IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR GLADES COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 83-CF-12**

CARY MICHAEL LAMBRIX,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE 3.851 MOTION

THIS CAUSE comes before the Court on Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," pursuant to Fla. R. Crim. P. 3.851, filed by counsel on December 15, 2015. The Court notes that a death warrant was signed on November 30, 2015, and the Florida Supreme Court has given this Court until January 4, 2016 to complete postconviction proceedings. Having reviewed the motion, the State's response, the record, the applicable law, and having heard arguments at a case management conference held December 18, 2015, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Lambrix v. State, 494 So. 2d 1143, 1145 (Fla. 1986).

> On the evening of February 5, 1983, Lambrix and Frances Smith, his roommate, went to a tavern where they met Clarence Moore, a/k/a Lawrence Lamberson, and Aleisha Bryant. Late that evening, they all ventured to Lambrix' 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 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' bloody shirt in a nearby stream.

> On Wednesday, February 8, 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.
>
> 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. Additional evidence exists to support a finding that Lambrix committed the two murders in question.

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

2. A jury convicted Defendant of two counts of first degree murder and recommended a sentence of death by a vote of ten to two for Aleisha Bryant and eight to four for Clarence Moore. The trial court followed the recommendations, finding four aggravating circumstances for the murder of Bryant, and five aggravating circumstances for the murder of Moore, with no mitigating circumstances for either murder. The Florida Supreme Court affirmed Defendant's convictions and sentences on direct appeal. Id. Defendant filed numerous postconviction motions, appealed the denial of each, filed numerous petitions in the federal courts, and petitions for extraordinary writ in the Florida Supreme Court. The full procedural history as set forth in the State's response, filed December 17, 2015, to the motion for DNA testing is incorporated by reference.

3. Defendant raised four claims in his seventh successive postconviction motion. On December 18, 2015, a hearing was held in accordance with Huff v. State, 622 So. 2d 982 (Fla. 1993). Having reviewed the motion, State response, appendices to both, and having heard argument by the parties, the Court finds that an evidentiary hearing is not required, for the reasons set forth herein.

4. According to Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective

assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. Furthermore, with "regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 669.

5. A successive motion for postconviction relief may be summarily denied when the record conclusively shows no entitlement to relief, the claims are insufficient, or when the court otherwise states its rationale in the order. Sireci v. State, 773 So. 2d 34 (Fla. 2002). For the reasons indicated below, Defendant has failed to present a legally sufficient claim. The request for leave to amend is denied. Doorbal v. State, 983 So. 2d 464, 484 (Fla. 2008); Bryant v. State, 901 So. 2d 810, 818-819 (Fla. 2005).

6. **As to Claim 1**, Defendant argued that he was denied due process since the expedited procedure under the death warrant limited his ability to make the record "he feels" necessary, such that Fla. R. Crim. P. 3.852 is unconstitutional as applied. Defendant argued that Fla. Stat. §119.19 and Fla. R. Crim. P. 3.852 violate his constitutional rights because they impermissibly restrict his access to public records by requiring him to demonstrate that he has made his own search for records, his requests are relevant to the postconviction proceedings, and his requests are not overly broad or unduly burdensome. Defendant argued that his 3.851 motion is incomplete, since review of the records received from the agencies is not complete. Defendant noted that the Court sustained "almost all of the agency objections despite argument" of counsel.

7. A claim that public records laws and Rule 3.852 restrict access to public records because the provisions mandate that the demand for public records not be overly broad or unduly

burdensome, and require a defendant make his own search for records has been denied by the Florida Supreme Court. Wyatt v. State, 71 So.3d 86, 111 (Fla. 2011). See also In re Amendment to Florida Rules of Criminal Procedure – Capital Postconviction Public Records Production, 683 So. 2d 475 (Fla. 1996). Further, Defendant raised this claim in his fourth successive postconviction motion, and the denial was affirmed by the Florida Supreme Court. Lambrix v. State, 124 So.3d 890, 895, n.2 (Fla. 2013). Given the lengthy postconviction and appeal proceedings in this case, Defendant has already received a dearth of records from previous proceedings. This Court properly denied his demands for additional records in this proceeding. The order on the demand for public records is incorporated by reference. To the extent that Defendant complained about the shortened time frames during the death warrant proceedings, such time frames are not unreasonable given the scheduling deadlines imposed by the Florida Supreme Court. Therefore, **Claim 1 is DENIED**.

8. **As to Claim II**, Defendant argued that he was deprived of effective assistance of counsel pre-trial and at trial. Defendant argued at the case management conference that this was not an ineffective assistance of counsel claim, but a claim of deprivation of counsel under United States v. Cronic, 466 U.S. 648 (1984) due to the alleged deficiencies in counsel's performance. Defendant argued that he was denied counsel due to: (a) a member of the Public Defender's Office giving a statement during a FBI interview; (b) trial counsels' failure to investigate Defendant's childhood and adult trauma; (c) failure to investigate PTSD or seek an expert to perform a CT scan; and (d) failure to raise during voir dire the issue that one of the jurors was the step-father of the officer subject to the FBI investigation into Defendant's allegations of assault by the officer. Defendant also repeats complaints that counsel did not sufficiently impeach

Frances Smith, and that counsel prevented him from testifying. As both of these claims have been fully litigated in previous proceedings, they are procedurally barred and will not be addressed further.

9. As it relates to (a), the alleged conflict of interest brought to light by the FBI report is untimely and procedurally barred. The FBI report was, or should have been, known to Defendant and counsel with due diligence many years ago. Defense counsel stated at the case management conference that prior defense counsel received the interview statement in 1999. A 3.851 claim of newly discovered evidence must be raised in one year of the date the evidence was or could have been discovered. Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008). Further, the person giving the statement merely indicated to the FBI agent that Defendant was a difficult client, had not been forthcoming, and had threatened to complain about counsel in collateral proceedings if his trial outcome was not favorable. The record reflects that these statements have all turned out to be true. There is no actual conflict of interest on the part of trial counsel based solely on the statement of an unknown individual from the Public Defender's Office to the FBI agent.

10. As it relates to (b), this issue was raised in the second 3.851 motion, and is now procedurally barred. The record indicates that trial counsel extensively investigated Defendant's background, and spoke to his parents, siblings and relatives (1990 Deposition of Mr. Engvalson pp. 35; 1990 Deposition of Mr. Jacobs pp. 11, 13, 25, 28, 44-45, 56). Trial counsel cannot be found ineffective for failing to present mitigating information regarding abuse, when little or none was provided to him by Defendant, his family, or friends, and where counsel had no reason to believe such information existed. Anderson v. State, 18 So.3d 501, 510 (Fla. 2009); Henyard v. State, 883 So. 2d 753 (Fla. 2004). Mr. Jacobs commented during his deposition that

Defendant was hostile and difficult, and their defense of him was hampered due to his lack of cooperation with them (1990 Deposition of Mr. Jacobs pp. 16, 19, 49, 53). The record refutes any claim of an actual conflict of interest on this sub-claim, since it appears counsel was acting diligently in representing Defendant.

11. As it relates to (c), Defendant argued that an expert recently retained has submitted a report indicating that a PET scan is desirable. That Defendant has now offered expert opinions different from those of the experts appointed before trial does not mean relief is warranted. Cherry v. State, 781 So. 2d 1040 (Fla. 2000). The record indicates that during the federal proceedings, Dr. Whitman testified that he had a neurologist, Dr. Steinmetz, evaluate Defendant for clinical abnormality or organic brain damage, and there was no evidence of gross neurological impairment (federal transcript, Vol. 3 pp. 17-23). Both trial counsel testified at their depositions that Dr. Whitman told them Defendant suffered from antisocial personality disorder, and that Defendant was "just mean" (1990 Deposition of Mr. Engvalson pp. 18; 1990 Deposition of Mr. Jacobs pp. 19, 39). Trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there was no mental health mitigation, and that initial diagnosis is not rendered incompetent merely because defendant has now secured the testimony of an expert who gives a more favorable diagnosis. Asay v. State, 769 So. 2d 974 (Fla. 2000). Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. Stewart v. State, 37 So.3d 243, 251-252 (Fla. 2010), *citing* State v. Sireci, 502 So. 2d 1221, 1223 (Fla.1987). "[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because another expert . . . questions the thoroughness of the

prior evaluations." Stewart, 37 So.3d at 253-254. Counsel cannot be deemed ineffective simply because he relied on what may have been less than complete pretrial psychiatric evaluations. State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987). Further, a subsequent finding of a mental deficiency does not necessarily warrant a new sentencing hearing, unless the psychiatric examinations were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. Id. at 1224. The pre-trial examination was not grossly insufficient. In addition, the new report does not constitute newly discovered evidence, so this claim is untimely. Grossman v. State, 29 So.3d 1034, 1042 (Fla. 2010). The record refutes any claim of an actual conflict of interest on this sub-claim, since it appears counsel was acting diligently in representing Defendant based on the knowledge counsel had at the time.

12. As it relates to (d), postconviction relief based on a lawyer's incompetence with regard to the composition of the jury is reserved for a narrow class of cases where prejudice is apparent from the record and a biased juror actually served on the jury. See Jenkins v. State, 824 So. 2d 977 (Fla. 4th DCA 2002). Defendant did not point to anything in the record that would support the conclusion that a biased juror actually served on his jury. Nor did the Court find any record evidence to support such a conclusion. Defendant has failed to allege any facts that, if true, would establish either prong of Strickland. Further, a defendant may not stand silent while an objectionable juror is seated and later attempt to attack his conviction on that basis. Trotter v. State, 576 So. 2d 691 (Fla. 1990). In addition, the issue of Juror Winburn was raised in the second 3.851 motion, and on appeal, and is now procedurally barred (copies of the relevant portions of the motion, response, and Florida Supreme Court order affirming the denial are attached). The record refutes any claim of an actual conflict of interest on this sub-claim, since it

appears counsel was acting diligently in representing Defendant. Therefore, **Claim II is DENIED.**

13. **As to Claim III**, Defendant argued that he was denied his constitutional rights because the jury's verdict was not unanimous, so his execution should be stayed pending the United State's Supreme Court's decision in Hurst v. Florida, 135 S. Ct. 1531 (2015). Defendant argued that the Hurst decision may affect the constitutionality of Florida's capital sentencing procedure. If so, he contends that the Florida Supreme Court "is likely" to revisit Defendant's case. The Florida Supreme Court has rejected this claim in a death warrant appeal issued after certiorari was granted in Hurst. Correll v. State, 2015 WL 5771838 (Fla. October 2, 2015). It has also declined to issue a stay in Hurst itself after certiorari was granted, as well as a capital case on direct appeal, Truehill v. State, SC14-1514. Further, a grant of certiorari by the United State's Supreme Court has no precedential value. Ritter v. Smith, 881 F.2d 1398 (11th Cir. 1987). Any claim that a decision in Hurst would impact Defendant's conviction is speculative. To the extent Defendant raised the issue of jury instructions, this issue could or should have been raised on direct appeal, and is now procedurally barred. Therefore, **Claim III is DENIED.**

14. **As to Claim IV**, Defendant argued that the totality of the punishment the State has imposed on him violates the Eighth Amendment and the precepts of Lackey v. Texas, 514 U.S. 1045 (1995). Defendant argued that he has been on death row for 31 years, where he has been "taunted with the specter" of being executed. Defendant argued that death row is an environment "so destructive to the human psyche that it is not intended for long term residency," such that it amounts to torture. This claim has been repeatedly denied by the Florida Supreme Court. Carroll v. State, 114 So.3d 883, 889 (Fla. 2013). As the Florida Supreme Court noted in that

case, the amount of time Defendant has spent on death row is due in large part to his voluminous filings of postconviction motions and petitions, and that the delay is due to his own actions in challenging his conviction and sentence. Therefore, **Claim IV is DENIED.**

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" is DENIED. Defendant may file a written notice of appeal within the time frame dictated by the Florida Supreme Court.

DONE AND ORDERED in Chambers at Labelle, Hendry County, Florida, this 21 day of Dec, 2015.

James D. Sloan
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Order has been furnished to: **William M. Hennis, III,** Capital Collateral Regional Counsel, Southern Region, 1 East Broward Blvd., Suite 444, Fort Lauderdale, FL 33301; **Cynthia A. Ross**, Assistant State Attorney, P.O. Box 399, Fort Myers, FL 33901-0399; **Capital Appeals Intake Box,** capapp@myfloridalegal.com **; Scott Browne,** Assistant Attorney General, Department of Legal Affairs, 3507 E. Frontage Road, 2nd Floor, Suite 200, Tampa, FL 33607; and **Administrative Office of the Courts** (XIX), 1700 Monroe Street, Fort Myers, FL 33901; this _____ day of _____, 2015.

SANDRA BROWN
Clerk of Court

By: _____
Deputy Clerk