IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1845

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of relief on the Appellant's successive motion for post-conviction relief filed under Fla. R. Crim. P. 3.851 and Appellant's associated *pro se* Fla. R. Crim. P. 3.853 motion for DNA testing, adopted by counsel.

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,
Lambrix v. State, 39 So. 3d (Fla. 2010);

"PCR2" – record on instant 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

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.

The foundation of the instant appeal of Mr. Lambrix's case began in 2009 when he filed a successive Rule 3.851 motion predicated on newly discovered evidence in the form of FLDE Crime Lab documents that had never been provided to counsel but that were obtained through a third party outside the public records process.

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 during the long history of his case 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 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 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. 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. The case should be returned to the circuit court for a full and fair evidentiary hearing after DNA testing of the material forensic evidence revealed by the newly discovered FDLE Crime Lab records noted herein. In addition, this Court should return the case for a competency evaluation of Mr. Lambrix and a competency determination in the context of his continuing request to waive statutory post conviction CCRC counsel and to thereafter represent himself in the proceedings in state court.

STATEMENT OF THE CASE AND FACTS

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.

The subsequent procedural history until the instant litigation, which began in 2009, 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); *Lambrix v. State*, 698 So. 2d 247 (Fla. 1996); and *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010), *cert. denied* January 13, 2011.

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.

Mr. Lambrix filed an October 11, 2002 amendment alleging a procedural due process violation under *Atkins v. Virginia*, 537 U.S. 304 (2002). PCR. 1321-1355. On June 20, 2003 another amendment, a claim based upon *Ring v. Arizona*, 536 U.S. 584 (2002), was also filed. 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.

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.[2] During the deposition in open court on April 5, 2004 Frances Smith revealed that 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

[2] 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).

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 denying relief 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 public records 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 material where Frances Smith testified at Mr. Lambrix's second trial that he had told her he had placed the female victim face down in a pond. 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*[3] 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*[4] 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 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

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

between Frances Smith and state attorney investigator Robert Daniels during the investigation and prosecution of Mr. Lambrix and whether there was a promise of immunity from the state 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.[5] Frances Smith testified that she was aware that she was a suspect in the case at the time of the investigation and she 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

[5] 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.

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. Notice of Appeal was docketed in this Court on January 16, 2008 in Case No. SC08-64. During the pendency of the appeal, Mr. Lambrix served an Initial Brief on October 28, 2008, and thereafter served an amended and corrected Initial Brief on January 21, 2009. The State served an Answer Brief on February 9, 2009. Mr. Lambrix's Reply Brief was served April 13, 2009. Following oral argument on November 4, 2009, this Court denied relief. *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010).

While the prior appeal in Case No. SC08-64 was pending, on September 9, 2008, CCRC South counsel was contacted by an independent researcher named Michael Hickey. Mr. Hickey advised that he had received a production of records from the Florida Department of Law Enforcement (FDLE) in July 2008 that concerned the investigation of Mr. Lambrix's case pre-trial. His own investigation

indicated to him that some of these records had never been turned over to trial counsel or to postconviction counsel in the subsequent litigation of Mr. Lambrix's case.

Hickey provided CCRC counsel with copies of the records that he received from both FDLE and the records repository. After reviewing what Hickey provided and comparing all the FDLE records with those that had been previously provided to postconviction counsel, undersigned counsel recognized that some of the documents could be considered newly discovered evidence.

Counsel for Mr. Lambrix thereafter sent a letter to the Records Repository on November 14, 2008, inquiring about any FDLE records at the repository associated with Mr. Lambrix's case. It described the situation as follows:

> Dear Ms. Golding:
>
> The Office of the Capital Collateral Regional Counsel - South, currently represents Cary Michael Lambrix, an indigent, death-sentenced Florida inmate, in his capital postconviction appeal in the above captioned case. This letter is intended to inquire as to whether your agency, or the Commission on Capital Cases before you, has ever received any production of records in this case directly from FDLE and, if so, how many pages that production included.
>
> During the pendency of the current appeal, undersigned counsel was contacted by a Mr. Michael Hickey concerning his own independent requests in July 2008 from both the repository and FDLE for records related to the above captioned case. Mr. Hickey provided me with his correspondence with repository employees

Miriam Spalding and Holly Sinco. It appears to describe the indexing of all the materials in your collection concerning the Lambrix case. Specifically, the correspondence noted that what you had there included Series 1739 Box 683 and Series 1739 Box 152. My own records indicate that these boxes were produced to the Commission in January 1999 and provided to CCRC-South in January 2000 and that Box 683 was produced by the State Attorney, 20th Judicial Circuit, and Box 152 was produced by the Florida Department of Corrections.

Mr. Hickey ultimately obtained 189 pages of documents directly from FDLE described as "lab case pages/documents". Your agency provided Mr. Hickey with 49 pages of FDLE Physical Evidence State Archive documents. My assumption is that the 49 pages of FDLE documents from the repository came from the State Attorney files (Box 683).

To the best of my knowledge, FDLE never has produced any records directly to the Commission or the repository. There was a production by FDLE directly to CCR on March 30, 1987. Please confirm that there has not been a production of records by FDLE to the Commission or the repository reflected by your collection and records. In addition, please confirm that there are no sealed boxes or files that were produced to the Commission or repository in the Lambrix case.

If I can be of any assistance to you in fulfilling this request, do not hesitate to contact me.

Sincerely,
William M. Hennis III
Litigation Director
CCRC-South
Attorney for Mr. Lambrix

On November 17, 2008, the repository staff responded to counsel's inquiry

concerning records production from FDLE by advising that that office had only received three boxes of records in the case of Cary Michael Lambrix: Box 152 from the Department of Corrections; Box 153 a sealed box from Department of Corrections, and Box 683, a box from the State Attorney, 20th Judicial Circuit.

The repository affirmed in an email dated November 17, 2008 that FDLE had never produced any records to the Repository. Counsel requested that a compact disk of all the records in the repository be provided to make certain that FDLE had never produced any records to the repository. Under cover of a letter dated December 4, 2008 the Repository provided the disks and copies of the transmittals and indices indicating that only the Florida Department of Corrections and the State Attorney's Office in Labelle, Florida had submitted records to the repository, respectively on January 15, 1999 and July 7, 1999.

The only FDLE documents held in the records repository collection of Mr. Lambrix were three file units or folders within the State Attorney's production: #8 FDLE Connie Smith report/notes (73 pages), #25 Lab report and submission notes (48 pages), and #26, Crime scene and evidence reports (4 pages). Therefore the SAO file contained a total of 52 pages of FDLE lab related documents. The FDLE never made any agency production to the records repository in Mr. Lambrix's case.

The production of public records in the Lambrix case by FDLE to then CCR Counsel Billy Nolas was invoiced on March 30, 1987. The invoice noted 696

pages of documents to be reproduced at .10 a page ($69.90) and an additional charge of $24.76 for an unspecified number of reproduced photographs.

A internal review of this material in CCRC South's files revealed that only 41 original pages of the 696 pages produced by FDLE to postconviction counsel in 1987 were "Lab Case Pages" related to FDLE testing. (PCR2. 81-124). Thus the lab notes and reports obtained in September 2008 by Mr. Hickey contained information never before provided to Mr. Lambrix by FDLE. (PCR2. 125-317).

On April 9, 2009 Mr. Lambrix served a successive Fla. R. Crim. P. 3.851 motion predicated on the receipt, content and materiality of the newly discovered FDLE records. (PCR2 1-27, & attachments: 28-335). The motion contained three discrete claims:

CLAIM I

MR. LAMBRIX IS BEING DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE HE IS BEING DENIED ACCESS TO PUBLIC RECORDS

CLAIM II

THE STATE COMMITTED A BRADY/GIGLIO VIOLATION WHEN IT FAILED TO PROVIDE A COMPLETE SET OF FLDE LAB NOTES AND RECORDS TO MR. LAMBRIX TO HIS SUBSTANTIAL PREJUDICE

CLAIM III

THE SUPPRESSED FDLE EVIDENCE WAS MATERIAL TO THE BRADY CLAIM (II) AND THE PRIOR CLAIMS ADJUDICATED BELOW

The State responded to the Rule 3.851 motion on April 28, 2009. (PCR2. 336-350). At the scheduled case management conference before Judge Corbin on May 28, 2009, the court was advised by CCRC South that Mr. Lambrix intended to discharge CCRC South and represent himself. (PCR2. Vol. IX). Given those circumstances and related litigation that resulted in the replacement of Judge Corbin with Judge Greider, the case management conference did not take place for another year.

In the interim, On September 8, 2009, Mr. Lambrix filed a *pro se* Fla. R. Crim. P. 3.853 motion for DNA testing of hairs that were found on the alleged murder weapon (PCR2. 411-442). He also filed a civil rights complaint naming the CCRC South director and counsel as defendants (PCR2. 446-659). As a result of that filing and the on-going request by Mr. Lambrix to discharge counsel, on October 6, 2009, CCRC South filed a motion to withdraw due to conflict of interest (PCR2. 660-667). Mr. Lambrix's motion for self-representation was denied without prejudice by an order entered on February 23, 2010 (PCR2. 717-719). Counsel's motion to withdraw was denied by order entered March 16, 2010 (PCR2. 720-725).

During the May 27, 2010 case management conference, the State conceded that the documents from FDLE were newly discovered. Specifically, the State said, "I do concede, for the purposes of this hearing, that these are newly

provided records to CCR." (PCR2. Vol. VIII at p. 36).

The lower court thereafter entered orders denying the Rule 3.851 and 3.853 motions on July 19, 2010. (PCR2. 752-755; 796-802). The lower court denied a subsequent motion for rehearing on both the Rule 3.853 and Rule 3.851 motions (PCR2. at 895-909; 940-941).

Notice of Appeal as to the denial of both the Rule 3.851 and 3.853 motions was docketed in this Court on September 28, 2010. (PCR2. at 949-951).

SUMMARY OF THE ARGUMENTS

ARGUMENT I:

The lower court's decision, first following a *Nelson*[6] hearing and later following a *Durocher/Faretta*[7] hearing, that Mr. Lambrix could not represent himself in circumstances where he wished to discharge CCRC South as counsel but did not wish to drop his postconviction claims or proceedings, was an abuse of discretion and a violation of Mr. Lambrix's rights pursuant to the constitutionally protected right to waive post conviction representation under *Faretta*.

ARGUMENT II:

In summarily denying Mr. Lambrix's *pro se* Fla. R. Crim. P. 3.853 motion for DNA testing following its oral adoption by CCRC South counsel in open court, the lower court failed to consider all the facts and failed to assume that the facts pled below by Mr. Lambrix were true where the motion was predicated on establishing Mr. Lambrix's innocence of the murders with which he was charged, convicted and sentenced to death. The denial of requested DNA testing of newly discovered physical forensic evidence identified in previously suppressed FDLE lab records that Mr. Lambrix has claimed supports his claim that a conspiracy involving state actors and the primary witness against him, resulted in his

[6] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).
[7] *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993); *Faretta v. California*, 422 U.S. 806 (1975).

unconstitutional convictions and sentences of death.

ARGUMENT III:

The State of Florida committed a violation under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), when it failed to provide a complete set of documents generated by FDLE in its analysis of evidence in Mr. Lambrix's case.

ARGUMENT IV:

The documents and information from Florida Department of Law Enforcement that were obtained from a third party outside the public records process were newly discovered evidence that could not have been otherwise obtained through the exercise of due diligence; the information contained therein was material to issues in Mr. Lambrix's case that were not resolved by the files and records of the case, such that the lower court's failure to grant an evidentiary hearing was error.

ARGUMENT V:

Mr. Lambrix was entitled to full and fair Fla. R. Crim. P. 3.851 proceeding, including a fair determination of the issues by a neutral, detached judge. The unexplained disqualification of Judge Corbin by the Chief Judge, subsequent appointment of Judge Greider and the failure by the court to disqualify Judge Greider and the entire 20th Judicial Circuit were a cumulative violation of *Wickham v. State*, 998 So. 2d 593 (Fla. 2008) and a denial of due process under state and federal law.

ARGUMENT VI:

The failure by the State to provide Mr. Lambrix with full access to the public records associated with his case in the possession of FDLE and the Office of the State Attorney, 20th Judicial Circuit, was a denial of due process under state and federal law.

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 all of the claims below, and therefore, 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

MR. LAMBRIX HAS THE RIGHT TO WAIVE STATUTORY POST CONVICTION COUNSEL AND TO REPRESENT HIMSELF PURSUANT TO *DUROCHER V. SINGLETARY*

A. The Instant Circumstances

This Court has recognized in *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993) and more recently reaffirmed in *James v. State*, 974 So. 2d 365 (Fla. 2008), capital death-sentenced defendants have a constitutionally protected right to waive post conviction representation under *Faretta v. California*, 422 U.S. 806 (1975). See *James v. State*, 974 So. 2d at 366.

> In *Durocher v. Singletary*, 623 So. 2d 482, 483 (Fla. 1993) this Court was confronted with the issue of whether a capital defendant

> could waive the appointment of post conviction counsel . . . we concluded that "if the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived," Id., we explained that "competent defendants have a constitutional right to refuse professional counsel, or not, if they so choose." *Faretta v. California*, 422 U.S. 806 (1975).

In the proceedings before the Circuit Court Mr. Lambrix invoked a waiver of collateral post conviction representation pursuant to *Durocher v. Singletary* and *James v. State*. In proceedings conducted before the Circuit Court on January 21, 2010, the Circuit Court provided Mr. Lambrix a *Durocher/James* hearing at which time Mr. Lambrix unequivocally asserted a waiver of collateral post-conviction representation. (PCR2. Vol. VII 1-51).

Following the hearing, the Circuit Court specifically recognized that Mr. Lambrix did "knowingly and voluntarily" waive his right to collateral post conviction representation and that he was competent to do so.[8] However, the Circuit Court thereafter denied Mr. Lambrix's asserted waiver of post conviction representation based upon her conclusion that Fla. R. Crim. P. 3.851 requires that Mr. Lambrix's motion to waive post conviction representation must be denied without prejudice because although he unequivocally waived collateral representation, in both *Durocher* and *James* the waiving defendants additionally

[8] Assigned counsel moved on March 10, 2010 that this Court order that a competency hearing be conducted below in circuit court to determine whether Mr. Lambrix is legally competent to waive his statutorily created right to collateral post conviction representation.

waived the right to any and all further collateral review.

Thus, the Circuit Court implicitly concluded that *Durocher* and *James* were inapplicable because Mr. Lambrix was not seeking to waive any and all pending and future post conviction review but rather Mr. Lambrix only sought to waive and discharge counsel so that he could exercise self representation. (See Order Denying Defendant's Pro Se Motion To Exercise Self Representation at PCR2. 883-85).

Following the denial of Mr. Lambrix's *Durocher/James* motion, Mr. Lambrix initiated a Pro Se Petition for Writ of Mandamus and/or Writ of Prohibition Upon CCRC South Director and the Twentieth Judicial Circuit, Case No. SC10-1517, which remains pending before this Court. In the petition Mr. Lambrix seeks mandamus/prohibition against appointed collateral counsel, CCRC South, and argues that applicable law prohibits CCRC South from representing him following his waiver in circuit court of the statutorily created right to post conviction representation.[9] In his most recent *pro se* filing in the instant case,

[9] Undersigned counsel notes that on February 2, 2011, Mr. Lambrix filed in the instant case a *pro se* "Motion To Stay Proceedings Pending This Court's Disposition of Pending Petition for Writ of Mandamus/Prohibition Seeking the Discharge/Waiver of Post-Conviction Representation Under Durocher." It was docketed on February 7, 2011. Given the circumstances described in the brief being served today, undersigned counsel has previously adopted the "Pro Se Motion to Stay Proceedings" filed by Mr. Lambrix. Undersigned counsel has previously filed conflict motions in circuit court and in this Court. The current record contains Counsel's conflict motion filed in the circuit court R. 660-67.

dated March 2, 2011, which was provided to counsel on March 4, 2011, Mr. Lambrix specifically states that "Appellant does now explicitly advise this Court that Appellant does continue to unequivocally assert the waiver of the statutorily created right to post conviction representation and does now renew the unequivocal assertion of Appellant's fundamental constitutional right to exercise self representation in all current and future capital post-conviction proceedings before the Florida courts." Mr. Lambrix also advises in his *pro se* filing that "Appellant would respectfully remind this Court that under *Traylor (v. State*), 596 So. 2d at 968, it is the Court's duty – not the defendant's – to offer and renew waiver of counsel at any "critical" stage of proceedings."

CCRC South is both ethically and legally bound to respect Mr. Lambrix's waiver of collateral post conviction representation. See *Sanchez-Velasco v. Secretary, Florida DOC*, 287 F. 3d 1015 (11th Cir. 2002). Mr. Lambrix has advised counsel that he plans to file a *pro se* initial brief to replace this brief. If Mr. Lambrix is competent, then he has a clearly protected constitutional right to discharge CCRC South and to assert his right to self-representation. Pursuant to

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Neither the Circuit Court nor this Court has recognized the conflict of interest that is clear to both counsel and to Mr. Lambrix. On a prison visit with Mr. Lambrix on March 3, 2011, counsel was provided with another *pro se* filing that Mr. Lambrix advised he had mailed to this Court dated March 2, 2011, entitled "Renewed Motion To Unequivocally Waive Post Conviction Representation As Means of Discharging Incompetent Counsel Acting Under Substantial Conflict of Interest, With Unequivocal Assertion of Constitutional Right To Exercise Self Representation." It was added to the docket on March 7, 2011.

Sanchez-Velasco, CCRC South must withdraw from representation if Mr. Lambrix is competent and thereafter take no further action in his behalf. In an abundance of caution, counsel is filing this initial brief to make sure Mr. Lambrix's rights are protected, pending the resolution of the previously filed motion to relinquish/remand and the acceptance of a replacement brief from Mr. Lambrix if counsel is ultimately discharged.

As noted *supra*, this Court has consistently recognized that the waiver of the statutorily created right to collateral post conviction representation is analogous to the waiver of the right to legal representation at trial under *Faretta v. California*, 422 U.S. 806 (1975). See *Durocher v. Singletary*, 623 So. 2d at 483 (specifically recognizing waiver of post conviction counsel analogous to *Faretta* waiver); *James v. State*, 974 So. 2d at 366.

As this Court recently recognized in *Pasha v. State*, 39 So. 3d 1259 (Fla. 2010), relying upon *Tenis v. State*, 997 So. 2d 375, 377-78 (Fla. 2008), if the lower court improperly denies a *Faretta* waiver and forces legal counsel upon the defendant against his expressed will, then full relief is entitled and all proceedings conducted before the lower court must be summarily vacated and the case remanded back to the trial court. That is what should happen in this case, going back to Judge Corbin's decision after the *Nelson* hearing.

In *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct 2379 (2008), the United

States Supreme Court modified *Faretta* to allow denial of a defendant's waiver of legal representation in certain circumstances if it can be established that the defendant is not competent to proceed on his own. Mr. Lambrix's circumstances may be one of those cases. The presumption of competency is overcome where, as here, there are reasonable grounds to question the defendant's competency. Once it is established that cause does exist to question the defendant's competency then the court must conduct a competency hearing pursuant to Fla. R. Crim. P. 3.111(d)(3), 3.210(a) & (b) and *Indiana v. Edwards*. As this Court recognized in *Tingle v. State*, 536 So. 2d 202, 204 (Fla. 1980), the failure to conduct a competency hearing is itself *per se* reversible error.

B. Mr. Lambrix's Choice Regarding Self-Representation

1. Before Judge Corbin

Mr. Lambrix informed counsel on May 14, 2009 that he wished to discharge CCRC South, and counsel informed the lower court of this request during the next scheduled hearing, on May 28, 2009, which had been scheduled as a case management conference before Judge Corbin. (PCR2. Vol. VIII, 1-18). On June 9, 2009 Mr. Lambrix served a *pro se* motion memorializing his desire to have counsel discharged (PCR2. 355-364). A *Nelson/Faretta* hearing was held before circuit court Judge Corbin on July 31, 2009. (PCR2. Vol. VI, 1-56). At the hearing Mr. Lambrix made detailed complaints to the lower court concerning the

effectiveness of CCRC counsel's representation concerning investigation related to the newly discovered FDLE Lab documents. In referring to CCRC-South's representation, Mr. Lambrix, stated that in regards to CCRC's failure to file a rule 3.853 motion for DNA testing as a companion to the then pending April 2009 rule 3.851 motion, "I think they deliberately threw me under the bus." (PCR2. Vol. VI, 1-56 at 6). Mr. Lambrix indicated during the hearing that he was seeking the appointment of alternative counsel and that he had "no intention of waiving the statutory right to post conviction counsel before the proceedings in the lower court." *Id.* at 7-8. Judge Corbin denied the motion to discharge counsel in open court. *Id.* at 39. On August 29, 2009 the lower court entered a written order denying Mr. Lambrix's motion, finding that there was no reasonable cause to believe that defense counsel is not rendering effective assistance to the defendant.[10] Judge Corbin did not address the conflict of interest issue because the defense had not yet moved to withdraw. (PCR2. 378-80).

A few days later, on September 1, 2009, Mr. Lambrix served a *pro se* motion to disqualify Judge Corbin predicated on what he described as newly discovered evidence that "show that an irrefutable personal and political relationship has existed between Judge Corbin and members of the 20th Judicial

[10] Mr. Lambrix thereafter filed a pro se Petition for Prohibition in the Florida Supreme Court regarding the lower court's denial of his motion to discharge counsel.

Circuit State Attorneys Office, including Chief Deputy State Attorney Randall McGruther, who personally testified as a material witness in this case in April 2004 and July 2006." (PCR2. 385-400). On October 7, 2009, an Order of Reassignment was entered by G. Keith Cary, Chief Judge, Twentieth Judicial Circuit, on his own motion, removing Judge Corbin and reassigning the Honorable Christine Greider to the case. (PCR2. at 674). On October 24, 2009, Mr. Lambrix wrote to Judges Cary and Greider notifying them of his intention to file formal complaints with the "Judicial Qualifications Committee" and the Justice Department (PCR2. 684-687). He did file a complaint with the Judicial Qualifications Committee on October 27, 2009 (PCR2. 692-696).

2. Before Judge Greider

On September 25, 2009 Mr. Lambrix filed a civil complaint in Leon County Circuit Court naming CCRC South Neal Dupree and CCRC South Litigation Director William Hennis individually as defendants, a action that resulted in counsel filing a motion to withdraw from the case on October 7, 2009. (PCR2. 446-659; 660-666). The complaint made many allegations against all the named defendants including broad conspiracy allegations.[11] In the complaint, Mr. Lambrix alleged that Mr. Dupree, Mr. Hennis, Governor Crist, State Attorney

[11] Mr. Lambrix's civil complaint contained myriad allegations of nefarious conduct by counsel and the other defendants in its 212 pages. The complaint in its entirety was included in the court file below. (PCR2. at 446-659).

Russell and Assistant State Attorney McGruther were engaged in a conspiracy with the intent to obstruct and deny Mr. Lambrix protected constitutional rights. (PCR2. at 582). Mr. Lambrix alleged a direct personal relationship with the aforementioned and stated that they are "knowingly engaged in a mutual understanding and deliberate 'conspiracy and collaboration' to obstruct and deny Plaintiff's protected constitutional right to fair and meaningful post conviction review . . . ." (*Id.*). Mr. Lambrix has continued to advise counsel that he believes that there is an on-going conspiracy against him in which CCRC South is a party. This is part and parcel of counsel's pending motion to remand for a competency evaluation.

The complaint also alleged a conspiracy between Mr. Dupree, Legislative Commission on Capital Cases director Roger Maas and CCRC Middle director Bill Jennings. According to the complaint, they were alleged to be deliberately engaged in obstructing Mr. Lambrix's rights. (PCR2. at 627) The complaint further alleged that Mr. Dupree, Mr. Maas and Mr. Jennings have adopted polices that are reasonably calculated to cause, and have caused, the execution of innocent persons. (PCR2. at 628).

Counsel argued below that Mr. Lambrix's complaint amounted to a conflict of interest between attorney and client in the same way a conflict arose in *Holifield v. State*, 717 So. 2d 69 (Fla. 1s DCA 1998). There, the defendant filed a motion to

withdraw his plea alleging he entered the plea while under the duress of counsel. *Id.* The First District held that a conflict of interest was created because counsel "was thereby placed in the position of having to respond to allegations against her." *Id*. *See also Roberts v. State*, 670 So.2d 1042 (Fla. 4th DCA 1996); *Brye v. State*, 702 So.2d 256 (Fla. 1st DCA 1997); *Lopez v. State*, 688 So.2d 948 (Fla. 5th DCA 1997); *Hope v. State*, 682 So.2d 1173 (Fla. 4th DCA 1996). Thus, the motion created a conflict of interest because it was not solely based on ineffective assistance of counsel. *Holifield*, at 69, citing *Cunningham v. State*, 677 So.2d 929 (Fla. 4th DCA 1996). In other words, although there were elements of ineffectiveness, the motion alleged that counsel forced Holifield to enter a plea against his will under duress. Similarly, Mr. Lambrix's civil suit alleged that counsel is actively involved in a wide ranging and on going conspiracy with Florida officials for the purpose of preventing him from obtaining postconviction relief. As such Mr. Lambrix's complaint is not based solely on ineffective assistance of counsel and therefore a conflict of interest between he and counsel has arisen requiring that counsel be allowed to withdraw. *Holifield v. State*, 717 So. 2d 69 (Fla. 1s DCA 1998).

Counsel argued below in a motion to withdraw filed in the circuit court that the *pro se* motion that Mr. Lambrix filed after the civil suit, pursuant to *Durocher* requesting the right of self representation and the discharge of counsel, was

additional evidence of a breakdown in the attorney client relationship (PCR2. at 665).

When a conflict of interest develops between an attorney and his client, this conflict violates the Sixth Amendment right to effective assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Glasser v. United States*, 315 U.S. 60 (1942); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991). Forcing counsel to remain on a case for expediency's sake is not in the best interest of judicial economy because the mere physical presence of an attorney does not fulfill the Sixth Amendment. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

3. The *Durocher* Hearing

On September 30, 2009 a *pro se* motion was served on counsel and the other parties by Mr. Lambrix in the circuit court asserting his right to waive postconviction counsel and to thereafter represent himself. (PCR2. 711-716). In the motion he also requested that the lower court conduct a hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993), and stated "Defendant seeks only to formally waive the statutorily created right to post conviction representation pursuant to *Durocher v. Singletary*, (citation omitted) and *Slawson v. State*, 796 So. 2d 491 (Fla. 2001), but Defendant does not seek to waive any recognized constitutional right." (PCR2. at 712). The motion concluded with the statement that "Defendant does now unequivocally invoke formal waiver of post

conviction representation pursuant to *Durocher v. Singletary* and *James v. State* and does now move this Court to conduct the necessary proceeding to effect [sic] this unequivocal waiver." (PCR2. at 716).

A hearing was held on January 21, 2010, with Mr. Lambrix appearing telephonically. (PCR2. Vol. VII, 1-51). Thereafter, the lower court issued a written "Order Denying Without Prejudice Defendant's Pro Se Motion To Exercise Self Representation After Hearing" memorializing the oral findings made in open court (*Id.* at 37-38) (PCR2. 717-719). The order found that after a full *Faretta* hearing Mr. Lambrix was both competent to proceed and that he fully understood the consequences of waiving his right to counsel. *Id.* Relying on *Durocher* and *James* the lower court then found that "In those cases, the defendants unequivocally waived their right to counsel, and voluntarily dismissed their postconviction proceedings. Here, Defendant wishes to continue with his postconviction proceedings, yet be permitted to represent himself. *Id*. at 718.

The order also stated that, "Further, Defendant's waiver of his right to counsel was equivocal, as he stated that, in the event that he could no longer adequately pursue his postconviction claims on his own, he intended to request counsel in the future (PCR2. Vol. VII. 31-32)". *Id.* [12] The court then held that

[12] The record reflects that Mr. Lambrix referred the court to *James v. State*, acknowledging that "the Florida Supreme Court recognized that if a capital post-conviction defendant waives post-conviction proceedings such as the right to a

"Fla. R. Crim. P. 3.851 requires that, when a defendant's waiver of right to counsel and right to proceed are not made knowingly and voluntarily, the motion must be denied without prejudice. Since Defendant brought his motion under Durocher, yet does not wish to waive his right to proceed, the Court cannot find that Defendant made both Durocher waivers knowingly and voluntarily, and it is ORDERED AND ADJUDGED that Defendant's motion is DENIED, without prejudice." (PCR2. 718-19).

Mr. Lambrix's motion to discharge counsel and to allow him to represent himself was evidence of a complete breakdown in the attorney client relationship that made it impossible for counsel to ethically and effectively represent Mr. Lambrix's interests. Therefore, counsel should have been allowed to withdraw given the existence of a conflict and Mr. Lambrix's stated desire to represent himself.

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post-conviction appeal, it cannot subsequently be resurrected when he changes his mind; however, the Court took no position on the subsequent reassertion of the right to the statutory created right to post-conviction representation. I just want, I think that needs to be clear, because in the event that a death warrant is signed in the future on me, or in the event that circumstances that I'm not aware of today develop to the point that I can no longer adequately pursue these post-conviction claims, then they will be my intent to assert my right to post-conviction representation." (PCR2. Vol. VI, 31-32). Mr. Lambrix expanded on this argument in his later Motion for Extraordinary Reconsideration. (PCR2. 726-734). He pointed out, quite correctly, that hypothetical events such as a defendant suffering a stroke or change in mental capacity, or a federal right to appointment of counsel in federal proceedings might well be considered as creating a "subsequent crucial stage" even when counsel has previously been waived. *Muehlman v. State*, 3 So. 3d 1149, 1156 (Fla. 2009). (PCR2. 731-732).

The actions of the lower court in preventing Mr. Lambrix from successfully asserting his right to self representation and in refusing to recognize the existence of a conflict between counsel and client requiring withdrawal of counsel present both federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. 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 discharge counsel and to represent himself pursuant to *Durocher*.

ARGUMENT II

MOTION FOR DNA TESTING

On September 8, 2009, Mr. Lambrix served a *pro se* motion, under Fla. R. Crim. P. 3.853, for DNA testing of evidence based upon information that was contained in the FDLE documents obtained outside the public records process

noted *supra*. (PCR2 411-432).[13] See Argument IV herein. In the *pro se* motion Mr. Lambrix explained the purpose of the motion as follows:

> Defendant seeks to compel mitochondrial DNA analysis on several "blond to blondish brown" hairs found on the alleged 'murder weapon' which in light of additional newly discovered evidence, will provide material exculpatory evidence sufficient to exonerate Defendant of the capital crimes this Defendant has been wrongfully convicted of, and sentenced to death for . . . Mitochondrial DNA analysis of the hairs found on the alleged murder weapon will provide irrefutable evidence to support Defendant's claim that the State knowingly presented false material evidence against Defendant at trial in violation of *Giglio v. United States*, 405 U.S. 150 (1972); *Guzman v. State*, 868 So. 2d (Fla. 2003) and *Greg v. State*, 685 So. 2d 1224 (Fla. 1996)(Id. at 1226, recognizing that the use of misleading evidence violates Giglio even if the evidence is not necessarily false).
>
> Last, as specifically argued below, compelling mitochondrial DNA analysis upon the hairs found on the alleged murder weapon will provide irrefutable "reliable scientific evidence" to support Defendant's specifically pled "fundamental miscarriage of justice" claim brought pursuant to *House v. Bell*, 126 S. Ct. 2064 (2006) and *Schulp v. Delo*, 513 U.S. 298 (1995).

(PCR2. at 411-412). In the body of the motion, Mr. Lambrix explained the materiality of his motion as follows:

> The question at issue in this motion is whether the DNA evidence sought to be tested would have provided substantial support for this Defendant's asserted "reasonable hypotheses of innocence" sufficient to compel the jury to harbor reasonable doubt and return a verdict of "not guilty." As the record clearly shows, by the State's own admission, the entire wholly circumstantial case of alleged premeditated murder was built upon the testimony of their key witness, Frances Smith. See, States argument before this court on

[13] The lower court *sua sponte* entered an order on July 14, 2010, filed and served on July 19, 2010, denying the Defendant's orally adopted Rule 3.853 motion which had been orally adopted in open court on May 27, 2010. (PCR2. 752-55).

> October 6, 2000: "Clearly, the State's case was built on Frances Smith . . . the entire case, premeditation and everything, is proven in her testimony and there has never been any question about that." Even at trial, the prosecutor specifically instructed the jury that Frances Smith "was the hub of the case." (R. 1950).
>
> As the trial record reflects at trial this Defendant's asserted defense was to convince the jury that key witness Frances Smith was not a credible witness, and that Smith had a personal reason to fabricate the allegations advanced against Defendant, and that substantial reasonable doubt existed which required the jury to find this defendant "not guilty." Additionally, Defendant's trial counsel specifically moved for a Judgment of Acquittal, arguing that under applicable law the State's wholly circumstantial theory of alleged premeditated murder was legally insufficient and that Defendant was entitled to entry of acquittal on these charges.

(PCR2 at 421). The *pro se* motion included as attachments Mr. Lambrix's own affidavit, the December 2003 affidavit of Deborah Hanzel supporting a conspiracy, and excerpted FDLE Lab Records that Mr. Lambrix deemed to be material to the motion for DNA testing. (PCR2. 431-442). The body and substance of the *pro se* motion for DNA testing included the contents required by Fla. R. Crim. P. 3.853(b)(1-6), and the lower court should have found the motion to be facially sufficient.

> (1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
>
> (2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is

not the person who committed the crime;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

During the May 27, 2010 Case Management Conference on the Rule 3.851 motion, after it became apparent that the trial court had failed to enter any order on Mr. Lambrix's *pro se* DNA testing motion filed eight months before, counsel advised the court that Mr. Lambrix's *pro se* Rule 3.853 motion for DNA testing was being adopted *in toto*, except for "the portions of his motion regarding any ethics complaints directed towards the Attorney General's Office and corruption references, we are not adopting those few sentences of the motion. But otherwise, the motion for mitochondrial DNA testing of the blood, the blondish hairs, we are adopting." (PCR2 Vol. VIII at 42).

The material portions of the *pro se* Rule 3.853 motion concerned how the facts of Mr. Lambrix's case supported DNA testing in circumstances where there was newly discovered evidence in the form of the FDLE Lab records and the information that they contained which intersected with Mr. Lambrix's claims of

innocence or exoneration by acquittal.

> [T]he State called upon the State Attorney's lead investigator, Miles "Bob" Daniels and Hendry County Sheriff's Deputy Larry Bankert, who testified that Frances Smith showed them where the Defendant allegedly threw this tire iron/tshirt into the creek, and that at Frances Smith's direction, they did retrieve a tire iron/tshirt from the creek.
>
> Through this testimony the State did then introduce into evidence before the jury this specific 'tire iron" as the alleged "murder weapon." As the trial record shows, Defendant's trial counsel did attempt to challenge the origin/authenticity of this alleged murder weapon, but the trial court let this into evidence.
>
> Only recently has newly discovered evidence been disclosed consisting of numerous FDLE Crime Lab reports/memos that case substantial doubt upon the origin/authenticity of this alleged "murder weapon." This "new evidence" is now before this Court in a successive Rule 3.851 Motion To Vacate Judgments of Conviction filed by appointed counsel on April 8, 2009. Defendant specifically incorporates this April 8, 2009 Motion To Vacate Judgments of Conviction, ect, into this instant motion by this specific reference, and submits that this Court must consider the claims presented therein in conjunction with this instant Motion To Compel DNA Testing of Evidence.
>
> Collectively these previously undisclosed FDLE Crime Lab documents establish that the alleged "murder weapon" introduced into evidence at trial was deliberately fabricated to support key witness Smith's testimony. Defendant submits that DNA testing of the numerous "blond to blondish brown" hairs found on this alleged murder weapon by the FDLE Crime Lab will provide irrefutable scientific evidence that key witness Frances Smith – perhaps with the assistance of the state – deliberately fabricated this material evidence to bolster her trial testimony by deceiving both the Court and the jury.
>
> In light of the previously undisclosed FDLE Crime Lab records, it is now known that Crime lab technician David Jernigan conducted a microanalysis of these "blond to blondish brown hairs in 1983 and concluded that these hairs did not match hair samples of either Moore/Lamberson, or Bryant. Newly discovered evidence now shows that Lab Tech Jernigan then advised the state Attorneys Office of this unexpected discovery, only to have the prosecutor, SA Randall

McGruther, inexplicitly instruct the FDLE crime Lab not to conduct any further tests to determine the origin of these hairs.

Equally important is the fact that the FDLE Crime Lab thoroughly examined both the tire iron and t-shirt, and could not find any forensic evidence to support that this tire iron was used in this alleged crime. What is significant is that according to the evidence presented at trial, this tire iron was used to inflict at least 8 blows upon Moore/Lamberson's head (in a continuous "swinging" motion) with sufficient force to literally crush Moore/Lamberson's skull. There can be no doubt that if this tire iron was the alleged murder weapon, it would have had a substantial amount of blood, hair, and even bone/skull particles on it – but virtually nothing was found.

According to Smith's trial testimony, this Defendant took a bloody t-shirt, and wrapped it around this tire iron, securing it by then wrapping a wire coat hanger around it, and only then threw this into the creek. Although arguably the cold water of the creek might had effectively washed the blood from the t-shirt, it would not had washed away hair and/or bone/skull particles, as the t-shirt (wrapped around the tire iron and tied with wire) would had acted as a filter containing any forensic evidence and yet virtually nothing was found.

Last, the irrefutable documents now before the Court show that the t-shirt found around the tire iron was a size small. The record reflects that at the time of this alleged crime Defendant was 5'10" , while key witness Smith was a petite 5'2". It is inconceivable that this Defendant, at 5'10", would had worn a "size small" t-shirt, but certainly a petite 5'2" woman would had.

Collectively, this newly discovered evidence supports the asserted conclusion that the key witness, Frances Smith, deliberately fabricated this evidence to bolster her trial testimony resulting in the introduction of material false evidence. Quite simply, at some time prior to Hendry County deputy Larry Bankert being directed to look in the creek and recover these items, Frances Smith – perhaps with the assistance of her lover, Inv. Daniels, took a tire iron from only God knows where, wrapped it up in her own "Ft. Lonesome" t-shirt, and threw it into this creek, to be recovered at her direction.

Defendant submits that mitochondrial DNA analysis of these "blond to blondish brown hairs" will show that these hairs do belong to, and came exclusively from, Frances Smith. Had this DNA evidence conclusively showing that the only forensic evidence found on this alleged murder weapon came exclusively from Frances Smith,

> and that the t-shirt found wrapped around this alleged tire iron was a size small, any reasonable juror would had immediately formed substantial and irreconcilable reasonable doubt as to the testimony of the State's key witness Frances Smith, and thus the State's wholly circumstantial theory of alleged premeditated murder – and the jury would had been compelled by law to exonerate this Defendant by finding defendant not guilty.
>
> Equally so, had this DNA evidence been available at trial to discredit the testimony of key witness Smith, and support this Defendant's asserted defense that key witness Smith had motive and reason to fabricate her testimony, this DNA evidence would had provided 'a reasonable hypotheses of innocence' which as stated above, in a wholly circumstantial case such as this, would had legally required entry of a Judgment of Acquittal on all charges, thus exonerating Defendant of this alleged crime.

(PCR2. at 425-427). Later in the case management conference, Counsel further advised the court that in addition to the testing of the hairs found on the tire iron, counsel wanted the T-shirt and the tire iron tested. (PCR2. Vol. VIII at 42-43). In a confusing colloquy that followed, counsel subsequently agreed to file a substitute motion which the court agreed would be considered *nunc pro tunc* to the original September 8, 2009 date of filing of the pro se DNA testing motion. *Id.* at 42-48. However the court utterly failed to specify a "deadline date" by which counsel was required to file the substitute motion.

Thereafter, without any prior notice, the court sua sponte entered an order on July 14, 2010 denying the Defendant's orally adopted Rule 3.853 motion. (PCR2. 752-55). The order stated in part that "Defendant has not established that the evidence would exonerate him, or result in a lesser sentence. The Court finds

there is no reasonable probability that Defendant would have been acquitted or received a lesser sentence if the DNA results had been admitted at trial. DNA testing will not be permitted if the requested DNA testing would shed no light on the Defendant's guilt or innocence. *Consalvo v. State*, 3 So. 3d 1014, 1016 (Fla. 2009)".

The order also stated that "[t]o date, CCRC has not filed its own adopted motion for DNA testing. Thus, having reviewed the pro se motion, **the State's response to the pro se motion**, the record, and the applicable law…" (PCR2 at 752)(emphasis added). The "response" referred to in the order was the *State's Motion To Strike Pro Se Motion* filed on September 28, 2009 which contained no substantive argument concerning the viability of DNA testing but rather put forward the proposition that "a pro se pleading by a criminal defendant who is represented by counsel is a nullity subject to being stricken" and which continued by stating that "[Mr. Lambrix's] pro se motion for DNA testing has not been adopted by counsel and must therefore be stricken." (PCR2. 443-44). Based on the exchange at the case management conference, Judge Greider had intended to strike the *pro se* motion but never entered an order doing so.

The lower court also concluded that Mr. Lambrix "failed to demonstrate how testing the hair would exonerate him or mitigate his sentence." (PCR2. at 753). The Court also went on to state that "[f]urther, Defendant's identity is not a

genuinely disputed issue in the case, since Defendant admits he was present, and asserted the defense of self defense." *Id.*

Rule 3.853 specifically anticipates that in the absence of identity being a disputed issue, a motion requesting DNA testing may still be granted where a defendant offers "an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received." Fla. R. Crim. P. 3.853(b)(4)(emphasis added).

Mr. Lambrix's motion satisfies the requirement of 3.853(b)(4). In particular, as pled, the motion specifically stated that DNA testing will establish that the hairs found will match the State's star witness Francis Smith. This evidence, in combination with other record evidence supports Mr. Lambrix's contention that Smith's critical testimony about the murder weapon was fabricated. Her admission she had an affair with State Attorney Investigator Bob Daniels, the newly discovered evidence from FDLE which establishes that Bob Daniels, on the instruction the Assistant State Attorney, told FDLE not to test the hairs, the shirt or the tire iron, and DNA testing establishing that Ms. Smith's hair was on the alleged murder weapon would call into question the credibility of her testimony. The State has always considered Smith to have been the hub of its case against Mr. Lambrix. In their opening statement at trial, the State 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. During closing argument the state reiterated that fact when it said,

> [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. Smith's testimony was critical in making the State's case in both the guilt phase and penalty phase. At the guilt phase, Smith's testimony established motive by testifying that Mr. Lambrix wanted to steal the victim's car, notwithstanding that Smith was the one arrested driving the stolen car. Without this critical testimony the state could not have established a first-degree murder claim. To the extent the results of DNA testing would uncover Smith's testimony to be fabricated, that evidence would exonerate Mr. Lambrix of first-degree murder and thus make him ineligible for the death penalty. At the penalty phase, Smith's testimony afforded the State the opportunity to argue for the pecuniary gain aggravator given her testimony about the victim's car. Again, without Smith's testimony Mr. Lambrix would not have received a death sentence. The order also denied the Motion for DNA Testing on the grounds that testing the hairs would not prove Mr. Lambrix was not at the crime scene. (PCR2. at 754). However, given record facts, Mr. Lambrix does not have to be absent from the crime scene in order

to establish that DNA testing would exonerate him or mitigate his sentence. Rather, as mentioned above, the DNA testing will help to establish that Francis Smith's testimony about the alleged murder weapon was fabricated. The DNA evidence along with the other evidence of Smith's illicit affair with investigator Daniels, the fact that she was arrested driving the victim's car, the fact that FDLE was ordered not to conduct further testing, all indicate that had this information been made available to trial counsel and presented to the jury, Mr. Lambrix would have been acquitted of first-degree murder and he would be ineligible, or exonerated from, the death penalty.

Although the *pro se* motion was not adopted in September 2009, it surely was at the May 27, 2010 case management conference when it became clear that the lower court had never entered any order denying the *pro se* Rule 3.853 motion. The lower court never entered a written order concerning when the substitute DNA motion should be filed.

On August 3, 20010, counsel for Mr. Lambrix filed a motion for rehearing requesting a review of Judge Greider's July 19, 2010 order denying DNA testing. (PCR2. 896-900). On August 12, 2010 the State filed *State Response to Motion For Rehearing On Denial of DNA Motion* at (PCR2 946-48). The lower court denied the motion for rehearing on the adopted DNA testing motion on August 11, 2010. (PCR2. at 940). The court held that Mr. Lambrix failed to call to the court's

attention any fact, precedent or rule of law that had been overlooked by the lower court.

Mr. Lambrix had argued in his adopted motion that he was entitled to DNA testing, and thereafter entitled to use the results of the testing on the hairs and associated materials in conjunction with the totality of all his post conviction claims, including the claims that were then pending in *Lambrix v. State*, Florida Supreme Court Case No. SC08-0064, because consideration of the DNA results requires the court to conduct a cumulative review. See *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996); *Gunsby v. State*, 670 So. 2d 920, 924 (Fla. 1994).[14]

[14] Mr. Lambrix's prior post conviction appeal in this Court was still pending at the time he filed the *pro se* DNA motion in the circuit court on September 8, 2009. In fact the oral argument in Case No. SC08-0064 was not held until November 11, 2009. Counsel filed a Motion to Relinquish Jurisdiction to the Circuit Court on April 9, 2009 requesting relinquishment for the purpose of filing a new Rule 3.851 motion predicated on the discovery of the previously undisclosed FDLE lab documents and notes, but on July 9, 2009 this Court denied relinquishment "because the newly discovered evidence claim it raises is unrelated to the issues involved in the postconviction motion pending on appeal in this Court. See Biggs v. State, 851 So. 2d 802 (Fla. 1st DCA 2003)." Mr. Lambrix believes that this Court's finding that the FDLE records were "unrelated" to the issues under consideration by this Court to be inaccurate where trial counsel previously testified that they would have relied on any impeachment material (such as was found in the FDLE records as to the legitimacy of the tire iron, the alleged murder weapon). Trial counsel did attack the chain of custody of the tire iron at trial. Having information from the FDLE file that raised questions about that very issue would have been extremely helpful in impeaching the testimony of diver/deputy Larry Bankert, Frances Smith and investigator Daniels about the recovery and chain of custody. Evidentiary hearing testimony from state attorney Randall McGruther concerning his directions to FDLE to not test the forensic materials, as memorialized in the FDLE lab notes, would clearly have been material as well.

As to the denial of DNA testing, the action by the trial court and the circumstances surrounding it (alleged conflict of interest, the request for self representation, unsuccessful attempt to disqualify the trial court(s)) implicate both federal and state constitutional issues. The harm and prejudice to Mr. Lambrix are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. See also *Skinner v. Switzer*, 562 U.S. __ (2011)(A state court decision is not reviewable by lower federal courts but a statute, such as the Texas postconviction DNA testing statute, or rule governing the decision may be challenged in a federal sect. 1983 action on due process grounds).

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*,

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The witness list included in the successive Rule 3.851 motion of April 2009 included surviving trial attorney Engvalson, and the same expert witnesses who were never allowed to testify at the evidentiary hearings: criminalist William T. Gaut, and medical examiners Dr. Willey and Dr. Katznelson, meteorologist Steve Wistar, property owner Sally Johnson Deller, engineer Richard H. Thompson, and researcher Michael Hickey. (PCR2 at 6-7, 17). The FDLE documents that were withheld from trial counsel and post conviction counsel would have been material to all their prospective testimonies. This Court should now undertake the required cumulative review as part of the process of determining the materiality of DNA testing in Mr. Lambrix's case.

670 So. 2d 920, 924 (Fla. 1994); and *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001). 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. The instant circumstances where specific items that were previously unknown to counsel have now been identified for testing are not the type of "fishing expedition" regarding DNA testing that this Court has criticized in *Gore v. State*, 32 So. 3d 614 (Fla. 2010) and *Scott v. State*, 46 So. 3d 529 (Fla. 2009). The lower court should have accepted Mr. Lambrix's pled facts as true and allowed DNA testing.

Any review of his claims on an individual basis substantially prejudices Mr. Lambrix and violates established procedural and substantive Due Process,

rendering the post conviction proceedings below fundamentally unfair under both the Florida and federal Constitutions Due Process Clause.

ARGUMENT III

THE BRADY/GIGLIO VIOLATION

Mr. Lambrix argued in Claim II of his motion below that the State committed a violation under *Brady* and *Giglio* when it failed to provide a complete set of the documents generated by FDLE in its analysis of evidence in his case. (PCR2. at 13-17). The lower Court summarily denied this claim on the grounds the evidence could not lead to impeachment of a witness or undermining the confidence in the verdict. The court held there was no prejudice from the state's violations. Mr. Lambrix has continually sought the right to develop, through an evidentiary hearing, facts that would establish prejudice. He has been denied the opportunity to present expert testimony regarding the crime scene and locations of where evidence was claimed to have been discovered that would establish those matters which the lower Court found in its order to be deficient.

In conjunction with that expert testimony, additional expert testimony regarding the new revelation that the blond blondish brown hairs that were found on the tire iron, the alleged murder weapon introduced at trial, that match neither Mr. Lambrix nor the victim would support Mr. Lambrix's long held self-defense claim and his claim that the state was engaged in misconduct regarding Francis

Smith's testimony against Mr. Lambrix and her relationship with Bob Daniels. Impeaching Smith would have been devastating to the state's case against Mr. Lambrix. As was specifically pled in the 3.851 motion, the "State's theory of premeditated intent came from the various and evolving statements by Frances Smith. During the course of the investigation that ensued after she was arrested in possession of the deceased victim's car, it became clear to Smith that she needed the police to believe her story. It also became equally clear to the investigating officers that they needed to establish a motive. *Without a motive, the State could not obtain convictions for first-degree murder.* Unless Frances Smith could provide them with premeditated intent, she would remain a suspect. Thus, the implausible theory that Mr. Lambrix lured the couple to his trailer so that he could rob and kill them for the car which was found in the possession of Frances Smith was hatched by the police and prosecutors. The problem in this case was that the trial attorneys had no sufficient basis on which to attack the credibility and bias of the witnesses at the time of the trial." (PCR2. at 15-16)(emphasis supplied). This newly discovered evidence would have given trial counsel such a basis to attack Smith's credibility.

The lower court failed to appreciate the significance of the fact that included in the newly discovered documentation is a note from the state attorney McGruther to FDLE laboratory personnel telling them not to conduct forensic testing on the

shirt, hairs or tire iron.[15] Had trial counsel had this information, along with other information recently provided, they would have been able to effectively cross-examine and impeach state expert witnesses and Francis Smith. They would have launched an investigation into the State Attorney's Office to determine how and why the decision to halt testing was made. Multiple areas of impeachment would flow from such investigation. Impeachment that would likely have changed the outcome of the trial or sentencing. Thus, the record does not conclusively establish that there is no prejudice or that Mr. Lambrix is not entitled to relief.

The motion below set forth a claim of a violation under *Brady*. First, with regard to *Brady*, the FDLE records unquestionably could be used for impeachment and the record does not conclusively establish otherwise. Second, as the state conceded, the FDLE documents were newly discovered. (PCR2. Vol. VIII. at 36). Thus, the documents were suppressed by the state and FDLE. Third, the suppression of the FDLE documents undermined the confidence in the verdict because they would significantly impeach Francis Smith, the acknowledged hub of the states case as well as the State Attorney McGruther who decreed to FDLE that no further testing of the hair, shirt or tire iron be undertaken. *Strickler v. Greene*,

[15] The *Giglio* violation here is that prosecutor McGruther knew that the alleged murder weapon was not what it seemed to be. There was a measure of fabrication that is supported by the secret instructions to FDLE to do no further testing. The lower court should have accepted the pled material allegations as true and granted an evidentiary hearing to sort out the matters which were in dispute as a result of the newly discovered FDLE records.

527 U.S. at 290 ("[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995))). Thus, a *Brady* claim was sufficiently pled and the record does not conclusively refute Mr. Lambrix's entitlement to relief.

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").

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 *Brady/Giglio* issues here present federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. 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).

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE AND THE FAILURE TO GRANT AN EVIDENTIARY HEARING

The April 2009 Rule 3.851 motion included as Claim III both a description of the materials that undersigned counsel believed to be newly discovered evidence, never produced to either trial counsel or post conviction counsel during the pendency of Mr. Lambrix's case from pre-trial until the records were obtained by Mike Hickey, and a detailed argument as to materiality which was later supplemented at the case management conference.

Materiality of the FDLE Records

> 29. To obtain relief on a claim of newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). Numerous issues that were litigated before this court are impacted by the new records produced by FDLE in 2008.
>
> 30. There were hairs that were found associated with the alleged murder weapon, the tire iron, that were not analyzed further once they were determined to be dissimilar to the male victim's hair. An undisclosed lab note concerns a previously unknown description of the color of one hair found on alleged tire-iron murder weapon. A "Blonde/blondish hair" was listed in testing on 6/10/1983, the report stating "found blonde to light with brown pigmentation." No attempt was made to compare the hairs to Frances Smith, Investigator Daniels, or others. The failure here to follow proper protocols supports the proffered reports in the prior claims concerning problems with the medical examiner's conclusions and the crime scene investigation outlined in proffered reports of the experts who were not allowed to testify at the postconviction evidentiary hearing.
>
> 31. The FDLE's forensic analysis of the short sleeve small t-shirt allegedly worn by Mr. Lambrix and used to wrap the tire iron/lug wrench before it was allegedly disposed of in a creek, revealed no blood on either item. Yet the hairs noted above were contained in the same materials as part of Exhibit #2/2A. Trial counsel and postconviction counsel never had the opportunity to argue that the hairs could not have been retained in the sample after hours or days in a creek when traces of blood were washed away because they had no access to the

detailed notes concerning the laboratory testing.

32. Mr. Lambrix maintains that the small "Fort Lonesome" t-shirt, which based on the FDLE's forensic testing was not bloody as reported by Frances Smith, could not have belonged to Mr. Lambrix but must have been Frances Smith's t-shirt. Based on concerns about chain of custody, trial counsel could have made out a case that after she and FDLE agent Connie Smith obtained her personal property and clothing on March 3, 1983, property which had been confiscated from in the trunk of the male victim's car which had been driving when she was arrested, Ms. Smith provided the t-shirt to Agent Daniels or FDLE to associate with the alleged murder weapon. Notes reveal that the tire iron, t-shirt and debris evidence (#2 and #2A) was re-packaged by FDLE because of deficiencies in packaging by SAO Investigator after it was turned over to FLDE by Daniels at Tampa Airport. Other notes indicate the tire iron and shirt may have gone missing at points during the chain of custody.

33. Trial counsel attempted to attack the chain of custody of the alleged murder weapon at trial but had little to hang their hats on. They would have followed-up with what was disclosed about the alleged murder weapon and chain of custody in the 2008 FDLE notes if only they had been aware of the new information that was never disclosed to them. Specifically, the notes reveal that that on June 21, 1983 Investigator Daniels relayed ASA McGruther's request (once the State determined their theory of case and had witness Smith on board) that certain items of evidence in the custody of the FDLE should not be further tested and should instead be returned to the state attorney office through Investigator Daniels.

34. There is significant information in the FDLE notes to support the conspiracy/collaboration claim that is on appeal after having been denied by this court. Although there is no prima facie case for manufacturing evidence, there are grounds in the notes to support an attack on the authenticity of the alleged murder weapon.

(PCR2. 17-25). *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. Thereafter, the pleading described in detail the materials that counsel believed to be newly discovered evidence that was previously unknown to counsel and Mr. Lambrix.

Newly Discovered Evidence in the Laboratory Materials Produced in July 2008 to Hickey

35. Unless specifically noted otherwise, the remaining entries are new evidence. Five folders of FDLE Lab records, a total of 187 pages, were produced to Mr. Hickey in July 2008 and forwarded to Mr. Lambrix in September 2008.

36. **Folder 1:** A Sanford Crime Laboratory note dated 5/27/83 states "Call from Inv. Bob (Miles) Daniels there is no problem putting everyone together major exam is on sub 003; compare #2 to #14. If stds. Are needed from Lambrix; call Daniels. Stds from everyone else is in the case. None of the submissions have been logged off as of this time." This note concerned testing on a pair of blue ladies slacks (003) and testing to compare hairs found on the alleged murder weapon (#2) with pulled head hairs from the male victim in the case (#14).

37. A 6/21/83 note on the same page signed by DKJ (David K. Jernigan, Crime Laboratory Analyst, Microanalysis) states "Inv. Miles Daniels called & said that per conversation with ASA MGruther that no further exams are needed or required on all pending exhibits. OK to return." A later note on the same page has the date and part of the content cut off, but appears to concern the location of #2, the alleged murder weapon/tire iron, "and if we still had". A later telephone message slip dated 11/9 from Daniels, Labelle/SAO and signed Connie indicates the caller's message was "Whereabouts of #2, (Sub. 003)?" A disposition of evidence stamp in the new records indicates that the tire iron (Exhibit 2) and Sub 003 (the blue slacks) were returned by KKJ by certified mail on 7/25/83 in Box 182. Why was the SAO still looking for these items three and a half months later?

38. **Folder 2**: David Jernigan's bench notes from his FDLE lab work were never before provided until 2008. A page long note dated 6/14/83 concerns his testing of the debris associated with the tire iron and t-shirt:

Results: Specimen 2A (debris) was examined for the presence of hair. Two head hairs and several body hairs all exhibiting microscopic characteristics typical of Caucasian origin were found. The two head hairs were examined and compared to specimen 14, head hair sample from Moore, and were found to be microscopically different and, accordingly, did not originate from the same representative of specimen 14. The body hairs found in this exhibit were too limited to be of value for significant comparison purposes. Also found in specimen 2A (debris) were five hairs all exhibiting microscopic characteristics typical of animal (non-human) origin. No further examinations were performed on the following exhibits: Q1A-Q1L, Q1Q-Q1Z, K1-K3, 2, 7-9, 12, 13, K6, 24-27. Remarks: The exhibits submitted, along with glass microscope slides prepared

during this examination, are being returned to your agency under separate cover by certified mail.

38. A report dated 15 June 1983 by David K. Jernigan, FDLE Crime Laboratory Analyst, Microanalysis, was included in the 1987 and 2008 FDLE production and the 1999 SAO records production. This report noted that Exhibit 2 was "One tire iron/lug wrench and one brown T-shirt" and it described Exhibit 2A as "Debris represented as having originated from one tire iron/lug wrench and one brown T-shirt." Exhibit 14 was described as a "Head hair sample represented as having originated from Clarence E. Moore."

40. The report thereafter reported the following testing results: "Specimen 2A (debris) was examined for the presence of hair. Two head hairs and several body hairs all exhibiting microscopic characteristics typical of Caucasian origin were found. The two head hairs were examined and compared to specimen 14, head hair sample from Moore, and were found to be microscopically different and, accordingly, did not originate from the source representative of specimen 14. The body hairs found in this exhibit were too limited to be of value for significant comparison purposes. Also found in specimen 2A (debris) were five hairs all exhibiting microscopic characteristics typical of animal (non-human) origin." Finally, in the "Remarks" section of his report, Jernigan stated that "[t]he exhibits submitted, along with the glass microscopic slides prepared during this examination, are being retained in this laboratory pending further examinations which would be the subject of a separate report."

41. Jernigan's bench notes were not provided counsel but were included in the 2008 FDLE production of records to a private citizen. A note dated 6/10/83 describes the testing of the hairs associated with exhibit #2, tire iron and shirt. Associated Items I and J were found "not like" the male victim's hair. Jernigan's notes further commented that Items I and J were "blonde to light brown pigmentation, eliminated by pigment color and distribution. Distribution of pigment is light, sparse & well dispersed." Another 6/10/83 note that was not previously disclosed concerned the related analysis of the Exhibit #14, the male victim's hair. Regarding Pigment, the male victim's hair displayed "well dispersed pigment with medium clumping (?) noticed throughout shaft."

42. A note dated 6/7/83 concerning the receipt of Item #2 "One white paper wrapped "Tire Iron 83-502 Glades Co. 2-16-83 Cary Lambrix Homocide Bryant/Moore Inv, Daniels." The same page of notes includes a description of Item #2: "Inside: one tire iron w/rust, one bent-up piece of coat hanger wire, two pieces of string, and one short sleeve size "s" brown T-shirt "Fort Lonesome Florida". All pkg. In with a yellow trash bag. Initialed and place back into white paper; No exam per Ruth Wilbarger because items were swept. Look at item #2A debris for hair".

43. Yet another note dated 6-10-03 by DKJ refers to "Debris collected from the tire iron and shirt around tire iron." The note goes on to describe what was inside the debris fold(er): "numerous hairs, several fibers, & assorted dirt & debris. The hairs were removed & placed on glass microscope slides for further examination."

44. **Folder 3**: There is a very badly reproduced note in the FDLE files

never before produced dated 5/5/83 that indicates "per conversation w/prosecutor McGruther (Sp.)" . . . "(Shirt wrapped around tire iron is subject's)" with the balance of the note unreadable on the version of the document produced in 2008.

45. A Tampa Regional Crime Laboratory "Request for Crime Scene Assistance" dated 2-17-83 noting that luminol testing was undertaken on the 1976 Black Cadillac that witness Frances Smith was arrested driving; an annotated version of a 2/25/83 FDLE Request for Examination of Physical Evidence form in Lab Case No. 830231411 (Mr. Lambrix's case) which includes a handwritten note concerning the tire iron/lug wrench wrapped in brown shirt #83-502-2 stating "(K-9 dog belonged to officer who retrieved #2 from (water?) + placed in back of his ___." No other mention of a dog being involved in the recovery of the alleged murder weapon appears in the records and files of the case. Notes dated 2/25/83 appearing on the same page indicate that items 2-14 were received by L [probably Laura Rousseau] and turned over to the FDLE evidence section, and that L "repackaged items in plastic and sealed in paper bags with original packaging material). An explanation of this procedure is necessary.

46. **Folder 4**: A longhand report dated 5/25/83, unsigned and not produced prior to 2008, concerns a telephone contact by FDLE with Assistant State Attorney Randy McGruther, who apparently returned a call made by FDLE to SAO Investigator Daniels. The note includes an explanation of the State's theory of the offense and concludes: "Exhibit #2 (Sub 03) was the alleged murder weapon, wrapped in the shirt Lambrix was wearing during the assault. They were thrown over a bridge into some water. McGruther will research file and discuss which exams are necessary." A letter in the file which was probably previously provided, dated May 20, 1983 states that exhibit #2 along with Exhibits # 3, 4, 5, 6, 8, 9, 12, 13, 24, 26, Q-1A thru Q-1R, and Q-1Q thru Q-1Z were transferred to the Sanford Regional Crime Lab.

47. There are also undisclosed bench notes dated 5/12 for an undecipherable type of testing on twelve different items; Another report which was (?) previously produced provides a reference point. In a May 19, 1983 report from Ruth A. Wilbarger, Crime Lab Analyst, Serology Section, Tampa, FL, she explains that "This report has reference to the following exhibits which were submitted to this laboratory under four separate submissions; Submission #02 on February 28, 1983, by CLA Laura Rousseau, Submission #03 on February 25, 1983 by Investigator R. Daniels, Submission #04 on March 4, 1983 by CLA Laura Rousseau, and Submission #06 on March 14, 1983, by Investigator M.R. Daniels." The report states that Submission #03 by Daniels included "#2 One (1) tire iron wrapped in a shirt." The results of testing undertaken revealed that "[e]xamination of the tire iron and shirt (Exhibit #2) . . . failed to give chemical indications for the presence of blood." This despite the fact that a bloody shirt was supposedly wrapped around the murder weapon. There is also a disposition of evidence note included in the file which may not have been turned over prior to July of 2008. It indicates that FDLE agent Connie Smith signed on 3/3/83 for Exhibits Q-1YY – 2 Brown paper bags of women's clothing from trunk.

48. **Folder 5**: This folder, provided by FDLE in Jul 2008, includes eighteen (18) undisclosed pages of bench notes by Ruth A. Wilbarger. These

notes included her testing notes on the T-shirt and tire iron on May 4th and 5th , 1983, with a comment that both results are "too weak". The notes also includes a detailed physical description of the tested T-shirt "Fort Lonesome, Florida (back) brown & beige short sleeve shirt." Other notes include ones dated February 21, 1983: "Daniels also said he had a bloody towel from residence and the suspected murder weapon wrapped in a shirt that he would submit at a later date"; February 25, 1983: Met Assistant Inv Bob Daniels at Hanger I – Tampa Airport & received Items #2 thru #14 of Submission 03. Several items were packaged incorrectly for lab analysis so I would have to repackage these items before I could turn them into evidence section." March 3, 1983: "Agent Connie Smith (FDLE) brought Francis Smith into the laboratories so I could get her hair standards salvia standards and inked finger and palm prints."

49. An additional twenty-five pages of material were produced as part of folder #5 including five pages of Crime Scene Processing Evidence Log Worksheet, 13 pages of Subpoenas, and two pages of photographs. The remaining pages include an illegible page titled "Found in Trunk of Q-1", a one page description of an un-named FDLE employee following the subpoena for Laura J. Rousseau that begins "14 ½ years FDLE Crime Laboratory Analyst c/c section (2 years c/s section)" , and three pages that were not produced prior to 2008.

50. Those three pages include a two page handwritten but unsigned "Chain of Custody" that memorializes events associated with the handling of evidence. The note dated Fe[b]. 25, 1983 states: "Met Inv Bob Daniels of St. att office at Hanger I (Tampa Airport) & received Items #2 through #14 (Submission 03) for lab analysis. Several items were packaged in plastic because of the smell so I told Bob I would repackage them prior to entering into Evidence Section (Put original packaging material inside what I packaged. Turned these items into Evidence Section (Teresa Stubbs)." The March 3, 1983 entry states: "FDLE SA Connie Smith brought Subject Francis Smith to Lab for collection of standards. I collected these items (Submission 04) Salvia Swabbing (K-4) Inked fgr + pp (K-5) Head Hair (K-6). Turned over 2 brown paper bags full of women's clothing from trunk of vehicle. Exhibit Q-1YY to Connie Smith." Finally, there is a one page note that reads "Bob Daniels (Moore Haven) Jerry Lambrix (Wood) 277 2875 Tire Iron Earliest."

51. As noted **supra**, the information contained in the suppressed FDLE records would have been relied on in any testimony of expert witnesses and trial counsel at an evidentiary hearing. Moreover, at an evidentiary hearing, Mr. Lambrix can prove he is entitled to the relief he seeks by presenting the listed witnesses, including witnesses to prove due diligence as to public records. The files and records in this case fail to show conclusively that Mr. Lambrix is entitled to "no relief."

(PCR2. 19-25). The lower court summarily denied the 3.851 motion on the grounds that the FDLE documents were not newly discovered and could have been

discovered by trial counsel's due diligence. This conclusion ignores the State's concession, during the case management conference, that the documents from FDLE were newly discovered. Specifically, the state said, "I do concede, for the purposes of this hearing, that these are newly provided records to CCR." (PCR2. Vol. VIII at 36). Thus, the FDLE documents have never before been produced to counsel for Mr. Lambrix. Second, the Court finding that the FDLE records "could have discovered through the exercise of due diligence at the time of trial" is simply unsupported by the record (PCR2. 800-801).

To conclude that due diligence would have uncovered the documents, testimony from trial counsel at an evidentiary hearing would be necessary. Although trial counsel did demand discovery from the state and did receive some documents and reports, there is no record support for a conclusion that they ever received these newly discovered FDLE lab documents or reports. The simple truth, as the state conceded, is that the FDLE documents have never been produced to counsel. Rather they only came to counsel's attention through the actions of a third party who received them directly from FDLE. The lower court's conclusory finding that due diligence would have produced that which FDLE has failed to produced pursuant to numerous requests in the previous twenty years is not based on the record. Thus, the record does not conclusively refute Mr. Lambrix's claim in this regard and an evidentiary hearing was certainly required.

The lower court's summary denial relies on a finding that the FDLE documents would not result in an acquittal or lesser sentence because the material therein does not prove that Mr. Lambrix was not present at the crime scene. (PCR2. at 801). This conclusion likewise misapprehends pertinent record facts. Given the fact that Mr. Lambrix has long argued self-defense and that the State fostered Francis Smith's damaging testimony, the question of whether he was at the crime scene is irrelevant. The real question, then, is does this newly discovered FDLE information help establish Mr. Lambrix's claim of self-defense and in establishing that Francis Smith's testimony was suspect. Smith's testimony was critical to the state's case in both the guilt and penalty phases. Smith's testimony provided the state with motive to establish a first-degree murder case as well as aggravators for the death penalty.

To the extent that her credibility and truthfulness is impacted, the outcome of the trial would have been different. Indeed, without Smith, the state's case would crumble. Smith has always been the hub of the states case against Mr. Lambrix. In their opening statement at trial the state 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. During closing argument the state reiterated that fact when it said,

> [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.

Francis Smith had a pivotal role in the state's case against Mr. Lambrix, thus her credibility is critical. Impeachment of her testimony concerning the alleged murder weapon would have undoubtedly changed the outcome of the trial. Trial counsel attempted to do just that but did not have the relevant and material information to do so.

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 his claims. Here, the lower court's failure to grant an evidentiary hearing was error. See *State v. Parker*, 721 So. 2d 1147 at 1151 (Fla. 1998)(suppression of evidence); *Davis v. State*, 26 So. 3d 519 (Fla. 2009)(prima facie due diligence); *Riechmann v. State*, 966 So. 2d 298 (Fla. 2007)(why not raised before?); *McLin v. State*, 827 So. 2d 948 (Fla. 2002)(required to accept affidavits as true for purpose of granting evidentiary hearing); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999)(trial court erred by failing to consider cumulative effect of evidence under *Brady* or newly discovered evidence claim). 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.

This claim presents federal and state constitutional issues and is predicated on the violation of Appellant's protected federal rights under the Fifth; Sixth, Eighth and Fourteenth Amendments of the United States Constitution supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. 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).

ARGUMENT V

JUDGE DISQUALIFICATION

On September 1, 2009, Mr. Lambrix served a *pro se* motion to disqualify Judge Corbin predicated on what he described as newly discovered evidence that "show that an irrefutable personal and political relationship has existed between Judge Corbin and members of the 20th Judicial Circuit State Attorneys Office, including Chief Deputy State Attorney Randall McGruther, who personally

testified as a material witness in this case in April 2004 and July 2006." (PCR2. 385-400). Completely out of the blue, on October 7, 2009, an Order of Reassignment was entered by G. Keith Cary, Chief Judge, Twentieth Judicial Circuit, on his own motion, removing Judge Corbin and reassigning the Honorable Christine Greider to the case. (PCR2. at 674).

On December 15, 2009, Mr. Lambrix served a *pro se* pleading entitled *Notice of Intent To Submit Additional Post Conviction Claims And Move For Disqualification of Judge Christine Greider Following Discharge of Appointed Counsel and Exercise of Self Representation* (PCR2. at 700-708). The rationale of his move for the disqualification of the newly assigned judge was as follows:

> Public records show that Judge Christine Greider personally worked within the local State Attorneys office for approximately 9 years (1997-2006) before being politically appointed to the bench. Judge Greider personally worked under both State Attorney Steve Russell and Chief Deputy SA Randall McGruther, both of whom will be compelled to testify on these post conviction proceedings.
>
> Additionally, public records show that the only time Judge Greider ever donated money to any political campaign other than her own was to State Attorney Steve Russell, establishing cause to believe that Judge Greider's personal and political relationship with State Attorney Steve Russell will prevent Judge Greider from providing fair and impartial review of this Defendants specifically raised post conviction claims alleging misconduct by Steve Russell and his employees.
>
> Last, this Defendant will specifically question the sua sponte appointment of Judge Greider to this capital case and will seek leave to depose both Judge Greider and Chief Judge G. Keith Cary, for the purpose of establishing their own personal and political relationship with the individuals (Joseph D'Allessandro, Steve Russell, Randall McGruther, Richard Spence, etc) who methodically exerted their

> political influence over local elections to manipulate and control the locally elected judiciary.
>
> * * *
>
> Further, this Defendant will specifically allege facts that will require both Judge Greider and Chief Judge Cary to become involuntary witnesses in these post conviction proceedings. For this reason, pursuant to Wickham v. State, 998 So. 2d 593 (Fla. 2008) this Defendant will move for the disqualification of both Judge Greider and Chief Judge Cary, and move for transfer of venue to have this capital case transferred to another judicial circuit.
>
> Therefore, due notice of intent is now provided, and these specific actions will be pursued upon this Court's discharge of appointed CCRC Counsel and recognition of this Defendant's asserted right of self-representation.

(PCR2. 707-708). At the case management conference on Thursday, May 27, 2010, counsel appeared in person and Mr. Lambrix appeared by telephone. One of the parties appearing by telephone identified herself as Nicole Forrett "from the Staff Attorney's Office in Ft. Myers." (PCR2. Vol. VIII, 1-49 at 5). The Court identified this person as "a representative from the court administrations staff attorney." *Id.*

Following the case management, Mr. Lambrix filed a *pro se* motion to disqualify Judge Greider and the Twentieth Judicial Circuit on June 3, 2010 (PCR2. 964-988).[16] Judge Greider's subsequent June 17, 2010 order striking Defendant's Motion to Disqualify Judge refers to the motion being received on

[16] Mr. Lambrix's pleading included a "Notice of Applicability of Mailbox Rule" as part of the Certificate of Service, noting that case law supported the proposition that the motion is deemed to have been filed on the day of mailing from the correctional institution. (PCR2. at 985).

June 8, 2010 (PCR2. At 756).

Undersigned counsel received by U.S. Mail a copy of Mr. Lambrix's Pro Se *Motion to Disqualify Judge Greider and Twentieth Judicial Circuit With Notice of Intent to Pursue Collateral Appeal* on June 7, 2010 along with the affidavit duly executed by Mr. Lambrix detailing his "reasoned and well founded fear that I cannot and will not receive a fair and impartial review by any Circuit Court Judge in the 20th Judicial Circuit." This was based in part on his discovery during the May 27, 2010 hearing that Nicole Forrett (noted in his affidavit as Nicole 'Follet') was participating in the above captioned case as a staff attorney for the Court.

Counsel thereafter filed a motion on July 21, 2010, adopting the following portion of Mr. Lambrix's pro se pleading along with the material portions of Mr. Lambrix's affidavit setting forth his well-founded fear of bias:

> "On May 27, Defendant learned for the first time that Nicole Follet is currently the "staff attorney" for the 20th Judicial Circuit Court and is personally participating in this capital case. Defendant submits that Ms. Follett has failed to disclose her own conflict of interest due to a prior unethical and adversarial relationship between Nicole Follet and this Defendant.
>
> Specifically, in 2006 and 2007 parties acting in behalf of Defendant were conducting investigations into misconduct by members of the 20th Judicial Circuit State Attorneys Office relevant to Defendant's capital case. At that time it was discovered that Ms. Follet had placed an ad offering legal services on "Craigslist" (an internet provided posting "ads"). Defendant's investigators then contacted Ms. Follet "online" and exchanged numerous emails in which Ms. Follet – although employed at the time as an Assistant State Attorney – solicited and received monetary payment in

exchange for information and legal advice.

> Pursuant to Ms. Follet's instructions, these monetary payments were sent by mail to her private residence in Lehigh Acres, Florida. Subsequently, Defendant personally corresponded with Ms. Follet by mail sent to her home in Lehigh Acres. Apparently for fear of this unethical relationship being exposed, Ms. Follet then deliberately abused her power as an Assistant State Attorney and contacted prison officials at Union Correctional Institution, and had Defendant's prison cell thoroughly searched in an attempt to obtain and confiscate the copies of emails, money receipts, and correspondence relevant to the relationship between Ms. Follet and this Defendant.
>
> Defendant had no further contact with Ms. Follet, and was not aware that Ms. Follet had subsequently left the State Attorney's office and is now serving as the "staff attorney" for the 20th Judicial Circuit Court. Had this Defendant been advised that Ms. Follet is currently serving as Judge Greider's "staff attorney," Defendant would had immediately moved for disqualification of both Nicole Follet and Judge Greider.
>
> It must be noted that Judge Greider was herself personally employed as an Asst. State Attorney prior to being politically appointed to the bench and personally worked with Nicole Follet. This past and present relationship between Nicole Follet and Judge Greider creates a presumption of bias and establishes a substantial and irreconcilable "well founded fear" in which compels this Defendant to believe that Judge Christine Greider cannot and will not provide Defendant with a fair and impartial hearing on Defendant's post conviction appeal presently pending before this Court." Pro Se pleading at 3-4.

Undersigned counsel received a copy of the hearing transcript on June 10, 2010, thirteen days after the hearing. The lower court's order striking Mr. Lambrix's *pro se* motion was received through the U.S. Mail by CCRC-South on June 23, 2010. However, neither counsel actually saw the order until June 25,

2010 since both were participating in a capital postconviction evidentiary hearing on another case in Punta Gorda from June 21 to June 24, 2010. The Order found that since Mr. Lambrix was represented by counsel, and since counsel had not adopted the *pro se* motion as of the date of the Order, the motion was a nullity.

Counsel moved the lower court to withdraw the Order Striking the Motion to Disqualify in light of its actions at the case management conference allowing counsel to adopt Mr. Lambrix's September 2009 Pro Se DNA motion that had been filed some eight months before, and in light of the fact that undersigned counsel had no reason to file a motion to disqualify within 10 days of the case management conference. (PCR2. 758-765).

The case law cited by the lower court in the order denying counsel's motion, *Sheppard v. State*, 17 So. 3d 275 (Fla. 2009) and *Murray v. State*, 1 So. 3d 407 (Fla. 2d DCA 2009), does not stand for the proposition that the lower court's action striking the *pro se* motion was appropriate.[17] This Court in *Sheppard* makes clear that although "the general rule of striking *pro se* pleadings is designed to improve the administration of justice and not frustrate it. However, the rule is not

[17] Although *Murray* does provide support for striking a Rule 3.853 *pro se* DNA motion where the scope of appointment of existing counsel included the specific purpose of representation on a Rule 3.853 DNA motion, in this case Judge Greider granted leave for counsel to file a Rule 3.853 motion that related back to the September 2009 *pro se* DNA motion filed by Mr. Lambrix. That motion was never filed because of the intervening disqualification issue, so Judge Greider ruled on the orally adopted motion.

unyielding." *Sheppard* at 285. This is surely one of those situations where the rule should not apply, especially in consideration of Mr. Lambrix's well-documented concerns about current counsel and the *ore tenus* order allowing the adoption of an old *pro se* DNA testing motion weeks before. As the *Sheppard* court noted, "[t]he administration of justice is further frustrated by the consequence that these allegations, once stricken because a defendant is represented by counsel, may reappear on postconviction in allegations of ineffective assistance of counsel requiring both the State and defense counsel to respond to those allegations later rather than sooner." *Id*. at 286. Keeping counsel and Mr. Lambrix in the dark about why Judge Corbin was removed and what the relationship of Ms. Follet was to the principals is a frustration of the administration of justice.

The lower court dismissed counsel's motion for withdrawal of the order striking Mr. Lambrix's *pro se* motion to disqualify the Judge and then struck counsel's "Limited Adoption" of Mr. Lambrix's *pro se* motion to disqualify. (PCR2. 766-767). The court's explanation was that the motion for withdrawal was untimely and that since the court had entered orders denying defendant's Rule 3.853 and 3.851 motions on July 19, 2010, two days prior to the filing date of the Defendant's July 21, 2010 Motion for Withdrawal of June 17, 2010 Order Striking Defendant's Pro Se Motion, and "[a]s such, all judicial labor in this case was completed prior to the filing of the notice." *Id.* at 767. This was a misstatement of

facts in that counsel subsequently filed a timely motion for rehearing on August 2, 2010. (PCR2. at 901-909).

Mr. Lambrix was entitled to full and fair rule 3.851 proceedings. *Holland v. State,* 503 So. 2d 1354 (Fla. 1987); *see also Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994). This includes a fair determination of the issues by a neutral, detached judge. The circumstances of this case are of such a nature that they are sufficient to warrant an objectively reasonable fear on Mr. Lambrix's part that he did not receive a fair hearing and did not receive a fair determination of his motion for rehearing. *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988). The United States Supreme Court recently reiterated that "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co., Inc.* 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court has long recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. **This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.** The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness,

> ‘generating the feeling, so important to a popular government, that justice has been done,’ by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (internal citations omitted)(emphasis added). Due process guarantees the right to a neutral, detached judiciary in order “to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.” *Carey v. Piphus*, 425 U.S. 247, 262 (1978).

A party may present a motion to disqualify at any point in the proceedings as long as there remains some action for the judge to take. If the motion is legally sufficient, “the judge shall proceed no further.” Fla. Stat. § 38.10 (1995), *see also Lake v. Edwards*, 501 So. 2d 759, 760 (Fla. 5th DCA 1987) (holding that ruling on a motion for new trial is an action "further" to the filing of a motion to and therefore improper). Rule 2.330 of the Rules of Judicial Administration similarly provides that "[i]f the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Fla. R. Jud. Admin. 2.330(f).

Florida courts have repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "**shall not pass on the truth of**

the facts alleged nor adjudicate the question of disqualification." *Suarez v. Dugger*, 527 So. 2d 191 (Fla. 1988) (emphasis added). *Livingston v. State*, 441 So. 2d 1083 (Fla. 1983); *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978); *Digeronimo v. Reasbeck*, 528 So. 2d 556 (Fla. 4th DCA 1988); *Ryon v. Reasbeck*, 525 So. 2d 1025 (Fla. 4th DCA 1988); *Fruhe v. Reasbeck*, 525 So. 2d 471 (Fla. 4th DCA 1988); *Lake v. Edwards*, 501 So. 2d 759 (Fla. 5th DCA 1987); *Davis v. Nutaro*, 510 So. 2d 304 (Fla. 4th DCA 1986); *ATS Melbourne, Inc. v. Jackson*, 473 So. 2d 280 (Fla. 5th DCA 1985); *Gieseke v. Moriarty*, 471 So. 2d 80 (Fla. 4th DCA 1985); *Management Corp. v. Grossman*, 396 So. 2d 1169 (Fla. 3rd DCA 1981). *See also Chastine v. Broome*, 629 So. 2d 293 (Fla. 4th DCA 1993).

The appearance of impropriety violates state and federal constitutional rights to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Under the circumstances, Mr. Lambrix was compelled to file a motion to disqualify Judge Greider and the other members of the 20th Judicial Circuit.

Florida law imposed an obligation on Judges Corbin, Greider and Cary to disclose to the parties any evidence of bias that they 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 the judges' 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 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.

The claims of judicial bias herein present federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the

Florida Constitution and applicable state law. 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).

ARGUMENT VI

PUBLIC RECORDS DUE PROCESS VIOLATION

In Claim I of his 3.851 motion, Mr. Lambrix argued that section 119.19 of the Florida Statutes and Florida Rule of Criminal Procedure 3.852 are unconstitutional. The lower court denied relief on the grounds that Mr. Lambrix did not identify a statute or rule requiring the disclosure of the documents that the state failed to disclose. (PCR2. at 798).

In denying this claim, the court overlooked or misapprehended facts and law specifically pled. For instance, Mr. Lambrix specifically pled that he made a diligent search for the records and contacted the Repository and that the statue and rule at issue operate in such a way as to impinge his constitutional rights. Trial counsel also engaged in discovery with the State. He requested and was provided documents pertaining to FDLE testing but was never provided the documents at issue herein.

The Court also denied Mr. Lambrix's motion on the grounds that Rule 3.852 does not require court permission to seek documents. However, the motion specifically pled that counsel did indeed contact the Repository for production of records. Indeed, the motion contained the full recitation of a letter sent by counsel to the Repository after counsel received newly discovered documents from a third party. (See PCR2. at 11-12) The motion also specifically pled that on November 17, 2008, the Repository advised counsel that it had only received three boxes of records in the case of Cary Michael Lambrix: Box 152 from the Department of Corrections; Box 153 a sealed box from Department of Corrections, and Box 683, a box from the State Attorney, 20th Judicial Circuit. The Repository informed counsel that FDLE had never produced any records to it. Counsel requested that a compact disk of all the records in the repository be provided to make certain that FDLE had never produced any records to the repository.

Upon diligent investigation it was revealed that the only documents related to FDLE in the records repository collection of Mr. Lambrix were three file units or folders within the State Attorney production: #8 FDLE Connie Smith report/notes (73 pages), #25 Lab report and submission notes (48 pages), and #26, Crime scene and evidence reports (4 pages). Therefore the SAO file contained a total of 52 pages of FDLE lab related documents. The FDLE never made any agency production to the records repository in Mr. Lambrix's case. Moreover,

FDLE never produced these documents at any time during the pendency of the trial, direct appeal or postconviction proceedings despite requests from counsel at these stages.

Fla. Stat. Section 119.19 and Fla. R. Crim. P. 3.852 should be held to be unconstitutional because none of the production done through the statute or the rule to the Repository was able to safeguard against the failure of the FDLE to providing certain critical FDLE Crime Lab documents to Mr. Lambrix. Instead, merely by happenstance, a third party received those documents and provided copies to counsel. The procedural obstacle course that is 3.852 and section 119.19 so thoroughly confuses litigants and agencies alike as to render it unconstitutional on its face and as it is applied. The record does not refute that Mr. Lambrix is not entitled to relief.

Additional issues appear to include the fact that there is no open file policy in 20th Judicial Circuit. There appears to be a practice and policy of withholding material evidence, for example the photographs of the alleged pond taken by state attorney McGruther that were previously litigated in the instant case. Whether all the FDLE Lab notes and any and all State Attorney notes concerning communication with FDLE have been provided is unknown. In fact it is very concerning that the state attorney records produced to the repository contain only a small fraction of the FDLE records produced to Mike Hickey and transferred to

CCRC South counsel. See *Johnson v. State*, 44 So. 2d 51,72 (Fla. 2010)(State has failed to show that "there is no reasonable possibility that the error contributed to the [death sentences]" *Guzman*, 941 So. 2d at 1050, quoted).

The self evident violations of public records law present federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. 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).

CONCLUSION

The six arguments in support of relief herein present federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. This Court is herein provided with the opportunity to review and correct these claimed violations of Mr.

Lambrix's federal and state constitutional rights.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing 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 14th day of March, 2011.

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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