IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO: ________________

IN RE: CARY MICHAEL LAMBRIX,
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APPLICATION FOR LEAVE TO FILE SECOND OR SUCCESSIVE HABEAS CORPUS PETITION BASED UPON NEWLY DISCOVERED EVIDENCE ESTABLISHING INNOCENCE

PETITIONER, Cary Michael Lambrix, by and through undersigned counsel, now moves this Court for leave to file a second or successive habeas corpus petition in the District Court pursuant to 28 U.S.C. § 2244(b)(2)(B)(ii).

This application is brought based upon newly discovered evidence due to actions attributable exclusively to the State of Florida in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Applicant could not have previously discovered this evidence by the exercise of due diligence prior to the filing of Applicant's previous habeas petition. When properly considered in light of the evidence as a whole, establishes by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the Applicant guilty of the underlying offense.

Applicant also invokes entitlement to relief based upon the fundamental miscarriage of justice doctrine set forth in *Schulp v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2005), by relying upon newly discovered evidence that constitutes exculpatory scientific evidence and critical physical evidence that was not presented at trial. This evidence is sufficient to open the door to a full and fair

review of numerous substantive constitutional errors that no State or Federal court has allowed review upon, due to the attachment of procedural bars.

As provided in Section V, *infra*, Standard of Review Applicable to Instant Application, Applicant submits that, as this Court has recognized in *In re Holladay*, 331 F.3d 1169, 1173-74 (11th Cir. 2003), a § 2244(b)(2)(B) Applicant "need only establish a prima facie showing sufficient to warrant a fuller exploration by the District Court," and that "a prima facie showing is not a particularly high standard." *Id.*, at 1173. Further, this Court must accept "as true for the purpose of evaluating the application" the Applicant's factual assertions. *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). Any factual disputes, including those pertaining to "due diligence," can only be resolved through a proper evidentiary process before the district court.

Further, this Court must be especially mindful that "the principles of fundamental fairness underlie the writ of habeas corpus," *Engle v. Isaac*, 456 U.S. 107, 126 (1982), *quoting Sanders v. United States*, 373 U.S. 1, 17-18 (1963), and that consistent with these constitutional principles of due process, habeas corpus proceedings "must remain flexible" to protect against manifest injustice. *Holland v. Florida*, 560 U.S. 631 (2010); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2012); *see also*, *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("the scope and flexibility of the writ–its ability to cut through barriers of form and procedural mazes–have always been emphasized and zealously guarded by the Courts.").

Congress never intended for § 2244(b)(2)(B) to erect an unyielding barrier that effectively eliminates any possibility of a grant of leave to file a second or successive federal habeas. *See* 141 CONG. REC. 57,808-01, 57,825 (1995) (statement of Sen. Hatch during debate of proposed Hatch-Spector AEDPA bill) ("[I]f the petitioner is innocent, he or she can have a successive habeas corpus petition and our bill contains a safety valve which permits federal courts to hear legitimate innocence claims. . . anytime someone can show innocence, we will allow that.").

In recent years, the Supreme Court has expressed a growing concern for the manner in which the lower federal courts are interpreting and applying the AEDPA. *See, e.g., Magwood v. Patterson*, 561 U.S. 320 (2010); *McQuiggin v. Perkins*, *supra*, *Holland v. Florida*, *supra*. What is now clear is that the continued constitutional validity of the AEDPA hangs upon the single thread of reasonable interpretation and application by the lower courts. *See In re Davis*, 130 S. Ct. 1 (2010) (questioning the constitutionality of the AEDPA when interpreted and applied to deny review of legitimate claims of innocence); *Felker v. Turpin*, 518 U.S. 651 (1996) (implicitly recognizing that if the provisions of the AEDPA were to be interpreted and applied in a manner that did obstruct meaningful review, then the constitutionality of the AEDPA would become subject to challenge as a suspension of the writ of habeas corpus).

For the reasons provided below and supported by applicable law, when considering the evidence as a whole, the newly discovered evidence presented

herein establishes that extraordinarily rare case in which, by clear and convincing evidence, but for that constitutional error, no reasonable fact finder would have found the Applicant guilty of the underlying offense of premeditated first degree murder. Applicant has established a prima facie showing of entitlement to grant of leave to file a successive habeas petition.

STATEMENT OF THE CASE AND FACTS

The State of Florida has conceded that the wholly circumstantial (i.e., no eyewitnesses to the crimes, no physical or forensic evidence identifying Mr. Lambrix as the murderer, and no confession by Lambrix) theory of the alleged premeditated murders of Clarence Moore, a.k.a., Lawrence Lamberson (hereinafter Moore) and Aleisha Bryant (hereinafter Bryant), rested entirely upon the statement and credibility of key state witness Frances Smith (hereinafter Smith). As the State has explicitly acknowledged in state court proceedings: "[C]learly that 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."[1]

In fact, during opening arguments at trial, the prosecutor characterized Smith as "the hub of the case" because all the other evidence depended entirely upon the jury believing Smith. As the record reflects, Smith has consistently testified that she never personally witnessed Lambrix commit any act of violence upon either Moore or Bryant. Only after she was arrested, while in exclusive

[1] The State of Florida made this statement in the lower court on October 6, 2000 in response to the newly discovered evidence contained herein. *See* pg. 36-37.

possession of victim Moore's automobile, did Smith provide a fabricated story of Lambrix's alleged premeditated murder based upon her allegation that Lambrix confessed that he had killed Moore and Bryant.

It was imperative at trial that Lambrix's defense expose Smith's testimony as farfetched and false, but the evidence necessary to do so was not available to trial counsel due to the State's *Brady/Giglio* violations, which are the subject of the instant application. The facts of this case make the materiality of this undisclosed evidence undeniable, and establish that no rational fact finder would have found Lambrix guilty of the underlying offenses of premeditated first degree murder. The collective weight of this newly discovered evidence would have irreparably impeached Smith's testimony and left the jury with no choice but to acquit Lambrix on all charges. Thus, what makes this particular capital case unique is that Lambrix's consistently pled claim of innocence of the underlying offense of premeditated first degree murder is based upon a claim of being compelled to act in involuntary self-defense, which under Florida law equates to justifiable homicide.[2]

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[2] As this Court recognized recently in *Rozzelle v. Secretary, DOC*, 672 F.3d 1000, 1014-16 (11th Cir. 2012), relying on *Finley v. Johnson*, 243 F.3d 215, 221 (5th Cir. 2009) ("[A] showing of facts which are highly probative of an affirmative defense which if accepted by a jury would result in the defendant's acquittal constitutes a sufficient showing of 'actual innocence.') and *Jones v. Delo*, 56 F.3d 878, 883 (8th Cir. 1995) ("one is actually innocent if the state has the right person charged, but he is not guilty of the crime for which he is charged'; *See also, Rozzelle*, *Id.*, at 1015-16, quoting *Jaramillo v. Stewart*, 340 F.3d 877, 879 (9th Cir. 2003), "claim of justification pursuant to self-defense 'corresponds with actual innocence requirement' *Id.* at 883, as "under Arizona law in effect at the time of the offense charged, justification was an affirmative defense rendering the conduct noncriminal."

Incredibly, although the State of Florida claims to dispute Mr. Lambrix's version of the facts, they have not and cannot produce any evidence to discredit Lambrix's consistently pled claim of self-defense. In fact, when Lambrix actually testified as to his claim of being compelled to act in self-defense, the State of Florida failed to impeach his testimony. In a subsequent oral argument before the Supreme Court of Florida on November 9, 2009, the State conceded that its own evidence is consistent with self-defense.

For the purpose of this application, the Court must look to the evidence as a whole. For that reason, the full facts of this case, including all the evidence developed prior to trial, presented at trial, and subsequently developed in collateral postconviction proceedings is fully set forth in the following.

I. EVENTS LEADING TO THE ARREST AND TRIALS

The murder case brought against Lambrix originated on February 9, 1983 after Smith was arrested on unrelated felony charges while driving a car owned by the male victim in the case, Moore. Initially, Smith told police that the vehicle belonged to her boyfriend–whose name she claimed not to remember. Then she changed her story and claimed that Lambrix picked her up on that morning and had asked her to drive him to a bus station in Plant City, Florida, and instructed her to abandon Moore's vehicle at a nearby intersection. When she was asked by police where Lambrix had obtained the car, she said she did not know as she had not seen Lambrix until that morning, February 9, 1983.

After Smith was arrested and taken into custody she spent the next three days in the Hillsborough County Jail. During that time, Hillsborough County detective Kenneth Mizell contacted Hendry County Sheriff's Office Detective Tommy Vaughn, who informed Mizell that the car that Smith had been driving was connected to a missing person's report filed several days earlier on an Aleisha Bryant. Based upon that information, Mizell interviewed Smith at the Hillsborough County Jail as to any knowledge she had relating to Bryant and her disappearance on or about February 5, 1983.

Smith repeatedly denied any knowledge about the victims, insisting that she was not in Glades County during the week of February 5 through February 9 , 1983, and had no knowledge of anything that may have transpired there. Smith posted bond and was released on February 12, 1983. Thereafter, Smith later reported that she consulted with members of her family and with a privately retained lawyer to weigh her options. The following week she went to the Office of the State Attorney—not to the police—and advised that she had knowledge of a double homicide that happened in Glades County on February 5, 1983.

Smith thereafter explained to authorities that a month earlier she had abruptly abandoned her husband of 14 years and her three minor children and traveled to Glades County with the much younger Lambrix, where the two briefly shared a trailer located on a rural ranch.

Smith stated that on the night of Saturday, February 5, 1983, she had accompanied Lambrix to a local tavern in nearby LaBelle, Florida, where by chance

they met a man named Chip, and were later joined by Bryant, a 19 year old local waitress.[3] The four then spent the remainder of Saturday night and into the early morning hours of Sunday at several local bars before all four returned to the trailer that Lambrix and Smith were sharing.

According to Smith, as she began cooking, Lambrix, Moore, and Bryant sat a few feet away in the adjacent living room, "laughing, teasing and playing around," as Lambrix and Moore drank from a bottle of whisky. Not long thereafter, Lambrix and Moore went outside, leaving Smith and Bryant alone in the trailer. Smith claims that some twenty minutes later, Lambrix returned alone at which time Smith was certain that Lambrix "looked normal." She stated that Lambrix then told Bryant that Moore had something to show her outside. Lambrix and Bryant exited the trailer, leaving Smith on her own.

Smith reported that about forty-five minutes later Lambrix once again returned alone, "covered in blood" and told her "they're dead." She insisted that Lambrix "never said why" and that when she tried to ask him what happened, Lambrix told her that he "didn't want to talk about it." Smith insisted that she did not hear or see anything that transpired outside of the trailer because it was dark and the radio in the trailer was turned up loud.

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[3] The State's investigation established that Chip was actually Clarence Moore, a.k.a., Lawrence Lamberson, a 35 year old career criminal and known associate of South Florida drug smugglers, with a criminal history that included violent assaults against women.

Although Smith claimed that Lambrix grabbed and shook her while he was covered in blood, there was no evidence of any blood being found on her person. She also stated that Lambrix threatened her with violence if she failed to assist him in burying and concealing the bodies. She claimed that Lambrix then washed up and afterwards she rode with him to a local store to purchase a flashlight. Both then stopped at a friend's house to borrow a shovel before returning to the trailer.

Smith claimed that Lambrix forced her to assist in superficially concealing the two bodies in shallow graves, and that at one point Lambrix made her lay down on the ground to measure the grave. Due to rain, the ground was wet and muddy, and yet somehow, Smith did not get dirty. Lambrix and Smith then left the Glades County area, leaving their own vehicles at the trailer and taking only Moore's car.

The following week Smith was arrested and released, having said nothing of a double homicide to the police. It wasn't until a later visit to the State Attorney's Office that she divulged her supposed knowledge of a double homicide. When asked why she failed to report the murders at the time of her arrest, she claimed that she was in fear of Lambrix. Yet at no time during the investigation of the case did Smith request protection. She later admitted that she continued to voluntarily communicate with Mr. Lambrix.[4]

Upon completion of her initial statement to the State Attorney's Office, Smith was allowed to return home. On February 16, 1983, she again met with the

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[4] Smith's claim of fear of Lambrix at the time of her arrest on February 9, 1983 is negated by her booking photo, where she can be seen laughing and smiling, hardly the image of a person exhibiting great fear. *See Appendix E*

authorities, and thereafter led them to the trailer area where the bodies of Moore and Bryant were buried. She also went with State Attorney Investigator Miles "Bob" Daniels (hereinafter Daniels) to a nearby stream where at Smith's direction, the alleged murder weapon, a tire iron, was recovered by a diver.

Based upon the evidence provided by and through Smith, an arrest warrant was issued. The following month, Lambrix was arrested while working at a carnival in Orlando, Florida. On advice of counsel, Lambrix provided no statement to law enforcement. He pled not guilty at his arraignment and has consistently maintained his innocence.

The State Attorney required that Smith submit to a polygraph examination to support her statements implicating Mr. Lambrix in the murders. The report from the polygraph indicated that Smith showed signs of deception. Subsequently, Deborah Hanzel, Smith's cousin's girlfriend, provided a statement to law enforcement concerning Mr. Lambrix and his possible motive. She stated that Lambrix also told her that he killed Moore and Bryant in order to gain possession of Moore's vehicle. During postconviction proceedings, Hanzel recanted this information and claimed that she had been coerced into testifying falsely at trial in order to bolster Smith's testimony. *See Section VI.*

When pressed by the State to provide a motive for the killings of Bryant and Moore, Smith stated that she had witnessed Lambrix searching the pockets of the victims for valuables, and that she saw Lambrix remove a gold necklace from

Moore's neck.[5] However, upon recovery of the two bodies, the medical examiner found both cash and jewelry in the personal effects of Moore and Bryant. This finding impeached Smith's account of Lambrix removing valuables from the victims

Although Smith testified that she never witnessed any acts of violence against Bryant or Moore, she claimed that Lambrix told her that he had choked Bryant, and hit Moore in the back of the head. The medical examiner, Dr. Robert Schultz, who conducted autopsies on the two victims, concluded that there was no evidence to support a finding that Bryant was choked, as he found virtually no signs of bruising or soft tissue damage nor did he find evidence of hemorrhaging in the eyes that usually is present in strangulation.

Dr. Schultz also failed to find evidence supporting Smith's assertion that Moore was hit in the back of the head. To the contrary, his finding was that Moore died as the result of trauma to his left and right temporal area, the front of the head, caused by numerous blows that were consistent with a continuous swinging motion. These findings indicated that Moore was facing his assailant when struck.

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[5] Pre-trial joint investigations by the state attorney, the Glades County Sheriff, and the Florida Department of Law Enforcement (FDLE) failed to locate anyone who had seen Moore with the alleged gold necklace that Smith claimed Lambrix removed from victim Moore. The investigators found that in the weeks prior to his death, Moore had been systematically pawning his possessions and had been forced to vacate his motel room for non-payment. The State never produced any collaborative evidence to support Smith's story about a gold necklace being removed from the body.

Dr. Schultz also concluded that there was no evidence of defensive wounds on Moore. This finding is consistent with Moore being the aggressor.[6]

After Lambrix refused a pre-trial plea offer to second degree he was brought to trial in Glades County, Florida, in December 1983. Lambrix advised his appointed public defenders that he wanted to testify on his own behalf. Legal counsel told him that they believed the State's case for first degree murder was so weak, that allowing him to testify would actually undermine their intended reasonable doubt defense. Lambrix continued to insist that he be allowed to testify in his own defense, at which time counsel improperly compelled the trial court to instruct Lambrix that if he insisted on testifying against counsel's advice, the trial court would discharge counsel and Lambrix would be forced to represent himself.[7] Lambrix was effectively prohibited from testifying at both trials, even though he was the only witness that could describe to the jury what transpired outside leading up to, and resulting in the deaths of Moore and Bryant. *See Section VI.*[8] Lambrix's

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[6] The State of Florida has previously asserted that Mr. Lambrix has mis-characterized this evidence. The transcript of Dr. Schultz's July 26, 1983 pre-trial deposition is attached as Appendix F.

[7] As this Court recognized in *Lambrix v. Singletary*, 72 F.3d 1500, 1508 (11th Cir. 1996), "it is beyond question that an attorney cannot threaten to withdraw during a trial in order to coerce the defendant to relinquish his fundamental right to testify," but this Court then denied habeas relief upon the completely unsupported speculation that Lambrix may have somehow "acquiesced" to not testifying at his second trial. *See also Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (The right to testify is "even more fundamental to a personal defense than the right of self-representation.")

[8] Lambrix did later testify in postconviction proceedings, and provided a detailed description of what happened on the night of the deaths of Bryant and Moore. He recounted how he came upon Moore violently assaulting Bryant, and was required to spontaneously intervene by attempting to stop Moore's assault, only to have Moore turn on him, forcing Lambrix to defend himself. The State of Florida had years to

initial trial lasted only four days. Even though there was no defense was presented beyond the argument that Frances Smith was unbelievable, the jury deliberated for over eleven hours without food or requested medication. Over Lambrix's objection, the trial court declared that deliberations would end due to a hung jury and ordered a mistrial. *Lambrix v. Singletary*, 72 F.3d 1500, 1504-05 (11th Cir. 1996).[9]

Two months later Lambrix was re-tried in Glades County after his motion for venue change was denied. Lambrix again refused to plead guilty to lesser charges. On the eve of the re-trial the presiding judge, Richard Adams, who sat on the bench during Lambrix's first trial, was abruptly removed and replaced by Judge Richard Stanley, who had been a career prosecutor prior to his service on the bench.

From the beginning of the trial Judge Stanley's pervasive bias manifested itself. He was openly hostile to defense counsel. This influenced defense counsel to forgo the removal of numerous biased jurors which deprived Lambrix of his right to be tried by a fair and impartial jury.[10] *See also Appendix T*, (Affidavit of trial

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prepare to discredit Lambrix's consistent claim of self-defense. *See Appendix A*, Affidavit of Cary Michael Lambrix, provided to the Court and the State in 1998, detailing the claim of self-defense. When Lambrix did actually testify, the State of Florida was unable to impeach or discredit Lambrix's account. *See Appendix B*, Transcript of Lambrix's 2006 postconviction testimony. In fact, during a subsequent oral argument before the Supreme Court of Florida on November 9, 2009, the State conceded that the State's own evidence was consistent with self-defense.

[9] *See Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., with Ginsberg, J., and Bryer, J., concurring) ("The fact that the first jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial.").

[10] Judge Stanley bragged in later years that while on the bench he always carried a "sawed-off machine gun" and believed that he should have been allowed to shoot capital defendants "between the eyes" in his court room rather than having to

counsel Robert Jacobs). This resulted in the empanelment of jurors who had preconceived opinions of Lambrix's guilt and harbored actual bias against Lambrix.[11]

In the opening statement to the jury, the prosecutor advised that the state's case rested upon key witness Frances Smith, who the prosecutor characterized as "the hub of the case." The State then presented a total of 14 witnesses, but it was only Smith who provided testimony as to the events that allegedly led up to and resulted in the deaths of Bryant and Moore. Smith admitted that she actually witnessed no acts of violence against Moore and Bryant. Rather, she testified that while she was in the kitchen cooking a spaghetti dinner, the other three were in the living room with Moore and Lambrix drinking whisky, and the three were "laughing, teasing, and playing around".

Smith also testified that upon returning to the trailer alone, Lambrix told her that he had killed both Moore and Bryant. She speculated that the motive was to steal Moore's vehicle, the car that was eventually recovered in the exclusive possession of Smith. The State thereafter presented testimony of Deborah Hanzel, who was the girlfriend of Smith's cousin, Preston Branch, to corroborate Smith's testimony about Lambrix's premeditated intent to kill Moore. Hanzel testified at

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sentence them to death. *See Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995); *Porter v. State*, 723 So. 2d 191 (Fla. 1998).

[11] *See Section VI.* Consistent with *Schulp v. Delo*, 513 U.S. 298 (1995) *and House v. Bell*, 547 U.S. 518 (2005), the newly discovered evidence presented herein entitles Lambrix to overcome the previously attached procedural bar pertaining to this constitutional error.

trial that Lambrix also told her that he killed the man, and also said that obtaining Moore's vehicle was part of the reason for doing so. Hanzel subsequently recanted her testimony during postconviction proceedings testifying that Smith and the State Attorney's investigator, Daniels, had convinced her to testify falsely and that in fact Lambrix had never told her that he had killed anyone.[12] *See Appendix C* (Composite exhibit of Hanzel's letter to Judge Corbin and Affidavit). *See Section V.*

Lambrix's entire defense of reasonable doubt rested on Smith's credibility. Although trial counsel attempted to impeach her with the conflicting statements that she had given to law enforcement authorities, Judge Stanley prohibited him from doing so during cross examination. He ruled that allowing it would open the door for the jury to be told by the State that Lambrix was previously incarcerated and had walked away from a work camp. The Court so held even in circumstances where, during voir dire, every juror admitted they had read newspaper accounts that contained Lambrix's prior record.[13]

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[12] As fully set forth in *Section VI.*, part of the newly discovered evidence presented herein is that, as key witness Smith testified to during the state postconviction proceedings, Smith and the state attorney's lead investigator "Bob" Daniels had engaged in an illicit relationship of a sexual nature during the prosecution of Lambrix's capital case, and deliberately failed to disclose this relationship to the defense in violation of *Brady v. Maryland*. *See Lambrix v. State*, 39 So. 3d 260 (Fla. 2010) (recognizing that evidence of this sexual relationship would have been of impeachment value pertaining to the credibility of both Smith and Daniels).

[13] *See Lambrix v. State*, 494 So. 2d 1143, 1145-46 (Fla. 1986) (denying relief on claim that the trial court unconstitutionally restricted cross examination of the key witness). Lambrix's trial counsel was also prohibited from eliciting during cross-examination of FDLE agent Connie Smith information concerning victim Moore, including that he was a career criminal, known associate of South Florida drug smugglers and that he had a criminal history that included violent assaults on females while he was intoxicated. *Id.*

Trial counsel also attempted to impeach Smith by inquiring as to any deals or promises of immunity from prosecution that was offered to her or had obtained from the state attorney in return for her cooperation in the Lambrix investigation. Smith denied receiving any sort of favorable consideration.[14] With trial counsel unable to impeach Smith, and with Lambrix unable to testify in his own defense, the second jury deliberated for only an hour before returning guilty verdicts of both counts of premeditated, not felony, first degree murder.

As the case proceeded to the penalty phase, it became clear that trial counsel had undertaken little meaningful mitigation investigation. Instead of an extensive examination and presentation of Lambrix's social history, the defense called a handful of immediate family members to testify in general terms about Lambrix. The testimony established that Lambrix grew up serving as a Catholic altar boy, participated in the Boy Scouts, joined the ROTC program in high school, and enlisted as a volunteer in the U.S. Army at age 18. Several of the family members also indicated that Lambrix had suffered some sort of injury while serving in the Army and that he was in some way "changed" by that experience. They also

[14] As fully set forth in *Section VI.*, part of the newly discovered evidence supporting this instant application is that in 2006 previously undiscoverable information and subsequent testimony from former assistant state attorney Tony Pires and former state attorney investigator Miles Daniels, established that contrary to her trial testimony denying any favorable treatment, Smith was promised immunity from prosecution thereby establishing a violation of *Giglio v. United States,* 405 U.S. 150 (1972).

testified that following his military discharge, Lambrix divorced and lost custody of his young children.[15]

By votes of 8 to 4 and 10 to 2 the jury recommended the death penalty on both counts. In a cursory order, entitled *Findings In Support of Sentences of Death*, the trial judge found five statutory aggravating factors and no mitigation. *See Appendix G.* Without explanation as to why no mitigation was found, on March 22, 1984 Judge Richard Stanley sentenced Mr. Lambrix to death on both counts of pre-meditated murder. A timely appeal followed, and the Florida Supreme Court affirmed the convictions and sentences of death, making the following factual findings:

> On the evening of February 5, 1983, Lambrix and Frances Smith, his roommate, went to a town tavern where they met Clarence Moore, aka Lawrence Lamberson, and Aleisha Bryant. Late that evening, they all ventured to Lambrix's trailer to eat spaghetti. Shortly after their arrival, Lambrix and Moore went outside. Lambrix returned about twenty minutes later and requested Bryant to go outside with him. About forty-five minutes later Lambrix returned alone. Smith testified that Lambrix was carrying a tire tool and had blood on his person and clothing. Lambrix told Smith that he killed both Bryant and Moore. He mentioned that he choked and stomped on Bryant and hit Moore over the head. Smith and Lambrix proceeded to eat spaghetti, wash up and bury the two

[15] *See Section V.* Because of the failure by trial counsel to properly investigate Lambrix's life history, the sentencing jury never heard that the injury he suffered while in service had lifelong consequences and left him physically disabled. The injury was also a causative factor in his subsequent escalating cycle of alcohol and substance abuse. The jury certainly heard nothing about his horrific life history which included his conception as the result of a violent sexual assault upon his polio-stricken mother and a relentless cycle of physical, emotional and sexual abuse throughout his childhood and teenage years. His life history exceeds the mitigation noted in *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003).

> bodies behind the trailer. After burying the bodies, Lambrix and Smith went back to the trailer to wash up. They then took Moore's Cadillac and disposed of the tire tool and Lambrix's bloody shirt in a nearby stream.
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> On Wednesday, February 9, 1983, Smith was arrested on an unrelated charge. Smith stayed in jail until Friday. On the following Monday, Smith contacted law enforcement officers and advised them of the burial.
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> A police investigation led to the discovery of the two buried bodies as well as the recovery of the tire iron and bloody shirt. A medical examiner testified that Moore died from multiple crushing blows to the head and Bryant died from manual strangulation.

Lambrix v. State, 494 So. 2d 1143, 1145 (Fla. 1986).

II. EXTRAORDINARY CIRCUMSTANCES THAT DEPRIVED MR. LAMBRIX OF A MEANINGFUL OPPORTUNITY TO PURSUE COLLATERAL POSTCONVICTION RELIEF

In addressing the facts of this capital case in context with the instant application and the statutory mandate that this Court consider the evidence as a whole, it is imperative that this Court fully consider the extraordinary circumstances relevant to Lambrix's original collateral postconviction proceedings. They explain why the substantial constitutional errors corroborate his claim of innocence and have never been addressed on the merits in state or federal court.[16] The State of Florida has not and cannot in good faith dispute these extraordinary circumstances.

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[16] This Court should be mindful that in the post AEDPA era, habeas corpus proceedings remain equitable in nature, and governed by principles of fundamental fairness, demanding that the interests of comity and finality must yield to the imperative of correcting a manifest injustice. *See, e.g., House v. Bell*, 547 U.S. 518 (2005); *Holland v. Florida*, 560 U.S. 631 (2010); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), etc.

After Lambrix's case was affirmed on direct appeal he requested the appointment of postconviction counsel, which was and is statutorily required under Florida law. *See Fla. Stat.* § 27.701 (1985). Due to inadequate funding of the statutory Office of the Capital Collateral Representative (CCR), collateral counsel was unavailable. *See Spalding v. Dugger*, 526 So. 2d 71, 72-73 (Fla. 1988) (recognizing the then on-going problem of inadequate funding in Florida).

After waiting almost a full year for assignment of collateral counsel and with the state statutory deadline for filing a postconviction motion fast approaching, Lambrix filed a *pro se* motion in the original trial court requesting the assignment of postconviction counsel immediately, or, in the alternative, that he be allowed to protect his interests by exercising self-representation before the state statutory deadline lapsed. However, both the state attorney and CCR opposed the *pro se* motion. They argued that under the Florida statutes death sentenced prisoners were categorically prohibited from self-representation in postconviction proceedings because the Florida Statutes mandated that only appointed CCR counsel was authorized to file a collateral action on behalf of death sentenced prisoners.

The trial court agreed and Lambrix was denied the opportunity to represent his interests. *See Appendix H*, December 9, 1987 Order of Judge Elmer Friday. Lambrix initiated a *pro se* appeal of the order, but the lower court was affirmed. *Lambrix v. Friday*, 525 So. 2d 879 (Fla. 1988). Florida's Governor Martinez then signed a death warrant scheduling Lambrix's execution for November 30, 1988

before collateral counsel was even assigned. Thereafter, CCR counsel was finally designated.

On the final day of the statutory period for initiating a state postconviction Fla. R. Crim. P. 3.850 motion, CCR counsel filed a shell motion under warrant that asserted that because of inadequate funding it was impossible for CCR to properly investigate, develop and present Lambrix's collateral claims in a timely fashion, and further, that unless a stay of execution and extension of time was allowed, Lambrix's constitutionally protected right to meaningful review "would be rendered illusory." *See Appendix I*, Affidavit of CCR counsel Billy Nolas.

The trial court denied Mr. Lambrix's shell Rule 3.850 motion in a two page order. The order failed to address either the merits of the limited claims presented or the extraordinary circumstances that warranted equitable extension of time. With only hours remaining before the scheduled execution, CCR counsel submitted an expedited appeal to the Florida Supreme Court, but by a marginal 4 to 3 decision, the summary denial by the trial court was affirmed. *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988).[17]

With Lambrix still facing imminent electrocution, CCR counsel lodged a hastily written habeas petition in the District Court, which immediately issued an emergency stay of execution. Upon Lambrix's *pro se* motion to discharge CCR

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[17] The Federal Southern District Court subsequently recognized that the Florida Supreme Court's denial of relief based on a finding that Lambrix had "abandoned" all but one collateral claim was clearly erroneous and contrary to Florida law in place at the time. See *Lambrix v. Dugger*, No. 88-12107 _CIV-Zloch (S.D. Fla. May 12, 1992).

counsel due to their alleged inability to adequately represent him, the District Court removed CCR counsel and re-assigned the case to the partially federally funded Volunteer Lawyers Resource Center (VLRC).

Thereafter, at the State's insistence, the District Court dismissed, without prejudice, the numerous claims predicated on *Strickland v. Washington* that Lambrix's CCR counsel had failed to present in state court. In direct violation of *Rose v. Lundy*, 455 U.S. 509 (1982), the District Court then addressed the limited *Strickland* claims that were deemed to have been exhausted, and after a limited evidentiary hearing, denied all relief. *Lambrix v. Dugger*, No. 88-12107 _CIV-Zloch (S.D. Fla. May 12, 1992).

VLRC counsel appealed to this Court, but review was delayed after a motion by the State for remand back to the state courts was granted for the purpose of consideration of a prior claim brought pursuant to *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, the Florida Supreme Court held that the *Espinosa* claim was procedurally barred due to previously assigned counsel's failure to timely raise it. *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994).

Lambrix's case was returned to this Court, which affirmed the District Court's denial of Lambrix's initial federal habeas. *Lambrix v. Singletary*, 72 F.3d 1500 (11th Cir. 1996). The United States Supreme Court granted certiorari review, limited only to the *Espinosa* issue, and then, in a 5 to 4 decision, held that Lambrix's entitlement to relief under *Espinosa* was procedurally barred. *Lambrix v. Singletary*, 520 U.S. 518 (1997).

While on remand to the state courts, VLRC counsel initiated a second state postconviction motion. The motion argued that there were extraordinary circumstances in which Lambrix was forced to accept belated representation by state-funded CCR counsel when CCR had advised the state courts that it was impossible for them to properly represent Lambrix's interests due to inadequate funding. In addition, the state courts had simultaneously prohibited Lambrix from protecting his own collateral postconviction interests by denying him the opportunity to represent himself. The motion argued that such circumstances established that a fundamentally unfair state impediment was created that deprived Lambrix of his constitutionally protected right to a fair and meaningful opportunity to present his substantive claims for relief to the state courts.

The argument was that under the *Murray v. Carrier*, 477 U.S. 478 (1986) cause and prejudice doctrine, this state created impediment established the necessary cause and the subsequent attachment of procedural bars to claims that entitled Lambrix to relief established the necessary prejudice. *See Section VI.* VLRC also argued that because Lambrix's claims established a colorable claim of innocence, any otherwise applicable procedural bars must be set aside under the fundamental miscarriage of justice doctrine. *See Schulp v. Delo*, 513 U.S. 298 (1995).

The original trial court summarily denied the second postconviction motion as untimely, and failed to address either the extraordinary circumstances or the claim of innocence. After a timely appeal, the Florida Supreme Court affirmed the

lower court relying on federal law expressed in *Murray v. Giarratano*, 492 U.S. 1 (1989).[18] The court stated that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief," because there is no constitutional right to the appointment of, or representation by, postconviction counsel. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996).

VLRC sought review from the Supreme Court, presenting the same question of constitutional law subsequently decided favorably in *Martinez v. Ryan*, but the Supreme Court denied certiorari review. *See Appendix U*, Petition for Writ of Ceriorari, *Lambrix v. Florida*, Case No. 97-____, denied at *Lambrix v. Florida*, 118 S. Ct. 1064 (1998).

III. SUCCESSIVE COLLATERAL PROCEEDINGS RAISING *BRADY/GIGLIO* VIOLATIONS AND NEWLY DISCOVERED EVIDENCE IN SUPPORT OF MR. LAMBRIX'S ACTUAL INNOCENCE

Following the completion of the initial round of state and federal collateral proceedings, VLRC counsel withdrew and was replaced by the Office of Capital Collateral Regional Counsel (hereinafter CCRC). Thereafter, new claims were filed in state court supporting Lambrix's claim of innocence, predicated on newly discovered evidence and violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972).

In 1998, Deborah Hanzel (hereinafter Hanzel)–the sole witness to corroborate Smith's testimony that Lambrix killed Moore and Bryan–recanted her trial testimony, providing under oath that Lambrix never told her that he had killed

[18] The Supreme Court has now conditionally departed from this rule of law based upon equitable principles. See *Martinez v. Ryan,* 130 S. Ct. 1309 (2012).

anyone. Lambrix's counsel then initiated a third state postconviction motion presenting evidence of Hanzel's recantation.[19]

The trial court ordered a full evidentiary hearing, recognizing that this new evidence had been timely presented. Hanzel testified that contrary to her trial testimony, Lambrix never told her he killed anyone. She also testified that she provided false testimony at trial because Smith and Daniels had coerced her to corroborate Smith's testimony by telling her that Lambrix would harm her children if she failed to testify. *See Section VI; see also Appendix D.*, Affidavit of Deborah Hanzel.

At the evidentiary hearing the State called Smith in an attempt to impeach Hanzel. Smith denied communicating with Hanzel, but counsel for Lambrix presented evidence and testimony that established that there were numerous telephone communications between Hanzel and Smith during the relevant time frames, further substantiating Hanzel's claims.

Smith's former husband, Douglas Schwendeman advised Lambrix's lawyers that Smith told him that she had a sexual affair with an investigator for the State who was a pilot that flew her to Labelle during the Lambrix investigation. He also said that she bragged about it. He said that she also said that she was told by the State Attorney what to say when she testified. *See Appendix S,* Affidavit of Douglas

[19] Lambrix also raised a newly discovered evidence claim predicated on *Porter v. State*, 723 So. 2d 191 (Fla. 1998). The claim was that the trial judge, Richard Stanley, harbored previously undisclosed bias that deprived Mr. Lambrix of his right to be tried before a fair and impartial tribunal.

Schwendeman. When confronted during her testimony with this previously undisclosed information, Smith reluctantly admitted that during the prosecution of Mr. Lambrix's case she had engaged in a sexual liaison with investigator Daniels and that they had deliberately concealed this information from the defense.

The State called investigator Daniels to rebut the testimony of Smith. He testified that he had never had sex with Smith. On cross examination he admitted that prior to his testimony he met with Smith in the hallway and she had apologized to him. He conceded on cross that even if Smith's account of a sexual encounter was true, he would never admit that it was, because to do so would cause him marital problems and jeopardize his state pension.

In his testimony Daniels also revealed that Smith had testified untruthfully at trial when she said she did not receive any promises of favorable treatment in exchange for her testimony against Lambrix. Daniels testified that Smith was promised immunity from prosecution in exchange for her testimony against Lambrix. His testimony was corroborated by the 2006 testimony of former Assistant State Attorney Tony Pires, who had been assigned to the Lambrix investigation after Smith first came forward.

Lambrix also testified at the 2006 evidentiary hearing. He provided a detailed account of the events of February 5, 1983, that lead up to and ended with the deaths of Moore and Bryant. The testimony recounted that Moore violently assaulted Bryant and Lambrix attempted to intervene to stop what turned out to be a fatal assault. Moore then turned on Lambrix, forcing Lambrix to respond in self-

defense. The State conceded in 2009 that the evidence was consistent with Lambrix's claim of self-defense.

In October 2007 the trial court issued an order denying all of Lambrix's claims. The order found the Hanzel recantation and claim of coercion by Smith and Daniels to provide false testimony was unreliable in light of Smith's testimony denying any coercion. At the same time the court found Smith's admission of a sexual relationship with the state attorney investigator to be not credible in light of Daniel's testimony denying any sex. Finally, the court found that Daniels' testimony that Smith was promised immunity was not credible based on Smith's denial and testimony from prosecutor Randall McGruther. The court failed to mention or acknowledge the evidentiary hearing testimony of either Mr. Lambrix or former ASA Pires.

The Florida Supreme Court affirmed the lower court's order and failed to address these dubious credibility findings, but did recognize that the evidence of a sexual relationship between Daniels and Smith would be a *Brady* violation, although, in their view, a harmless one. *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010).

As the *Brady/Giglio* issues presented in Lambrix's third postconviction motion were pending on appeal, Lambrix's counsel was compelled to initiate a fourth Rule 3.851 motion in state court when it was revealed that the original prosecutor had failed to disclose numerous Florida Department of Law Enforcement (FDLE) crime lab reports from the 1983 investigation. These reports indicated that

prior to trial the FDLE crime lab found and examined several undisclosed hairs on the alleged murder weapon that did not match Mr. Lambrix or the two victims.

During pre-trial discovery requests and during trial, the prosecutor claimed that no forensic evidence was found. When Lambrix raised the *Brady/Giglio* claim, the State specifically conceded that these FDLE crime lab records were not previously disclosed, and further, that the hairs found on the alleged murder weapon probably belonged to key witness Smith. The trial court summarily denied this fourth postconviction motion and the Florida Supreme Court again affirmed. *Lambrix v. State*, 124 So. 3d 890 (Fla. 2013).[20]

After the Florida Supreme Court again denied relief, Lambrix attempted to initiate a *pro se* Application for Leave to File a Second or Successive Habeas Petition pursuant to 28 U.S.C. § 2244(b) in this Court. The motion also requested the appointment of collateral counsel, as statutorily mandated. See, e.g., *McFarland v. Scott*, 512 U.S. 849 (1994) and *Harbison v. Bell*, 129 S. Ct. 1481 (2000).

In that application, Lambrix argued that he was entitled to review of the previously unavailable *Brady/Giglio* claims, also invoking entitlement to having the

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[20] Lambrix, through counsel, also filed a fifth state postconviction motion based on newly discovered evidence, pertaining to penalty phase mitigation. The motion alleged that the sentencing jury at trial never knew that Lambrix is an honorably discharged, legally recognized disabled veteran. Postconviction counsel provided this new evidence that establishes the actual extent of Lambrix's service related injury and the resulting permanent physical disability and connected escalation of substance abuse and self-medication for pain, rendering the sentences of death recommended by the jury constitutionally unreliable under *Porter v. McCollum*, 130 S. Ct. 447 (2009). Relief was summarily denied in the trial court and that denial was affirmed on appeal. *Lambrix v. State*, 124 So. 3d at 901-03 (Fla. 2013), cert. denied 134 S. Ct. 1789 (April 7, 2014).

previously attached procedural bars set aside under the fundamental miscarriage of justice doctrine set forth in *Schulp v. Delo* and *House v. Bell.* The application set forth an argument that the newly discovered evidence established, by clear and convincing evidence, that Lambrix was innocent of the crimes for which he was convicted. This Court denied the appointment of counsel and also denied the 2010 *pro se* § 2244(b) application as legally insufficient in *In re Lambrix*, 624 F.3d 1355 (11th Cir. 2010). Lambrix sought review, *pro se*, invoking the original habeas jurisdiction of the Supreme Court, but the Court denied review. *In re Cary Michael Lambrix*, 131 S. Ct. 2907 (2011).[21]

Following the Supreme Court's decision in *Martinez v. Ryan*, Lambrix initiated a *pro se* pleading in the Southern District of Florida, where his initial federal habeas had been adjudicated, entitled "Motion to Appoint Substitute Collateral Counsel for Purpose of Pursuing Habeas Relief Under *Martinez v. Ryan.*"[22] Thereafter, following a transfer to the Middle District, the court, *sua*

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[21] Lambrix has filed numerous *pro se* pleadings during the long history of his capital case. The State has mischaracterized the nature of these *pro se* pleadings and implied that they show a history of frivolous or abusive litigation. In fact, each was necessary to either prevent unnecessary delays by compelling the appointment of collateral counsel, or, to compel the timely review of collateral proceedings before the lower courts. *Lambrix v. Friday*, 525 So. 2d 879 (Fla. 1988); *Lambrix v. Martinez*, 534 So. 2d 400 (Fla. 1988); *Lambrix v. Reese*, 705 So. 2d 902 (Fla. 1988); *Lambrix v. State*, 727 So. 2d 907 (Fla. 1998); *Lambrix v. State*, 766 So. 2d 221 (Fla. 2000); *Lambrix v. State*, 900 So. 2d 553 (Fla. 2005). None of these *pro se* actions have been found to be either abusive or frivolous.

[22] Undersigned counsel initiated a sixth state postconviction Rule 3.851 motion seeking state court exhaustion of a claim to entitlement of relief under *Martinez v. Ryan.* This claim was summarily denied as untimely based upon the finding that pursuant to *Gore v. State*, 91 So. 3d 769 (Fla. 2012) and *Howell v. State*, 109 So. 3d 763 (Fla. 2013), relief under *Martinez v. Ryan* is unavailable in the State courts. The

sponte and without notice to any party, characterized the pleading as an unauthorized successive habeas and dismissed the action without prejudice, specifically instructing that any such action must first be filed in this Court pursuant to 28 U.S.C. § 2244(b). *But see Castro v. U.S.*, 540 U.S. 375 (2003). Lambrix filed a *pro se* notice of appeal with a motion for a Certificate of Appealability (COA) which the district court denied without comment. Undersigned counsel than agreed to seek appointment for the limited purpose of that action and filed an Amended Motion for COA in this Court.[23]

This Court denied the COA, but allowed briefing and argument on the appointment of counsel issue, recognizing that an appeal on that issue was automatically authorized pursuant to *Harbison v. Bell*. Thereafter this Court issued a panel decision denying relief, and likewise denied rehearing. The mandate issued on September 3, 2014. *Lambrix v. Sec., Florida DOC*, 756 F.3d 1246 (11th Cir. 2014).

On May 2, 2014, through counsel, Lambrix submitted a Petition for Writ of Certiorari to the Supreme Court seeking review of this Court's denial of a COA on the issue of whether a petition filed second in time seeking relief under *Martinez v. Ryan* can properly be construed as successive in nature and thus subject to the all

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Florida Supreme Court affirmed the lower court's summary denial in an unpublished order and the Supreme Court denied certiorari on October 6, 2014. *Lambrix v. State*, FSC Case No. SC13-1471 (Fla. March 27, 2014).

[23] As fully set forth in the subsequent appellate briefing to this Court in *Lambrix v. Sec., DOC*, Case No. 13-11917, as state-assigned CCRC counsel acting under the limited authority of Fla. Stat. § 27.701-710, undersigned counsel is statutorily prohibited from representing Lambrix in many forms of federal court review.

but impossible § 2244(b) gatekeeper standard in light of *Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and whether the AEDPA provisions effectively amount to an unconstitutional suspension of the writ when applied to deny review of a supported claim of innocence in a capital case. Certiorari was denied on October 6, 2014.

This instant action is now timely brought before this Court.

IV. SUBSTANTIAL ERRORS MADE IN PRIOR § 2244 APPLICATION

Mr. Lambrix's capital case illustrates why both Congress and the Supreme Court have unequivocally mandated that death sentenced litigants be appointed and represented by experienced collateral counsel in all federal habeas proceedings, which presumably must include an application under § 2244(b). *See Harbison v. Bell*, 556 U.S. 180 (2009) (recognizing that 21 U.S.C. § 3599 applies to all collateral proceedings in capital cases); *McFarland v. Scott*, 512 U.S. 849 (1994) (instructing that the appointment of counsel in capital cases is statutorily mandated as due to the inherently complex nature of capital collateral habeas proceedings, absent appointment of qualified counsel, the death sentenced petitioner could not receive fair review).

Lambrix moved for the appointment of qualified collateral counsel in his 2010 *pro se* § 2244(b) application. This Court departed from established precedent, and after instructing the State of Florida to submit an expedited response to the *pro se* application, improperly adapted all but verbatim the State's grossly distorted

factual conclusions. This Court ignored the facts pled by Lambrix. *Contra Jordan v. Sec., DOC*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (panel decision by Carnes, J.) ("In issuing a § 2244(b)(3)(A) order authorizing the filing of a second or successive petition in the district court, *we do not make any factual determinations*, we make only a prima facie decision for § 2244(b)(3)(A) purposes. When we make that prima facie decision we do so *based only on the petitioner's submission. We do not hear from the government.*") (emphasis added).

This Court should not have elicited or accepted the submission from the State of Florida, especially in circumstances where the *pro se* litigant was deprived of any opportunity to respond to the submission by the State. Therefore this Court should not now rely on the panel decision reached in *In re Lambrix*, 624 F.3d 1355 (11th Cir. 2010). The integrity of the judicial process demands that the letter of the law be followed, especially in a capital case asserting a claim of innocence. As provided in *Section V*, herein, this Court is not the designated fact finder, but is authorized only to determine whether a *prima facie* showing of entitlement to a grant of second or successive habeas was established.

This Court's erroneous adoption of the alleged facts submitted by the State of Florida while simultaneously ignoring the specifically pled facts advanced by Mr. Lambrix, violated this Court's own established law and procedures and served to deprive him of a fair and meaningful opportunity to establish entitlement to an order granting leave to file a second or successive habeas petition pursuant to § 2244(b)(3)(A).

This Court's improper reliance upon only the purported facts pled by the State resulted in a clearly erroneous denial. It is imperative to the interests of justice that, as a preliminary matter, these unsupported facts now be addressed in the instant pleading. First, this Court accepted the State of Florida's completely unfounded claim that Lambrix had previously provided other stories or accounts of the alleged crimes that conflicted with his consistently pled claim of innocence.

This Court held in *In re Lambrix*, 624 F.3d at 1361, n.4, that "according to the State, before trial Lambrix insisted that he had nothing to do with the deaths of the victims." This assertion apparently stemmed from Lambrix's pre-trial plea of not guilty. In fact, Lambrix never provided the authorities with any pre-trial statement. The State has not and cannot provide any pre-trial statement from Lambrix to support this unfounded assertion.

Next, "At trial, his attorneys asserted that one victim was involved in drugs and suggested an unknown drug dealer arrived on a nearby private airstrip and killed both victims." *Id.* Contrary to this characterization by the State, this argument by trial counsel is not attributable to Mr. Lambrix. Trial counsel provided this hypothesis supporting reasonable doubt in the closing argument to the jury. This argument was advanced in circumstances familiar to the jury members from rural Glades County. Specifically, that in the same time period of the Lambrix case there were at least five drug-related homicides in Glades County, including one on property adjacent to the crime scene. In the latter case, the owner of a nearby

airstrip was subsequently indicted on charges related to a drug smuggling operation.

Finally, "[i]n his state and federal postconviction proceedings, Lambrix asserted he was intoxicated and could not have formed the necessary premeditation to support his two first-degree murder convictions." *Id.* To suggest that Lambrix's presentation of a legal claim advancing a voluntary intoxication defense conflicted with his consistently pled claim of self-defense and innocence of murder simply ignored well established and material Florida law. Florida recognizes that "inconsistent defenses are allowable in criminal cases where the proof of one does not necessarily disprove the other." *See Merck v. State*, 124 So. 3d 785 (Fla. 2013), relying on *Phillips v. State*, 874 So. 2d 705, 707 (Fla. 1st DCA 2004).

There is no conflict between Lambrix's claim of voluntary intoxication and his claim of self-defense. These two defenses are compatible and are supported by the evidence. Lambrix has consistently claimed that the events leading up to and resulting in him being compelled to defend himself evolved directly from and were the product of, an intoxicated joke that unpredictably escalated into violence.

This Court implicitly concluded that since Lambrix admitted to striking Moore, his claim of self-defense amounted to a claim of legal innocence as opposed to factual innocence. *See In re Lambrix*, 624 F.3d at 1360. ("**IV. Admissions In Lambrix's Application**", stating "we point out several factual admissions in his Application because those facts . . . vitiate certain claims in his Application.").

In so finding, this Court apparently relied on *Gonzalez v. Sec. DOC*, 366 F.3d 1253, 1274 (11th Cir. 2004) (*en banc*), which held that "Actual, factual innocence is required; legal innocence is not enough." *See also Rozzelle v. Sec., DOC*, 672 F.3d 1000 (11th Cir. 2012) (finding that based on *Gonzalez*, a claim merely asserting legal innocence is not sufficient to establish entitlement to a second federal habeas under § 2254(b)). This Court's finding ignored the fact that Lambrix's consistently pled claim of being compelled to act in self-defense is not merely a claim of technical "legal innocence," but instead is a claim of factual and actual innocence. To hold otherwise would be such a perverted interpretation of what Congress clearly intended § 2244(b) to be available for that it would constitute a suspension of the writ of habeas corpus and invalidate the constitutionality of the AEDPA.

This Court recognized in *Rozzelle v. Sec., DOC*, 672 F.3d at 1014-16 that the majority of the other Circuits have held that the type of innocence claim advanced by Mr. Lambrix establishes entitlement under § 2244(b) to a grant of leave to file a second or successive habeas. *Rozzelle* cites to *Finley v. Johnson*, 243 F.3d 215, 221 (5th Cir. 2001) ("A showing of facts which are highly probative of an affirmative defense which if accepted by a jury would result in the defendant's acquittal constitutes a sufficient showing of 'actual innocence'."); *Britz v. Cowan*, 192 F.3d 1101, 1103 (7th Cir. 1999) ("A claim that he was insane at the time of the murder, for which he was convicted and sentenced to death, was a cognizable actual vitiated Lambrix's claim of innocence innocent if the state has the 'right' person but he is not guilty of the crime with which he is charged."); *Jaramillo v. Stewart*, 340 F.3d 877,

879 (9th Cir. 2003) (claim of justification pursuant to self-defense "corresponds with actual innocence requirement," *Id.* at 883, as "Under Arizona law in effect at the time of the offense charged, justification was an affirmative defense rendering [Jaramillo's] conduct non-criminal.").

This Court concluded that Lambrix's admissions in his *pro se* application vitiated his claim of innocence. The admission was that he was compelled to strike Moore after Moore first assaulted Bryant. He confronted Moore in an attempt to stop Moore from continuing his ultimately fatal assault on Bryant. When Moore turned upon Lambrix, he was forced to strike Moore, an act of legally justified self-defense. This Court's conclusion is contrary to the intent of Congress that an Applicant must establish that "no reasonable factfinder would have found the applicant guilty of the underlying offense." Here, the underlying offense is the alleged premeditated murders of both Bryant (Count I) and Moore (Count II). This Court's finding in *Gonzalez v. Sec., DOC* that "actual, factual innocence is required, legal innocence is not enough" was met here, where Lambrix did plead actual, factual innocence in the death of Bryant, and asserted the affirmative defense of legally justifiable self-defense in the death of Moore. Under Florida law at the time of the offense Mr. Lambrix's actions were not criminal and should have resulted in complete acquittal on the charges of murder, thus establishing his actual and factual innocence in the death of Moore.

Therefore, presumably due to the *pro se* form of Lambrix's 2010 Application along with this Court's adoption of the factual misrepresentations presented by the

State in response to the Application at the request of this Court, which should not have been assumed to be true without any proper evidentiary process, there are fundamental factual and legal errors in this Court's panel decision which render that decision unreliable. *In re Lambrix*, 624 F.3d 1355 (11th Cir. 2010). *See Section VI.*

V. STANDARD OF REVIEW APPLICABLE TO INSTANT APPLICATION

Congress did not intend for the adoption of the AEDPA to erect an absolute and unyielding bar to all second or successive federal habeas petitions and, by unambiguous statutory intent, instructed that habeas relief would remain available under § 2244(b) upon showing that:[24]

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence;
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the appellant guilty of the underlying offense.

As the statutorily designated "gatekeeper," it is not this Court's duty to reach factual determinations as to the validity of the applicant's pled assertions. Rather, as this Court recognized in *In re Holladay*, 331 F.3d 1169, 1173-75 (11th Cir. 2003), an applicant need only establish a prima facie showing to warrant entitlement to

[24] *See 141 Cong. Rec.* 57803-01, 57825 (1995) (debate of proposed Hatch-Spector AEDPA bill, in which Senator Hatch stated: "If the petitioner is innocent, he or she can have successive habeas corpus petitions and our bill contains a safety valve which permits Federal Courts to hear legitimate innocence claims . . . anytime someone can show innocence, we will allow that."

grant of leave to file a successive habeas. *Id.* at 1173, quoting *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) ("By prima facie showing we understand . . . Simply a sufficient showing to warrant a fuller exploration by the district court.").

As this Court instructed, "a prima facie showing is not a particularly high standard," *Holladay* at 1173, and this Court is obligated to accept the applicant's factual assertions "as true for the purpose of evaluating the application," *In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997). This Court specifically adopted the standard articulated in *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997), recognizing that this *Bennett* standard has been uniformly adopted by all the other Circuits; *In re Holladay* at 1174-75:

> Therefore, if it appears reasonably likely that the application satisfies the stringent standards for the filing of a second, successive petition, the application shall be granted, *quoting Bennett*, 119 F.3d at 469-70; *see also Bell v. United States*, 269 F.3d 127, 128 (2d Cir. 2002) ("A prima facie showing is not a particularly high standard, an application need only show sufficient likelihood of satisfying the strict standard of § 2255 to 'warrant a further exploration by the district court,' *quoting Bennett*, 119 F.3d at 469; *Thompson v. Calderon*, 151 F.3d 918, 925 (9th Cir. 1998) (same); *Rodriguez v. Superintendent*, 139 F.3d 270, 273 (1st Cir. 1998) . We adopt this standard as well.

As provided above, this Court is obligated to accept the applicant's factual assertions as true, as any alleged factual disputes can only be resolved before the district court by way of a proper evidentiary process.

In fact, as this Court itself has instructed, the government is not authorized to submit any response, and this Court will "not hear from the government." *See*

Jordan v. Sec., DOC, 485 F.3d 1351 (11th Cir. 2007) (*Id.* at 1357-58, "In issuing a § 2244(b) order authorizing the filing of a second or successive petition in the district court, we do not make any factual determinations."). As Judge Carnes explained, at the application stage of the proceedings, Id. at 1358, "The statute does not allow us to make that decision." *Jordan* at 1358 (emphasis added):

> When we make that prima facie decision *we do so based only on the petitioner's submission. We do not hear from the government.* We usually do not have access to the whole record, And we often do not have the time necessary to decide anything beyond the prima facie question because we must comply with the statutory deadline. See § 2244(b)(3)(D) (requiring a decision within 30 days after the motion is filed). Even if we had submissions from both sides, had the whole record before us, and had time to examine it and reach a considered decision on whether the new claim actually can be squeezed within the narrow exceptions of § 2244(b)(2), *the statute does not allow us to make that decision at the permission to proceed stage.* It restricts us to deciding whether the petitioner has made out a prima facie case of compliance with the § 2244 (b) requirements. Things are different in the district court. That court has the benefit of submissions from both sides, has access to the record, has an opportunity to inquire into the evidence, and usually has the time to make and explain a decision about whether the petitioner's claim truly does meet the §2244(b) requirements. *The statute puts on the district court the duty to make the initial decision about whether the petitioner meets the § 2244(b) requirements*– not whether he has made out a prima facie case for meeting them, but whether he actually meets them.

In determining whether an applicant has met the prima facie showing, this Court must be mindful that "the principles of fundamental fairness underlie the writ of habeas," *Engle v. Isaac*, 456 U.S. 107, 126 (1982), quoting *Sanders v. United States*, 373 U.S. 1, 17-18 (1963); *see also Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ–its ability to cut through barriers of form and

procedural mazes–have always been emphasized and zealously guarded by the courts.").

These principles of fundamental fairness and equity that have historically governed habeas proceedings clearly remain in full force in the post-AEDPA era, and the imperative of protecting against manifest injustice must prevail over the competing interests of comity and finality. *See, e.g., McQuiggin v. Perkins*, 133 S. Ct 1924 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Holland v. Florida*, 560 U.S. 631 (2010); *House v. Bell*, 547 U.S. 518 (2005). As the Supreme Court instructed in *Panetti v. Quarterman*, 127 S. Ct. 2842, 2857-58 (2007), the statutory provisions of the AEDPA governing successive habeas review "must yield" to principles of due process designed to protect against "the invitation of arbitrariness and error" in capital habeas proceedings. See also *Zinermon v. Burch*, 494 U.S. 113, 115 (1990), relying upon *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

Further, this is a capital case in which, absent grant of review, the Applicant will be put to death. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("qualitative difference of the death penalty demands 'the need for reliability in the determination that death is the appropriate punishment in a specific case").

If Lambrix can show by clear and convincing evidence that he did not commit premeditated murder, then the Constitution would prohibit his execution. *See, In re Davis*, 130 S. Ct 1 (2009) (questioning the constitutionality of the AEDPA "to the extent it bars relief for a death row inmate who has established his innocence").

Further, Lambrix simultaneously invokes herein his entitlement to relief under the fundamental miscarriage of justice doctrine as set forth in *Schulp v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2005). Newly discovered evidence that, by actions attributable exclusively to prosecutorial misconduct, was not available at the time Lambrix pursued his original habeas, which in addition to relief under §2244(b)(2)(B), will entitle Lambrix to a full and fair review of the specifically pled substantive claims of constitutional error set forth in *Section VI, infra*. Consistent with the §2244(b)(2)(B) statutory mandate that the evidence be considered as a whole, this evidence will establish that Lambrix is actually innocent of both counts of premeditated murder in this capital case.

As the Supreme Court recognized in *House v. Bell*, the fundamental miscarriage of justice doctrine survived the enactment of the AEDPA. When applied, this doctrine demands that principles of comity and finality must yield "to the imperative of correcting a fundamentally unjust incarceration." *House* at 536. The Supreme Court explained:

> In an effort to balance the societal interests in finality, comity, and scarce judicial resources with the individual interest in justice that arises in the extraordinary case, *Schulp*, 513 U.S. at 324, 115 S. Ct. at 851, the Court has recognized a miscarriage of justice exception. 'In appropriate cases,' the Court has said, 'the principles of

> comity and finality that inform the concepts of cause and prejudice" must yield to the imperative of correcting a fundamentally unjust incarceration, *Carrier*, supra, at 495, 106 S. Ct. 2639 (quoting *Engle*, supra, at 135, 102 S. Ct. 1558).

In formulating §2244(b)(2)(B)(i), Congress placed the burden upon the applicant to establish that "the factual predicate for the claim could not have been discovered previously, through the exercise of due diligence." Again, it bears reiterating that this Court must accept the applicant's assertions as to due diligence "as true for the purpose of evaluation the application." *In re Boshears*, 110 F.3d at 1541. To the extent that any factual dispute exists regarding exercise of due diligence, the case must be remanded to the district court for factual resolution.

As for the second prong of §2244(b)(2)(B), an applicant is required to make a prima facie showing that "the facts underlying the claim, if proven and viewed *in light of the evidence as a whole,* would be sufficient to establish by clear and convincing evidence that, *but for constitutional error*, no reasonable factfinder would have found the applicant guilty *of the underlying offense*." (emphasis added).

This requires the Court to conduct a cumulative review of all the evidence, both admissible and inadmissible, and make a "probabilistic determination" comparable to that applicable in claims brought under *House v. Bell* and *Schulp v. Delo*, as well as that required in evaluation alleged violations of *Brady v. Maryland* and *Giglio v. United States*. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (evidence must be "considered collectively and not item by item"), then the weight of that collective evidence must amount to something substantially less than the "truly persuasive" measure necessary to establish a free-standing claim of innocence

under *Herrera v. Collins*, 506 U.S. 390 (1993) and something more than the "more likely than not" measure provided in *House v. Bell* and *Schulp v. Delo.*

Ultimately, whether an applicant can cross this threshold comes down to the validity of the underlying constitutional error, here the specifically pled *Brady/Giglio* violations.

In determining the materiality of a *Brady/Giglio* claim, the Court must consider it in the context of the strength or weakness of the State's collective evidence. See *Guzman v. Sec., DOC*, 661 F.3d 602 (11th Cir. 2011). In a case such as this, where by the State's own admission the entire case rested upon the credibility of a single key witness, and the previously undisclosed evidence encompassing the underlying *Brady/Giglio* constitutional error would have substantially impeached that key witness, then the applicant has established a prima facie showing sufficient to warrant exploration by the lower court, and the application must be granted. *In re Holladay*, 331 F.3d at 1174-75.

As to the determination of whether in light of the evidence as a whole no reasonable fact finder would have found the applicant guilty of the underlying offense, this Court must specifically look to applicable Florida law defining the elements and standard of proof, as it must be assumed that a reasonable fact finder would diligently apply the law as instructed by the trial court.

This is unquestionably an extraordinary case in which the State never presented any eyewitnesses to the alleged crimes, any physical or forensic evidence linking Lambrix with the alleged murder weapon, or any confession to support the

State's circumstantial theory of alleged premeditated murder. In addition, Lambrix's first trial resulted in a hung jury and subsequent mistrial.[25] The State's own key witness readily admitted that she did not actually see or hear any of the events that happened outside of the trailer that lead up to and resulted in the deaths of Moore and Bryant. In determining what a reasonable fact finder would do, this Court must evaluate the evidence under Florida's special standard of proof applicable to cases of premeditated murder based upon circumstantial evidence.

As Florida law has long held, "where the only proof of premeditation is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *Heiney v. State*, 447 So. 2d 210, 212 (Fla. 1984), quoting *McArthur v. State*, 351 So. 2d 972, 976 (Fla. 1977). As the Florida Supreme Court explained in *Ballard v. State*, 923 So. 2d 475, 485 (Fla. 2006), quoting *Davis v. State*, 90 So. 2d 629 (Fla. 1956):

> *It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict.* Circumstantial evidence which leaves uncertain several hypotheses, any of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to support a probability of guilt, *it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.* (*emphasis added*).

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[25] *See Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J. with Ginsburg, J. and Breyer, J., *concurring*) ("The fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial.").

Although the State of Florida has adamantly contested Lambrix's claim of innocence based upon a theory of self-defense, the State has never produced any evidence to discredit the claim. The State conceded during oral argument before the Florida Supreme Court in November 2009 that the evidence is consistent with self-defense. The argument that a reasonable fact finder could simply reject Lambrix's claims runs afoul of Florida law, which would have required that the trial jury be instructed that they must accept Lambrix's claim of self-defense as true unless the State provided actual evidence to show that it was false. See *McArthur v. State*, 351 So. 2d 972, 976 (Fla. 1977) quoting *Holton v. State*, 87 Fla. 65 (Fla. 1924) (recognizing that "for at least the last 80 years the law in Florida has been that 'the version by the defense must be believed if the circumstances do not show that version to be false.'"). *See also, Fowler v. State*, 492 So. 2d 1344, 1345-47 (Fla. 1986) (providing comprehensive analysis on this standard of Florida law).

The facts and the evidence outlined in *Section VI., infra.*, do establish a prima facie showing of entitlement to a grant of leave from this Court to file a second/successive habeas petition. Applicant's asserted facts must be accepted as true, and consistent with the intent of Congress, this Court should now grant the instant §2244(b)(2)(B) application.

VI. NEWLY DISCOVERED EVIDENCE OF INNOCENCE ENTITLES LAMBRIX LEAVE TO PURSUE A SUCCESSIVE HABEAS PETITION

Applicant, Cary Michael Lambrix, through counsel, submitted numerous requests for discovery prior to trial and during the subsequent collateral postconviction proceedings. The State of Florida disclosed some materials pretrial

however, it was later revealed that additional records existed that the prosecutor **deliberately** withheld. These included numerous 1983 FDLE crime laboratory reports and associated notes that show, in direct contradiction to the trial prosecutors assertions that no forensic evidence was recovered, that the FDLE crime lab did in fact find several hairs on the alleged murder weapon and upon comparative hair analysis, it was determined the hairs did not match Mr. Lambrix or either of the two victims.

These previously undisclosed notes show that the FDLE crime lab contacted the State Attorney's Office in 1983 and advised the prosecutor of this discovery. According to the records, the prosecutor instructed the FDLE crime lab to return all of this evidence to his office and to undertake no additional testing. Despite numerous pre-trial requests for discovery, this information was never disclosed to the defense and therefore, this forensic evidence was never presented to the jury. *See* Statement Regarding Due Diligence, *Section VI (A)., infra.*

Upon the discovery of these intentionally concealed FDLE crime lab reports, Mr. Lambrix's counsel timely initiated a state postconviction motion within the one-year prescribed under Fla. R. Crim. P. 3.851. *See Appendix K.* Mr. Lambrix also filed a *pro se* Motion to Compel DNA Testing pursuant to Fla. R. Crim. P. 3.853 that was later adopted by counsel.[26]

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[26] In the Rule 3.851 motion, Lambrix also challenged the constitutionality of Fla. R. Crim. P. 3.852, which substantially obstructs and even prohibits requests for public records as part of the discovery process after an initial round of postconviction review. Rule 3.852 only applies to the narrow class of capital postconviction litigants. The denial of this claim, as well as the constitutional validity of the Florida state court

As required, the lower state court held a preliminary hearing on the alleged violation of *Brady/Giglio*, as well as on the motion for DNA testing pursuant to Rule 3.853. At that time, the State of Florida explicitly conceded that the FDLE records reflecting the fact that forensic evidence was found on the alleged murder weapon were never previously disclosed despite the numerous discovery requests. The State also conceded that the hairs found on the alleged murder weapon probably were those of key witness Smith.

However, the State argued that there was no *Brady/Giglio* violation because no portion of the undisclosed evidence was material. The State **speculated** that it was possible that the hairs became attached to the alleged murder weapon because Smith was present both at the crime scene and during the recovery of the alleged murder weapon. The State has not produced any evidence that suggests that Smith ever touched the alleged murder weapon and was unable to provide an explanation as to how virtually no other forensic evidence was found other than Smith's hair.

Based on the admissions by the State, Lambrix has established that the evidence was favorable to the accused and that the evidence must have been suppressed by the State. As the presence of Smith's hair on the alleged murder weapon could have been used to impeach her account of its disposal and recovery, and the State admitted the evidence had not been provided during discovery, all

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process used to deny Lambrix's motion to compel DNA testing will be separately filed as a §1983 civil action pursuant to *Skinner v. Switzer*, 131 S. Ct. 1289 (2011).

that was left for Lambrix to establish was the materiality prong of his *Brady/Giglio* claim.

The lower court failed to provide any opportunity for Lambrix to establish materiality, and summarily denied the claim making the following findings: (1) that Lambrix failed to demonstrate that the records upon which the claim is based could not have been discovered previously through the exercise of due diligence; and (2) the untested hairs that were found by the FDLE on the tire iron did not exonerate Lambrix because they did not prove that he was not the perpetrator or was not present at the crime scene.[27]

Lambrix timely sought an appeal to the Florida Supreme Court, arguing that the lower court's finding that Lambrix failed to establish due diligence was in conflict with the record due to the fact that Lambrix, or his counsel, had made repeated discovery requests pre-trial and in postconviction. And, that the State had explicitly conceded during postconviction proceedings that the FDLE lab notes and records at issue had not been previously disclosed. Further, the state court findings that the evidence failed to exonerate Lambrix or refute his presence at the crime scene stands contrary to the law as expressed in *Kyles v. Whitley*, 514 U.S. 419, 434

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[27] For reasons that were never explained, in 2009 state circuit court Judge R. Thomas Corbin–who had presided over Lambrix's postconviction proceedings since at least 1998–was abruptly removed and replaced by state circuit court Judge Christine Greider. Lambrix moved to disqualify Judge Greider based on evidence that indicated that she had worked as an assistant state attorney with the prosecutor in Mr. Lambrix's case, Randall McGruther, prior to her appointment to the circuit court bench in 2009. McGruther was the prosecutor named in the undisclosed FDLE notes who Lambrix alleged had committed the *Brady/Giglio* violations. Judge Greider failed to disqualify herself.

(1995) and *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). There, the Supreme Court explained:

> "That evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70, 129 S. Ct. 1769, 173 L. Ed 701 (2009). A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine confidence in the outcome of the trial'." *Kyles v. Whitley*, 514 U.S. 419, 434, 45 S. Ct. 1555, 131 L. Ed. 490 (1995).

By ignoring the fact that the State itself conceded that this evidence was not previously disclosed and that the hairs on the alleged murder weapon probably did belong to Smith, the state courts engaged in the type of reasoning and analysis that this Court has characterized as objectively unreasonable. *See, Guzman v. Sec., DOC*, 661 F.3d 602, 615 (11th Cir. 2011) ("The Florida Supreme Court's materiality determination was more than just incorrect–it was an objectively unreasonable application of clearly established Supreme Court precedent."); *Smith v. Sec., DOC*, 572 F.3d 1327, 1344 (11th Cir. 2009) (finding the Florida Supreme Court's determination of materiality of *Brady* violation was objectively unreasonable). The Florida Supreme Court denied relief on Lambrix's specifically pled *Brady/Giglio* violation upon the finding that:

> In his third claim, Lambrix contends that the State violated *Brady* and *Giglio* by failing to disclose certain FDLE documents pertaining to these hairs The postconviction court denied relief. We affirm the denial because Lambrix has completely failed to allege how any of the three *Brady* prongs have been met, including how the

> documents could constitute favorable evidence in any manner.

Lambrix v. State, 124 So. 3d 890, 896 (Fla. 2013). Where the record reflects that a defendant has repeatedly requested discovery, and that a prosecutor has consistently denied the existence of any forensic evidence, when it is subsequently discovered that forensic evidence did in fact exist and that the prosecutor did in fact have knowledge of, and was in possession of, that forensic evidence, it is objectively unreasonable for a court to ignore the State's admissions of misconduct and find that the defendant failed to establish that the evidence was suppressed, whether willfully or inadvertently, by the State.

Here, by the State's own admission, it relied exclusively upon the testimony of a single key witness. The State also explicitly concedes that the previously undisclosed hairs found on the alleged murder weapon, according to a state lab report, did not match either the victims or Lambrix, and probably did in fact match their key witness. It is objectively unreasonable for the state court to reach a factual determination, as it did here, that Lambrix completely failed to establish that the withheld evidence was "favorable to the accused, either because it was exculpatory, or because it is impeaching." *Strickler v. Greene*, 527 U.S. 263, 282 (1999). During postconviction proceedings, the State of Florida acknowledged that their case against Lambrix "was built on Frances Smith–the entire case, premeditation and everything, is proved in her testimony, and there has never been any question about that." And at trial, the prosecutor conceded that Frances Smith was "the hub of the case."

As this Court plainly held in *Guzman v. Sec.*, DOC., 661 F.3d 602, 614 (11th Cir. 2011): "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence effecting credibility falls within this general rule." *Giglio,* 405 U.S. at 154, 92 S. Ct. at 766 (citing *Napue,* 360 U.S. at 269, 79 S. Ct. at 1177).

Thus, by the State's own admissions, Lambrix established the first two prongs of his alleged *Brady/Giglio* violations, and as this Court found in both *Guzman v. Sec., DOC,* 661 F.3d at 615 and *Smith v. Sec., DOC,* 572 F.3d at 1344, it was objectively unreasonable for the Florida Supreme Court to concluded that Lambrix "completely failed" to establish these first two prongs.

This leaves only the materiality prong left to examine. (i.e., "prejudice must have ensued"), which as this Court has explained:

> There are two categories of *Brady* violations, each with its own standard for determining whether the undisclosed evidence is material and merits a new trial. *Id.* The first category of violations, often called (and what we will call) *Giglio* claims, occurs where the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false. *Agurs,* 427 U.S. at 103-04, 96 S. Ct. at 2397-98; *Giglio v. United States,* 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L.Ed.2d 104 (1972) (noting that the same rule applies when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears.") (internal quotation marks omitted); *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir. 1995) (the *Giglio* rule applies to "explicit factual representations by the prosecutor at a side bar and implicit factual representations to the jury" while questioning a witness). Under this category of *Brady* violations the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have

> affected the judgment of the jury." *Agurs,* 427 U.S. at 103, 96 S. Ct. at 2397. The "could have" standard requires a new trial unless the prosecution persuades the court that the false testimony was "harmless beyond a reasonable doubt." *Ford v. Hall,* 546 F.3d 1326, 1332 (11th Cir. 2008) (quoting *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L.Ed.2d 705 (1967)). This standard favors granting relief. It is shaped by the realization that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary *1334 demands of justice." *Giglio,* 405 U.S. at 153, 92 S. Ct. at 766 (internal quotation marks omitted).
>
> The other category of *Brady* violations occurs when the government suppresses evidence that is favorable to the defense, although the evidence does not involve false testimony or false statements by the prosecution. The defendant is entitled to a new trial if he establishes that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 685, 105 S. Ct. 3375, 3383, 3385, 87 L.Ed.2d 481 (1985) (internal quotation marks omitted); see also *Kyles v. Whitley,* 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L.Ed.2d 490 (1995). A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *See Kyles,* 514 U.S. at 434, 436-37 n. 10, 115 S. Ct. at 1566, 1567 n. 10.

Smith, 572 F.3d at 1333-34 (Carnes, J.).

As this Court further explained, "we evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately." *Smith,* at 1334. Applicant will address each of the elements relevant to the instant application in the following subsections.

A. STATEMENT REGARDING DUE DILIGENCE AND TIMELINESS OF INSTANT APPLICATION

As with all facts asserted in a § 2244(b) application, this Court is statutorily obligated to accept the facts asserted as true, which obviously must include allegations as to due diligence and the timeliness of the application. To the extent any factual dispute might exist, this dispute can only be addressed and properly resolved by evidentiary process before the district court.

Further, although the state court did deny the *Brady/Giglio* claims, finding that "Defendant has not asserted that the State had received the cited records from FDLE, or knew that they existed," (*Appendix J*, Order Denying Defendant's Fourth Rule 3.851 Motion, p. 4), which the Florida Supreme Court adopted to conclude that the claim was untimely, *See Lambrix v. State*, 124 So. 3d at 896, this finding was not based on an independent state procedural rule or law, but on an objectively unreasonable application of federal law.

Federal courts are not authorized to review a state court decision that found a claim to be procedurally defaulted based on independent state law–but may only review a state court decision when that decision is "clearly and expressly ... based on bona fide separate, adequate, and independent grounds." *See Coleman v. Thompson*, 501 U.S. 722, 729, 733 (1991). In *Coleman*, the Supreme Court instructed the federal courts to "presume that there is no independent and adequate state ground for a court decision . . . when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 735. In order to overcome this presumption, "the last state court to which the petitioner

presented his federal claims" must clearly and expressly rely on an independent and adequate state ground. *Id.*

In *Lambrix v. State*, 124 So. 3d at 896, the Florida Supreme Court ambiguously held that the *Brady/Giglio* claims were untimely, providing no reference to any independent state law ground. It must be assumed that the Florida Supreme Court actually adopted the lower court's clearly erroneous and objectively unreasonable application of federal law–that Lambrix was obligated to produce evidence that the State had received the cited records from FDLE or knew that they existed.

There is no dispute that the prosecutor requested the FDLE crime lab to examine the tire iron and the t-shirt for forensic evidence, and further, upon the discovery by the FDLE of the previously unknown hairs, the agency was instructed by the **prosecutor** to return the evidence to his office. *See Appendix K*, (composite exhibit of FDLE records). As noted in the Motion to Relinquish Jurisdiction that is included in Appendix K, the State Attorney did previously provide 52 pages of FDLE lab records from their own files in a submission to the records repository, but this only amounted to a portion of the 189 pages of FDLE lab records that the FDLE provided directly to Hickey. There is therefore no question that the FDLE was working with the prosecutor in this case.

Under applicable Supreme Court precedent "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. at 437, relying on *Brady v. Maryland*,

373 U.S. at 87. Lambrix submitted pre-trial and postconviction requests for discovery of the FDLE and state attorney records, but even if he had not, the prosecutor had an independent constitutional obligation to disclose the FDLE lab records. See *Kyles*, 514 U.S. at 433. Therefore, the state court findings that Lambrix's claims were untimely were based on an objectively unreasonable application of Supreme Court precedent.

The State has not disputed that Lambrix made the discovery requests nor that there was a failure to disclose the FDLE crime lab records that were in dispute below. The State of Florida has conceded that these records were not previously disclosed, but argued that because the records were not "material" there was not a *Brady/Giglio* violation.

Prior to, and during, the two trials the prosecution stated that no forensic evidence had been found on the alleged tire iron murder weapon. Until 2008, counsel for Mr. Lambrix had no reason to believe otherwise. Only when independent research conducted by one Michael Hickey (hereinafter Hickey) led to the discovery of the undisclosed FDLE lab reports did the *Brady/Giglio* issue emerge.

Hickey contacted Lambrix's postconviction counsel in 2008 and informed counsel of the existence of the undisclosed FDLE lab records. Through its own investigation, counsel thereafter verified the authenticity of the records, and compared what had been previously provided through discovery by both the FDLE and the State Attorney and timely filed a successive state postconviction motion

pursuant to Rule 3.851. There has never been any state court ruling that this action was untimely according to state law.

Finally, Lambrix presents this application to this Court in a timely fashion. As this Court stated in *In re Lambrix*, 624 F.3d at 1367, this claim was not yet properly exhausted at the time Lambrix submitted his *pro se* §2244(b) application in 2010. ("Lambrix has not yet exhausted his state remedies to this claim."). Lambrix has now done so. *Lambrix v. State*, 124 So. 3d 890 (Fla. 2013). This claim is now properly before this Court. *Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

Applicant submits that if any other jurisdictional issues can conceivably apply, this Court must be mindful that the Supreme Court has held that the statutory provisions under the AEDPA are "not jurisdiction" and do not erect "an inflexible rule requiring dismissal . . . [whenever] the clock has run." *Day v. McDonough*, 547 U.S. 198, 205 (2006). Rather, the provisions of §2244 are "subject to equitable tolling in appropriate cases." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010), and the decision to equitably toll "must be made on a case-by-case basis." *Id.* at 2563, quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

Generally an applicant is entitled to equitable tolling if "some extraordinary circumstance stood in his way" and he has "been pursuing his rights diligently." *Holland*, 130 S. Ct. at 2562, quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011).

In this case, since March 2013, Lambrix has had a *pro se* initiated motion for the appointment of counsel pending pursuant to 21 U.S.C. §3599 and *McFarland v. Scott*, 512 U.S. 849 (1994), which was only recently denied by this Court in *Lambrix v. Sec., DOC*, 756 F.3d 602 (11th Cir. 2014). Until the issue was resolved, this action could not be properly filed.

Last, in that Lambrix is presenting a claim of actual innocence, specifically invoking the fundamental miscarriage of justice doctrine set forth in *House v. Bell*, 547 U.S. 518 (2005), this application is timely filed. *McQuiggen v. Perkins*, 133 S. Ct. 1924 (2013). *See Section VI, infra*, Application of Fundamental Miscarriage doctrine.

B. APPLICANT HAS ESTABLISHED PRIMA FACIE SHOWING OF §2244(B)(2)(B)(II)

As to the second prong for establishing entitlement to a grant of leave to pursue a second/successive habeas, Applicant must make a prima facie showing that:

> The facts underlying the claim, if proven and *viewed in light of the evidence as a whole*, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, *no reasonable factfinder would have found the applicant guilty of the underlying offense*. (emphasis added).

By statutory mandate, this Court must look beyond the facts underlying the claim presented and to the evidence as a whole with the intended objective of determining whether "no reasonable factfinder would have found the applicant guilty of the underlying offense." There is nothing ambiguous about what Congress intended.

For that reason this Court cannot ignore the fact that by the State's own admission, the circumstantial theory of alleged premeditated murder of Moore and Bryant rested solely on the testimony of Smith. This Court should look to the State's own words: " . . . clearly the State's case was built on Frances Smith–the entire case, premeditation and everything; is proved in her testimony and there has never been any question about that." (Argument on October 6, 2000 to the state circuit court by Assistant Attorney General Carol Dittmar.).

This Court must consider, in relation to the undisclosed hair evidence, a simple question. If the evidence of Smith's hairs being discovered on the alleged murder weapon was not material, then why did the prosecutor instruct the FDLE crime lab to return this evidence to his office **and** proceed to conceal the existence of the evidence from the defense?

In *In re Lambrix*, 624 F.3d at 1367, this Court improperly adopted the State's completely unsupported assertion that "in any event, Lambrix's own statements vitiate this tire iron claim. In his Application, Lambrix admits grabbing and handling the tire iron and hitting Moore with it. Even if the tire iron had hairs of another person, that does not contradict the trial evidence or exonerate Lambrix."[28]

That factual determination ignores the specific facts that Lambrix pled and the supporting evidence, which this Court is statutorily obligated to accept as true. Although Lambrix has admitted to using a tire iron, there is absolutely no

[28] See *Jordan v. Sec., DOC*, 485 F.3d at 1358 ("When we make that prima facie decision we do so based only on the petitioner's submission. We do not hear from the government.").

evidentiary support for the conclusion that Lambrix ever touched the actual tire iron that was admitted into evidence at trial.

Lambrix's *Brady* claim is founded upon an argument that the State of Florida failed to disclose the FDLE records reflecting that hairs belonging to Smith were discovered on the alleged murder weapon, and that this evidence was material. If this evidence had been made available to the defense at trial Lambrix could have, and would have, used it to impeach Smith's account of the disposal of the alleged murder weapon.

Lambrix also pled a *Giglio* violation in which he argued that the prosecutor knowingly deceived both the trial court and the jury when he claimed that there was no forensic evidence found on the alleged murder weapon. Based on the collective evidence the prosecutor knew, or should have known, that the actual tire iron was never recovered and that the tire iron that the prosecution offered into evidence was a replacement intended to deliberately deceive both the trial court and the jury.

This Court cannot evaluate this claim in a vacuum but, as statutorily required under both § 2244(b)(2)(B)(ii) ("viewed in light of the evidence as a whole") and the applicable standard of law governing *Brady/Giglio* claims, this Court is required to examine all the evidence relevant to the materiality of this previously undisclosed evidence in the context of the evidence presented at trial. For that reason, it would be objectively unreasonable for this Court to ignore the indisputable fact that from the very beginning Lambrix has consistently, and

without contradiction, insisted that the State's theory of alleged premeditated murder of Moore and Bryant was deliberately fabricated.

At both trials, Lambrix's asserted defense was that Smith fabricated the theory of premeditated murder, and that her self-serving and specious testimony could not be believed. Had this previously undisclosed evidence been available at trial, the existence of only Smith's hair being found on the alleged murder weapon could have, and would have, been used to impeach Smith.

More importantly, proper disclosure of this evidence would have resulted in an investigation by trial counsel relating to this evidence as well as other evidence of manipulation and fabrication. The result would have been the discovery of the wealth of evidence brought to light in postconviction proceedings that collectively establishes that Smith and members of the state attorney investigation and prosecution team conspired and colluded to coerce and present false testimony, conceal evidence, and manipulate and fabricate material evidence, all with the intention of having Lambrix convicted and sentenced to death for two first degree murders he is innocent of.

This is neither speculative nor unfounded conjecture as it is supported by the collective evidence that is presented herein. In the interest of establishing the required prima facie showing of entitlement to grant of leave to pursue a successive habeas, Lambrix submits the following:

1. Viewed In Light of the Evidence As A Whole

Lambrix specifically incorporates the Statement of the Case, *supra*, and the facts herein by instant reference. The following is provided in context to the *Brady/Giglio* claims presented in the instant application.

To properly evaluate the evidence, this Court must first look to the circumstances surrounding the recovery of the alleged murder weapon. At trial, the State presented the testimony of Smith to establish that she personally witnessed Lambrix wrap the tire iron in a bloody t-shirt that he was wearing and then tie it up with a wire coat hanger. Smith stated that she then accompanied Lambrix to a nearby bridge and watched as he threw the tire iron into the Bee Branch creek.

The State also presented the testimony of state attorney investigator Daniels and Hendry County Sheriff's Deputy Larry Bankert, both of who testified that at least 10 days later, and at the direction of Smith, the tire iron was recovered from the Bee Branch creek. There is no dispute that absent Smith leading them to this evidence, the tire iron would never have been found.

It is not disputed that at some point in the month that followed, Daniels travelled to the FDLE crime lab to deliver the tire iron for forensic evaluation. On that same day, Smith went to the FDLE crime lab and was given a bag containing her clothes, which had been recovered from Moore's vehicle at the time of her arrest. *See Appendix K*, Composite exhibit of FDLE records.

Based on the contents of the previously undisclosed FDLE records we now know that when the FDLE examined the tire iron they made several discoveries.

First, they found several hairs on the tire iron that a comparative analysis revealed did not match either Lambrix or the victims. The State of Florida has since conceded that these hairs probably belonged to Smith. Equally important is the fact that the reports show that the t-shirt was a size small. There is no factual dispute that in 1983 Lambrix was 5' 10" tall and of average build, while Smith was a petite 5' 2" and barely 100 pounds. Lambrix would not have worn a size small t-shirt but the petite Smith would have.

Finally, Smith's trial testimony cannot be ignored. Therein she testified that the item in evidence was the tire iron used to kill Moore. The medical examiner, Dr. Robert Shultz, testified that Moore suffered numerous blows administered in a continuous swinging fashion to his temporal forehead, which caused his skull to be crushed. Further, each blow would have caused substantial bleeding, which would have caused blood spatter. Smith testified that the t-shirt Lambrix wore was covered in blood and that Lambrix used this bloody t-shirt to wrap around the tire iron.

However, when the FDLE crime lab examined the tire iron and t-shirt they found no forensic evidence apart from the hairs. The State would have the courts believe that cold creek water washed away all traces of blood, but not the hairs of Smith. This disingenuous argument is illogical both on its own and when properly considered in the context of all the evidence.

Cold creek water may well have washed away visible signs of blood, but all traces of DNA evidence would not have been washed away. If the examined

evidence were actually the tire iron used by Mr. Lambrix to fend off Moore, according to the medical examiner's testimony, it would have contained fragments of Moore's skin, hair, and even bone. All traces of DNA would not have been washed away. And yet the FDLE identified no forensic evidence contributable to Moore or Lambrix.

The logical conclusion is that the tire iron introduced into evidence at trial as the alleged murder weapon was not what the State and Smith claimed it to be. The collective evidence shows that contrary to the testimony at trial, the State failed to recover the actual tire iron used by Mr. Lambrix. Rather than risk having Smith's testimony discredited by admitting that actual tire iron used was not found, a similar tire iron and Smith's small sized t-shirt were substituted and admitted into evidence in violation of *Giglio v. United States*.

The evidence Lambrix proffered into the record before the state courts further supports this conclusion. *See Appendix M* (composite exhibit of expert witness, meteorologist Steve Wistar, with records of rainfall). The proffer provides reliable scientific evidence that after February 5, 1983, the date Smith claimed to have seen Lambrix throw the tire iron in the creek, until February 17, 1983, the date the tire iron was recovered by law enforcement, the area encompassing Bee Branch Creek experienced record torrential rainfall. According to state witness Larry Bankert, the weather caused the creek to overflow, flooding the entire area. Given the volume of water rushing down the Bee Branch Creek between February 5

and February 17, 1983, the actual tire iron would have washed away and would not have been recoverable.

These collective facts are supported by reliable scientific evidence and the State's failure to disclose these crucial FDLE records was a violation of *Brady* and establishes Lambrix's *Brady*/G*iglio* claims. The presence of **only** Smith's hair on the alleged murder weapon coupled with the fact that the t-shirt it was wrapped in was a size small are facts that could have, and would have, been used by the defense to impeach Smith's testimony. The disclosure of this evidence would have established that the tire iron the State admitted into evidence was not the actual murder weapon, but rather a substitute introduced with the intention of misleading the trial court and the jury.

2. APPLICATION OF THE FUNDAMENTAL MISCARRIAGE OF JUSTICE DOCTRINE

As provided above, § 2244(b)(2)(B)(ii) specifically requires that this Court evaluate the *Brady/Giglio* claim "in light of the evidence as a whole." This means that this Court must look not only to the evidence, or lack thereof, that was presented at trial in support of the convictions, but also must review previously raised *Brady/Giglio* claims. Although these prior claims may not have been legally sufficient to establish materiality standing on their own isolated merit, when they are considered cumulatively, a clear and convincing showing that no reasonable factfinder would have found the applicant guilty of the underlying offense is established. *See Section VI., Infra.*

The statutory mandate requiring examination of the evidence as a whole is entirely compatible with the standard of law applicable to review of a *Brady/Giglio* claim, which as the Supreme Court instructed, the evidence must be "considered collectively, not item by item," *Kyles v. Whitley*, 514 U.S. at 436, to determine 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." *Kyles*, 514 U.S. at 435.

The unique circumstances of this case requires a momentary digression. Lambrix's claims of *Brady/Giglio* violations were previously presented to this Court *pro se*. He specifically moved for the appointment of counsel pursuant to 21 U.S.C. § 3599, which the Supreme Court has held is statutorily mandated. *McFarland v. Scott*, 512 U.S. 849 (1994); *Harbison v. Bell*, 129 S. Ct. 1481 (2008) (consistent with *Martel v. Clair*, 132 S. Ct. 1276 (2012). This Court was obligated to resolve the issue regarding collateral counsel prior to proceeding. However, without any explanation, this Court summarily denied Lambrix's request for appointment of counsel, then proceeded to deny Lambrix's *pro se Brady/Giglio* claims as legally insufficient.

Clearly the "principles of fundamental fairness underlie the writ of habeas." *Engle v. Isaac*, 456 U.S. 107, 126 (1982), quoting *Sanders v. United States*, 373 U.S. 1, 17-18 (1963). As the Supreme Court has consistently held, these principles of fundamental fairness and equity continue to govern habeas proceedings in the post-AEDPA era, and the imperative of protecting against manifest injustice must prevail over the equally legitimate and competing interests of comity and finality.

See, e.g., *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Holland v. Florida*, 560 U.S. 631 (2010); *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007); *House v. Bell*, 547 U.S. 518 (2005). *See also Zimmermon v. Burch*, 494 U.S. 113 (1990), relying on *Morrisey v. Brewer*, 408 U.S. 471 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

In light of these binding concepts of fundamental fairness and the equitable principles that govern habeas proceedings, and given that Lambrix was deprived of the benefit of legal representation in his prior 2010 *pro se* § 2244(b) application contrary to the specific intent of both Congress and the Supreme Court, this Court should consider that prior 2010 *pro se* pleading to be a nullity, and give no weight to this Court's prior decision in *In re Cary Michael Lambrix*, 624 F.3d 1355 (11th Cir. 2010). This Court should now review upon first impression the additional *Brady/Giglio* claims from the record below along with the newly discovered evidence.

To the extent that other procedural bars may apply, counsel for Lambrix herein invokes the fundamental miscarriage of justice doctrine enunciated in *Schulp v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2005). Lambrix has presented this Court with newly discovered critical physical evidence of an exculpatory scientific nature, including the previously undisclosed evidence that Smith's hair was the only forensic evidence found on the alleged murder weapon. This evidence is sufficient to establish a prima facie showing of a colorable claim of

innocence applicable to the *Schulp/House* gateway. *See Schulp v. Delo*, 513 U.S. at 315, quoting *Herrera v. Collins*, 506 U.S at 404, 419 (1992). Applicant's innocence claim "was not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." [29]

As this Court explained in *Arthur v. Allen*, 452 F.3d 1234, 1245 (11th Cir. 2006):

> A habeas petitioner asserting actual innocence to avoid a procedural bar must show that his conviction 'probably resulted' from 'a constitutional violation.' *Schulp v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867, 130 L. Ed. 2d 808 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2646, 91 L. Ed. 2d. 397 (1986)). The petitioner meets the 'probably resulted' standard by demonstrating, based on the new evidence, 'that it is more likely than not no reasonable juror would have found petitioner guilty beyond a reasonable doubt.' *Schulp*, 513 U.S. at 327, 329, 115 S. Ct. at 867-68. The 'reasonable doubt' standard is not to be determined on the basis of the district court's independent judgment, but should be based on the district court's 'probabilistic determination about what reasonable, properly instructed jurors would do.' *Id.* at 329, 115 S. Ct at 868. The petitioner must support the actual innocence claim "with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial. *Id.* at 324, 115 S. Ct. at 865. A petitioner meets the 'threshold showing of innocence' justifying 'a review of the merits of the constitutional claims' if the new evidence raises 'sufficient doubt about [the petitioner's]

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[29] The *Schulp/Delo* fundamental miscarriage of justice doctrine is a "gateway" process comparable to that enumerated in § 2244(b). Lambrix is not required to conclusively prove actual innocence, but to only establish a prima facie showing sufficient to warrant a fuller exploration by the district court. In evaluating this claim, this Court is obligated to accept Lambrix's factual assertions as true.

> guilt to undermine confidence in the result of the trial.' *Id.* at 317, 115 S. Ct. at 862.

The following substantive claims were timely presented to the state courts, and previously presented in the *pro se* § 2244(b) application in 2010 which this Court found to be legally insufficient. This Court also denied Lambrix the benefit of legal counsel. Manifest injustice will result absent a full and fair review of these claims now presented through counsel with the legal deficiencies corrected. Fundamental fairness and principles of equity entitle Mr. Lambrix to have the claims herein properly addressed on their merits. The claims should also be evaluated collectively, not item by item, to determine whether the evidence as a whole establishes that no reasonable fact finder would have found Lambrix to be guilty of premeditated first degree murder.

The facts established before the state court indicate that in 1988 Lambrix's then assigned state collateral counsel learned, through the publication of *Porter v. State*, 723 So. 2d 191 (Fla. 1988), that the same trial court judge that had presided over Lambrix's second capital trial was found to have had substantial and constitutionally prejudicial bias against capital defendants. Thus, it became public knowledge, based on the depositions and evidentiary process before the state court after this Court's decision in *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995), that Judge Stanley had provided under oath statements that he always carried a sawed-off machine gun while on the bench, and that he believed that he should have been allowed to "shoot [the]capital defendants between the eyes" rather than

having to sentence them to death. Judge Stanley also testified that he had always felt that way.

Based upon this newly discovered evidence, Lambrix's newly assigned state collateral counsel investigated the claim of judicial bias, including interviewing potential witnesses that might have knowledge of Judge Stanley's bias.[30] That investigation led to an interview of former state trial witness Deborah Hanzel who advised counsel that she was not aware that Mr. Lambrix was still alive. During the interview Hanzel advised counsel that contrary to her testimony at Mr. Lambrix's trial, Lambrix "never told [her] he killed anyone." Until that interview counsel had no indication or reason to suspect that Hanzel would spontaneously recant her trial testimony or otherwise come forward with new information. Thereafter, Lambrix's counsel timely initiated a successive state postconviction motion based upon the newly discovered evidence of judicial bias and the statement of Hanzel. Although the state court summarily denied the judicial bias claim, it found that the newly discovered evidence of recantation by Hanzel was timely presented and could not have been previously discovered by due diligence.[31] The state trial court then

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[30] Contrary to the Florida Supreme Court's clearly unreasonable factual finding in denying this claim in *Lambrix v. State*, 39 So. 3d 260 (Fla. 2010), which this Court adopted in *In re Lambrix*, 624 F.3d at 1365-66, Lambrix most certainly did present independent evidence of the manifestation of actual bias harbored by Judge Stanley in Lambrix's case and Lambrix did not base this claim solely on the evidence developed in the Raleigh Porter case. *See Appendix T* (Affidavit of trial co-counsel Robert Jacobs, attesting to actual bias). Further, the state courts prohibited Lambrix's counsel from ever deposing Judge Stanley, which was allowed in the Raleigh Porter case.

[31] In *In re Lambrix*, 624 F.3d at 1365 this Court denied relief upon the finding that Lambrix (in his *pro se* pleading) failed to establish "that the factual predicate of this

granted a full evidentiary hearing in which Hanzel testified that contrary to her trial testimony, Lambrix never told her that he had killed anyone. While Hanzel was not an ideal witness and she appeared to be confused, she did unequivocally testify that Lambrix never confessed to killing anyone.

In July 2003 the trial court denied the claim and found that Hanzel appeared confused and was an unreliable witness. *Lambrix v. State*, 39 So. 3d at 270-71. Several months later Hanzel wrote a letter to the presiding judge, informing the court that she had failed to provide the whole truth.[32] Lambrix's counsel was unaware of this communication until the lower court provided a copy of the letter to the parties.

In the October 23, 2003 letter Hanzel advised the court that she did not want to be involved but did want to do the right thing. She further explained that she was an unwilling witness and had not provided the Court with all the relevant information. *See Appendix C*, (Letter from Deborah Hanzel to Judge Corbin). Hanzel said that the only reason she testified falsely for the State at the trial was because Smith and investigator Daniels told her that Mr. Lambrix would harm her children if she failed to testify.

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claim could not have been discovered previously through the exercise of due diligence." However, by clear statutory intent, this Court is obligated to give "great deference" to the state court's factual determinations absent a showing of clear error. This deference must apply equally to factual findings as to due diligence.

[32] Hanzel did not tell the court that her 2003 evidentiary hearing testimony was false. Her correspondence made it clear that she had not told everything and then advised the court of the rest of her story.

Consistent with the contents of her October 23, 2003 letter to the judge, counsel subsequently obtained an affidavit from Hanzel. Its contents mirrored the information in the letter to Judge Corbin and it was submitted into the record. *See Appendix D.* In addition to attesting under oath in her affidavit that her trial testimony was false and that Smith and investigator Daniels had convinced her to so testify, Hanzel also said that prior to trial Smith informed her that, according to Lambrix, victim Moore had "gone nuts" requiring Lambrix to respond. This information supports Lambrix's claim of self-defense.

The trial court, *sua sponte*, recognized this additional evidence as newly discovered, and ordered a new evidentiary hearing. When Hanzel testified at the second evidentiary hearing, the original prosecutor intimidated her with threats of prosecution for perjury if her testimony was inconsistent with her trial testimony. Although Hanzel's testimony was still generally consistent with the contents of her letter to the judge and her subsequent affidavit, she was never charged with perjury.

Postconviction counsel was able to corroborate Hanzel's account that she was in repeated communication with Smith prior to supplying her subsequent pre-trial statement that Lambrix had confessed to her through William McMillan, a Verizon Communications records custodian. McMillian provided telephone records and testified that the records established that at least 3 telephone calls were made between Hanzel and Smith in the relevant time period. This testimony corroborated Hanzel and contradicted Smith's claim that she had no communication with Hanzel.

Lambrix's testimony during the postconviction hearing also corroborated Hanzel's testimony that Smith informed her that, according to Lambrix, victim Moore had "gone nuts" in the context of the events that led to the deaths of Bryant and Moore. Lambrix was unable to testify at trial, but at the hearing he testified that when he attempted to stop Moore's violent assault upon Bryant, he was compelled to act in self-defense when Moore turned his rage upon him. *See Appendix D.* (Affidavit of Deborah Hanzel) (attesting that Frances Smith told her that Lambrix said Moore "went nuts").

The State of Florida has known of Lambrix's claim of self-defense since at least 1986, and as this Court recognized in *In re Lambrix*, 624 F.3d at 1361, n.4, Lambrix's affidavit has been part of the record since 1998. *Appendix A*, (Affidavit of Cary Michael Lambrix). Notably, when Lambrix testified in 2006 detailing the events that transpired that night, the State failed to impeach his testimony. *See Appendix B.* As noted *supra*, the State has since conceded that their evidence is consistent with self-defense.

The State called Smith at the evidentiary hearing to rebut Hanzel's testimony. Smith testified that she had a casual relationship with Hanzel and had no reason to talk with her. When confronted with the telephone records noted herein, Smith was unable to offer explanation of the record of telephone calls

between her and Hanzel during the time period in which Hanzel claimed Smith convinced her to provide false testimony in order to corroborate Smith's testimony.[33]

Shortly before Smith testified, her former husband Douglas Schwendeman, advised Lambrix's counsel that Smith "often bragged" about being protected from prosecution in the Lambrix case due to the fact that she had engaged in a sexual relationship with the State Attorney's investigator, Daniels. Based upon this new information, Lambrix was granted leave to depose Smith. However, during the deposition, the State instructed Smith not to answer questions involving the sexual relationship. The trial court admonished the State for this conduct and ordered Smith to answer the questions. After initially denying that she knew investigator Daniels, Smith ultimately admitted that during the prosecution of Lambrix, she engaged in an illicit affair "of a sexual nature" with Daniels, and by mutual agreement, had concealed this information.[34]

The State then called investigator Daniels to impeach Smith, their own witness. Daniels denied the existence of any sexual relationship. However, on cross examination, he admitted that prior to his testimony, he met shortly with Smith in the courthouse hallway during which she apologized to him. On cross Daniels

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[33] After the 2004 hearing where Hanzel and Smith testified, postconviction proceedings were held in abeyance so that plea negotiations could be conducted. The State offered to reduce Lambrix's death sentences to life if Lambrix would agree to drop all appeals. Lambrix refused the offer and insisted he could not plead out to two crimes that he did not commit.

[34] Daniels developed the circumstantial evidence in the Lambrix case and personally provided the arrest affidavit initiating the capital murder charges against Mr. Lambrix.

conceded that even if Smith's story was true, he would never admit to having sex with Smith because it would jeopardize his state pension and cause problems in his marriage.

Daniels also testified that contrary to Smith's testimony at trial, she was promised immunity from prosecution in exchange for her testimony against Lambrix. At trial Smith was asked whether she was promised any favors or immunity from prosecution in exchange for her testimony against Lambrix and she unequivocally testified that she did not.[35] Counsel also presented the testimony of former Assistant State Attorney Tony Pires, to corroborate Daniels' testimony concerning immunity. Pires testified that he was originally assigned to the Lambrix case after Smith first came forward and that consistent with state attorney's office policy at the time, Smith was given a very clear understanding that she would receive immunity from prosecution in exchange for her testimony against Lambrix. He also noted that having the witness to undergo a polygraph examination was part of that same policy. It was further established that consistent with this previously undisclosed promise of immunity, Smith was never prosecuted in this case and shortly after Lambrix's conviction, Smith's own unrelated felony charges were dropped.

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[35] In Lambrix's original federal habeas he raised an issue "concerning Frances Smith's alleged immunity deal," but the claim was denied when Lambrix failed to produce any supporting evidence at that time to support the asserted *Brady/Giglio* violation. See *In re Lambrix*, 624 F.3d at 1362. The previously undisclosed evidence presented herein now provides that evidence. In the interest of fundamental fairness and to protect against manifest injustice, this previously pled *Brady/Giglio* claim must be revisited in light of the new evidence.

It was only in light of 1) the previously undisclosed testimony that Smith cooperated with Daniels to influence Hanzel to testify falsely to corroborate Smith's testimony of premeditation; and 2) Smith's admission of having a sexual relationship with the state attorney investigator during the prosecution of the Lambrix case, that Lambrix's counsel had reason to question the independence and objectivity of the pre-trial investigation and development of the evidence in the case. Counsel representing Lambrix retained the assistance of homicide investigator William Gaut to undertake an independent review of Daniels' pre-trial investigation. *See Appendix Q*, Resume of William Gaut. He concluded that from the beginning Daniels had manipulated the circumstantial evidence to favor Smith's story while ignoring a wealth of evidence that questioned Smith's account of what had transpired. *Appendix R*. Report of William Gaut. He concluded in his report that there was no credible evidence to support the State's theory of pre-meditated murder.

Lambrix argued before the state court that the cumulative newly discovered evidence identified *supra*, established that an actual conspiracy and collaboration existed between Smith and the Office of the State Attorney to fabricate a theory of premeditated murder with the intent to convict Lambrix.[36] This evidence included

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[36] Lambrix attempted to raise this conspiracy claim in his 2010 § 2244(b) application, but without the benefit of trained counsel, this Court found that Lambrix failed to establish a prima facie showing. In *In re Lambrix*, 624 F.3d at 1365. Under § 2244(b)(2)(B)(ii) ("viewed in light of the evidence as a whole") and the *Schulp/House* fundamental miscarriage of justice doctrine, this claim must now be revisited, and considered "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. at 435-36.

Hanzel's sworn statement that Smith and Daniels worked together to coerce her to provide false testimony; Smith's admission that she did engage in a sexual relationship with Daniels during the prosecution; and the report by expert witness William Gaut identifying how the investigation manipulated the evidence to support Smith's testimony. In support, Lambrix proffered into the record exculpatory scientific evidence not presented at trial. Specifically, to convince the jury that Lambrix acted with premeditated intent, the prosecutor elicited testimony from Smith that she had seen victim Bryant's body "face down, up to her knees" in a pond.[37] Smith further testified that when she asked Lambrix why Bryant was in the pond, he replied that he deliberately placed her there "so if she wasn't dead, she would drown."

This testimony was false. There was no pond located on the crime scene property. The prosecutor, who had visited the crime scene, must have known that there was no pond.[38] To support Smith's testimony, Daniels testified and introduced several aerial photographs he had taken that depicted the crime scene and what the state characterized as a body of water. The photographic evidence was

[37] At no time during pre-trial, depositions, or at the first trial did Smith provide any statement concerning the pond. Rather, trial counsel was blind-sided by her testimony and was unprepared and effectively without an opportunity to challenge it. Due to the extraordinary circumstances surrounding Lambrix's initial collateral review postconviction proceedings, he was further deprived of any meaningful opportunity to present exculpatory scientific evidence conclusively establishing that no pond existed. Under § 2244(b)(2)(B)(ii), this Court must now consider this evidence as well under the *Schulp/House* fundamental miscarriage of justice doctrine.
[38] Indisputable pre-trial investigative reports show that Randall McGruther was personally present when the bodies of Moore and Bryant were recovered and visited the crime scene on numerous occasions.

deliberately misleading. The records of Daniels' flight logs, in which he was the pilot, introduced by the State into evidence during the 2006 evidentiary hearing indicate that the photographs were taken **after the historic rain event where record rainfall saturated the area.**

Lambrix proffered into the postconviction record an affidavit from Susan Johnson-Dellar, who owned the property that included the crime scene. She was prepared to testify that no pond existed in the pasture area. *See Appendix L.* Lambrix also proffered reliable, scientific evidence to corroborate this fact through the expert report and testimony of meteorologist Steve Wistar, showing the composite records of rainfall in relevant area. *Appendix M,* Report of Steve Wistar. Also proffered was the expert report of Richard Thompson who, as a qualified hydrologist, was prepared to testify that based on the unique contours of the land and the composition of the soil, had any significant body of water collected in the pasture on the night of February 5, 1983, it would have been impossible for the bodies of Moore and Bryant to have been superficially concealed where they were ultimately discovered. *Appendix N.*

The evidence the State relied upon to convince the jury that Lambrix acted with premeditated intent was patently false.[39] Smith's testimony regarding the

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[39] For example, in support of their argument in support of premeditation, the State argued that Lambrix's motive was to steal Moore's automobile, and that Smith had also testified that she witnessed Lambrix removing a gold necklace from Moore's body. Other than the Smith testimony there was no evidence to support the theory that Lambrix wanted Moore's vehicle. Smith's trial testimony established that she retained the exclusive possession of Moore's car and that when she was arrested she

alleged pond was corroborated **only** by the deceptive aerial photos taken by her lover, Daniels, and his testimony. This led the jury to believe the photos accurately depicted the crime scene at the time of the crime and proved the existence of a pond, supporting Smith's account. This behavior corroborates Hanzel's postconviction account of how Smith and Daniels worked together to assure Lambrix's conviction..

The trial court failed to allow counsel to present any of this evidence during the 1998-2006 successive state postconviction process, adopting the State's position that such evidence was procedurally barred because Lambrix's counsel should have presented it during Lambrix's 1988 original state postconviction motion. Lambrix in turn argued that under the *Schulp/House* fundamental miscarriage of justice doctrine, any otherwise applicable procedural bars must yield to the imperative of preventing manifest injustice. However, the state courts found that the *House/Schulp* doctrine applies only to proceedings before federal courts and has no application in state court proceedings.

At the conclusion of the state court evidentiary hearing process, the trial court denied all relief in a bizarre and self-contradictory order that unreasonably ignored crucial evidence in a self-evident outcome determinative manner. See *Jefferson v. Upton*, 580 U.S. 284 (2010).

Specifically, the trial court found that Hanzel's recantation was unreliable because she was a less than perfect witness. The trial court unreasonably ignored

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was driving it. As noted *supra*, the State was never able to establish the existence of a gold necklace.

the prosecutor's improper intimidation of the witness through unfounded threats of criminal prosecution, and ignored the corroborating testimony by the Verizon Communications records custodian confirming telephone calls between Hanzel and Smith. The trial court also unreasonably concluded that Preston Branch's trial testimony that allegedly mirrored Hanzel's remained intact. Contrary to this clearly erroneous factual finding, Preston Branch did not testify that Lambrix said he killed the two victims, rather Branch testified that Lambrix **did not** say that he killed anyone.

The trial court also refused to acknowledge the proffer of reliable, scientific evidence corroborating Hanzel's claim that Smith and Daniels had worked together to secure Lambrix's conviction. Specifically the evidence established that Smith and Daniels worked together to fabricate a claim that Lambrix placed Bryant "face down in a pond, up to her knees," to ensure that she died, when no such pond existed at the crime scene. Homicide investigator William Gaut was prepared to testify that, consistent with Hanzel's testimony, Daniels did in fact manipulate evidence to support Smith's story while ignoring evidence that Smith's story was untrue. Even though the State was unable to impeach Lambrix's own corroborating testimony, the trial court made a bizarre factual determination that Lambrix never testified at the hearing, when in fact he did. *See Appendix B.*

Next, the state trial court concluded that Smith's admission of a sexual relationship with Daniels was **not credible** finding Daniels testimony denying the existence of any such relationship **to be credible**. Inexplicably ignoring the fact that

Daniels conceded on cross that even if Smith's story were true, he would not admit to it because to do so would cause him marital problems and jeopardize his state pension.

But yet, astoundingly the trial court found Daniels' testimony regarding Smith's false assertion that she received no promises of immunity from prosecution to **not be credible** and found Smith's testimony denying any such deal **to be credible.** The trial court failed to acknowledge the testimony of former assistant state attorney, Tony Pires, which corroborated Daniels' testimony. The court also failed to acknowledge the record evidence establishing the fact that Smith was never prosecuted on any charges in this case, and that shortly after Lambrix was convicted, Smith's unrelated charges were dropped.

Through counsel Lambrix timely appealed, but the Florida Supreme Court affirmed the trial court's denial of relief, finding that appellate courts "do not reweigh the evidence or second guess the circuit court's finding as to the credibility of witnesses." *Lambrix v. State*, 39 So. 3d 260, 268 (Fla. 2010). The Florida Supreme Court recognized that evidence of a sexual affair between Smith and Daniels would violate *Brady* because it "could be used to impeach both Smith and Daniels, because it could be a basis as to why Daniels focused his investigation on Lambrix (as opposed to Smith, who was initially arrested while driving the victim's car)." *Id.* at 269. However, the Court held that standing alone any *Brady* violation was harmless.

C. BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACT FINDER WOULD HAVE FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE

To determine whether an applicant has met the § 2244(b)(2)(B)(ii) standard, this Court first looks to the validity of the "facts underlying the claim," which must be "viewed in light of the evidence as a whole." For this reason the standard applicable to the review of a claim brought under *Brady v. Maryland* and *Giglio v. United States* is first applied, and only upon recognition of the establishment of the underlying *Brady/Giglio* claim does the Court proceed to evaluate whether the previously undisclosed evidence, considered "collectively, not item by item," *Kyles v. Whitley*, 514 U.S. at 1435, establishes by clear and convincing evidence that "no reasonable factfinder would have found the applicant guilty of the underlying offense."

First and foremost, this Court must look at the evidence or lack thereof presented to the jury by the State to support the conviction. Obviously, in a case in which the State's evidence supporting the underlying conviction was overwhelming, the alleged previously undisclosed evidence necessary to establish that prerequisite prima facie showing would be difficult to meet. Congress, however, clearly intended a safety valve to be available to prevent the perpetuation of a constitutionally intolerable manifest injustice so that when an extraordinary case does come along, equitable relief would be available.[40]

[40] *See*, 141 Cong. Rec. 57803-01, 57825 (1995) (debate of proposed Hatch-Spector AEDPA bill, in which Senator Hatch stated: "If the petitioner is innocent, he or she can have successive habeas petitions and our bill contains a safety valve which permits the Federal Courts to hear legitimate innocence claims . . . any time someone can show innocence, we will allow that.").

This case warrants such equitable relief. This Court cannot ignore that by the State of Florida's own admission the entire wholly circumstantial case of alleged premeditated murder rests exclusively upon the credibility of their key witness Smith. There were no eyewitnesses, no physical or forensic evidence directly tied to Mr. Lambrix, and no confession. As state counsel said on October 6, 2000, "[C]learly, the State's case was built on Frances Smith–the entire case, premeditation and everything – is proved in her testimony and there has never been any question about that."

It would now be objectively unreasonable for this Court to find that previously undisclosed evidence was not material where it collectively establishes that the testimony was not only false, but the product of deliberate fabrication stemming from a conspiracy and collaboration between key witness Smith and members of the prosecution team. Had the jury been aware of this cumulative evidence, the outcome would have been different.

The proceeding section sets forth the *Brady/Giglio* violations establishing constitutional error that resulted in this wrongful capital conviction. When these *Brady/Giglio* claims and the newly discovered evidence, *i.e.*, the recantation of Deborah Hanzel, are considered "collectively, not item by item," there is no question that the weight of this collective evidence clearly does "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-35.

This Court should not confuse the materiality standard applicable to establishing the underlying *Brady/Giglio* claims with the clear and convincing

evidence standard applicable to evaluating the § 2244(b) application. For the purpose of clarification, in evaluating this instant § 2244(b) application, this Court first looks at the merits of the underlying *Brady/Giglio* claim, analyzing that claim under the materiality standard established by the Supreme Court in *Kyles v. Whitley, supra.* Lambrix is not obligated to establish the underlying *Brady/Giglio* claim by clear and convincing evidence, but only by the "more likely than not" standard set forth in *Kyles.* As the Supreme Court explained in *Smith v. Cain*, 132 S. Ct. 627, 630 (2012):

> That evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different," *Cone v. Bell*, 556 U.S. 449, 469-70, 129 S. Ct. 1769, 173 L. Ed 701 (2009). A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial,' *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995).

In the above, Lambrix has established the underlying *Brady/Giglio* claim. Under this Court's established precedents, it was "objectively unreasonable" for the Florida courts to deny Lambrix relief. *See*, *Guzman v. Sec., DOC*, 661 F.3d 602, 615 (11th Cir. 2011) (finding that Florida Supreme Court's denial of *Brady/Giglio* claims "was an objectively unreasonable application of clearly established Supreme Court precedent"); *Smith v. Sec., DOC*, 572 F.3d 1327 (11th Cir. 2009) (*accord*).

This is especially true when the undisclosed evidence establishes that the credibility of the state's key witness is at issue. *See Guzman* at 614 ("when the reliability of a given witness may well be determinative of guilt or innocence,

nondisclosure of evidence effecting credibility falls within this general rule") (quoting *Giglio v. United States*, 405 U.S. at 154 and *Napue v. Illinois*, 360 U.S. at 329).

The record reflects that Lambrix's defense at trial was that reasonable doubt precluding any verdict of guilt existed. The first trial ended in a hung jury. *See Kyles v. Whitley*, 514 U.S. at 455 (Justice Stevens, with Ginsburg, J., and Breyer, J.) ("The fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial.") The defense theory was based specifically on convincing the jury that witness Smith's story of cold-blooded, premeditated murder was the product of a conspiracy to wrongfully convict Lambrix.

In closing argument to the jury, the prosecutor mocked Lambrix's defense, admonishing the jury that Lambrix produced no evidence to support this theory of a conspiracy to wrongfully convict. We now know that the prosecutor deliberately concealed evidence that, if available at trial, would have established his theory of defense and no reasonable fact finder would have found Lambrix guilty of any charges as this undisclosed evidence would have impeached the State's entire case. The undisputed facts now show that the prosecutor knew that Smith's hair was found on the alleged murder weapon, which was wrapped in a size small t-shirt, and the prosecutor deliberately concealed this crucial evidence from the defense and the fact finders.

The only witness to corroborate Smith's testimony that Lambrix acted with a premediated design and intent to kill has now testified under oath that Smith and Daniels coerced her to provide this crucial false testimony. *See Appendix C* and *Appendix D*. The state courts refused to allow Lambrix to present evidence that would have corroborated Hanzel's claim that Smith and Daniels worked together to coerce Hanzel to testify falsely and to fabricate evidence in order to convict Lambrix by supporting Smith's otherwise unsupported story.

It was later revealed that key witness Smith and Daniels engaged in an illicit affair of a sexual nature, which she admitted under oath, that both concealed from the defense. See *Olden v. Kentucky*, 488 U.S. 227 (1988) (refusal to allow impeachment of witness on sexual relationship required grant of new trial); *Lambrix v. State*, 39 So. 3d 260, 265 (Fla. 2010) (recognizing that evidence of sexual relationship between Smith and Daniels was unquestionably of impeachment value).

Although Daniels denied that the affair, the Florida courts unreasonably ignored Daniels' concession on cross examination that even if it had happened he would never admit to it.[41] But thereafter, Daniels volunteered that key witness

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[41] The adoption by the Florida Courts of the state's materiality argument that even if a sexual relationship did occur, it was not consummated until after Smith had finalized her pre-trial statements, therefore the sex had no impact on the proceedings, is objectively unreasonable. When the sex happened is not determinative. It was up to the jury, the ultimate fact finder, to decide what weight to give to the evidence (which they never heard). The issue is whether the romantic relationship between the key witness and the lead investigator improperly influenced the investigation. *See Appendix R*, Report of William Gaut, concluding that from the early stages of the

Smith had testified falsely at trial when she denied receiving promises of immunity from the prosecution. Daniels' postconviction testimony that Smith was promised immunity was corroborated by the testimony of Tony Pires.[42]

The state courts refused to allow Lambrix to present his scientific evidence to refute Smith's testimony that Mr. Lambrix had placed Bryant face down in a pond, testimony which was clearly false as no pond existed on the property at the time of the alleged murders. *Appendix L.*[43] It cannot be reasonably ignored that the prosecutor relied on this false evidence to convince the jury that Lambrix had acted with premeditated intent.[44]

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investigation, Daniels manipulated the evidence to support Smith's emerging account of the events the night of the deaths of Bryant and Moore.

[42] As this Court recognized in *In re Lambrix*, 664 F.3d at 1362, Lambrix did attempt to raise this *Giglio v. United States* claim in his original habeas, but it was denied when the district court found that Lambrix failed to produce any evidence to prove the claim.. That evidence is now established by the testimony of Daniels and Pires that Smith was promised immunity from prosecution in return for her cooperation with the Office of the State Attorney

[43] In recent postconviction proceedings, the State has argued that maybe there was not a pond but instead there was pooling or ponding of water, or a puddle. Smith testified that it was a pond. And the State's argument is irrelevant where the scientific evidence proffered below from the land owner and the hydrologist retained by Mr. Lambrix establishes that no pond or ponding existed on the night of the offenses on the property.

[44] The evidence used at trial to corroborate Smith's testimonial account of Lambrix placing Bryant in a pond serves to support the theory of conspiratorial collaboration. Aerial photographs taking by Daniels, who was a pilot, were introduced into evidence during Daniels' testimony and led the jury to believe that there was a pond on the property. However, these photographs were taken weeks after the alleged murders following a period of historic torrential rain in the area, documented by Lambrix's hydrologist and rainfall records. *See Appendix M.* The photos do not accurately reflect the conditions on the night of the alleged crime.

Additionally, when Smith was asked why she did not report the deaths of Bryant and Moore to law enforcement earlier, Smith told the jury that she was in great fear of Lambrix. Even though Lambrix himself was not taken into custody until the month following Smith's detention, she never requested police protection. Her booking photo from February 9, 1983, the week after the alleged murders, does not reveal the face of a person in great fear. To the contrary, Smith appears to be smiling, perhaps laughing. *See Appendix E.* (Booking Photo of Frances Smith). The cumulative weight of the evidence that was never heard by the jury establishes that, by clear and convincing evidence, no reasonable fact finder would have found Lambrix guilty, as the collective weight of this previously undisclosed evidence would have irreparably eliminated any credibility, leaving the jury with no credible evidence to support the State's theory of premeditated murder.

This Court must make this "probabilistic determination" with the assumption that the jury would follow applicable law, and in this case in which by the State's own admission the entire case rested on the testimony of Smith, the jury would have been given and were legally obligated to follow instructions that if they did not find Smith to be credible, they must acquit Lambrix on all charges. This point must not be ignored. Impeaching Smith would have resulted in full acquittal on all charges.

Finally, by statutory mandate, this Court must look to the evidence as a whole in determining whether reasonable fact finders would have found the applicant guilty of the underlying offense. This requires the Court to consider

Lambrix's own consistently pled claim of being compelled to act in legally justified self-defense.

As this Court recognized in *In re Lambrix*, 124 F.3d at 1362, Lambrix has adamantly insisted throughout his state and federal collateral review that he was unconstitutionally prohibited from testifying at his trial. *See Lambrix v. Singletary*, 72 F.3d 1500, 1507-09 (11th Cir. 1996) (recognizing the circumstances that served to deny Lambrix his fundamental right to testify–but then based solely on speculation, concluding that Lambrix appeared to have acquiesced in not testifying at his second trial since there was no record evidence of renewing his desire to personally testify).

Throughout his prolonged state and federal postconviction proceedings Lambrix has not wavered in his claim that after he and Moore attempted to play an intoxication inspired practical joke on Bryant, Bryant responded in anger directed at Moore, whereupon Lambrix left the two alone to work this out, only to then hear a scream from the area where he had previously left them.

This Court recognized the full content of Lambrix's claims in *In re Lambrix*, 664 F.3d at 1360-61. Additionally, Lambrix's 1988 Affidavit, which this Court relied on in that opinion, is attached and incorporated by reference. *Appendix A*. Although deprived of the opportunity to testify at trial, Lambrix did testify at the state postconviction evidentiary hearing. *See Appendix B*. As reflected therein, even though the State was aware of the self-defense claim since at least 1986, when Lambrix wrote to the victim's family, during Lambrix's 2004 testimony, the State

did not and could not produce any evidence to impeach his consistently pled claim of self-defense.

The State also has continued to argue that Lambrix gave contradictory statements about what happened, but has failed to produce any statement from Lambrix that conflicts with his account of self-defense. And, of course, the State conceded during oral argument at the Florida Supreme Court in November 2009 that their own evidence "is consistent with self-defense" . . . and it bears emphasizing that the State has never produced any evidence to discredit Lambrix's claim of self-defense.[45]

This Court has implicitly questioned the truth of Lambrix's claim of self-defense. *See In re Lambrix*, 624 F.3d at 1361 ("several factual admissions . . . vitiate certain claims in his application"); *Id.* at 1367 ("Lambrix's current claim is that he happened upon the male victim Moore, attacking the female victim, Bryant, and Lambrix then attacked Moore to save Bryant, but both ended up dead. The State, however, points out that Lambrix's theory of innocence has changed over the years."). Lambrix admits to grabbing and handling the tire iron and hitting Moore with it. There is no merit to the assertion that Lambrix's theory of innocence has changed over the years. Lambrix has never stated that he "attacked" Moore, and this mischaracterization is unsupported by the record. Lambrix's so called

[45] For example, the State argued that Lambrix attempted to recruit his sister Mary Lambrix to help fabricate a false alibi defense prior to the trial. When the State attempted to argue that this served to contradict Lambrix's statements, Mary Lambrix provided an affidavit denying the assertion and indicating that Mr. Lambrix never had asked her to lie for him. *Appendix V*, Affidavit of Mary Lambrix.

admissions do not vitiate his consistently pled claim of innocence of capital, pre-meditated murder.

This Court is required to view all the evidence as a whole, which must include the State's own evidence supporting Lambrix's claim of self-defense. Lambrix is not asking this Court to take his word as gospel, rather he asks that this Court consider the State's own evidence which supports Lambrix's claim. The State's theory that Lambrix lured Moore and then lured Bryant out under false pretenses and then brutally killed both of them cannot be true.

If there is any testimony from Smith that has remained a constant from pre-trial through her subsequent testimony, it is that she did not see or hear anything that transpired outside leading up to the deaths of Moore and Bryant. As Smith testified at trial, the last time she saw Lambrix with both Moore and Bryant, all three were sitting in the living room of the trailer, "laughing, teasing and playing around" while drinking from a bottle of whiskey. Smith has consistently testified that there was no indication of animosity, and that Lambrix never suggested any intent to commit a crime against Moore or Bryant.

Other than Lambrix, Smith was the only person who could testify as to what transpired, and, as reflected in Smith's trial testimony, Smith was certain that when Lambrix returned to the trailer after first going out with Moore, Lambrix "looked normal" and did not have any blood on him and did not have possession of the "tire iron" at that time. Lambrix then accompanied Bryant outside, leaving Smith alone inside.

The state medical examiner testified that only Moore suffered physical trauma that would account for a substantial loss of blood and that Bryant did not have any injuries that would have caused significant blood loss. In fact, as provided in attached *Appendix F,* Pre-trial deposition of medical examiner Robert Schultz, the physical trauma inflicted upon Moore would have caused substantial "splashing" with each blow, undoubtedly saturating whomever hit him.

This evidence establishes that Moore was still alive and waiting outside when Lambrix returned to the trailer to ask Bryant to come outside with him. If Moore was already dead, Lambrix would already have been covered in blood when he returned for Bryant. Smith's testimony for the State is strong evidence that Lambrix, Bryant and Moore were alive outside together with Lambrix.

The State's theory of the crime is implausible. Lambrix would have had to physically overpower and kill both Moore and Bryant simultaneously in completely different ways. At the time of his arrest Lambrix weighed about 140 pounds, while Moore weighed 195 pounds and Bryant 185 pounds. Smith was asked pre-trial if Lambrix exhibited "any scratches or bruises" and Smith was certain that he did not.

The post-mortem evidence indicated that Bryant was a healthy 19 year old woman. Bryant would have fought for survival. Lambrix had no scratches or bruises consistent with a physical struggle, based on Smith's account. The medical examiner found that Moore did have numerous scratches consistent with a physical struggle with someone. Fingernail scrapings of Bryant that could have confirmed Moore or Lambrix as her assailant **disappeared** before there was any analysis.

The jury that convicted Lambrix never knew that the pre-trial investigation had uncovered facts about Moore that indicated that he was a 35 year old career criminal with a history of violent assaults against women while intoxicated. In 1981 Moore had been arrested in Miami after a police officer witnessed him assaulting a woman. When the officer intervened to try to stop this assault, Moore turned on and physically assaulted the police officer, in similar fashion to Lambrix's account of Moore's assault upon Bryant.

These are facts that this Court must not ignore. When the State was pressed, counsel conceded that the State's own evidence is and was consistent with self-defense. Lambrix did not kill Bryant and there is little credible evidence that he did. Certainly not the testimony of Smith, who freely admitted that she never saw Lambrix attack anyone. Although she testified that Lambrix told her that he "choked" Bryant, the medical examiner concluded that there was little direct evidence of asphyxia. Lambrix was prohibited from presenting reliable scientific evidence that the conclusion of the state medical examiner, "probable manual strangulation," was only speculation and was not supported by the existing evidence. *See Appendix O,* (Report of Edward N. Willey, M.D.); *Appendix P,* (Report of Dr. Arkady Katznelson). As provided above, Smith's testimony about Lambrix placing Bryant face down in a pond was simply false because no such pond existed.

When the evidence is considered "as a whole" as required under § 2244(b)(2)(B)(ii), Lambrix has provided clear and convincing evidence that no

reasonable juror would have convicted Lambrix of any crime in the death of Bryant. Lambrix is actually and factually innocent of the murder of Bryant.

As to the death of Moore, the State's own evidence establishes that by clear and convincing evidence no reasonable juror would have found Lambrix guilty of the murder of Moore as no act of murder ever took place. In evaluating this claim, and viewing the evidence as a whole, this Court must assume that any reasonable fact finder would follow the law as instructed by the trial court. This Court must look to Florida law to determine what a reasonable fact finder would do.

First, although the State throws up a smoke and mirrors show challenging the self-defense claim, the State has failed to present any evidence to contradict it. When Lambrix testified in postconviction, the State could not, and did not, discredit or impeach his account. *Appendix B.* And in oral argument before the Florida Supreme Court in November 2009, Assistant Attorney General Carol Dittmar conceded that the State's evidence is consistent with self-defense.

Therefore, under Florida law, the jury would have been specifically instructed that they must accept Lambrix's claim of self-defense as true, and fully acquit Lambrix. See, e.g. *McArthur v. State*, 351 So. 2d 972, 976 (Fla. 1977) (quoting, *Morton v. State*, 87 Fla. 65, 99 So. 244 (Fla. 1924)) (Recognizing that "for at least the last 80 years the law in Florida has been that 'the version by the defense must be believed if the circumstances do not show that version to be false.'"). See also *Fowler v. State*, 492 So. 2d 1344, 1345-47 (Fla. 1986) (providing a comprehensive analysis of the governing law).

Second, contrary to the State's unfounded argument that Lambrix's postconviction claim of voluntary intoxication contradicts and discredits the claim of self-defense, under Florida law the jury would have been instructed that both of these affirmative defenses must be considered, as under applicable Florida law a claim of self-defense is entirely consistent with the affirmative defense of voluntary intoxication. See, e.g., *Merck v. State*, 124 So. 3d 785 (Fla. 2013), relying on *Phillips v. State*, 874 So. 2d 705, 707 (Fla. 2004) ("Inconsistent defenses are allowed in criminal cases where the proof of one does not necessarily disprove the other."). Obviously, Lambrix could have been found by the jury to have been so intoxicated so as to be legally incapable of forming intent, and still be compelled to act in legally justified self-defense, as under Florida law, self-defense is not a crime of intent, thus, one defense does not disprove the other.

Third, the State's key witness, Smith admits that she actually saw nothing. This case was brought on the theory of premeditated murder and not felony murder. Under Florida law, the jury would have been instructed that in a wholly circumstantial case such as this, "where the only proof of premeditation is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *Heiney v. State*, 477 So. 2d 210, 212 (Fla. 1984), *quoting McArthur v. State*, 351 So. 2d 973, 976 (Fla. 1977). As the Florida Supreme Court explained in *Ballard v. State*, 923 So. 2d 475, 485 (Fla. 2008), quoting *Davis v. State*, 90 So. 629 (Fla. 1956):

> It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any of which may be sound and some of which may be entirely consistent with innocence is not adequate to sustain a verdict of guilt. Even though circumstantial evidence is sufficient to support a probability of guilt, *it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.* (emphasis added).

Lambrix has established that, but for constitutional error (the numerous above pled *Brady/Giglio* violations and the newly discovered evidence), when the evidence is considered collectively, not item by item (i.e., as a whole), by clear and convincing evidence no reasonable fact finder would have found Lambrix guilty of the underlying offenses.

The evidence establishes that Lambrix is actually and factually innocent of the murder of Bryant where the State's own evidence establishes that Moore–not Lambrix–killed Bryant, and that Lambrix did not engage in any criminal act contributing to the death of Bryant.

As to the death of Moore, by clear and convincing evidence Lambrix has established that he is factually and actually innocent of the murder of Moore, as no act of murder occurred. The State has conceded that their own evidence is consistent with self-defense. The collective weight of the previously undisclosed and the newly discovered evidence establishes beyond a reasonable doubt that Moore was the aggressor, compelling Lambrix to involuntarily act in legally justified self-defense. The State of Florida has failed to produce any evidence to the contrary.

To the extent that this Court might rely upon *Rozzelle v. Sec.*, DOC, 672 F.3d 1000 (11th Cir. 2012) and *Gonzalez v. Sec., DOC*, 366 F.3d 1253 (11th Cir. 2004) (*en banc*) to conclude that since Lambrix admits to the act of self-defense, this is not a true innocence case, Lambrix submits, that unlike *Rozzelle*, Lambrix is not arguing that he is guilty of a lesser degree offense, rather he is arguing that under applicable Florida law he is completely innocent of all criminal charges.

This type of claim of innocence is cognizable in a § 2244(b) application, as this Court recognized in *Rozzelle*, 671 F.3d at 1014-16, quoting *Finley v. Johnson*, 243 F.3d 215, 221 (11th Cir. 2001) ("A showing of facts which are highly probative of an affirmative defense, which, if accepted by the jury would result in the defendant's acquittal constitutes a sufficient showing of actual innocence.*"); Britz v. Cowan*, 192 F.3d 1101, 1103 (7th Cir. 1999) ("A claim that he was insane at the time of the murder for which he was convicted and sentenced to death, was a cognizable 'actual innocence' claim."); *Jones v. Delo*, 56 F.3d 878, 883 (8th Cir, 1995) ("One is actually innocent if the state has the 'right' person, but he is not guilty of the crime with which he is charged."); *Jaramillo v. Stewart*, 340 F.3d 877, 879 (9th Cir. 2003) (claim of justification pursuant to self-defense "corresponds with actual innocence requirement" Id. at 883, "under Arizona law in effect at the time of the offense charged, justification was an affirmative defense rendering [Jaramillo's]conduct non-criminal").

In light of the evidence as a whole, Lambrix has established by clear and convincing evidence that any reasonable factfinder, following the instructions given

on applicable Florida law, would have found Lambrix's actions non-criminal, fully acquitting Lambrix on all criminal charges.

VII. CONSIDERATION OF REMAND BACK TO FLORIDA SUPREME COURT

As this Court held in *Smith v. Sec., DOC*, 572 F.3d 1327 (11th Cir. 2009) (Carnes, J., with Hull, J. and Dubina, J.) and *Guzman v. Sec., DOC*, 661 F.3d 602 (11th Cir. 2011), the Florida Supreme Court's refusal to conduct the proper and constitutionally required cumulative review of the *Brady/Giglio* claims was objectively unreasonable. *See Kyles v. Whitley*, 514 U.S. at 436 ("suppressed evidence (must be) considered collectively, not item by item").

In *Guzman v. Sec., DOC, supra*, this Court granted a new trial in circumstances remarkably similar to the instant case, where there was previously undisclosed evidence that impeached the reliability of the state's key witness. In *Smith v. Sec., DOC* this Court remanded the case back to the lower court with instructions that it conduct the required cumulative review. Subsequently the *Smith* case was remanded back to the Florida Supreme Court so that the Florida courts could conduct the required cumulative review of the *Brady/Giglio* and newly discovered evidence claims.

What is clear from the record in this case is that, as in *Smith* and *Guzman*, the Florida courts categorical refusal to conduct the required cumulative review of the collective evidence was objectively unreasonable. As to the primary pled claim, (the deliberate non-disclosure of FDLE crime lab records showing that the only forensic evidence found on the alleged murder weapon belonged to key state witness

Smith and not to Lambrix and the t-shirt that the alleged murder weapon was wrapped in was a size small), the State itself conceded that these FDLE records had not been previously disclosed and Lambrix established that these records, which were deliberately concealed by the prosecutor, could not have been discovered previously by the exercise of due diligence, and that the undisclosed hairs found on the alleged murder weapon by the FDLE crime lab "probably", in the words of the State, did belong to Frances Smith.

Under these circumstances Lambrix established the first two prongs pf his *Brady/Giglio* claim. Only the question of materiality then remained. The lower court could not properly evaluate the claim without the cumulative review which the Florida courts have failed to do.

The Supreme Court has instructed: "state courts are the principle forum for asserting constitutional challenges to state convictions" and that "state proceedings are the central process, not just a preliminary step for later federal habeas proceedings." *Harrington v. Ritcher*, 131 S. Ct. 770, 787 (2011), relying on *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Especially in light of the AEDPA, which statutorily requires the Federal Court to give "great deference" to the factual findings reached by the state courts, it is imperative that the state courts fulfill their own obligation to conduct a proper evaluation of the cumulative effect of pled *Brady/Giglio* claims.

As in *Smith*, this Court should now remand this capital case back to the Florida Supreme Court with instructions to provide the required evidentiary

process necessary to evaluate the materiality of the sum of the undisclosed evidence, and only then make a factual determination of the evidence collectively, not item by item.

CONCLUSION

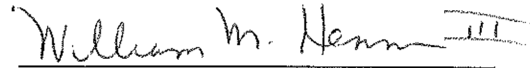
As required by § 2244(b)(2), Lambrix has established by prima facie showing both prongs of entitlement to grant of the instant application. Lambrix has established that 1) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and that 2), "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would have been sufficient to establish by clear and convincing evidence, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."

As this Court has recognized, *In re Holladay*, 331 F.2d 1169, 1173-75 (11th Cir. 2003), an applicant need only establish a prima facie showing of entitlement, and by prima facie showing "simply a sufficient showing to warrant a fuller exploration by the district court." *Id.* at 1173, quoting *Reyes &. Requera v. U.S.*, 243 F.3d 893, 899 (5th. Cir 2001). Further, a prima facie showing "is not a particularly high standard." *Holladay* at 1173, and this Court must accept the Applicant's factual assertions "as true, for the purpose of evaluating the application." *In re Boshears* (SP), 110 F.3d 1538, 1541 (11th Cir. 1997), adopting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir 1997).

As this Court instructed, the government is not authorized to submit a response and this Court "will not hear from the government." *Jordan v. Sec., DOC*, 485 F.3d 1351, 1358 (11th Cir. 2007) (Carnes, J.), as any factual dispute can only be resolved by the district court upon grant of the application.

This is the extraordinary case in which a prima facie case of actual innocence has been established. Pursuant to the intent of Congress, Lambrix is entitled to a grant of leave to pursue a second or successive habeas corpus petition in the district court. Lambrix has not been provided with an evidentiary process in the Florida courts to establish the materiality of the pled *Brady/Giglio* claim noted herein. This Court is unable to properly evaluate the materiality of this previously undisclosed evidence and how it would have affected the jury's verdict without allowing Lambrix an opportunity to present relevant evidence, and conduct the constitutionally required cumulative review of the evidence as a whole.
Under § 2244(b)(2)(B), Lambrix is entitled to grant of this application.

Respectfully submitted,



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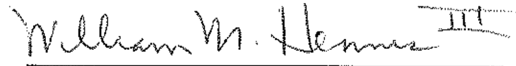
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail to Sara Macks, Assistant Attorney General, this 16th day of December 2014.



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