saw the body of the female victim "she was lying face down in the pond." PCR. 1839. On re-direct she testified that Mr. Lambrix told her that he placed the female victim "face down in the pond" because she was not yet

dead and "would finish drowning." PCR 1948.   No necklace was in evidence.

Frances Smith also testified that Mr. Lambrix told her that if she "turned him in" he would kill her. PCR. 1842. Shortly after burying the bodies, she said Mr. Lambrix picked up the tire tool and wrapped it in the t-shirt that she had given him, and they left the area in Lamberson's Cadillac. PCR. 1843-56.

Frances Smith then testified about several other areas that were used to support the State's case of premeditation: she testified that after they arrived at his sister's house, Mr. Lambrix searched Lamberson's car then told her that he thought Lamberson "had more money than that." PCR. 1860; she also testified that Mr. Lambrix took some of Lamberson's clothing from the car and that Mr. Lambrix told her that he sold a gold necklace that she saw him take from Lamberson's body. PCR 1861.

However, Frances Smith readily admitted that she did not actually witness Mr. Lambrix commit any act of violence against either alleged victim, nor did she hear anything that occurred outside the trailer. PCR. 1819-20; 1932. Frances Smith testified that she was arrested in Lamberson's car driving alone on a trip back to Mr. Lambrix's sister's house to see if he had any mail. PCR. 1863. She testified that no one offered or promised her immunity or special treatment if she told what happened. PCR. 1868. She said that she told her story and then she assisted in locating the bodies after being flown from Tampa to Ft. Myers by Investigator Bob

Daniels. She tried to assist the investigators by pointing out the spot on the bridge from which she said Mr. Lambrix allegedly threw the tire tool and the t-shirt into the creek. PCR.1865-73. On re-direct Frances Smith testified as to an entirely new story about Mr. Lambrix shoving her up against the wall at the Town Tavern and cussing at her because she was talking to a karate instructor named Angel. PCR. 1946. She also testified that Mr. Lambrix never told her why he allegedly killed Lamberson and Bryant.

Argument II of the instant brief outlines the newly discovered evidence that establishes that she lied at trial by deliberately withholding from her testimony the material and exculpatory fact that Mr. Lambrix told her that he hit the male victim in self-defense and that she solicited Deborah Hanzel to lie to police and fabricate evidence in order to make her version of what happened appear more credible, and that, as a result of her urging, Deborah Hanzel fabricated evidence that Mr. Lambrix told her that he killed the male victim in order to steal the car.

Frances Smith testified that when Mr. Lambrix returned to the trailer the first time, after going outside only with Lamberson, he appeared normal and had no blood on him PCR. 1917-18. It was only after returning to the trailer the second time, after being outside with both Lamberson and Bryant, that Mr. Lambrix had blood on him. PCR. 1919-20. The fact that Mr. Lambrix appeared normal when he returned to the trailer the first time, but had blood on him when he returned the

second time, combined with the fact that Lamberson's wounds and not Ms. Bryant's resulted in blood loss, strongly suggests that Lamberson was still alive and waiting outside while Mr. Lambrix returned to the trailer the first time. This quite reasonable interpretation of the facts is wholly consistent with what Mr. Lambrix maintains happened that night, and directly contradicts the State's theory that Mr. Lambrix lured Lamberson and Ms. Bryant outside, and killed them there, one by one. Mr. Lambrix maintains that what happened that night was a spontaneous fight between Lamberson and Ms. Bryant, which resulted in her death. When Mr. Lambrix came to Ms. Bryant's aid, he was attacked by Lamberson, and in the course of defending himself, killed Lamberson.

The State has always acknowledged that Frances Smith was the case against Mr. Lambrix. In their opening statement at trial they declared that "[a]t the hub there is one witness, Frances Smith. . . And I submit that when you hear the entire testimony of the State's case, that you will see that all of the spokes fit. The hub is solid, and the wheel is complete. Frances Smith is the hub of the case." PCR 1950.

> [B]ased on Frances Smith, the hub, and how everybody else's testimony supports that statement that she gave back February 14th, [1983] a year ago when she first came with Connie Smith, Bob Daniels and all of the evidence they found after that, the tire iron, the shovel, the location of the bodies, the letter. That all supports her as the hub. Everything fits. The wheel is complete.

R. 2520 (State's closing argument at trial).[10] The credibility and believability of Frances Smith was crucial to the State making out a case of premeditated first degree murder against Mr. Lambrix. Trial counsel struggled to attack her credibility. She had hesitated coming forward despite many opportunites before she did so. An attempt to impeach with her prior inconsistent statements made in custody for aiding and abetting after being arrested in the stolen car, statements where she denied even knowing Mr. Lambrix, was thwarted by trial counsel's concern about the trial court allowing in the fact that Mr. Lambrix was a fugitive from walking away from the work release center where he was serving time for bad check charges. PCR. 1937-40.

Kinley Engvalson, trial counsel, testified that he was not aware of the alleged affair or of any promise of immunity and, if he had been, he would have used the information at trial. PCR. 8973-9026. Trial counsel also testified that the defense strategy at the trial was to demonstrate that Frances Smith had a hidden motive to testify against Mr. Lambrix. PCR. 8932-33; see also R. 2652-2688. The late Robert Jacobs II, also trial counsel, also testified below and verified that he

[10] During the post conviction proceedings below, the State argued that "clearly the State's case was built on Frances Smith. . . . [T]he entire case, premeditation and everything, is proven in her testimony. And there has never been any question about that." (Transcript of Hearing October 6, 2000, at 37)(Counsel has been unable to locate this transcript in the record on appeal).

also would have used the information concerning the affair and promise of immunity in the defense of this case. PCR. 9054-59.

The selfsame witness found incredible by the lower court concerning her account of an affair with Investigator Daniels, was the testimonial lynchpin of the State's case at trial for two circumstantial premeditated first degree murder counts against Mr. Lambrix.

Trial counsel could have cross-examined both Frances Smith and Investigator Daniels at the trial regarding Frances Smith's admission of sexual misconduct in order to expose their interest, motive and bias in testifying against him. Olden v. Kentucky, 488 U.S. 227 (1988); United States v. Beckman, 222 F. 3d 512, 525 (8th Cir. 2000). Thus, the information concerning the affair could have been used to impeach the State's witnesses. There is no dispute that the defense did not know about the affair, or about Frances Smith's admissions regarding the affair.

B. THE SEX, THE RELATIONSHIP, AND WHY IT MATTERS

There was simply no rational basis for the lower court to conclude below that Frances Smith was lying or mistaken regarding the sex with Investigator Daniels. There is competent, substantial evidence on the record to support a finding that Frances Smith and state attorney investigator Miles R. "Bob" Daniels had sex during at least one of the times that she came to southwest Florida in

connection with the investigation and prosecution of Lambrix case.[11]

While the lower court was required to make initial credibility determinations about the witnesses at the evidentiary hearing, See McLin v. State, 827 So. 2d 948 (Fla. 2002), this Court's review must not begin and end with the lower court's determination alone: the lower court's credibility assessment failed to include any analysis as to how the jurors at trial would have viewed the testimony of Frances Smith, Investigator Daniels, Deborah Hanzel and the other witnesses presented at the evidentiary hearing. The jury's ability to weigh the credibility of all of Frances Smith's testimony should be reviewed by this Court in light of her sexual allegations.

After she first admitted this relationship in April 2004, Smith never wavered or backed down about the sex - the only issue is that her memory failed her regarding when, exactly, during the investigation and prosecution of the case that the sex occurred. The issue is not simply about whether Frances Smith and Investigator Daniels had sex. The real issues are how early during the course of the investigation the relationship developed, when they sexually consummated the relationship, and what impact the relationship had on Frances Smith's testimony

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[11] The case for this is set out in extravagant detail in Mr. Lambrix's Mid-Hearing Brief filed on August 25, 2006. PCR. 7296-7331. Page limitations for Initial Briefs do not allow the depth of detail and charting found therein concerning "Reasons to Believe Frances Smith About the Sex" and the associated chart of record support. PCR. 7310-15.

and the verdict and death recommendation from the jurors. The jurors below needed to know about the manner in which a developing relationship between Investigator Daniels and Frances Smith influenced Daniels in his obligation to conduct an objective investigation when developing the case ultimately brought against Mr. Lambrix.[12]

It is unreasonable to conclude that there was not more to the relationship between Investigator Daniels and Frances Smith than just a sexual encounter - they did not just wake up in bed together one morning. Rather, this sexual relationship was obviously the culmination of a much longer progressive mutual interest that led up to that undisputed sexual relationship despite the State's attempt to downplay the issue by calling it a "brief sexual encounter." Had the jurors been made aware that prior to both Investigator Daniels and Frances Smith testifying, the nature of this progressive relationship had already reached the point of evolving into a sexual relationship, any reasonable juror would have questioned both witnesses' possible bias and prejudice against Mr. Lambrix as well as both witnesses' personal motivations for ensuring that Mr. Lambrix was convicted.

The jurors at trial were told that they "may believe or disbelieve all or any part of the evidence or the testimony of any witness." Fla. Standard Jury

[12] This would have been established below by expert testimony as detailed in *Argument III*.

Instruction 3.9. Even if this Court must give deference to the lower court's opinion regarding credibility, the real issue in Mr. Lambrix's case is what the jury heard and what the jury was entitled to hear.

The jury never heard the impeachment that should have been available at trial. Some of Frances Smith's record statements were false. She knew that the car she was arrested in belonged to the deceased Lamberson; she certainly did not have permission to have it. She did not know when she was arrested for aiding and abetting whether the deceased had been reported missing or if the car had been reported stolen. PCR. 8823-27. She lied and told Deputy Launkitis of the Hillsborough Sheriff's Office that she did not even know Cary Lambrix. <u>See Statement</u> at PCR. 2122-25. She knew that the police would have tough questions for her if she admitted to knowing the Defendant whom the police had been looking for since he walked away from a work release program. PCR. 8823-27. On February 11, 1983, while she was still in jail, Detective Mizell interviewed Frances Smith regarding a possible grand theft auto charge in connection with the Cadillac. PCR. 6007-08. Frances Smith admitted that she had seen Mr. Lambrix at a store and that she took him to a bus station. She said that he told her to park the car at Turkey Creek Road and that someone would pick it up. Her statements to Det. Mizell were not truthful.

Frances Smith's self-interest led her to minimize her own complicity in

burying the bodies and fleeing the scene in the deceased's car. Then she greatly exaggerated and fabricated her knowledge of what really happened between the two victims and Mr. Lambrix. Cool v. United States, 409 U.S. 100, 103 (1973)(there is a "recognition that an accomplice may have a special interest in testifying, thus casting doubt upon [her] veracity").

Whether or not there was an affair or whether or not there is a dispute, the State's star witness claimed that she had sex with the chief investigator in the case and that, in and of itself, is information that the jury should have been entitled to hear. The question is whether there is a reasonable possibility that the jurors would have believed the affair occurred.

C. THE LOWER COURT'S FINDINGS WERE INCORRECT

When asked about the nature of her relationship with investigator Daniels, Smith said, "It was a sexual encounter. Yes, there was one." PCR. 8781. In April 2004 Smith had indicated that the "encounter" occurred during the prosecution of the case against Mr. Lambrix. PCR. 8273-80. At that prior hearing she had told the lower court that she stayed in a hotel in connection with this case and that Daniels called her to his hotel room where they had sexual intercourse. PCR. 8723.[13] She

[13] Mr. Lambrix argued below that the testimony and evidence established that the sexual encounter likely took place before Frances Smith testified at the second trial. The affair may have occurred as early as when she came down for the grand jury. She could not remember if she had sex with Daniels the first or second time she flew down. Def. Exh. 7. Frances Smith remembers that the affair occurred

also told the court that she was not proud of her actions. PCR. 8725.

In taking the stand at the evidentiary hearing Investigator Daniels faced a terrible Hobson's choice: either deny the truth about an affair that occurred more than twenty-years ago or admit the truth which would mean that he perjured himself regarding the extent of his relationship with Frances Smith when he testified at trial.

Daniels categorically denied that he had sex with Smith. When it was pointed out that if he told the truth and admitted the affair, it would jeopardize his marriage, he offered: "which is exactly why I would never dream of doing anything that stupid." (6/2/06 Daniels depo, 31); PCR. 8944, 8948. Daniels admitted below that he was not at all faithful to his first wife and that fellow investigator Carla Mitar was not the first or only woman with whom he had an affair. PCR. 8894. Adding alcohol to the equation, it is even more likely that Frances Smith and Daniels had sex. PCR. 8902-04. His protestations of fidelity are simply not credible. Furthermore, even though he denied the affair, the evidence at the hearing revealed that once Frances Smith's allegation became public, Daniels immediately went to work with his old friend at the State Attorney investigator office, William McQuinn, to figure out the only time that it could have happened, based on a review of the flight logs. PCR. 8896-8902. He testified that he spoke to McQuinn

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during one of the times that Daniels flew her down and there was a storm. Def. Exh. 7.

three to four times during the investigation of Frances Smith's sexual allegations. PCR. 8962-63.

Although Frances Smith vacillated regarding when she and Daniels had their illicit encounter most of the surrounding circumstances support a finding that they had sex during the few days before Frances Smith testified at the second trial. At the time of the initial investigation, Daniels was living with his then girlfriend and colleague, Carla Mitar. Mitar was an integral part of the investigation team and therefore, was at his side during the course of the investigation. However, after the first trial, Carla Mitar left the State Attorney's Office and consequently, she did not attend the second trial in Moorehaven.

The flight logs introduced as evidence below support a finding that Daniels did fly Frances Smith from Tampa to southwest Florida several times, but there was only one time that both he and Frances Smith stayed for several days at a motel and that was at the time of the second trial. PCR. 8935-42. Frances Smith indicated that the affair took place at a time when there was a storm and Daniels confirmed that there was a storm when he flew her down for the second trial, recalling that "I've never been so scared in my life." PCR. 8932-33. Daniels admitted that he went back home to Mitar right after the second trial. PCR. 8941. The testimony of both Daniels and Frances Smith along with the flight logs and trial transcripts support a finding that they had sexual intercourse during the second

trial.

Frances Smith testified that Investigator Daniels flew her from Tampa to southwest Florida several times in connection with the case; she could not remember how many times and she did drive down one time. PCR. 8736; Def. Exh. 7. The flight logs introduced at the evidentiary hearing established that Daniels flew her down on February 15, 1983, March 29, 1983 and February 20, 1983. PCR. 8923-42; Def. Exh. 13, State 1,2. The second trial, in Moorehaven, began on February 20, 1983 and Frances Smith did not testify until February 24, 1983. R. 2170-217.

Daniels's testimony corroborated that there was a storm when he flew Frances Smith down for the second trial. PCR. 8883, 8932; (State 1,2 Flight logs). Daniels picked Frances Smith up from Tampa and they landed in Pahokee on February 20, 1984. They were picked up and taken to the trial in Moorehaven. PCR. 8932-37; (Def. Exh. 13, State 1,2). PCR. 8723, 8767(Smith). Investigator McQuinn told Daniels that the affair "allegedly" occurred "at the motel in Moorehaven." PCR. 8901 (Daniels). Frances Smith was in the Moorehaven area ready to testify at the trial from February 20, 1984 through February 24, 1984. (Def. Exh. 13. State 1,2). Daniels stayed in a motel in Moorehaven 2-3 nights during the second trial. PCR. 8892.

Despite the foregoing, the lower court found that Frances Smith was not

credible. PCR. 7832-33. The State's entire case rested on the credibility of its key witness – Frances Smith – and the lower court specifically found as a fact that she is not credible concerning the sex.

What motive did Frances Smith have to lie about the sex? Frances Smith never tried to help Mr. Lambrix since the day she was caught driving the late Mr. Lamberson's car in 1983. She refused to meet with investigators for the defense team and the lower court had to personally supervise her in-court deposition in order to get her to answer any questions. PCR. 7829. She initially denied under oath that she had a relationship with Daniels. The lower court's opinion that Frances Smith was lacking in credibility is even more questionable given that she had no reason to make up a story about having an illicit relationship with Daniels twenty years before during the pendency of the Lambrix investigation.

Amazingly, on the first morning of the final evidentiary hearing, Frances Smith and Investigator Daniels ran into each other in the hallway. According to Frances Smith, she "just apologized to him for everything that happened." PCR. 8742; 8946. According to Investigator Daniels, she explained to him that she had told her ex-husband (Doug Schwendenman) about the affair. PCR. 8845,8847-48. As it turned out, Schewendeman corroborated that fact when he testified that more than twenty years before, Frances Smith told him about her affair with the investigator and pilot on the Lambrix case. PCR. 8844-54. The lower court did not

find his testimony to be credible.

The lower court's findings included a recognition that Frances Smith has memory problems, is being medicated for anxiety and depression, and perhaps is "slow" of speech and mind. PCR. 7832-33. The reliability of the lower court's contradictory findings as to the credibility of all her other testimony, except about the sex, must be called into question. The credibility findings are not reasonable and are totally unsupported by competent and substantial evidence, and are therefore an abuse of discretion. See Clegg v. Chipola Aviation Inc., 458 So. 2d 1186 (Fla. 1st DCA 1984).

If these findings were being reviewed under the federal "clearly erroneous" standard, relief could be granted. United States v. Gypsum Co., 333 U.S. 364, 395 (1948)("a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

D. THE CONSIDERATION

Investigator Daniels was forthright in his testimony below that there was a plea deal between the Office of the State Attorney and Frances Smith. At the evidentiary hearing below, Investigator Daniels testified that after Frances Smith took the polygraph examination, even though it indicated some deception, "the State agree[d] to do certain things for [Frances Smith]." PCR. 8858-62. He testified

that there was an agreement that Frances Smith would not be prosecuted if she passed a polygraph and thereafter testified truthfully. PCR. 8856-58. Tony Pires, a former prosecutor on the Lambrix case, also verified that a polygraph examination like the one given to Frances Smith was usually a "benchmark" for a plea agreement. PCR. 9027-33. Chief Assistant State Attorney Randy McGruther, who was the lead prosecutor, could only add that he was not aware of any plea agreement. PCR. 9066-80.

The lower court failed to acknowledge or find credible the testimony of Investigator Daniels or Tony Pires concerning the plea deal. The lower court's order found "there is no credible evidence that the State offered a plea deal or a plea bargain or any other consideration to Frances Smith Ottinger in exchange for her testimony." PCR. 7883.

In contrast, the lower court found Investigator Daniels' testimony that he never had a sexual relationship with Frances Smith to be credible: "There is no credible evidence of an intimate relationship between Frances Smith Ottinger and Robert Daniels." PCR. 7883. "Mr. Daniels was at all times forthright and direct. He did not evade the questions posed to him and he answered each question promptly and without delay. He never wavered in his denial of a sexual encounter between himself and Ms. Ottinger" "Mr. Daniels' testimony is credible." PCR. 7834, 7837.

Given these findings, it was an abuse of discretion for the lower court to utterly fail to credit Daniels' testimony at the evidentiary hearing concerning the plea arrangement as credible, competent and substantial evidence. PCR. 8857-58; PCR. 8892.

Investigator Daniels was completely frank in his testimony: Frances Smith testified pursuant to an agreement that she would not be prosecuted. The ultimate facts lead to this conclusion as well. Frances Smith was never prosecuted for aiding and abetting, grand theft, or for first-degree murder. There was competent, substantial evidence on the record to allow the lower court to make a finding that the State failed to disclose the consideration offered to Smith in exchange for her testimony, in violation of Brady.

Knowledge of misconduct on the part of an investigating officer employed by the Office of the State Attorney is imputed to the State regardless of whether the prosecutor knew about the suppressed evidence. Kyles v. Whitely, 514 U.S. 419 (1994); Pyle v. Kansas, 317 U.S. 213 (1942); Freeman v. Georgia, 559 F. 2d 65 (5th Cir. 1979).

Mr. Lambrix should have been afforded an opportunity to present the evidence including all the expert and lay witnesses that would have assisted in proving up his claims. *See Argument III*. This Court should only give deference to the lower court's findings of fact that are supported by competent, substantial

evidence. Stevens v. State, 748 So. 2d 1028, 1034 (1999). Whether the suppressed evidence is "material" for Brady purposes is a mixed question of law and fact subject to independent review on appeal. See Allen v. State, 854 So. 2d 1255, 1260 (Fla. 2003). See Henry v. State, 937 So. 2d 563, 574 (Fla. 2004)("We conclude that while Strickland claims can be properly dispensed with on either of the two prongs, limiting the scope of the inquiry at the outset to only one prong seems to create more problems that it solves."); see also, Grosvenor v. State, 874 So. 2d 1176, 1182 (Fla. 2004). The lower court fell into the Henry trap by drastically limiting Mr. Lambrix's evidentiary development.

The Brady evidence must, of course, be considered cumulatively with the newly discovered evidence of a conspiracy (*Arguments II & III*), as evidenced by Hanzel's more recent statements. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 and the evidence presented at trial); Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1994)(holding that the combined effect of Brady violations, ineffective assistance of counsel and newly discovered evidence required a new trial).

E. PREJUDICE

1. Record Evidence of Prejudice

The developing relationship between Frances Smith and Investigator

Daniels that culminated with the likely sexual encounter in 1984 is mirrored by the changes that seeped into her testimony at the second trial. The credibility of the witnesses is central to both the first and last prongs in the Brady claim - the testimony with regard to the sexual misconduct is inextricably intertwined with the testimony of Frances Smith and Investigator Daniels that was used against Mr. Lambrix at trial. For example, the State asked Frances Smith whether she changed her testimony, or whether her testimony was influenced by her relationship with Daniels and she said "no." Of course, Frances Smith saw no discrepancy between the testimony in the first and second trials. This is obviously wrong: she revealed statements attributed to Mr. Lambrix for the first time in the second trial.

During the retrial, Frances Smith testified to a number of "facts" that she had never mentioned before to the police, to the defense attorneys, or at the first trial. The emergence of these "facts" which operated to the prejudice of Mr. Lambrix should have been considered by the lower court when evaluating her credibility. During the retrial, Frances Smith told the jury that "Cary said that there might be some marijuana plants outside the trailer" PCR. 1822.[14] She also mentioned for the first time that Mr. Lambrix searched Lamberson's pockets. She also said that she heard a "horrible noise" and that Cary told you that it was air

[14] At the first trial, two months prior, she said that she had no knowledge of marijuana plants. R. (1st trial), p. 60.

escaping from the lungs of both the deceased. PCR. 1835-36, 1840.

Frances Smith testified Aleisha Bryant's body was found face down in a pond from her knees up in the water. PCR. 1839. She went on to say to the jury that Mr. Lambrix had said that Bryant ended up in the pond because "he said she wasn't dead. She would finish drowning." PCR. 1836, 1948. At the retrial, the prosecutor asked Frances Smith if Mr. Lambrix told her why he did what he did. Her response this time was:

> Yes. He just said, "Do what?" And he said, "it's already forgotten. You should forget it too." He said, "At least now we have a car."[15]

PCR. 1859. Other new details emerged in Frances Smith's testimony at the retrial, including her testimony that Mr. Lambrix showed his sister a gold necklace that Frances Smith said he took from the Lamberson. PCR. 1861. Additionally, she said, for the first time that Mr. Lambrix had said that he thought Mr. Lamberson "had more money than that" PCR. 1860. At the retrial trial she also testified, for the first time, that Mr. Lambrix shoved her up against the wall at the Towne Tavern bar that night. PCR. 1946. Frances Smith for the first time also told the jury that ultimately recommended death for Mr. Lambrix that he acted "happy" while he was dragging the dead bodies. PCR. 1836.

2. The lower court's limitations on presentation of evidence

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[15] During the first trial, the prosecutor specifically asked Frances Smith whether the Defendant had ever mentioned the automobile and the answer was "No." R. 91.

As part of the prejudice prong, Mr. Lambrix intended to prove below that his right to procedural due process was violated due to the suppression of the sexual relationship between the State's main witnesses. Scipio v. State, 928 So. 2d 1138 (Fla. 2006); Mordenti v. State, 894 So. 2d 161 (Fla. 2004). However, the lower Court did not allow the trial attorneys to be fully examined regarding how the undisclosed evidence "handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d 373 (Fla. 2001).

Mr. Lambrix maintains that the actions of the lower court imposed a limitation on his due process right to prove his claims. See Strickler v. Greene, 527 U.S. 263, 281 n.20, 289 (1999); Lightborne v. State, 549 So. 2d 1364 (Fla. 1989); Scott v. State, 657 So. 2d 1132 (Fla. 1995); Henry v. State; Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1994); and Rogers v. State, 782 So. 2d 373, 385 (Fla. 2001). Mr. Lambrix should have been allowed to call the remainder of his witnesses, including his experts, before the lower court ruled on any aspect of this case.

A particularly striking example of the lower courts limitation on Mr. Lambrix was allowing the State to enter undocumented photographs into evidence at the final evidentiary hearing alleged to be of the "pond" that Frances Smith claimed Mr. Lambrix had placed the female victim into face down, over the Defendant's objection. PCR. 8954-59; 8965-67; 9052. There was no competent testimony concerning the origin of the photos or even that they showed the relevant

portions of the crime scene. This should have opened the door wide to testimony from the defense expert witnesses, three of whom had proffered reports or affidavits and been listed for the specific purpose of refuting the existence of a pond on the property. PCR. 8952-57. The lower court denied Mr. Lambrix's motion to compel the photographs from the Office of the State Attorney. PCR. 6403-05.

The lower court also failed to allow Mr. Lambrix to develop other important aspects of the prejudice prong below, including but not limited to evidence of Judge Stanley's bias through the Parole Commission records, failing to allow a deposition of Judge Stanley, and failing to allow testimony from the crime scene property owner and affiant Sally Johnson Deller about the non-existence of a pond on that property. PCR. 6403-05, 6241-43.

Appellant was not allowed to present all of his witnesses at the evidentiary hearing below and to fully examine the trial attorneys as to how their strategy was negatively impacted. The Brady prejudice prong cannot be fully addressed.

ARGUMENT II

DEBORAH HANZEL'S TESTIMONY: NEWLY DISCOVERED EVIDENCE

A. HANZEL'S NEW EVIDENCE

Deborah ("Debbie") Hanzel was living in Plant City, Florida with her boyfriend, Preston Branch, sometime around Christmas in 1982 when she met Cary Michael Lambrix through his brother, Chuck Lambrix. PCR. 1999-2003. Frances Smith's brother was married to one of Preston Branch's cousins. FDLE Agent Connie Smith came into contact with Preston Branch when she stopped him with Chuck Lambrix. PCR. 7000.

Hanzel told police in her statement that Mr. Lambrix showed up at their place in Plant City driving a black Cadillac and she saw a "bill of sale" for the car made out to "Cary Lambertson" or "Lamberson." She said that about a week later (on Saturday February 12, 1983) she, Preston Branch, and Mr. Lambrix drove down to Labelle in a yellow truck in order to help him gather his belongings from the abandoned trailer. On the way back, Hanzel told police that Mr. Lambrix "said if you give me a hundred dollars I can show you where two bodies are buried right now. And then we were sitting there talking, I don't remember all what we were talking about or how it came up but he says I killed two people you know." PCR. 5812; Attachment to Order of July 9, 2003. PCR. 5793-5869.

At the retrial, Debbie Hanzel corroborated Frances Smith's story. She told the jury that Cary Lambrix came up to see her and Preston Branch in a Cadillac and, that he was wearing a nice suit. PCR. 2001-02. She told the jury that they all went to Labelle a week later in a yellow truck to clean up the trailer and gather Mr. Lambrix's belongings. PCR. 2002-2013. On the way back, she testified that the Defendant told her: If you give me $100.00, I could take you back and show you where I killed two people and buried them." PCR. 2015. She was "sure" about the words. PCR. 2016-17. She also testified that Mr. Lambrix called her a few times after she last saw him and that during their last telephone conversation she read a newspaper article to him about the search going on for him and then asked whether "he killed a guy for the car," she testified he replied "that was of the reason." PCR. 2019. Hanzel was impeached regarding the name on the bill of sale. PCR. 2027-30.

Following an investigation in 1998 by CCRC Middle that included an interview with Hanzel, she was deposed on September 16, 1998, stating in contradiction to her trial testimony that Mr. Lambrix "never admitted that he killed anybody." PCR. 1008, 2287-99; 2295. Thereafter, new claims were filed concerning changes in Hanzel's testimony and the lower court granted an evidentiary hearing on the Hanzel new testimony claim. PCR. 1159. At the evidentiary hearing on October 17, 2002 the substance of her testimony was that Mr. Lambrix never told her that he killed two people and that she only previously

said that he had because law enforcement caused her to be afraid of him. PCR. 8057-58. She further testified that she could not recall any telephone calls from Mr. Lambrix. PCR. 8055. Edward Doskey, one of Mr. Lambrix's former CCRC-Middle lawyers, also testified in order to explain how counsel had become aware that Debbie Hanzel's trial testimony was not true. PCR. 8063-70.

Trial proscecutor Randall McGruther also testified at the hearing but could not shed light on whether or not she had been threatened or pressured. He did, however, confirm that State Attorney Investigator Robert Daniels had contact with Debbie Hanzel during the initial stage of the investigation. PCR. 8058-63.

The lower court thereafter entered an order denying relief on the newly discovered evidence claim as to Hanzel's prior statements. PCR. 5793-5809. While the Appellant's rehearing motion was still pending, Hanzel wrote a letter to the Court:

> Mr. Lambrix never threatened me-it was the police and Frances Smith that had convinced me that he was a threat to me and my children.
>
> * * *
>
> Frances told me that if I would back her story up by telling the police that Mr. Lambrix told that he killed the people for their car we wouldn't have to worry about it, I asked Frances if that is what really happened and she said that she didn't know what happened outside but that Cary told her that the guy went nuts and he had to hit him. At first I told her, I'd think about it, but she called again the next day and I agreed to tell the police that Mr. Lambrix had called me and that I asked him about the murder and that he told me that he killed the man for the car.

> In truth, I never received a phone call from Mr. Lambrix and he never told me that he killed anyone. I didn't want to do that but because of my fear that Mr. Lambrix would come back and harm me and my kids, I finally agreed to do what Frances as asking-to back her story up by telling the police that Mr. Lambrix had phoned me and told me that he killed them for their car. However, this was not true as I never discussed the murders with Mr. Lambrix at all.

PCR. 6000-6002.

The letter said that she had not told the truth at the recent hearing and also revealed for the first time that Frances Smith told her that Mr. Lambrix told Frances Smith that he struck the male deceased, Mr. Lamberson, after Lamberson attacked Mr. Lambrix. PCR. 5950-52.

Ms. Hanzel subsequently provided an affidavit consistent with the facts contained in her letter to the Court:

> I testified at Mr. Lambrix's trial in 1984 that Mr. Lambrix called me on the telephone and indicated to me that he killed the victims in part so that Mr. Lambrix could take the car. This did not really happen. Mr. Lambrix never at any time told me or in any manner indicated to me that he killed the victims in order to get the car. Furthermore, he never told me at any time or in any manner indicated to me that he killed the victims at all.
>
> When all this happened in 1983, I was recently divorced and living with Preston Branch, who was Frances Smith's cousin. I do not remember specific dates, but I know that after Frances went to the police and told them that Mr. Lambrix had killed those people it took several weeks before they found and arrested him. Frances knew that Preston and I were cooperating with the police and she called me at home several times to talk about it. During one of these telephone calls, Frances told me that she was afraid that the police wouldn't believe her story and that, as a result, she feared Mr. Lambrix would eventually come after all of us. The police working on this case also

> told me Mr. Lambrix might come after my children and me. Because of the stories the police and Frances Smith were telling me about Mr. Lambrix, I was convinced that he likely would come after my children and me. During this time, I lived in constant fear. Every night I would lie on the floor in my children=s room unable to sleep. The police and Frances Smith persuaded me to believe that Mr. Lambrix was a serious and credible threat to my children and me.
>
> When Frances called me, she asked me to back up her story about the car and about Mr. Lambrix going crazy on the guy who owned the car. She kept saying that Mr. Lambrix was going to come and get anyone who testified against him but that if I would back up her story by telling the police that Mr. Lambrix told me that he killed the people in order to steal their car, I wouldn't have to worry about Mr. Lambrix coming after me or my children. When I asked Frances if that was what really happened, she told me she didn't really know what happened outside but that Mr. Lambrix had told her that the guy went nuts and he had to hit him.
>
> I told Frances that I would think about it. I reluctantly agreed to tell the police that when Mr. Lambrix had called me, I asked him about the murder and he told me that he killed the man for the car. While Mr. Lambrix did call me, he never told me or indicated to me that he killed anyone or that he killed the guy in order to get the guy's car. Because I so feared for my and my children's safety, I told this to the police even though it was not true.

PCR. 5984-86; PCR. 8185, Def. Exh. 3.

The lower court, *sua sponte*, ordered Hanzel to return to court and give testimony regarding this new evidence to allow the court to determine whether there was a "recantation."

On February 9, 2004, Hanzel testified that Mr. Lambrix never told her that he killed Bryant or Lamberson. PCR. 8145. Hanzel explained that the reason she initially said that he did tell her that he killed two people was due to the fact that

Frances Smith asked her to go along with "what she had to say." PCR. 8147. She also testified that Frances Smith told her that Mr. Lambrix attacked Mr. Lamberson only after Lamberson "went nuts." PCR. 8152, 8143, 8144, 8155.

B. SUPPORT FOR HANZEL'S TESTIMONY IN THE RECORD

The defense called William MacMillen, an employee of Verizon Communications, for the purpose of establishing that Frances Smith and Debbie Hanzel had at least three telephone communications in February and March 1983 early on during the investigation of the case, based on the phone records. PCR. 8308-17; PCR. 8316, Def. Exh.1.

Thereafter, the State called Frances Smith as a rebuttal witness, and she denied Hanzel's allegations that she had requested that Hanzel testify falsely. PCR. 8351-52. Even when she was confronted with the telephone records in evidence, on the issue of the telephone calls reported by Hanzel, Frances Smith testified that "I don't remember talking to her. Maybe I did. I don't remember speaking with her." PCR. 8352-55. Frances Smith also testified that she did not remember if the romantic relationship with Investigator Daniels was going on in February and March 1983 at the times the telephone records indicated she had spoken with Hanzel. PCR. 8355.

Mr. Lambrix took the stand to corroborate the testimony of Debra Hanzel and he testified that Lamberson was physically attacking Bryant and that

Lamberson was killed as a result of Mr. Lambrix trying to defend both himself and Bryant. PCR. 8317-50. The lower court's final order in 2007 failed to even acknowledge Mr. Lambrix's testimony and instead makes reference to an earlier November 25, 1998 affidavit as "only an affidavit and not competent testimony." PCR. 7881-82.

The lower court's final order also found that there was no credible evidence to support the Hanzel recantation and stated that "The Court stands by its ruling of July 8, 2003, and nothing that the Court has heard since has caused it to reach a contrary conclusion." PCR. 7883. The July 2003 order explained that the "gravamen of the Defendant's claim is that a material witness, Deborah Hanzel, recanted inculpatory evidence given during the trial of this cause." PCR. 5796.

After Hanzel testified, the lower court found that Ms. Hanzel had not recanted, rather, the court held, "she has neither withdrawn nor repudiated her trial testimony, but rather has simply confirmed that she does not now believe Mr. Lambrix committed the crimes for which he has been convicted. Plainly this is insufficient as a matter of law to support the claim of recantation." PCR. 5793-5869; 5801. The lower court's order noted that even if there had been a a formal recantation ("To withdraw or repudiate formally and publically") by Hanzel, "the court has a duty to deny a new trial where it is not satisfied that the recantation is true. Sweet v. State, 810 So. 2d 854, 867 (Fla.2002). PCR. 5800.

C. ERRONEOUS FINDINGS AND ABUSE OF DISCRETION

The lower court's final order re-affirmed the 2003 denial of the Hanzel claim stating that "nothing that the Court has heard since has caused it to reach a contrary conclusion". The order completely fails to acknowledge or to take into account the 2003 Hanzel letter and affidavit or Ms. Hanzel's subsequent testimony on February 9, 2004.[16] Ms. Hanzel's testimony was consistent as to Mr. Lambrix's exculpatory statement ("the guy went nuts") reported by Frances Smith to Deborah Hanzel as well as Frances Smith's request that Hanzel lie about what Lambrix told her in order to corroborate Frances Smith's story. PCR. 8142-8190.

The complete failure by the trial court to take account of either Mr. Lambrix's testimony at the hearing or the telephone record evidence, both of which corroborated Hanzel, was also an abuse of discretion. See State v. G.H., 549 So. 2d 1148 (Fla. 3d DCA 1989)(The trial judge cannot reject unrebutted testimony because the decision would not be based on competent and substantial evidence).

[16] After Ms. Hanzel's second testimony the lower court acknowledged on the record that prospective newly discovered evidence had emerged since Hanzel's earlier testimony and the lower court's order of July 8, 2003 which was still at that time pending on rehearing:

> THE COURT: That is that Miss Frances Smith asked Miss Deborah Hanzel to say something that actually never occurred to Deborah Hanzel.
>
> MR. HALLENBURG: Correct. Your Honor, in argumentative terms it was a conspiracy between these state witnesses to lie at trial and that's how we characterize it in our amendment. PCR. 8194.

The lower court's order simply ignored the fact that Mr. Lambrix testified below and was subject to cross-examination by the State.

Demonstrating the absence of competent substantial evidence in the post conviction context is at best an almost impossible task because this Court has held that trial judges are in the best position to resolve disputed issues of fact. The competent substantial evidence test is applicable in the review of lower court decisions in the context of evidentiary hearings. Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999). Pursuant to Florida law this Court must give deference to the findings of the trial court as to the credibility of witnesses when based on competent substantial evidence. See California Club Realty, Inc. v. Lucca, 517 So. 2d 72 (Fla. 3d DCA 1987).

In the instant case, the orders below are an abuse of discretion. They are filled with clearly erroneous findings of fact and conclusions of law. This Court should review the record of this case with an eye to "the interests of justice." Fla. R. App. P. 9.140(i); Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981)("This rule . . . has often been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings, which occurred at trial"). As is the case regarding the findings of the lower court concerning the credibility of the testimony of Frances Smith and Investigator Daniels, this Court should only give deference to those findings below that are supported by competent, substantial

evidence.

D. STATE INTERVENTION AND MISCONDUCT

One aspect of the new evidence in Ms. Hanzel's letter to the judge and her affidavit was confirmed by her subsequent testimony: there was a conspiracy to make sure that Mr. Lambrix was wrongfully convicted. The conspiracy involved Ms. Hanzel affirming information that was not true at the behest of Frances Smith and another unnamed state actor, a male investigator who was neither assistant state attorney McGruther nor the blond female FDLE agent Connie Smith. PCR. 8147; 8154-56.

Hanzel specifically testified about the mis-information provided by the investigator that put her in fear for her life and her childrens' lives: "Like that when he was killing the girl he was raping her and that when he was done I guess putting them in the ground and whatever he was jumping up and down on their chest to make sure they stopped breathing or whatever. And that at one time they told me he tried to kill his ex-wife by running her off the road." PCR. 8154. Hanzel also testified that Frances Smith had told her that Mr. Lambrix could "come back and hurt me or the kids or she didn't know what he would do really" and she said that because of the fear she felt from the persuasion from the investigator and from Frances Smith, she agreed to lie. PCR. 8156.

A pattern of prosecutorial intimidation became apparent during the post

conviction proceedings beginning with an attempt to intimidate Hanzel before her February 9, 2004 testimony. Assistant State Attorney Randall McGruther first filed a motion requesting that Hanzel be offered counsel. PCR. 6232-33. Then in open court, with Hanzel waiting outside, he advised the lower court of potential perjury charges against her if her testimony at the evidentiary hearing differed from her trial testimony supporting Frances Smith's story. PCR. 8129-30. He described Hanzel's affidavit as a "180 degrees contradiction" of her testimony at the two trials and her testimony at the October 2002 evidentiary hearing. He concluded that "Quite frankly, that would appear on its face at least to be a matter of perjury by contradictory statements in a capital proceeding, which is a second degree felony in this state." PCR. 8130.

McGruther also refused to withdraw from the case despite having been a witness at a prior hearing. PCR. 8058-62. The lower court refused to disqualify McGruther, ruling that it was not a foregone conclusion that McGruther would testify again in the case. PCR. 8138. McGruther did in fact testify again in 2007 after being deposed. PCR. 9066-80. In that testimony, the lower court intervened to stop post conviction counsel's cross-examination and attempted impeachment of McGruther with his deposition concerning his knowledge of a plea/non-prosecution agreement between the Office of the State Attorney and Frances Smith. PCR. 9070-80. This benefit to Smith, confirmed in the deposition and

testimony of state attorney investigator Bob Daniels, was unknown to the judge and jury at Mr. Lambrix's trial. PCR. 8857-65.

The State later advised Frances Smith as if she were their client. She was told not to answer questions at a court ordered defense deposition. In fact, the lower court found "that it is improper for a lawyer to instruct a witness not to answer a question posed at a deposition," and thereafter required that the deposition take place in open court. PCR. 7829. The State subsequently met secretly with Frances Smith at her home during a "non-investigation" after she made her revelation about the affair with Investigator Daniels. PCR. 9043-51.[17]

Mr. Lambrix requested aerial photos of the crime scene property alleged to show the existence of a pond through the public records process for years and the State stonewalled the request and objected to their production. PCR. 6399-6402. As noted *supra*, the lower court also denied Mr. Lambrix's request to have the

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[17] Chief Investigator McQuinn testified that his office did not investigate the allegations of sexual misconduct by Daniels, but he acknowledged that he drove Assistant State Attorney Ross from Ft. Myers to the Tampa/Plant City area where Frances Smith lived and sat in on the interview at Frances Smith's home while Ross interviewed her about her allegations of sexual contact with investigator Daniels. He also admitted searching for flight logs, talking with investigator Daniels, researching weather reports for specific dates and looking for documents in the case file and elsewhere. PCR. 9035-53. Daniels directly contradicted McQuinn's testimony about the lack of an investigation and his testimony revealed unreported details from Frances Smith about the alleged affair that she never testified about, details that must have been provided to Daniels after the investigation by his friend and former colleague McQuinn. PCR. 8902.

property owner testify. In 2004, Assistant State Attorney McGruther made on the record personal threats directed at post conviction counsel of potential “legal action” based on the defense calling into question the failure by the state to produce aerial photographs of the crime scene area that McGruther admitted he was in possession of. PCR. 8202. McGruther made an offer of the aerial photographs, allegedly showing a pond at the crime scene, but he never produced or documented any such pictures. PCR. 8202. Inexplicably, at the final evidentiary hearing in 2006 the State decided to trot out undocumeted photos of wet swampland as some sort of “rebuttal” to a fact that Mr. Lambrix had not even been allowed to discuss in his case-in-chief. PCR. 9052

There were also significant mis-statements in the lower court’s final order of November 7, 2007 concerning the plea negotiations entered into during the post conviction proceedings. The order found that “the Defendant has himself made a plea offer to concurrent life sentences, an offer which was subsequently withdrawn by the Defendant.” PCR. 7880. This is simply not the case. Plea negotiations ended after Mr. Lambrix rejected a State offer following counsel’s communication of a plea offer of two consecutive (rather than concurrent) life/25 sentences. A letter dated July 18, 2006 memorializing the plea discussions was drafted by post conviction counsel, provided to the state and filed in open court on the next day along with the State’s response. PCR. 8710-12. The letter stated that Mr. Lambrix

had rejected the State's offer "of two consecutive life/25 sentences if Mr. Lambrix agreed to plead guilty to first-degree murder in the two deaths and agreed to drop his post-conviction litigation and any right to appeal." In any event, the plea negotiations of Mr. Lambrix were not a relevant subject for the lower court's order.

E. NEWLY DISCOVERED EVIDENCE

The information imparted by Hanzel's testimony admitting her false statements at trial, reporting the exculpatory comments as to Mr. Lambrix's actions made to her by Frances Smith, and the undue influence imposed on her by Frances Smith and state agents was all newly discovered evidence. See Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1325 (Fla. 1994) ("The asserted facts '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 them by the use of diligence'"); see also Kinsey v. State, 19 So. 2d 706, 708 (Fla. 1944) ("it must appear that the defendant and his counsel not only were ignorant of the fact but could not have known it by the use of due diligence in time to present it to the court, unless excused by fear, duress, fraud or the like"). Mr. Lambrix plead these issues below in a timely fashion but was never allowed to make a full and fair evidentiary presentation.

Courts considering new evidence not available at trial must evaluate the cumulative effect of such evidence rather than determining its effect piece by

piece. Kyles v. Whitley, 514 U.S. 419, 436 (1995); Battle v. Delo, 64 F.3d 347, 352 (8th Cir. 1995)(applying the Kyles cumulative effect test to a newly discovered evidence claim); Gunsby, 670 So. 2d at 924 (holding that the combined effect of Brady violations, ineffective assistance of counsel, and newly discovered evidence requires a new trial); Swafford, 679 So. 2d at 739 (directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion, and the evidence presented at trial). This analysis was never undertaken below and that abject failure is a fundamental violation of Appellant's federal and state constitutional rights.

ARGUMENT III

THE LOWER COURTS FAILURE TO ALLOW A FULL AND FAIR HEARING BELOW INCLUDING EXPERT TESTIMONY SUPPORTING A CONSPIRACY/COLLABORATION TO WRONGFULLY CONVICT MR. LAMBRIX RESULTED IN PREJUDICE TO MR. LAMBRIX; THE CLAIM BELOW WAS NOT DEPENDENT ON THE ALLEGATIONS OF SEXUAL RELATIONSHIP

Mr. Lambrix's claim of conspiracy and collaboration (Claim VI below) was never dependent upon establishing that an actual sexual affair took take place between Frances Smith and Investigator Miles R. Daniels.[18] PCR. 7877-78. The

[18]In the Huff hearing ORDER dated January 5, 2006, the lower Court described Claim VI as simply being about counsel's allegations of newly discovered evidence of the intimate relationship between the State Attorney's Chief

original conspiracy claim was filed several months before Frances Smith revealed the information regarding the alleged affair.

The newly discovered evidence brought to light through the letter to the judge and affidavit of Debra Hanzel was raised as a separate claim in February, 2004. Hanzel thereafter testified that an actual conspiracy and collaboration existed between her, Frances Smith, and other state actors, to, by deliberate intent and design, wrongfully convict Mr. Lambrix by working together to fabricate the circumstantial evidence used to convict this Defendant in violation of his protected federal and state constitutional rights. Debbie Hanzel was a witness that the State originally found to be so reliable that based upon her otherwise unsupported testimony the State was willing to convict and condemn a man to death.

The lower court's final order "disagrees" with Mr. Lambrix about whether there was a formal hearing on the conspiracy/collaboration claim below. PCR. 7881. The witnesses that Appellant listed and wished to present below in support of the claim were not allowed because the lower court repeatedly found that to do so "would be tantamount to a retrial of the entire case." PCR. 7881. The lower court prejudicially failed to allow Appellant to present the evidence necessary to support the evidence of such a conspiracy to wrongly convict at an evidentiary hearing.

Investigator, Robert Daniels, and one of the State's witnesses, Frances Smith. PCR. 7106-17.

By its very nature, a conspiracy between parties to commit a particular act or take a particular action is seldom if ever- reflected in direct evidence. Proof of such a conspiracy is traditionally established through circumstantial evidence. This is true whether it is reviewed under a criminal conspiracy, or a civil law conspiracy. Such was the situation below in the instant case.

In Bradley v. State, 787 So. 2d 732, 740 (Fla. 2001), this Court addressed the sufficiency of evidence necessary to prove the existence of a criminal conspiracy, finding that conspiracy can be proven by circumstantial evidence and thus a jury may infer that an agreement existed to commit a crime from all the surrounding and accompanying circumstances. Likewise, in Robinson v. State, 610 So. 2d 1286 (Fla., 1992), this Court stated the applicable standard even more clearly:

> Conspiracy has been defined as an express or implied agreement of two or more persons to accomplish by concerted action, some criminal or unlawful act, Boyd v. State, 389 So. 2d 642, 647, n.2 (Fla. 2nd DCA, 1980). The existence of a conspiracy can be inferred from the conduct of the participants or from circumstantial evidence, See, Perez v. State, 561 So. 2d 1265 (Fla. 3d DCA), rev. denied 576 So. 2d 289 (Fla. 1990)(emphasis added) Robinson v. State, supra, 610 So. 2d at 1289.

When a conspiracy is alleged to exist, the moving party must be allowed to establish the existence of such a conspiracy from the conduct of the participants or from circumstantial evidence. Id. In a criminal context, where guilt must be proven beyond any reasonable doubt, circumstantial evidence is clearly sufficient and this

is equally true if the applicable standard is that used to prove a civil case by merely preponderance of the evidence.

To establish a prima facie case of section 1983 conspiracy, a Plaintiff must show, among other things, that the Defendants reached an understanding to violate (his) rights, Strength v. Hubert, 854 F 2d 421, 425 (11th Cir. 1988). The plaintiff does not have to produce a smoking gun to establish the understanding or willful participation required to show a conspiracy, Bendiburg v. Dempsey, 909 F 2d 463, 469 (11th Cir. 1990), but must show some evidence of agreement between the Defendants (emphasis added) Rowe v. City of Ft. Lauderdale, 279 F. 3d 1271, 1283-84 (11th Cir. 2002).

Based upon this clearly applicable law, the lower court should have provided the appellant a meaningful opportunity to establish the existence of a conspiracy from all the surrounding and accompanying circumstances as well as from the conduct of the participants or from circumstantial evidence.

This Court was unable to fairly evaluate the impact of Deborah Hanzel's testimony without considering all of the corroborating circumstances that establish that both Frances Smith and Investigator Daniels had a reason to get Hanzel to support their theory on motive and intent. See Roberts v. State, 678 So. 2d 1232 (1996)(quoting Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994) for the proposition that the case should be remanded for a hearing to allow the defendant

to demonstrate the corroborating circumstances sufficient to establish the trustworthiness of newly discovered evidence.)

The lower court unreasonably refused to acknowledge the existence of the supporting evidence that was presented. As noted *supra* in *Arguments I & II*, Hanzel testified that she lied about material facts implicating Mr. Lambrix at the behest of Frances Smith and state agents. Frances Smith testified that she had a relationship culminating in a sexual encounter with the chief investigator on Mr. Lambrix's case. Investigator Daniels testified that he believed there was a plea agreement with Frances Smith. Frances Smith's ex-husband, Schwendeman, testified that Frances Smith had told him twenty years before about the affair with the investigator. For unexplained reasons the lower court failed to find any of this testimony credible or material, even though other portions of the same witnesses' testimony served as the foundation of the findings below. The lower court's determinations are themselves not based on competent and substantial evidence. The lower court's fact finding is objectively unreasonable.

Mr. Lambrix expected to prove that his right to procedural due process was violated. This Court should conduct a cumulative analysis of all the evidence, including the proffered expert reports, in order to determine whether the suppressed evidence was material. Kyles, Mordenti, supra. This is not, as the lower court insisted, a retrial on the merits of the case; rather, it is a judicial analysis of

the fundamental fairness of the entire trial.

Mr. Lambrix submitted an extensive witness list well in advance of the scheduled evidentiary hearing and requested that the lower court allow the presentation of listed expert witnesses in support of the conspiracy/collaboration claim before the lower Court ruled on any aspect of this case. PCR. 7124, 8672. The lower court indicated at the Huff hearing that no expert testimony would be allowed: "You are not bringing in an expert. There is nothing here needed for an expert opinion." PCR. 8565.

Relevant evidence in this case should have been any testimony offered to prove the facts that demonstrate that confidence in the outcome of the trial has been undermined. Fla. Stat. § 90.401. Expert testimony should have been allowed below to assist the lower court in determining how the suppressed evidence precluded Mr. Lambrix from defending himself fully and fairly at his trial. Fla. Stat. § 90.702. A full evidentiary hearing should have been allowed because facts were in dispute and the files and records in Mr. Lambrix's case did not conclusively show that he was entitled to no relief. See Fla. R. Crim. P. 3.851 (f)(5)(B); Fla. R. Crim. P. 3.850 (d)("an evidentiary hearing is warranted where the motion, files, and records in the case do not conclusively demonstrate that the movant is entitled to no relief").

Medical Examiner Robert Schultz testified at trial. PCR. 1731-72. He

testified that Investigator Bob Daniels and Sam Johnson, an investigator from the medical examiner's office, were both present at the autopsy. PCR. 1738. Dr. Schultz testified that Mr. Lamberson's injuries could have splashed blood on his assailant (PCR. 1786)(PCR. 1731-90). At his deposition of July 26, 1983, he was even more resolute: He stated, "I would have expected a good deal of blood from the scalp lacerations and with each blow he would have splattered more". PCR. 1951-1989, 1987. He testified that he was not at the crime scene but obtained scene information from Sam Johnson. PCR. 1748. He testified as to the cause of death of both victims. He stated that the male victim died as the result of "multiple crushing blows to the head" inflicted by "a very hard, round, stick-like object." PCR. 1757, 1759. He then identified a tire jack, State exhibit 10-A, as the type of object that could have inflicted the head injuries on the male victim. PCR. 1764. As to the female victim, he opined that the cause of death was manual strangulation. PCR. 1766. He based his opinion on the fact that each decedent "died at the hands of another" and he believed that manual strangulation was the most likely cause of death, even though he found no evidence of hemorrhage or fracture in her neck. PCR. 1770-71. On cross-examination Dr. Schultz testified that the male victim was most likely intoxicated at the time of death with a bile alcohol level of .27 grams per cent. PCR. 1780-83. He also testified that the male victim was struck eight times, four times on the left forehead and four times on the right forehead, possibly

inflicted by the weapon being applied to the victim's head in a side-to-side motion. PCR. 1788-89.

Mr. Lambrix listed two forensic pathologists as witnesses. They were retained to review the autopsy records and the Medical Examiner's testimony in this case. The testimony of these two medical doctors would have assisted the lower court in understanding how the trial attorneys could have explained the significance of the deficiencies they found to the jury. This was technical and scientific testimony that required an expert opinion. Reports were prepared by the retained defense experts, Dr. Arkady Katz-Nelson and Dr. Edward Willey, and both were filed and served on the Court and the State. (See Notice of Filing Expert Reports, PCR. 7179-7217).

The Medical Examiner was not cross-examined on the fact that his opinion of "probable manual strangulation" was probably based on information gained from Investigator Daniels, who, in turn, based his whole investigation on the word of Frances Smith. The jury never knew that, according to Frances Smith, she and Investigator Daniels had an evolving relationship that culminated in sex by the time that the medical examiner testified. If the trial attorneys had known that Investigator Daniels may have been biased in favor of Smith's version of the events, they could have cross-examined the medical examiner in the proper context.

The experts would have testified that it is extremely important that a forensic pathologist should be present at the crime scene where the body was found. Because the medical examiner failed to go to the scene, it was impossible to tell what evidence might be missing. The clothing of Bryant was removed prior to examination by the Medical Examiner. The experts would have testified that this action was inappropriate and contradicts the rules and common practice of forensic pathology. The expert medical examiners would have also testified that part of the standard protocol at an autopsy is the taking of fingernail scrapings.

If scrapings of Bryant had been preserved after they were taken, an analysis could have helped to establish just who was her attacker and if she did or did not act to defend herself. The experts would have testified that the autopsy photographs appear to show that scrapings were taken, but no record of retention exists. They also would testify that no vaginal or rectal smears or swabs collected (even thought the investigators later tried to get Frances to say that the crime was sexually motivated). The experts were also prepared to testify that it was significant that there was no evidence of injury on Bryant's neck structure in spite of Dr. Schultz's finding of probable manual strangulation and no evidence that Bryant drowned.[19]

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[19] This testimony would support Mr. Lambrix's argument that Frances Smith's testimony at the second trial that the female victim was placed face down in a pond and left to die was a lie. The experts were also prepared to testify that the

The bottom line is that the defense doctors were prepared to testify that Dr. Schultz simply assumed that the female victim died of manual strangulation based on the fact that she was buried with Lamberson, an obvious victim of violence, in a clandestine manner. They would have testified that the facts of the crime scene do not exclude the possibility that the female victim died from a cardiac arrest precipitated by the events of that evening and that the cause of death should have been listed as undetermined.

Mr. Lambrix would have also called William Gaut, an expert witness in police procedures and criminal investigations, in order to assist the lower court in assessing how an unbiased and objective investigation should have been conducted. The report prepared by William Gaut was turned over to the State and the lower court. PCR. 7179-7217. Mr. Gaut reviewed relevant reports (including the medical examiner's reports and testimony) and testimony with attention to the evidence that was available to Investigator Daniels in 1983. His opinions would have assisted the lower Court in evaluating how the impropriety of the affair reported by Frances Smith handicapped the defendant's ability to investigate or present other aspects of the case. See Rogers v. State, 782 So. 2d 373, 385 (Fla. 2001).

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forensic evidence that they reviewed failed to show any contamination of foreign substances in her airways, and that her lungs were not filled with water.

Based on his report, Gaut was prepared to testify about significant deficiencies that he found in the Lambrix investigation. He believed that FDLE Investigator Connie Smith failed to follow the generally accepted police procedures pertaining to witness interviews, that Frances Smith was improperly induced to give evidence against Mr. Lambrix based on the statements by the police and investigators early in the investigation and that the "consent to search" form signed by Robert Johnson was not a valid authorization to conduct a lawful search of Mr. Lambrix's residence. He also was prepared to offer the opinion that any sexual relationship between an unindicted co-conspirator and one of the investigators is improper and violates generally accepted police practices and procedures.

Gaut was prepared to offer expert testimony regarding the known facts about victim Lamberson's criminal record including violence against women and how an objective investigator would have processed that information.[20] If the trial attorneys had known that investigator Daniels had a self-serving reason to believe Frances Smith's story, they could have successfully cross-examined him regarding his failure to investigate Lamberson, because evidence of bias is always admissible. Harmon v. State, 394 So. 2d 121 (Fla. 1st DCA 1980).

[20] Lamberson's criminal history is part of the record. PCR. 6226-31.

Mr. Gaut's testimony at an evidentiary hearing would also have shed light on the propriety of the deal that according to Daniels was offered to Smith if the State believed her story. As an example, the trial attorneys wanted to bring out the fact that Smith failed to come forward with her tale until after she was arrested. Judge Stanley ruled that if they did so in front of the jury, that would open the door to evidence concerning Mr. Lambrix's escape charge when he walked away from the work release center facility where he was serving time for a bad check conviction. Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). Based only on what they knew at the time, the trial attorneys did not take the risk. If they had known that Frances Smith was saying that she was having sex with Investigator Daniels, perhaps in order to keep herself out of trouble, then their strategy most likely would have been much different. See, Rogers, Scipio, supra.

Mr. Gaut was especially concerned with Frances Smith's story and the complete failure of the police to resolve conflicts in her versions of the events. For example, during the course of various statements, Frances Smith gave very definite statements as to on what night the homicides occurred and provided three different dates. He was prepared to testify that this type of fundamental inconsistency is a symptom of witness deception. He also would have testified that Frances Smith initally claimed that the flashlight they used for light to bury the bodies came from the trailer but later claimed that it was bought at a convenience store. The police

never followed up on this. He also would have stated a special concern about the fact that although Frances Smith was deemed by the State and Investigator Daniels to have passed the polygraph, there was evidence that she was deceptive in her answers.

There were other witnesses that Mr. Lambrix was prevented from presenting. Susan Johnson Deller, the property owner of the crime scene, who provided an affidavit, was denied the opportunity to testify. She would have testified as a lay expert that there was no pond on her property. PCR. 8231-32, 6241-43.

Mr. Lambrix also listed Steve Wistar of AccuWeather, Inc. and hydrologist Richard Thompson as expert witnesses who would have testified below in support of Mr. Lambrix's claim that Frances Smith fabricated the existence of a pond to bolster the state's case in aggravation. The reports and/or documents that Mr. Wistar and Mr. Thompson would have relied on in offering their opinions and scientific testimony were provided to the State and to the lower Court. (See Notice of Filing Expert Reports, PCR. 7179-7217).

These three witnesses would have testified that there was not a pond on the property and therefore, Frances Smith was lying. This was a fact that Mr. Lambrix should have been allowed to prove through scientific and lay testimony. While the non-existence of a pond is only one small part of this case, if Mr. Lambrix had

been allowed to establish this fact through expert testimony, such evidence would have supported one aspect of the the conspiracy/collaboration claim and damaged Frances Smith's credibility. It also would have raised a red flag of concern that Investigator Daniels and Assistant State Attorney McGruther may have manufactured evidence. Trial counsel was on this same road when they attempted to impeach the chain of custody of the alleged murder weapon, the tire tool, and the small t-shirt that was wrapped around it when the State introduced the two items into evidence through Frances Smith's trial testimony. PCR. 1846-57.

Mr. Lambrix was prejudiced and his state and federal constitutional rights were violated when the lower court refused to allow the defense's expert testimony and then subsequently allowed the State to enter previously unproduced photographs into the record, over the Defendant's objection, to attempt to refute the Mr. Lambrix's claim that a pond did not exist at the crime scene. The evidence, supported by the opinions of the experts that would have been presented, would have seriously impeached the credibility of Frances Smith's testimony at trial and refuted the aggravating factors argued at the penalty phase by the state attorney.[21]

The relevant finder of fact in these circumstances is the jury. Mr. Lambrix's

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[21]The State refused to turn over the aerial photographs in response to a motion to compel or to document the photos during the public records and discovery process. PCR. 8230. Only at the hearing in July 2006 were they were offered to the lower court without any foundation other than that they came from the State Attorney files. See Huff Hearing at PCR 8558-59; 8564; 8572-76.

jury should have heard the expert testimony and should have also known that the linchpin witness in the case against him was either having a sexual relationship with the chief investigator on his murder case or she was for some unknown reason making statements of fact that were not credible.

ARGUMENT IV

THE JUDICIAL BIAS OF JUDGE RICHARD M. STANLEY INFECTED THE CASE BELOW TO THE EXTREME PREJUDICE OF MR. LAMBRIX

A. THE CLAIM OF JUDICIAL BIAS

Based on this Court's holding in Porter v. State Mr. Lambrix filed a successive Rule 3.850 motion on January 16, 1998 alleging bias based on Judge Richard M. Stanley's testimony at the evidentiary hearing in Mr. Porter's case. See PCR. 1-67, 1669-1719. The claim below alleged that based on what was then known about Judge Stanley's judicial temperament and bias, this new evidence, had it been known at the time of trial, would have resulted in a successful motion to recuse Judge Stanley. PCR. 1-20. Mr. Lambrix alleged that the new evidence of bias implicated virtually all aspects of the trial. PCR. 15. The motion also sought to question Judge Stanley about his alleged bias. PCR. 8.[22]

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[22] The sum and substance of Judge Richard M. Stanley's comments in the Porter proceedings is detailed in the Statements of the Case and Facts. The claim below was amended in December 1998 and January 2001. PCR. 290-394, and 1430-85.

The aspects of judical bias claimed below included Judge Stanley's denial of Mr. Lambrix's motion for judgment of acquital after the trial; the derivative denial by Judge Stanley of Lambrix's right to testify at the second trial; the composition of the jury; and the failure to allow cross examination of key witnesses as to bias. In addition, Mr. Lambrix was prejudiced by the lower court's failure to allow or compel a deposition of Judge Stanley before his death in light of his testimony in Porter and the finding of bias by this Court regarding the re-sentencing in Porter. Mr. Lambrix's ability to obtain a full and fair hearing on the judical bias claim below was crippled by the lower court's acts and omissions.

On March 22, 1984, Judge Richard M. Stanley had sentenced Mr. Lambrix to death in both victims' deaths. Lambrix 494 So. 2d at 1148. Concerns about judicial bias were first memorialized in trial counsel's motion for judgment of acquital at the end of the State's case in chief. Trial counsel brought to judge Stanley's attention the fact that the State had failed to present evidence of premeditation as to Lamberson and had failed to make out a prima facie case of first-degree murder as to female victim Bryant. Defense counsel pointed out that the State had not established a cause of death for Aleisha Bryant and that Frances Smith's testimony was consistent with second degree murder. R. 2461-62.

In an affidavit, dated October 28, 1998, trial counsel Jacobs outlined his views about Judge Stanley's bias towards Mr. Lambrix at trial. PCR. 1720-23. His

opinion was that Judge Stanley's rulings, including the denial of individual voir dire, the seating of biased jurors, and restrictions on his ability to cross-examine Frances Smith with her prior inconsistent statements, "manifested his bias against Mr. Lambrix" in such a manner that without Judge Stanley's bias, "the outcome of [Mr. Lambrix's] trial would have been different."

On August 31, 2001, the lower court denied claim I (Judicial Bias of Judge Stanley) finding that the claim was legally insufficient but timely filed.[23]. PCR. 1159-60. The lower court thereafter reaffirmed the denial of claim I in its final order, finding that it was a purely legal claim that was not contingent of the presentation of any evidence. PCR. 7875-76. Although trial counsel Jacobs's affidavit was part of the record below it was not noted in the lower court's final order below which indicated that there had been no evidence of bias presented.

B. THE MISSED OPPORTUNITY TO DEPOSE

Post conviction counsel sought to depose Judge Stanley but was never

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[23] "This claim is legally insufficient because the motion does not allege any evidence of judicial bias in this case. The defendant bases this claim on the decision of Porter v. State, 723 So. 2d 191 (Fla. 1998) and the facts of judicial bias relied on by the Supreme Court in reaching its decision in that case. . . [h]owever, in this case, there is no evidence of bias against Mr. Lambrix alleged in the motion beyond the trial judge's statements in the record of Porter to the effect that he favored the death penalty." PCR. 1159. There is no mention in the lower court's order of the Jacobs' affidavit or of the prejudice to Mr. Lambrix due to the court's failure to allow/require deposition of Judge Stanley in discovery prior to his death and the obstruction by the State in opposition to search for justice by opposing the deposition.

afforded that opportunity before the judge's death. PCR. 197-202. In an October 26, 2000 order, the lower court refused to allow Judge Stanley to be questioned regarding this case, stating that "the taking of a deposition is premature until all of the defendant's claims have been stated in writing in an amended motion and an answer is filed by the state" PCR. 1098.

The State filed a motion to Strike the Notice of Taking Deposition of Judge Stanley, which was granted on October 26, 2000. PCR. 212-15; PCR. 1097-1104. The request to depose was renewed in January 2001. PCR. 1433. At a status hearing held on June 29, 2001, the parties were informed that Judge Stanley had died.

Mr. Lambrix has consistently asserted his desire to depose Judge Stanley in order to question the judge about the judicial bias issue in his case. At every turn, however, those efforts were thwarted by a constellation of roadblocks advanced by the State.[24] Alone and in combination, these events have led to the present situation where a critical witness is dead and Mr. Lambrix is deprived of the opportunity to investigate. The prejudice to him is substantial.

The only issue now is the provision of a proper remedy in light of the

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[24] Certainly, none of the problems that Mr. Lambrix encountered with respect to the provision of conflict-free effective counsel are attributable to him; it is not Mr. Lambrix's fault that the State-created "hodge-podge" system of collateral legal representation that he must use has been plagued with "uncertainty and unevenness of representation." Arbelaez v. Butterworth, 738 So. 2d 326, 329 (Fla. 1999) (Anstead, J., specially concurring). See ABA Report on Florida Death Penalty. PCR. 7355-7817.

deprivation of due process and the concomitant inability of Mr. Lambrix to further investigate and develop additional evidence in support of his claim. That actual prejudice has been demonstrated is clear. Mr. Lambrix repeatedly and diligently sought to depose Judge Stanley, yet for years, those efforts have been thwarted. Judge Stanley is now dead, and Mr. Lambrix cannot meet the bar established by the lower court: beyond what had been plead he cannot "allege any evidence of judicial bias in this case." PCR. 1159; 7875.

"[I]t is clear that the delay in [Mr. Lambrix's case] provided the prosecution with a tactical advantage." Scott v. State, 581 So. 2d 887, 893 (Fla. 1991). See also Seymore v. State, 738 So. 2d 984, 986 (Fla. 2d DCA 1999)("the fact of that witness' death has left [the] defense in tatters, with probably no hope of recovery. If we are to assume these facts to be true--and the record before us has no contradictory evidence—[the defendant] has shown actual prejudice").

The only legally available avenue for Mr. Lambrix to get the facts about Judge Stanley's bias was to conduct a deposition of Judge Stanley. Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995); State v. Lewis, 656 So. 2d 248 (Fla. 1994). The State had no discernable legitimate purpose in continuing to oppose a simple deposition other than the fear of what would come out of Judge Stanley's mouth. That the State so clearly feared the fruits of the deposition speaks volumes for the integrity of this process and for the validity of the governmental interest at stake. The State has no

legitimate interest in espousing the reliability of a trial and sentencing proceeding presided over by a judge who lacked the impartiality and temperament that the constitution mandates. This is true regardless of the strength of the evidence against a defendant, see Cartalino v. Washington, 122 F.3d 8, 10-11 (7th Cir. 1997)(right to be tried by an impartial judge "is not subject to the harmless error rule, so it doesn't matter how powerful the case against the defendant was, or whether the judge's bias was manifested in rulings adverse to the defendant"), and is particularly true when the defendant, like Mr. Lambrix, is in fact actually innocent of the crimes for which he was convicted and sentenced to death.

C. THE PAROLE COMMISSION RECORDS

During the proceedings below, Mr. Lambrix was unable to obtain records of Judge Stanley's comments concerning clemency for Mr. Lambrix in 1987, 1988 and 1994. Counsel requested an *in camera* inspection of the clemency records of 1987 and 1998 for Brady material. PCR. 8080. There was argument with counsel for the Florida Parole Commission present before the lower court. PCR. 8085 (October 27, 2003). The Florida Parole Commission argued that Brady did not apply to these records, relying on Asay v. State, 769 So. 2d 974 (Fla. 2000) for that proposition. PCR. 8096. The lower court failed to ever order either production or an *in camera* inspection despite appellant's request below.

Asay should not apply to the State's denial of access to portions of the

clemency records in Mr. Lambrix's case. The request for records was limited solely to the statements made by Judge Stanley as part of the clemency proceedings in 1987 and 1998 and was not the kind of "fishing expedition" anticipated by Asay. In fact, the State's action in withholding potential exculpatory evidence was a due process violation which deprived Mr. Lambrix any meaningful opportunity to get the facts about Judge Stanley's prejudice.

In Jones v. State, 740 So. 2d 520 (Fla. 1999), the deprivation of a fundamental right was found where a capital defendant was afforded a new trial when, due to a twelve-year delay in adjudicating his case attributable to state action, a retrospective determination of the defendant's competency to stand trial was impossible to make and thus resulted in a violation of due process.

This Court should remand to the circuit court to allow Mr. Lambrix to obtain the benefit of an *in camera* inspection of the statements made to the Parole Commission by Judge Stanley in Mr. Lambrix's case. Because the lower court refused to undertake an *in camera* inspection of the clemency records, the record is bare of clemency material for this Court to review in support of the judicial bias claim. See Roberts v. Butterworth, 668 So. 2d 580, fn. 7 (Fla. 1996); Scott v. Butterworth, 734 So. 2d 391 (Fla. 1999). If this Court fails to remand for an *in camera* inspection, a strict interpretation of the separation of powers doctrine by this Court, based on sect. 14.28 Fla. Stats., raises due process and equal protection

issues.

D. PREJUDICE

At no stage of the proceedings against Mr. Lambrix did Judge Stanley disclose to Mr. Lambrix or his counsel his bias and predisposition. See Morgan v. Illinois, 504 U.S. at 739 (holding that if judge has announced a predetermination of sentence before evidence is presented, the judge "should disqualify himself or herself"). Mr. Lambrix's federal constitutional rights were violated.

Mr. Lambrix should not be penalized because Judge Stanley ignored his ethical responsibility to disclose all potential sources of bias. To do so would be to sacrifice Mr. Lambrix's constitutional right to a fair trial before a neutral judge.

Florida law also imposed an obligation on Judge Stanley to disclose to the parties any evidence of bias that he possessed: "Where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, he should decline to officiate, whether challenged or not." Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980)(emphasis in original). This Court discussed this principle in Crosby v. State, 97 So. 2d 181, 184 (1957).

Even if Judge Stanley's conduct could not be considered to reflect an actual bias, it is clear that there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of [Mr. Lambrix]." Ungar v. Sarafite, 376 U.S. 575, 588

(1964).

The newly discovered evidence of Judge Stanley's bias and lack of impartiality requires not only scrutiny on its own merits, but rather this Court is required to re-evaluate Mr. Lambrix's previous allegations regarding the lack of an adversarial testing so that a collective analysis can be conducted. Based on Judge Stanley's testimony at the evidentiary hearing in Mr. Porter's case, there is no reason to suspect that Judge Stanley's bias disappeared or dissipated when dealing with Mr. Lambrix's capital case. Cf. Porter v. Singletary, 49 F. 3d 1483, 1490 (11th Cir. 1995). Moreover, based on what is now known about Judge Stanley's judicial temperament and bias, this new evidence, had it been known at the time of trial, would have resulted in a successful motion to recuse Judge Stanley. See, e.g. Asay at 980. Because the presumption of neutrality has been overcome as to cases involving Judge Stanley, all of Judge Stanley's conduct in this case must be reevaluated in light of what is now known about his lack of impartiality and his bias. It was error for the lower court to deny a hearing on this matter. “The floor established by the Due Process Clause clearly requires a ‘fair trial in a fair tribunal’ before a judge with no actual bias against the defendant or interest in the outcome of the particular case.” Bracey v. Gramley, 117 S.Ct. 1793, 1797 (1997). "[I]f the judge was not impartial, there would be a violation of due process. Pursuant to Fla. R. Crim. P. 3.850 (d), an evidentiary hearing was warranted below where the

motion, files, and records in the case do not conclusively demonstrate that the movant is entitled to no relief. See also Gaskin. Mr. Lambrix made out sufficient allegations of judicial bias to warrant an evidentiary hearing.

During his judicial career, Judge Stanley sentenced three defendants to death; two of those cases involved overriding jury recommendations of life. See Porter v. State, 723 So. 2d 191 (Fla. 1998); Walsh v. State, 418 So. 2d 1000 (Fla. 1982). In both of these cases, the defendants received relief. Mr. Lambrix's case is the only remaining death sentence that was imposed by Judge Stanley. Mr. Lambrix is entitled to relief.

Based on the foregoing discussion, as well as in light of basic principles of due process and fundamental fairness, the only fair remedy under these circumstances is the granting of a new trial due to the violation of due process occasioned by the delay attributable to the State and/or state action which has deprived Mr. Lambrix of the ability to adequately develop his evidence.

Because Judge Stanley's bias infected virtually every aspect of Mr. Lambrix's capital trial and precluded him from ruling with an open mind at every critical juncture in the trial, justice requires a new trial.

ARGUMENT V

MR. LAMBRIX IS ENTITLED TO A NEW TRIAL BASED UPON HIS ACTUAL INNOCENCE OF THE CRIMES FOR WHICH HE WAS WRONGFULLY CONVICTED AND SENTENCED TO DEATH SUBJECT TO THE "FUNDAMENTAL MISCARRIAGE OF JUSTICE" DOCTRINE UNDER FEDERAL LAW AND THE RELATED "MANIFEST INJUSTICE" DOCTRINE UNDER FLORIDA STATE LAW; AND BECAUSE EMERGING EIGHTH AMENDMENT JURISPRUDENCE DEMANDS RELIEF FROM PROCEDURAL BARS

A. PREVENTING "MANIFEST INJUSTICE"

The lower court's final order reiterated an absolute refusal during the proceedings below to allow any testimony or evidentiary development on the claims of actual innocence and the fundamental miscarriage of justice exemption to previously attached procedural bars. PCR. 7878. Yet at the same time the lower court recognized that "[T]his case is perhaps the most complicated criminal matter to ever come before the Court. The prosecution of Cary Michael Lambrix has a protracted legal and procedural history." PCR. 7870. In the Huff hearing order, the lower court ruled, in part, as follows:

> "[C]ounsel argued that the evidence thus far presented (or to be presented at an evidentiary hearing) will enable counsel to leap over any procedural hurdles that the law would otherwise impose, thus entitling the Court to consider all claims listed above, including those that have been previously denied. These would include the claims regarding the alleged bias on the part of the sentencing judge, the Defendant's alleged denial of his right to testify, etc.
>
> The Court disagrees. No further testimony or evidence will be

> presented to or entertained by the Court on this issue, for doing other would be tantamount to granting the Defendant the right to retry the entire case. That said, the Court will not foreclose counsel from making any further legal argument in support of this claim following presentation of evidence."

PCR. 7106-17. In the Order dated March 28, 2006, the lower Court reiterated:

> "The Court will not hear evidence on Claim VIII as that claim has already been denied. In other words, the Court advised counsel that the evidence presented to the Court must be relevant to those three claims and those three claims alone. Any testimony that is not relevant to those claims will not be heard by the Court at the evidentiary hearing to be scheduled by the Court in accordance with its prior orders and this order in particular. As stated previously, the Court will not permit a retrial of this case on the merits."

PCR. 7143-50.

This Court previously denied Mr. Lambrix relief without addressing the merits of Mr. Lambrix's "fundamental miscarriage of justice" claim or any of the claims of constitutional deprivation fully pled below. See Lambrix v. State, 698 So. 2d 247 (Fla. 1996). In a recent opinion, this Court's ruling implicitly overturned Lambrix v. State. See Jimenez v. State, 33 Fla. L. Weekly S 805 (Fla. September 29, 2008). Standing alone, the issues raised below and detailed in Argument I (Brady/Giglio regarding the sex allegations), Argument II (newly discovered evidence), and Argument III (conspiracy/collaboration) are sufficient to warrant relief in the form of a new trial.

Because these issues also raise a colorable claim of actual innocence, applicable constitutional law now entitles Mr. Lambrix to a full review of all of the

specifically identified claims originally incorporated below into Claim VIII under the fundamental miscarriage of justice doctrine. PCR. 6829-7019. See Schulp v. Delo, 513 U.S. 298 (1995); Murray v. Carrier, 477 U.S. 478 (1986); House v. Bell, 126 S. Ct. 2064, 2076 (2006)("'In appropriate cases,'" the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'"). Mr. Lambrix is not required to prove has actual innocence, but rather must only establish "a colorable claim of innocence" supported by newly discovered evidence. Schulp at 313-335, Murray at 478, 496. The standard of "probably resulted in the conviction of one who is actually innocent" governs the miscarriage of justice inquiry rather than the more stringent standard that was used in Sawyer v. Whitley, 505 U.S. 333 (1990). Schulp, at 313-319.

Mr. Lambrix alleged that he is entitled to review of procedurally barred claims under Schlup v. Delo because he can establish that he is actually innocent. PCR. 6831. The following issues were raised below as part of the fundamental miscarriage of justice claim: (a) Mr. Lambrix was denied the effective assistance of appellate counsel because counsel failed to argue on direct appeal that he was entitled to judgments of acquittal on the charges of first-degree murder. PCR. 6832; (b) Mr. Lambrix was denied his right to effective assistance of trial counsel because counsel's actions deprived him of his right to testify where counsel

threatened to withdraw if Mr. Lambrix did so. PCR.6841, 2086-91 (1st trial colloquy)(The lower court found that the issue of Appellant's "right to testify" had been fully litigated on the merits, and relied on Lambrix v. Singletary, 72 F. 3d at 1508 (11th Cir. 1996) to support that finding). PCR. 5807 (Order of July 8, 2003); (c) Mr. Lambrix was denied the effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments by trial counsel's failure to adequately cross-examine and impeach Frances Smith, the State's key witness. PCR. 6848; (d) trial counsel was ineffective for failing to challenge the State's evidence on the cause of death of Bryant by failing to retain the assistance of an independent pathologist, crime scene expert, other experts and by failing to effectively cross-examine the State witnesses. PCR. 6860 (See *Argument III*); (e) trial counsel was ineffective by failing to challenge unqualified jurors after individual voir dire was denied by the trial court. PCR.6870, PCR. 2061-85. Mr. Lambrix is also entitled to review of the procedurally barred claims under Sawyer v. Whitley because he is actually innocent of the death penalty. PCR. 6883. Mr. Lambrix is entitled to relief from the judgments of conviction and sentence as Mr. Lambrix's wrongful convictions are the result of the State's use of perjured testimony. PCR. 6885.

Considered together, the newly discovered evidence of Hanzel's testimony that she was coerced into testifying falsely, the Brady/Giglio violations implicit in the allegations of sexual misconduct made by Frances Smith concerning state

attorney Investigator Daniels, and the evidence of a conspiracy to wrongfully convict Mr. Lambrix that is detailed in *Argument III*, the Appellant is now entitled to a full and fair review of all the previously procedurally barred claims of post-conviction relief based upon substantial constitutional deprivation that occurring during the trial under the Schulp/Murray "fundamental miscarriage of justice doctrine."

Mr. Lambrix himself testified below that he acted in self-defense. PCR. 8317-50. Counsel argued at the Huff hearing that Mr. Lambrix's testimony was, in and of itself, evidence of actual innocence supporting Claim VIII. PCR. 8536.[25] It should be noted that when Mr. Lambrix testified, the State failed to impeach Mr. Lambrix's account of what transpired. Mr. Lambrix's claim of involuntary self defense should be believed and cannot be rejected. See McArthur v. State, 351 So. 2d 972, 976, n. 12 (Fla. 1977)(In applying the standard [of circumstantial evidence], the version of events related by the defense must be believed if the circumstances do not show that version to be false).

Case law in Florida relating to the applicability of the miscarriage of justice doctrine by Florida's courts is limited. The historical progression from application

[25]Petitioner House testified at his federal habeas corpus evidentiary hearing in support of his innocence claim and the federal district court determined that he was not a credible witness. Despite this finding below, the United States Supreme Court found that he made the stringent showing required by the actual innocence exception. House at 2086.

of the Writ of Coram Nobis to the creation of Rule 1 in Florida to the present application in capital cases of Fla. R. Crim. P. 3.850/3.851/3.852/8.853 provides an appropriate context for extraordinary remedies to be provided in cases like Mr. Lambrix's where "no other remedy is presently available." See Reddick v. State, 190 So. 2d. 340, 350 (Fla. 1966)("It all boils down to this: that Rule 1 is broad enough to reach "[a] prisoner in custody under sentence of a court who has been deprived of his fundamental and constitutional right to a fair and impartial trial. In other words, the true criterion of whether collateral attack is permissible is not, as a general rule, whether a specific constitutional guaranty was violated, but whether the defendant, on the whole record, was denied a fair trial.").

Mr. Lambrix case is the kind of case anticipated by Reddick, which at 352 fn. 5 also cites favorably to Sunal v. Large, 332 U.S. 174 (1946), for the legal premise that "in exceptional cases where there 'has been a fundamental miscarriage of justice for which no other adequate remedy is presently available' the writ is effectual."

There are simply times when a *de novo* review of the record should result in extraordinary relief. See LeBruno Aluminum Co. v. Lane, 436 So. 2d 1039, 1040 (Fla. App. 1 Dist 1983)(where the dissent equates a reversible fundamental error holding by majority with a finding of "fundamental miscarriage of justice going to the very foundation of the case" where the remark of a deputy commissioner after

hearing testimony of workman's compensation claimant indicated prejudice).

Mr. Lambrix's case was circumstantial, a case where the State itself never provided reliable scientific evidence, any trustworthy eyewitness account of the alleged murders, or critical physical evidence, and instead relied primarily upon the testimony of a single key witness, Frances Smith. Newly discovered evidence that substantially questions the reliability of her testimony should be recognized as sufficient to meet the procedural gateway standard.

This Court should function to intervene to prevent manifest injustice. See Baker v. State, 878 So. 2d 1236, 1246 (Fla. 2004), ANSTEAD, C.J., specially concurring. ("[I]n our attempts to efficiently regulate a system for addressing post conviction claims we must constantly keep in mind that we are dealing with the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries. This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts. As we reaffirmed in Harvard v. Singletary, 733 So.2d 1020, 1024 (Fla. 1999), "we will continue to be vigilant to ensure that no fundamental injustices occur.").

In that the files and records in this case do not conclusively show that Mr. Lambrix is entitled to no relief, the lower court should have provided Mr. Lambrix

a full evidentiary hearing on each of the claims consolidated into this fundamental miscarriage of justice issue. This Court should also undertake “cumulative review” of Mr. Lambrix’s contemporaneously pled newly discovered evidence claims. Kyles v. Whitley, 514 U.S. at 436; Jones v. State, 709 So. 2d at 521-522; Swafford v. State, 679 So. 2d at 739; Gunsby v. State, 670 So. 2d at 924. Mr. Lambrix has established entitlement to this “fundamental miscarriage of justice” exemption to previously attached procedural bars, and the claims of constitutional deprivation as specifically raised below.

B. DEPRIVATION OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS

Mr. Lambrix claimed below that the deprivation of substantive and procedural due process where his claims of actual innocence, lack of premeditation, ineffective assistance of trial and appellate counsel and judicial bias had never been fully litigated below on the merits demanded a remedy. PCR. 1321-36. The claim was predicated on Eighth amendment jurisprudence implicating the evolving standards of decency. The claim included citations to material studies on innocence, exonerations and notice of a prospective witness at any evidentiary hearing. No evidentiary hearing was granted below

The issues incorporated in the claim can and should be revisited on the merits even if this Court fails to apply the actual innocence or fundamental miscarriage of justice/ends of justice doctrine. The other issues included in the

claim were routinely dismissed by the lower court in multiple pronouncements throughout the record that the case was not going to be re-tried.

The lower court failed to appreciate that Appellant's claim was not predicated on the Eighth Amendment results in Atkins v. Virginia, 537 U.S. 304 (2002), that execution of the mentally retarded no longer comports with the evolving standards of decency as demonstrated by the movement by the states since Penry v. Lynaugh, 492 U.S. 302 (1989) in legislative adoption of restrictions on sentencing those persons to death because of an appreciation for their reduced culpability. PCR. 5807; 7876-77. Rather the claim was grounded in what Atkins teaches: that the application of the Eighth Amendment must be grounded on an examination of "evolving standards of decency" and that, as a result, what may not have violated the Eighth Amendment in the past may violate the amendment now. The claim below relied on the emerging trend based on the pace and number of exonerations nationwide such that the evolving standards of decency pursuant to the Eighth Amendment prohibit both the execution of the innocent and the continued incarceration of the innocent.

Counsel argued below that the holding in Atkins provided a pathway for the lower court to allow for evidentiary development of claims otherwise facing procedural bars to merits development and review. PCR. 8073-78. This path is an alternative means of review outside of the fundamental miscarriage of justice/ends

of justice analysis.

In Herrera v. Collins, 506 U.S. 390 (1993), a prisoner advanced the claim that he was innocent of the offense of which he had been convicted and that it would violate the Fourteenth Amendment to put him to death. The Chief Justice assumed for purposes of the decision in Herrera that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Id. at 417.

The contemporary evolution of society's intolerance of wrongful convictions calls into question whether Herrera is still good law in light of Atkins. If evidentiary development of claims that have been deemed to be procedurally barred is necessary in order to make a showing of actual factual or legal innocence, there should be both a state and a federal remedy that allows the evidence to be presented and considered. Appellant proffered evidence in support of the claim after the lower court denied an evidentiary hearing on the elements noted supra. See American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006, PCR. 7355-7817. Based on all of the information that has come to light, Mr. Lambrix is entitled to a retrial before a fair and impartial judge and jury.

C. SUFFICIENCY OF THE EVIDENCE

Cary Michael Lambrix is innocent. There never was any evidence sufficient to convict him of causing the death of Aleicia Bryant – there is no credible evidence that she was the victim of a homicide. There was never any credible evidence that this was a robbery or that it was cold, calculated or premeditated - these are the aggravating factors that put Mr. Lambrix on death row.[26]

The allegations of robbery and the pecuniary gain and CCP aggravating factors came exclusively from Frances Smith – a witness that the lower court has now found not to be credible – and they were developed at the behest of the prosecutor. It was Frances Smith that testified that Mr. Lambrix "got me and started shaking me and told me he would do me too." PCR. 1825. It was Frances Smith that provided the only description of what happened when she "said he hit Mr. Lamberson in the head with the tire tool and he said he choked Alicia. And after that, he stomped her in the head." PCR. 1827.

It was Frances Smith that provided the State with a motive for the attacks when she testified that Mr. Lambrix took a gold necklace from Lamberson's neck and went through his pockets. PCR. 1835. She testified Mr. Lambrix "acted

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[26] The following aggravating factors were found: (1) the capital felonies were committed by a person under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony (the conviction for Lamberson's murder was a previous conviction with respect to Bryant's murder and vice-versa.); (3) the murder of Lamberson was committed for pecuniary gain; (4) the capital felonies were especially heinous, atrocious and cruel; and (5) the homicides were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

happy" during the burial process. PCR. 1836. She testified in support of premeditation and CCP concerning the body of the female victim "she was lying face down in the pond" and how Mr. Lambrix told her that he placed the female victim "face down in the pond" because she was not yet dead and "would finish drowning." PCR 1836, 1948.

Frances Smith also supported the State's case of premeditated murder and when she testified that Mr. Lambrix searched Lamberson's car then told her that he thought Lamberson "had more money than that." PCR. 1860; she also testified that Mr. Lambrix took some of Lamberson's clothing from the car and that Mr. Lambrix told her that he sold the gold necklace that she saw him take from Lamberson's body. PCR 1861.

This was a wholly circumstantial case, thus applicable law requiring proof of premeditation to the exclusion of any other reasonable hypothesis of innocence applies. See, Ballard v. State, 923 So. 2d 475, 482 (Fla. 2006), quoting, Davis v. State, 90 So. 2d 629 (Fla. 1956)[27] ("It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses', any of which may be sound and some of which may be entirely consistent with

[27] In this case, Mr. Ballard was also prosecuted in the Twentieth Judicial Circuit by Assistant State Attorney McGruther based on circumstantial evidence. This Court reversed.

innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.")

Defense counsel at trial moved for a judgment of acquittal on behalf of Mr. Lambrix at the end of the State's case in chief. The defense argued that the State had failed to present any evidence of premeditation as to the deceased, Lamberson, and had failed to make out a prima facie case of first degree murder as to victim Aleisha Bryant. (R. 2461-62). Defense counsel pointed out that the State had not even established a cause of death for Ms. Bryant and that the testimony of Frances Smith was consistent with second degree murder, not premeditation. The motion argued that Mr. Lambrix was entitled to entry of acquittal on Bryants's death, that it was a reasonable hypothesis based on the evidence presented that Lamberson had killed Bryant, that there was no credible evidence of intent to kill by Mr. Lambrix . The booking information in the record indicates that Mr. Lambrix was a slight man, 5'9" and 140 pounds. (R. 301).

Even as improbable as Mr. Lambrix's claim might be, the evidence shows that it is true. The state's theory that Lambrix lured Lamberson out first, then returned alone and lured Bryant out leave only one reasonable conclusion – that Lamberson had to have still been alive when Bryant went out as Frances Smith

was absolutely certain that Lambrix did not have any blood, or possession of the alleged weapon – when Lambrix first returned after going outside with Lamberson. As the state's own medical examiner conceded, Bryant did not suffer any significant loss of blood – but Lamberson clearly did. Since, according to Frances Smith's trial testimony, Lambrix "looked normal" and had no blood on him until after Bryant went outside, Lamberson was still alive when Bryant went outside, and the evidence supports a spontaneous confrontation, not premeditated intent. (PCR. 1917-18).

A review of cases about insufficiency of the evidence under Florida law regarding premeditated first degree murder provides support for Mr. Lambrix's pleas for relief. Bigham v. State, 995 So. 2d 207 (Fla. 2008)(Slip opinion No. SC05-245 July 10, 2008)("Upon reviewing the record, we find that while the evidence is sufficient to support a finding that Bigham was responsible for the victim's death, the evidence is insufficient to sustain a conviction of premeditated first-degree murder")("Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained"). Green v. State, 715 So. 2d 940, 943-44 (Fla. 1998) cited in Bigham slip opinion at 8.

> Prior to Green, and in a case that also involved a death by strangulation, we concluded that the evidence of premeditation was insufficient despite evidence that the strangled victim was found partially nude and the defendant had a history of strangling women

> while raping them. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). Subsequently, we found insufficient evidence of premediatation in two strangulation murders in Randall v. State, 760 So. 2d 892 (Fla. 2000). In Randall, we relied upon our earlier decision in Kirkland v. State, 684 So. 2d 732 (Fla. 1996), also holding that evidence of premediation was lacking in a strangulation case. Randall, 760 So. 2d at 902. Hence, we have concluded in a number of cases that evidence of premediation was insufficient even though the defendant had killed the victim by strangulation.

Bigham slip at 10. See Gosciminski v. State, 944 So. 2d 1018 (Fla. 2008)(Slip Opinion SC05-1126 October 8, 2008)(The trial court granted defendant's motion for judgment of acquittal on the charges alleging kidnapping, sexual battery, and felony murder; but the trial court denied the motion for JOA as to first degree premeditated murder. Reversed and remanded for new trial).

This Court must revisit the motion for judgment of acquittal issue and address the sufficiency of the evidence to support the conviction and sentence in Mr.Lambrix's case in light of Eighth amendment concerns in spite of the fact that direct appeal counsel failed to raise the issue on direct appeal

In Mr. Lambrix's case, the State failed to prove its circumstantial case of first degree premeditated murder to the exclusion of all other reasonable inferences. See Coolen v. State, 696 So. 2d 1046 (Fla. 1993). Coolen's conviction of first-degree murder was overturned by the Florida Supreme Court because the Court found that although "the nature and manner of the wounds inflicted may be circumstantial evidence of premeditation, Holton v. State, 573 So. 2d 284, 289

(Fla. 1990), "the stab wounds inflicted are also consistent with an escalating fight . . . or a preemptive attack in the paranoid belief that the victim was going to attack first." Coolen at 741.

The fact that Mr. Lambrix was charged with and convicted of the first degree murder of two victims does not weaken the argument regarding the insufficiency of the evidence. In Randall v. State, 760 So. 2d 892, 902 (Fla. 2000), this Court held insufficient the circumstantial evidence of first degree murder in two strangulation killings, where that evidence was not inconsistent with a reasonable exculpatory hypothesis as to the presence of premeditation and the defendant did not exhibit, mention or possess an intent to kill the victims prior to the homicides and there was "no evidence that either of the two murders was committed according to a preconceived plan."

This Court should review the sufficiency of the evidence on the merits on Eighth amendment grounds even if the fundamental miscarriage of justice doctrine does not apply. Even if this Court does not recognize the newly discovered evidence offered below, Mr. Lambrix's actual innocence of the murders should be evaluated under an evolving standards of decency analysis evolving from Herrera v. Collins. There has been an evolution in society's intolerance of wrongful convictions. Among other things, Atkins stands for the proposition that Eighth

amendment relief is available even where a claim of a specific cruel and unusual punishment has not been preserved below.

Regardless of the lower court's specific findings below as noted in his orders, the jury would be required to acquit because a review of all the evidence presented at trial and at the evidentiary hearing would not exclude a reasonable hypothesis of innocence pursuant to Randall, Ballard, Coolen, et. al.

CONCLUSION

All of the preceding five arguments in support of relief present federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and associated rights under the Florida Constitution. This Court is herein provided with the opportunity to review and correct these claimed violations of Mr. Lambrix's federal and state constitutional rights. Mr. Lambrix requests relief in the form of a new trial. The circuit court erred in denying Mr. Lambrix an evidentiary hearing on all of his claims below where the evidence, the files, and the records in the case do not conclusively show that Mr. Lambrix is entitled to no relief. In the alternative, this Court should reverse the circuit court's order and remand the case for an *in camera* inspection of the Florida Parole Commission records and an evidentiary hearing covering the issues other than the credibility of Frances Smith's claim of a sexual relationship with Investigator

Daniels.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Amended and Corrected Initial Brief has been furnished by United States Mail, first class postage prepaid, to Carol M. Dittmar, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, this 21th day of January, 2009.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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