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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

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

In the State's zeal to belittle Mr. Lambrix it proclaims that there is no constitutional right to counsel in postconviction matters. While this may be technically true,[1] the State nonetheless, and quite ironically, proclaims that Mr. Lambrix has no right to discharge appointed counsel and represent himself. This strange confluence of arguments forces Mr. Lambrix into a procedural no man's land where he has no constitutional right to counsel yet is forced to be represented by appointed counsel against his desire to represent himself. The state asserts that there is no law that allows for Mr. Lambrix to represent himself and contends that *Farretta* and *Durocher* do not apply to Mr. Lambrix's position. However, the State fails to present this Court with any case negating Mr. Lambrix's claim. Rather, the State cites to *McDonald v. State*, 952 So. 2d 488 (Fla. 2006) which stands for the proposition that a postconviction defendant has a right to self representation. The State's argument is that Mr. Lambrix is not entitled to self-representation because his claim is a successive postconviction proceeding not an

[1] Nonetheless, the State of Florida has granted postconviction death penalty litigants the right to counsel. *See* Fla. R. Crim. P. 3.851(b); §27.7001, *et seq.*, Fla. Stat. (2011).

original one as was in *McDonald*[2].

Mr. Lambrix is not asserting that self-representation is absolutely required in all circumstances. Indeed, *Farretta* has its limitations and does not require self-representation in all cases. What Mr. Lambrix is asserting is that where he understands the proceedings and desires to represent himself, applicable case law such as *Farretta*, *Durocher* and *McDonald* operate to permit self-representation. The State's logic is as circular and flawed as the circuit court's when in proclaimed that Mr. Lambrix could waive appointed counsel only if he waives his postconviction rights.

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[2] In its Statement of the Case and Facts the State unfairly characterizes Mr. Lambrix as an abusive appellant who repeatedly attempts to manipulate the judicial process. (State's Brief at 19). Mr. Lambrix joins the State in encouraging this Court to address this alleged "due process" issue – but doing so under the limited parameters of this instant appeal of the summary denial of Mr. Lambrix's Rule 3.851 and Rule 3.853 motions is not the proper forum. Due process requires that Mr. Lambrix be provided what he has been denied below, a fair and meaningful opportunity to present evidence relevant to the extraordinary circumstances applicable to Mr. Lambrix's collective attempts to pursue state post conviction relief. This Court should remand the instant case to the circuit court with instructions to convene a full and fair evidentiary process, allowing witnesses and evidence to be presented by both parties, relevant to the state postconviction process Mr. Lambrix has received. The facts and evidence will establish that the delays in Mr. Lambrix's case are attributable to the State and not to Mr. Lambrix. See *Swafford v. State*, 679 So. 2d 736, 741 (Fla. 1996)(Harding, J concurring)("the post conviction process still may appear inordinately long to the general public in some cases. However, neither public perception nor the reality of a lengthy post conviction process justifies foreclosing meritorious claims of newly discovered evidence. While finality in important in all legal proceedings, its importance must be tempered by the finality of the death penalty").

The State, along with the circuit court contends that Mr. Lambrix's waiver of counsel was "equivocal." (State's Brief at 24). This is a misinterpretation of Mr. Lambrix's testimony. He stated that he may want to re-assert his right to counsel if circumstances develop in the future where he did not feel he was competent to represent himself. This would be a situation such as litigation under a death warrant or another critical stage of the proceedings beyond the current state postconviction process. The state cites to no authority that prohibits a pro se defendant from asserting his right to counsel if the circumstances under which self-representation has been asserted have changed and the defendant is no longer able to adequately represent himself.

The circuit court concluded that since Mr. Lambrix "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). Notwithstanding the State and the court's attempt to explain this inconsistency away, the court is most certainly is requiring Mr. Lambrix to waive his right to proceed with his postconviction proceedings in order to waive his right to counsel. Such a Hobson's choice is inconsistent with the constitutional right to represent one's self. If a defendant in a postconviction matter can only represent himself if he waives his post conviction claims then there

is nothing left for him in which to represent himself. The right of self-representation becomes a hollow, purely academic fiction that may interest lawyers in a discussion but does not further a defendant's constitutional rights.

The State also claims that Mr. Lambrix has been able to enjoy "hybrid" representation. This is simply not the case and is not born out by the record. The only pro se motion arguably to have been considered was the DNA motion. In fact, the DNA motion was initially not heard by the circuit court and was, as the court recalled at the case management conference and the state reiterates in it brief, "dismissed as a nullity since Lambrix was represented by counsel." (State's Brief at 28). The only reason the DNA motion was heard was because counsel adopted the motion at the case management conference. Every other pro se motion Mr. Lambrix has filed in circuit court and this Court has been dismissed as improvidently filed because Mr. Lambrix is represented by appointed counsel. This is hardly hybrid. Rather, it is evident from the record that Mr. Lambrix has desired to represent himself, has filed numerous pleadings on his own and has not been able to get those pleadings heard by courts precisely because counsel has been appointed to him. His knowing, intelligent and voluntary waiver of counsel evidenced at the January 21, 2010 hearing indicates that the circuit court erred in not discharging appointed counsel and allowing Mr. Lambrix to represent himself.

The State further suggests that Mr. Lambrix is attempting to "manipulate"

the judicial process by attempting to exercise his right to self-representation. (State's Brief at 25). The focus of the State's argument seems to be that Mr. Lambrix is not entitled to represent himself in a successive postconviction proceeding and his attempts at doing so amount to some sort of legal stunt. In putting forth this theory, the State seems to be arguing that there is a right to self-representation in postconviction but since there is no case law specifically addressing self-representation during "successive" postconviction proceedings Mr. Lambrix must have appointed counsel forced upon him in the face of a clear and unequivocal desire to represent himself. The State cites *McDonald v. State*, 952 So. 2d 488 (Fla. 2006), for the proposition that a postconviction defendant can be allowed to waive counsel but states such representation is, quite obviously, not compelled. (State's Brief at 23). The State utterly fails to address the circuit court hearing where it was clearly established that Mr. Lambrix was desirous and capable of self-representation.

Instead, the State argues, in a thinly veiled ad hominem attack upon Mr. Lambrix and appointed counsel, that violating Mr. Lambrix's right to self-representation is a "benefit to the entire judicial system" because it will lessen frivolous claims. (State's Brief at 25-26.) The State claims support for this assertion in *Logan v. State*, 846 So. 2d 472 (Fla. 2003). However, a reading of *Logan* does not disclose such policy consideration by this Court. Rather, what

Logan stands for is the proposition that a defendant has the constitutional right to waive counsel and represent himself. *Id.,* at 475. This Court did rule that a represented defendant is subject to having pro se pleading stricken where he does not also unequivocally ask to have counsel discharged. *Id.* Since Mr. Lambrix quite clearly and unequivocally sought to discharge counsel in his motion which stated in the conclusion 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). Thus, contrary the State's position, *Logan* actually lends support to Mr. Lambrix's argument that he has a right to represent himself.

Logan, does not stand for the proposition the State contends. The State seeks to twist *Logan* into justification to accept expedience and ease over a defendant's constitutional rights. Such a conclusion is anathema to the Constitution. Indeed, constitutional protections exist in order to protect against expedience. In other words, constitutional protections cannot give way to expedience or because the judicial system will have an easier time of it. It is that very concern for the unfettered power of "the system" that gave rise to protections we hold so dear and that lawyers have fought to uphold for generations.

Finally, the State attempts to inject a prejudice analysis into Mr. Lambrix's

right to self-representation. The State seems to require Mr. Lambrix to identify claims not raised that he would have as a ground for being permitted to represent himself. In the State's zeal to present this unique and legally unsupported argument, it fails to cite any case law in support. Such conjecture by the State misses the point of Mr. Lambrix's argument; that he has a constitutional right to represent himself and that right was violated by the circuit court's ruling.

Mr. Lambrix, therefore, should have been allowed to exercise his right to self-representation and discharge counsel pursuant to *Durocher*. *See also, 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 II

MOTION FOR DNA TESTING

Mr. Lambrix sought to have blonde hairs found bundled with the alleged murder weapon tested through mitochondrial DNA testing. The blonde hairs were found bundled in a shirt with a tire iron that was claimed to be the murder weapon. Mr. Lambrix sought to have the hairs tested to establish that they belonged to the State's star witness, Frances Smith. The State claims that Mr. Lambrix's claim is purely speculative. However, the State agrees that the hairs could be linked to

Smith. (State's Brief at 30). Since the State agrees the hairs could be Smith's, its claim of speculation rings hollow. (State's Brief at 30) *See also, Hitchcock v. State*, 866 So 2d 23 (Fla. 2004). Furthermore, the state misconstrues Mr. Lambrix's position regarding the DNA testing. Mr. Lambrix was not moving to test the hairs in order to prove that Smith fabricated the tire iron. (State's brief at 30). Rather, Mr. Lambrix sought to have the hairs tested to establish that Smith was involved in a conspiracy and collaboration with law enforcement in planting the tire iron at the location where it was found. The State claims that because the evidence of Smith's conspiracy and collaboration was not accepted previously there is no merit to his motion. However, establishing that the hairs belonged to Smith will shed further scientific light on her conspiracy and collaboration with law enforcement such that those previous determinations lack sufficient reliability. In other words, if the hairs belong to Smith, all of the conclusions regarding Smith's testimony, her sex with Daniels, her immunity deal and her collaboration with law enforcement must be revisited. Thus, the previous factual determinations are not, as the State contends, a bar to 3.853 relief, they are reason to order the testing to insure the reliability of those determinations.

The State also incorrectly focuses on the notion that Mr. Lambrix is not entitled to DNA testing because if the hairs belong to Smith it would not exonerate him. The state fails to discuss how the DNA evidence would mitigate Mr.

Lambrix's sentence. Frances Smith was the undisputed hub of the state's case. Therefore, her credibility is extraordinarily critical. A finding of her hair on the alleged murder weapon would inculpate her and cast serious doubts upon her credibility. With Smith's credibility compromised it is reasonably likely that the jury, now viewing the testimony of the State's star witness with a jaundiced eye, would have not voted to impose the death penalty or even could have chosen to convict him of a lesser crime than first-degree murder. Such a situation is exactly what is contemplated in Rule 3.853 and the trial court erred by summarily denying Mr. Lambrix relief. Thus, Mr. Lambrix has established the threshold for DNA testing and the court's order denying him the opportunity to test the DNA is a violation of due process and should be reversed. *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).

In that the lower courts summarily denied Mr. Lambrix's specifically pled allegations of materiality of the DNA evidence, clearly a factual dispute exists that requires an evidentiary process. Mr. Lambrix provides notice of exhaustion with intent to pursue civil action under *Skinner v. Switzer*, 131 S.Ct. ___ (2011) that the failure to provide a full and meaningful evidentiary process to address the materiality of DNA evidence violates due process under the Fifth and Fourteenth

Amendments of the U.S. Constitution, rendering Florida's "process" applicable to DNA testing and materiality fundamentally unfair. The Rule 3.853 process that allows the summary denial of a Rule 3.853 DNA testing motion to be based upon factual determinations of materiality without ever allowing defendant's like Mr. Lambrix to present the necessary witnesses and evidence to establish materiality is fundamentally unfair and violates due process.

ARGUMENT III

THE BRADY/GIGLIO VIOLATION

With regard to this issue, the lower court as well as the State fail to appreciate the significance of the fact that included in the newly discovered documentation is a note from the Assistant State Attorney McGruther to FDLE laboratory personnel directing them not to conduct forensic testing on the shirt, hairs or tire iron, the alleged murder weapon. In more stark language, the prosecutor ordered FDLE personnel not to conduct forensic testing on the item he claimed was the murder weapon or the bundle in which is was allegedly found. In connection with the State's admission that the hairs could have come from Frances Smith, such undisclosed information only seeks to enhance Mr. Lambrix's long held claim that Smith was engaged in a conspiracy and collaborated with law enforcement and the prosecution.

As has been argued, but overlooked by the State, the prosecution in this case

needed to have a theory of motive to hang a first-degree murder charge and conviction on Mr. Lambrix. The theory they arrived at was that Mr. Lambrix killed the victims to steal Lamberson's car. In order to make this theory of prosecution plausible, they had to deal with Frances Smith. Smith was found by police, alone, driving victim Lamberson's car. Thus, in order to frame the prosecution of Mr. Lambrix that it was he who wanted the car, Smith had to be dealt with. If the prosecution had to face evidence that the alleged murder weapon was found with Frances Smith's hair on, her testimony that that she was forced into her role by Mr. Lambrix would have been compromised. As is evident from even the most cursory view of the record, Frances Smith was the hub and the star witness against Mr. Lambrix. With out Frances Smith, there was no case against Mr. Lambrix. So the State had to hide or disavow anything that would negatively impact her testimony. This is why the letter from the prosecutor directing FDLE not to test the alleged murder weapon is so important and, had trial counsel had it, would have produced a different outcome at trial.

In short, the evidence in the newly discovered documents would have, at the very minimum, served to impeach Frances Smith's testimony and her version of the events. It would also have established the conspiracy and collaboration between her and the State. In connection with her affair with Investigator Daniels and her immunity deal, her testimony would have been eviscerated and the case

against Mr. Lambrix would have fallen to pieces. The record does not conclusively refute Mr. Lambrix's entitlement to relief and he should have been entitled to an evidentiary hearing.

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE AND THE FAILURE TO GRANT AN EVIDENTIARY HEARING

The State questions the existence of this issue but during the case management conference counsel for 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). As fully detailed in the Rule 3.851 motion and the initial brief, there are numerous documents never previously presented to Mr. Lambrix during the long history of this case. If the state's case is so overwhelmingly compelling it seems inconceivable that it would hide the amount of evidence that was recently uncovered. (PCR2 19-25). The only conclusion to be drawn is that the State was so compelled to safeguard Frances Smith's testimony from attack that it failed to disclose the numerous documents detailed in the successive 3.851 motion.

The State claims that no cumulative analysis need be undertaken with regard to the claims previously made on Mr. Lambrix's behalf. (State's Brief at 41). The State fails to recall that by its own admission, all roads lead to Frances Smith. The State's reliance on Smith cannot be overemphasized. During closing argument the

state 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.

Not only was Smith's credibility critical at trial it was critical during the evidentiary hearing where her testimony was either believed or not depending on the issue at hand. For instance, Smith was not credible when she said she had sex with Daniels and was concomitantly credible when she claimed she had no immunity deal. If nothing else, the decision to prohibit testing of the alleged murder weapon to protect Smith's testimony gravely impacts the evidence against Mr. Lambrix. The State passes this decision off as a decision based on the other evidence which made further testing "simply unnecessary." (State's Brief at 42). It is inconceivable that forensic testing of the murder weapon would be considered "simply unnecessary" in a first-degree murder prosecution where the death penalty was being sought.

The record does not conclusively refute that Mr. Lambrix is not entitled to relief and an evidentiary hearing should have been held. 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)(evidentiary hearing to determine why issue 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).

ARGUMENT V

JUDGE DISQUALIFICATION

It has long been held that all litigants are "entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). The State takes issue with Mr. Lambrix for not attacking predecessor judge, Judge Corbin's, denial of his motion to disqualify. (State's Brief at 43, n. 3). However, notwithstanding Judge Corbin's denial, the case was soon after abruptly and inexplicably transferred to Judge Grieder. Thus, any challenge to Judge Corbin's ruling would be moot and a waste of judicial resources since he is no longer presiding over Mr. Lambrix's case. Rather, Mr. Lambrix does challenge the denial of his legally sufficient claim that he would not receive a fair hearing before Judge Grieder.

By the time the circuit court received Mr. Lambrix's pro se Motion to Disqualify, the court was well aware of his desire to represent himself. The

hearing on Mr. Lambrix's Durocher motion had already taken place so the court was fully aware of Mr. Lambrix's desire. Nonetheless, the court struck Mr. Lambrix's motion to disqualify based on the fact that he was represented by appointed counsel and thus, at the states urging, the motion was a nullity. It is worth noting that in a recent United States Supreme Court case, the Court granted relief to a Florida defendant whose petitions to this Court were stricken due to his representation by appointed counsel. *See Holland v. Florida*, 130 S.Ct. 2549, 2559 (2010). In granting Holland relief, the Supreme Court emphasized the need to avoid inflexible mechanical rules. Specifically the Court stated "we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity." *Id.*, at 2563, quoting *Hazel-Atlas Glass Com. V. Hartford-Empire Co.*, 322 U.S. 238, 248 (1994). Thus, knowing full well Mr. Lambrix's desire for self-representation, the circuit court inflexibly applied a strict rule that was identified as unworkable by the Supreme Court in *Holland*, and upheld the evil of archaic rigidity by striking Mr. Lambrix's pro se motion to disqualify.

Irrespective of the circuit court's rigid adherence to mechanical rules, Mr. Lambrix presented a legally sufficient motion for disqualification. He identified, among other things, that the Staff Attorney assigned to assist Judge Grieder, Nicole

Follet, had previously represented Mr. Lambrix. Given that Attorney Follet's representation of Mr. Lambrix granted her attorney client privilege and access to privileged information, it is no wonder that he has a well-found belief he cannot get a fair hearing when his former lawyer is now, in essence, working for the judge. It is important to note, that from the time that Mr. Lambrix identified Ms. Follet as his former lawyer, no one, not the State, not the court and not Ms. Follet herself, has disputed that fact. Rather, the State and the court would prefer to grip onto a rigid rule of questionable value, in an effort to mechanically deny Mr. Lambrix relief rather than address the undisputed facts. This is because once the undisputed facts are considered there only alternative is to grant Mr. Lambrix's motion for disqualification.

ARGUMENT VI

PUBLIC RECORDS DUE PROCESS VIOLATION

The public records process in Mr. Lambrix's case was fundamentally flawed. Trial counsel and postconviction counsel filed numerous discovery and public records requests directed to the state attorney and FDLE, but the state never disclosed many pages of FDLE laboratory records until a private researcher obtained them. The State's Reply brief states that "Lambrix offers this claim despite the fact that he never even requested FDLE documents under Rule 3.852

(V8/34-35), and whatever request may have been made in 1987 under Section 119.19 was not offered to the court below and is not in the record." Reply brief at 47.

This is the first time that the State has ever challenged the facts pled in circuit court concerning the production of public records in the Lambrix case by FDLE to in 1987 or requested by inference a copy of CCR's 1987 records request. The invoice to CCR is dated March 30, 1987 and entitled "PUBLIC RECORDS REQUEST: Cary Michael Lambrix" and is part of the instant record as an Attachment B to the motion below. (PCR2. 81-82) The record also includes an FDLE internal notice from the Division of Staff Services to the general counsel that refers to "Public Records Request 87-050" indicating that FDLE had in hand the CCR request made in 1987. (PCR2. at 83). The invoice notes that FDLE was producing 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. Mr. Lambrix pled that the FDLE material in CCRC South's files revealed that only 41 original pages of the 696 pages produced by FDLE to CCR counsel in 1987 was "Lab Case Pages" related to FDLE testing. In 1987 CCR public records requests were made under Chapter 119 and routinely requested "any and all" public records in possession of the agency they were directed to concerning the particular case at issue. The State has never produced any objection filed by FDLE to production of

records under the public records law in effect in 1987.

The FDLE lab notes and reports obtained in September 2008 included 189 lab case pages and documents retained by FDLE under Lab Case # 830231411. This material along with 48 pages of FDLE lab notes that were included in a unreported and unsolicited production to the records repository from the Labelle, Florida branch of the State Attorney's Office on July 7, 1999, contain information that was not provided to CCR/Mr. Lambrix by FDLE in 1987. As pled below the content of the FDLE lab reports discovered in 2008 differed materially from the 1987 production to CCR by FDLE, which included only 41 unduplicated pages of Lab documents (out of a total of sixty-nine pages of lab documents produced which included 28 duplicate pages). 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 documents related to FDLE in the records repository collection of Mr. Lambrix were the three file units or folders within the La Belle,

Florida, State Attorney production.

The State's Reply includes the disingenuous comment that "[t]he rule is not invalid simply because Lambrix and his attorneys lack the cognitive ability to understand a rule of procedure which places an obligation on them to affirmatively seek public records."[3] (State's Brief at 48). The fact is that CCR and Mr. Lambrix had every right to expect FDLE to provide copies of all its records in response to CCR's records request in 1987.[4] Likewise, the State Attorney should have provided copies of all the FDLE records it had as part of discovery before the trial and later in postconviction.

The lower court's order denying relief found that "Defendant has not asserted that the State had received the cited records from FDLE, or knew that they existed." (PCR2 at 799). This finding overlooks the obvious fact that FDLE is the State. The lower court's finding which has been repeated in the State's Answer is contrary to the long established principle that recognizes that the State must disclose exculpatory or impeachment evidence in its possession or in the possession of its agents or law enforcement agencies involved in the case even if

[3] It should be noted that neither Mr. Lambrix nor counsel will endeavor to respond to the State's churlish ad hominem attacks.

[4] The language of Rule 3.852(a)(2) specifically notes that "This rule shall not be a basis for renewing requests that have been initiated previously or for relitigating issues pertaining to production of public records upon which a court has ruled prior to October 1, 1998."

the defendant does not specifically request disclosure. *United States v. Agurs*, 427 U.S. 97, 107-11 (1976); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001)(granting new trial upon finding that state failed to disclose discoverable material held in possession of law enforcement agency involved in case).

The only indication that Mr. Lambrix had that there were records beyond what was produced by FDLE in 1987 was the notification by private researcher Michael Hickey in 2008 that he had obtained substantial additional FDLE lab records that contained exculpatory material relevant for impeachment purposes and calling into question witness Frances Smith's credibility and honesty. A review of the records raised the likelihood of deliberate concealment of these FDLE lab records and notes by both FDLE and the State Attorney as has been pled below.

This case is indicative of what has become only too common – the State's deliberate failure to comply with numerous public records requests over many years until they are discovered to have been withholding materials. Then the State argues that there are due diligence problems and procedural bars for the defendant failing to comply with the confusing and inconsistently applied portions of Chapter 119 and Fla. R. Crim. P. Rule 3.852. Summary denial below was specifically based upon a finding that Mr. Lambrix failed to establish the materiality of the FDLE crime lab records, and that he failed to show that these FDLE crime lab

records could not have been discovered by due diligence. (PCR2, 752-55). The lower court relied upon and adopted the State's erroneous argument that since the FDLE crime lab records and memos originated in the FDLE and not the State Attorney's office, the State had no constitutional obligation to disclose the records to Mr. Lambrix because he could have obtained them himself.

As this Court provided in *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001)("As provided in *Strickler v. Green*, 527 U.S. 263, 289-90 (1999), even where the prosecutor does not know about the existence of the exculpatory material, a suppression may still be deemed to have occurred if the state agents possess the evidence and it was not disclosed"). The issue of whether all the FDLE Lab records at issue were or were not in the State Attorney file is a red herring. The knowledge about the exculpatory content of the FDLE Lab files was known by the State Attorney and concealed from Mr. Lambrix. As noted in the pleadings below, State Attorney McGruther was aware of the content of these records, thus was in constructive possession of the information contained in them in any case, as is borne out by the contents of the records. (PCR2. 19-25)("McGruther will research file and discuss which exams are necessary" Id. at 23).

Mr. Lambrix has argued that both trial counsel and post conviction counsel made the appropriate requests for all the FDLE documents. The State had a discovery responsibility at trial and an on-going responsibility under *Brady* to

produce exculpatory information to Mr. Lambrix during the pendency of post conviction proceedings. This the State deliberately failed to do. In post conviction the 1987 request directed by CCR to FDLE resulted in the production of 696 pages of documents which included 69 pages of lab documents, 28 pages of which were duplicates. Thus 41 pages of FDLE Lab records were produced by FDLE in 1987.

While the State's reply correctly states that CCRC sent a June 2008 public records request to the State Attorney, that request was directed to documents concerning Frances Smith and her allegations of sexual involvement with the State Attorney investigator, not to FDLE lab notes or reports. Mr. Lambrix simply had no way to know about the existence of additional FDLE Lab notes and reports beyond what had been produced by FDLE in 1987 until September 2008 when independent researcher Hickey contacted CCRC. Hickey provided CCRC with copies of the 189 pages of FDLE Lab reports and notes that he obtained from FDLE related to the Lambrix case. The State would simply have objected to a CCRC South Rule 3.852 records request directed to FDLE subsequent to the 1987 production as a "fishing expedition" if a request had been made. In any case, once the records were provided by Hickey, the need for such a request was moot. The resulting contact with the repository to make sure that FDLE had never produced the records there resulted in the discovery of 48 pages of FDLE Lab reports and

documents from the SAO files which had apparently been produced to the repository without notice by the LaBelle, Florida branch of the State Attorney's Office on July 7, 1999. The State has conceded that many of the FDLE Lab records were never provided to Mr. Lambrix until 2008. (PCR2, Vol. VI, Transcript of 5/27/10 p. 36)("I do concede, for purposes of this hearing, that these are newly provided records to CCR. So, I am not asking for an evidentiary hearing for them to prove that point").

This Court granted a capital defendant a new trial on very similar facts on Brady grounds in *State v. Huggins*, 788 So. 2d 238, 243 (Fla. 2001). In *Huggins* the State provided hundreds of pages of discovery, but deliberately withheld the few pages of crucial records that were favorable to the defendant. When it was discovered that the State had withheld the few missing pages, the State argued, as in the instant case, that Huggins could have conducted his own public records request and obtained the documents himself. This Court rejected that argument and granted a new trial, finding that under *Brady v. Maryland*. The State was constitutionally required to disclose all of these documents.

The lab notes and reports obtained in September 2008 contain information never before provided to Mr. Lambrix by FDLE. Mr. Lambrix argued below that the FDLE records were material to his motion and based on the facts pled below. The collective evidence that Mr. Lambrix wanted to present below at an

evidentiary hearing would have supported a reasonable conclusion that the State never actually found or recovered the actual tire iron used at the crime scene and in an attempt to support and bolster Frances Smith's credibility, introduced a substitute with the assistance of Smith. Trial counsel attempted to challenge the origin and authenticity of the tire iron but they did not have the FDLE records to use in impeaching Frances Smith's testimony. This Court must look to the collective circumstances. The undisclosed FDLE records show that there was no forensic evidence linking the tire iron to the case, except for several blond/blondish brown hairs that the State now concedes were probably Frances Smith's.

Most importantly, the concealed FDLE Lab records show that when the FDLE crime lab technician advised the State that testing had found virtually no evidence linking the tire iron and the t-shirt it was wrapped in to the alleged crime, but did find hairs that did not match Mr. Lambrix or either of the victims, the state attorney ordered the FDLE to stop all further testing and to return the evidence to the State Attorney's Office. Thereafter the State concealed all the portions of the FDLE crime lab reports and memos that documented these facts.

This case should be remanded back to the circuit court where Mr. Lambrix can obtain a full and fair opportunity to present the additional corroborating evidence of other acts of fabrication, presentation of false evidence and testimony. See *Roberts v. State*, 678 So. 2d 1232 (Fla. 1996); *Johnson v. Singletary*, 647 So.

2d 106, 111 (Fla. 1994); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). The only question properly before this court is whether Mr. Lambrix's pled allegations, which must be accepted at this juncture as true, established a prima facie entitlement to relief. As this Court recognized in *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000), "In cases where there has been no evidentiary hearing we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record."[5]

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.

[5] Mr. Lambrix again provides notice of exhaustion with intent to pursue civil action under *Skinner v. Switzer*, 131 S.Ct. ___ (2011) concerning the Florida public records process under Rule 3.852 that improperly advocates noncompliance by the State with constitutionally mandated discovery and rewards the State for deliberate misconduct when, as here, they hide the ball and the fail to provide a full and meaningful evidentiary process. Such action violates due process under the Fifth and Fourteenth Amendments of the U.S. Constitution, rendering Florida's "process" applicable to public records production under Rule 3.852 fundamentally unfair.

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 7th day of June, 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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