IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17 - _____

CARY MICHAEL LAMBRIX,
Petitioner,

v.

JULIE JONES, Secretary,
Florida Department of Corrections,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This habeas corpus petition is being filed while Lambrix is under death warrant. The petition preserves claims arising under decisions of the United States Supreme Court and details substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Lambrix was deprived of appropriate review where this Court misconstrued and misinterpreted the record, resulting in his convictions and death sentences being obtained and affirmed on appeal in violation of fundamental constitutional guarantees.

Citations to the Record shall be:

(R.) -- Record on Direct appeal;

(PCR.) -- Record of Post-Conviction Appeal (where necessary)

(Supp-PCR.) -- Supplemental Record of Post-Conviction Appeal (where necessary)

All other citations shall be self-explanatory and incorporated by specific reference.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court—governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a) (3) and Article V, section 3(b) (9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163

(Fla. 1985). In addition, the Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Fla. Const. Art. I, § 13.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied the direct appeal. *See*, *e.g*., *Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction, and its authority to correct constitutional errors is warranted in this case.

Under the extraordinary circumstances of this capital case, and the fundamental imperative of preserving the integrity of the judicial process by preventing an unconscionable and unconstitutionally intolerable execution of an innocent man, this Court's exercise of habeas corpus jurisdiction—along with and Court's constitutional duty to protect against manifest injustice—is warranted in this capital case.

REQUEST FOR ORAL ARGUMENT

Lambrix requests oral argument on the claims asserted in the present petition. The extraordinary and unprecedented nature of this action, as well as the fundamental imperative of preventing an inconceivable manifest injustice and to fulfill this Court's promise to extend "extraordinary safeguards …to ensure that only

those whose guilt is certain …are ultimately put to death" warrants grant of oral argument in this capital case.

TIMELINESS

The instant state habeas petition could only be brought after the conventional process has failed to remedy the fundamental miscarriage of justice set forth herein. *See Zinermon v. Burch*, 494 U.S. 113 (1990) ("The constitutional violation actionable…is not complete when the deprivation occurs; it is not complete until and unless the state fails to provide due process").

As this Court has stated, "extraordinary safeguards must be taken to ensure that only those whose guilt is certain …are ultimately put to death." *Amendments to Fl. R. Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213, 1214 (Fla. 2001) (concurring Anstead, J.,).

This Court has long recognized that "[i]n exceptional cases where there 'has been a fundamental miscarriage of justice' for which no other adequate remedy is presently available, the writ [of habeas] is effectual," *Reddick v. State*, 190 So. 2d 340, 350 (Fla. 1966); citing *Sunal v. Large*, 332 U.S. 174 (1946). The availability of habeas review "when all other remedies have been exhausted" was reiterated in *Baker v. State*, 878 So. 2d 1236, 1246 (Fla. 2004) (Anstead, J., specially concurring):

> [I]n our attempts to efficiently regulate a system for addressing postconviction claims we must constantly keep in mind that we are dealing with the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our

> Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries. This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts. As we reaffirmed in *Harvard v. Singletary*, 733 So.2d 1020, 1024 (Fla. 1999), "we will continue to be vigilant to ensure that no fundamental injustices occur.

This Court has also held that it would not hesitate to "issue a stay of execution" if the petitioner "brings a successive postconviction challenge that casts doubt on his or her guilt, the integrity of the judicial process, or the validity of the death sentence imposed." *Abdool v. Bondi*, 141 So. 3d 529, 555-56 (Fla. 2014) (Pariente, J., concurring with Labarga, J., and Perry, J.).

Surely, innocence trumps finality and the interests of comity and finality must yield to the imperative of correcting a fundamental miscarriage of justice. *See House v. Bell*, 126 S. Ct. 2064, 2075-76 (2005). Our justice system is not perfect. *Herrera v. Collins*, 506 U.S. 390, 415 (1993) ("it is an unalterable fact that our judicial system, like the human beings that administer it, are fallible.").

Availability of the Writ of Habeas Corpus when the conventional process has proven inadequate or unwilling to correct a manifest injustice reflects who we are as a society and our recognition that preserving the integrity of the process by providing the flexibility necessary to correct manifest injustices will always take priority over finality. *See Holland v. Florida*, 560 U.S. 631, 649-50 (2010) (emphasizing "the need for flexibility" and to "accord all the relief necessary to correct…particular

injustices" in habeas proceedings); *see also Haag v. State*, 591 So. 2d 614, 619 (Fla. 1992) (habeas corpus "should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice"). The imperative of preventing a manifest injustice demonstrates this petition is timely.

THIS COURTS CONSTITUTIONAL DUTY IS TO PROVIDE A FULL AND FAIR REVIEW OF A TRULY PERSUASIVE CLAIM OF INNOCENCE

The Supreme Court addressed whether a free-standing claim of actual innocence could be advanced through a federal habeas corpus petition in *Herrera v. Collins*, 506 U.S. 390 (1993). At issue in the instant petition to this Court is the independent obligation of the courts of the State of Florida to provide meaningful review of a claim of actual innocence of the murder of Bryant in conjunction with a claim of legal innocence of the murder of Moore, based on self-defense.

Lambrix submits that the Florida Constitution and applicable state and federal law require that the Florida Courts must provide a full and fair review of a truly persuasive claim of innocence. First, as the Supreme Court explained in *Harrington v. Richter*, 131 S. Ct. 770, 787 (2001), relying on *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), the "state courts are the principle forum for asserting constitutional challenges to state convictions," and "state proceedings are the central process, not just a preliminary step for later federal habeas proceedings." (emphasis added). This

philosophy is consistent with what this Court stated in *Holland v. State*, 503 So. 2d 1250 (Fla. 1987), adopting *Mickel v. Louisiana*, 350 U.S. 91, 93 (1955), that the "Due Process clause guarantees a defendant 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court."

In *Jones v. State*, 740 So. 2d 520, 523 (Fla. 1999), quoting *Scull v. State*, 569 So. 2d 1251, 1252-53 (Fla. 1990), this Court held that in the context of capital postconviction proceedings, due process "embodies a fundamental conception of fairness that ultimately derives from the natural rights of all citizens." *See also, Engle v. Isaac*, 456 U.S. 107, 126 (1982), quoting *Sanders v. United States*, 373 U.S. 1, 17-18 (1963) ("principles of fundamental fairness underlie the writ of habeas corpus"). As this Court explained in *Scull v. State*, 569 So. 2d at 1252:

> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, § 9, Fla. Const. While we often have said that "due process" is capable of no precise definition, *e.g. Gilmer v. Bird*, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsumed within the meaning of the term. The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. *See* art. I, § 9, Fla. Const. (emphasis added).

The substantive claims presented below invoke fundamental rights protected by both the Florida and Federal Constitutions. This Court has enforced procedural rules limiting the availability of collateral relief but also has recognized that "[n]ot even the hoariest precedent is permitted to violate the guarantees of habeas relief, equal protection, and equal access to the courts, or any of the other fundamental rights set forth in the Declaration of Rights, Art. I., Fla. Const." *Hagg v. State*, 591 So. 2d at 618.

Under Florida law, Lambrix possesses a fundamental constitutional right to have his claims of actual and legal innocence heard before and determined by the state courts. The failure to allow the claims presented below to be fully and fairly heard establishes a violation of Lambrix's due process rights under the Eighth and Fourteenth Amendments of the U.S. and Florida Constitutions. *See, e.g., District Attorney's Office v. Osbourne*, 557 U.S. 52, 129 S. Ct. 2308, 2320 (2009) ("Federal Courts may upset a state's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.")

In the context of both applicable Due Process and the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishment," the Florida Constitution provides "greater protections" than its Federal counterpart. This Court referenced this concept recently in *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016), quoting *State v. Horwitz*, 191 So. 3d 429, 438 (Fla. 2016):

> Put simply, the United States Constitution generally sets the 'floor – not the ceiling – of personal rights and freedoms that must be afforded to a defendant by Florida law.' *State v. Kelly*, 999 So. 2d 1029, 1042 (Fla. 2008). As we recognized in *Kelly*, 'we have a duty to independently examine and determine questions of state law so long as we do not run afoul of federal constitutional protections. *Id.* at 1043.

In this instant habeas petition, Lambrix asserts that his execution, or continued incarceration, would run afoul with that greater protection because he is actually and legally innocent. *See Kuhlman v. Wilson*, 477 U.S. 436, 452 (1984) ("a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is incarcerated").

A plurality of the Supreme Court has recognized that the execution of an innocent person would unquestionably violate the prohibition against cruel and unusual punishments. *Herrera v. Collins*, 506 U.S. 390, 419 (1993) ("the execution of a legally and factually innocent person would be a constitutionally intolerable event") (O'Connor, J., joined by Kennedy, J., concurring); *Id.* at 431 ("the Constitution forbids the execution of a person who has been validly convicted and sentenced, but who nevertheless can prove his innocence") (Blackmun, J., joined by Stevens and Souter, J.J., dissenting); *Id.* at 417, ("assuming, without deciding, that the execution of an innocent man is unconstitutional") (Renquist, J., concurring).

The execution of an innocent person would violate the Eighth Amendment. Under Article I, §17 of the Florida Constitution, "Florida's interpretation of the cruel and unusual clause (shall be) construed in conformity with the United States

Supreme Court decisions." *Lightbourne v. McCollum*, 969 So. 2d 326, 334 (Fla. 2007). Thus under Florida law, Lambrix's execution would be a constitutionally intolerable event if he can prove his actual and legal innocence.

Both the Florida and Federal Constitutions require that Lambrix be provided a fair and meaningful opportunity to prove that the constitution would prevent his execution. *See Hall v. Florida*, 134 S. Ct. 1086, 2001 (2014) ("the death penalty is the gravest sanction our society may impose. Persons facing that most severe sanction must have the opportunity to show that the Constitution prohibits their execution").

The principle that the Florida Constitution provides even greater protections than its Federal counterpart, as noted in *Hurst v. State*, is only meaningless rhetoric if the Florida Courts are unwilling to provide a meaningful opportunity to invoke that "greater protection" by providing state court review of substantive constitutional claims – especially those relevant to establishing actual and legal innocence as in the instant case.

THERE IS A SUBSTANTIAL DISTINCTION BETWEEN THE INSTANT STATE CLAIM AND THE CLAIM ADDRESSED IN *HERRERA V. COLLINS*

In addressing the instant state habeas petition, this Court is not constrained by the limitations of *Herrera v. Collins, supra.* There is a substantial distinction between the instant state court claim and the claim addressed in *Herrera v. Collins*.

The primary issue in *Herrera* was whether a Federal habeas corpus petitioner could bring a "free-standing" claim of innocence in federal court to challenge the validity of a state conviction. The *Herrera* Court stopped short of recognizing the validity of such a "free-standing" innocence claim, but left open the possibility that in a capital case "a truly persuasive demonstration of 'actual innocence' would render the execution of a defendant unconstitutional" if there was no available state avenue of postconviction relief, even if the conviction was the product of a fair trial. *Herrera v. Collins*, 506 U.S. at 417.

Applicable Florida law provides an avenue for state court review of Lambrix's claims of actual and legal innocence. Only if the Florida courts refuse to provide the equitable remedy necessary to prevent the manifest injustice complained of by Lambrix, would the very question left open in *Herrera* need to be confronted. Lambrix concedes that "the threshold showing for such an assumed right (to pursue a free-standing innocence claim) would necessarily be extraordinarily high." *Herrera, Id.*, at 417. *See also, McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013). Upon establishing a prima facie showing of actual and legal innocence, Lambrix must be provided a full and fair evidentiary hearing to establish his actual and legal innocence. *See In re: Davis*, 130 S. Ct. 1 (2009) ("the substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing"); *Hall v. Florida*, 134 S. Ct. at 20001 (explaining persons facing

execution ”must have a fair opportunity to show that the Constitution prohibits their execution”).

Although Lambrix presents this instant state habeas petition within the general perimeters of the question reserved by the Supreme Court in *Herrera v. Collins*, the available empirical evidence now shows that the premises on which the Court relied in 1993 to decide *Herrera* were fundamentally flawed and unreliable. Specifically, the *Herrera* Court relied on a presumption that even if the state judicial process failed to correct a fundamental miscarriage of justice, the states' historic use of executive clemency as a necessary safety net and "fail-safe" to protect the innocent would be available. Lambrix is prepared to demonstrate that the State of Florida has abandoned any meaningful executive clemency process in capital cases. He should be provided a meaningful opportunity to do so through a full, fair and proper evidentiary process.

Lambrix previously challenged the constitutional inadequacy of Florida's clemency process before the Florida courts, but they have refused to address the issue. *Lambrix v. State*, 217 So. 3d 977 (Fla. 2017). The available evidence shows that Florida by far leads the country in the number of wrongful convictions and exonerations in capital cases. Despite this fact clemency has not been granted in the case of any death-sentenced prisoner in Florida for thirty-three years. *See* Appendix A, (Affidavit of Professor Michael Radelet, and attachments). If Lambrix is

compelled to seek federal review of his innocence claim he will ask the Supreme Court to re-visit *Herrera v. Collins*. Presentation of evidence of the absence of a meaningful state clemency process in Florida will be of significant importance in obtaining review.

Lambrix has requested clemency consideration only to be denied the opportunity after 1987 to present relevant evidence or to be heard. *See* Attached Appendix B, (Affidavit of clemency counsel attorney Norman Adam Tebrugge) (detailing Lambrix's efforts to pursue clemency review).

In *Herrera v. Collins* members of the Court also relied upon another false presumption. They assumed that legitimate claims of innocence that were left uncorrected in the conventional state and federal postconviction process were so "extraordinarily rare" that judicial intervention was unwarranted. When *Herrera* was decided in 1993, DNA testing and DNA exonerations were still in their infancy. Since *Herrera* there have been more than 350 DNA exonerations, including at least 20 cases involving death-sentenced prisoners. This fact conclusively establishes by empirical evidence that the presumption relied on by the Supreme Court that uncorrected claims of innocence are "exceedingly rare" was misplaced and that the actual error rate is far higher than thought in 1993.

This Court should not be constrained by rationales and the reservations articulated in *Herrera*, as circumstances have changes or surfaced which show this

issue must be considered. This Court should address Lambrix's instant claims from a contrary set of assumptions: that executive clemency is not a reasonably available fail-safe in Florida and that legitimate claims of actual innocence left uncorrected by the conventional judicial process are not rare.

LAMBRIX IS ENTITLED TO A FULL, FAIR AND MEANINGFUL EVIDENTIARY PROCESS TO RESOLVE ANY MATERIAL FACTUAL DISPUTES

This original habeas petition contains factual assertions that will be disputed by the State of Florida. Lambrix submits that both state and Federal law entitle him to a full, fair, and meaningful evidentiary process to resolve any and all material factual disputes, especially any disputes pertaining to Lambrix's claim of actual and legal innocence.[1] *See In re Davis*, 130 S. Ct. at 1.

This Court's own precedent recognizes that at this juncture, the Court must accept Lambrix's factual assertions as true. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) ("[I]n cases where there has been no evidentiary hearing…we must accept the factual allegations made by the defendant to the extent they are not refuted by the record"); *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995) (same); *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989) (same). This Court should remand the case to the circuit court with instructions to conduct a full evidentiary

[1] Lambrix struck the male victim in self-defense when he encountered him assaulting the female victim. Lambrix did not kill or attack the female victim in any way.

hearing on all issues of material fact that remain in dispute between the parties. *Freeman v. State*, *supra*; *Scott v. State*, *supra*; *Lightbourne v. State*, *supra*.

CLAIM I

The constitutional prohibition against the execution of an innocent person and fundamental principles of due process mandate a cumulative review of all the evidence in a capital case when conducting such a review will establish a truly persuasive showing of actual and legal innocence.

The issue presented herein is one of first impression – this Court has never addressed whether the Florida Constitution prohibits the execution of an innocent person, and if so, what measure of constitutional protections must be available under both Florida law, and Federal law, to protect against such a constitutionally intolerable event. As provided above, it is clear that under the Eighth Amendment of the Federal Constitution, which this Court is bound by under Article I, § 17, Fla. Constitution, and *Lightbourne v. McCollum*, 969 So. 2d at 334, the execution of an innocent person would be a constitutionally intolerable event.

There must be a means in which to establish innocence. *Cf. Hall v. Florida*, 134 S. Ct. at 2001 (capital defendants "must have the opportunity to show that the constitution prohibits their execution"); *Reddick v. State*, 190 So. 2d at 350 (citing *Sunal v. Large*, 332 U.S. at 174) ("In exceptional cases where there 'has been a fundamental miscarriage of justice' for which no other adequate remedy is presently available, the writ [of habeas] is effectual"). Under long established Florida law,

fundamental principles of due process dictate that "extraordinary safeguards must be taken to ensure that only those whose guilt is certain …are ultimately put to death," *Amendments to Fla. R. Crim. P. 3.851, 3.852, 3.853, and 3.993*, 797 So. 2d at 1214 (Anstead, J., concurring) (emphasis added).

As noted elsewhere herein, the question of whether a free standing claim of innocence can be brought was debated in *Herrera v. Collins, supra*. But this question is not exclusively a federal habeas corpus issue. The state courts are constitutionally required to provide an adequate remedy because "state courts are the principle forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 131 S. Ct. at 787, relying on *Wainwright v. Sykes*, 433 U.S. at 90. Florida law has long recognized the right to "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court." *Holland v. State*, 503 So. 2d at 1250, adopting *Mickel v. Louisiana*, 350 U.S. at 93.

Further, the recognized principle that the Florida Constitution provides "greater protections" than the Federal Constitution becomes meaningless if Florida's courts refuse to allow substantial constitutional claims to be heard in the state courts. See *Hurst v. State*, 202 So. 3d at 57 (relying on *State v. Kelly*, 999 So. 2d at1042-43).

Lambrix's capital case presents extraordinary circumstances. A cumulative review of all the readily available evidence that was not considered by the jury or

reviewed upon the merits by any state or federal court will establish that Lambrix is actually or legally innocent of each of the two murders that he has been wrongfully convicted of and condemned to death for. That review should be available "as a means to correct manifest injustices…when all other remedies have been exhausted"). Under these extraordinary circumstances, "extraordinary safeguards" must be available. *Baker v. State*, 878 So. 2d at 1246 (Anstead, J., concurring) (habeas corpus must be available "as a means to correct manifest injustices…when all other remedies have been exhausted").

The fundamental imperative of protecting against the constitutionally intolerable execution of an innocent person dictates that this Court must provide an equitable remedy under applicable Florida law to prevent manifest injustice. Lambrix is constitutionally entitled to have this Court address this issue presented herein under both applicable Florida law and the Federal Constitution.

a) <u>A Summary of the Facts of the Case and the Evidence Presented</u>

As the State of Florida has conceded, Lambrix has consistently maintained that he is factually and legally innocent of capital murder.[2] This Court has summarized the basic facts of the case as it was presented to the jury in 1984. *See*

[2] Because of page limitations, a full statement of the facts cannot be adequately provided in the instant pleading. For a more comprehensive Statement of the Case and Facts, this Court can look to the Initial Brief submitted under warrant in *Lambrix v. State*, Case No. SC16-08.

Lambrix v. State, 494 So. 2d 1143, 1145 (Fla. 1986). Subsequently this Court has also recently provided a chronological summary of the prolonged and convoluted history of the postconviction review of the case. *See Lambrix v. State*, 217 So. 3d 927 (Fla. 2017). Although it has been repeatedly pled, this Court has never recognized that by the State's own admission the theory of the alleged premeditated murder of Clarence Moore and Aliesha Bryant at the hands of Lambrix rested entirely upon the testimony of the State's single key witness, Frances Smith.

The evidence of guilt for premeditated murder in this capital case was not overwhelming. At trial, the prosecution argued that witness Frances Smith was the hub of the wheel of the State's evidence against Lambrix. (R. 1925). In subsequent postconviction proceedings, the State's position was made even clearer by the Assistant Attorney General assigned to the case. At a hearing in state circuit court on October 6, 2000, the AAG stated on the record that "clearly the State's case was built on Frances Smith…the entire case, premeditation and everything, is proven in her testimony. And there has never been any question about that."

The evidence presented at trial established that in early January 1983 Lambrix met Frances Smith in Hillsborough County, Florida. Together, they relocated to Glades County, Florida. There, they rented a mobile home located on a ranch outside of the town of LaBelle, Florida. Lambrix obtained employment as a farm equipment

mechanic while Smith found work as a house cleaner. The record reflects that, at that time, Smith was age 31 and Lambrix was age 22.

On the evening of Saturday, February 5, 1983, Lambrix and Smith went together to a local bar called the Town Tavern. There they met by chance a man who called himself Chip, who was later identified as Moore. Unknown to Lambrix and Smith, Moore was a 35 year old career criminal and known associate of drug smugglers. He also had a criminal history of an intoxicated violent assault upon a female.

After Chip sat with Lambrix and Smith at their table, a local 19 year old waitress, Aleisha Bryant, entered the bar and joined them. In the hours that followed they all remained together consuming alcohol. After leaving Town Tavern, they all went to a second bar called "Squeeky's." The State's pre-trial investigation revealed that Moore had checked out of a local hotel room on Saturday morning, intending to return to the Miami area. Aleisha Bryant was scheduled to be back at her job at White's Restaurant at 6:00 a.m on Sunday morning.

Around midnight, Lambrix purchased a bottle of whiskey and some Coca-Cola and the four left the bar and travelled to the trailer shared by Lambrix and Smith. Upon arrival at the remote trailer, Smith went into the kitchen to prepare a late-night spaghetti dinner. The other three sat in the adjacent living room. Frances Smith testified at trial that that she witnessed no animosity between any of the parties

and that Lambrix, Moore, and Bryant were drinking whiskey while "laughing, teasing and playing around" with each other. (R. 2204-05).

Smith testified that Lambrix and Moore went outside the trailer together, leaving her alone in the trailer with Bryant, and that about 20 minutes later, Lambrix returned alone. She said that he told her and Bryant that Moore wanted to show them something outside. (R. 2205-06). Smith chose to remain inside because she was still cooking. (R. 2206). Smith testified that Lambrix "looked normal" when he returned to the trailer without Moore and did not have any blood on his person and was not then in possession of the alleged murder weapon, a tire iron. (R. 2206-07).

She testified that Lambrix and Bryant then went outside together while she remained inside. She stated that she did not see or hear anything that occurred outside because it was very dark and the stereo in the trailer was turned up loud. (R. 2208). She said that, after another 45 minutes of preparing spaghetti, Lambrix returned alone and was "covered in blood," so she "started screaming." Lambrix, according to Frances Smith, "grabbed and shook her" to be quiet and told her "they're dead," and he stated that he "would do [her] too." (R. 2209-11).

Smith testified that Lambrix washed up and changed his clothes, and as he did, she repeatedly asked him what had happened, but Lambrix "never said why." (R. 1819-21, 1932). She said he told her that he had to hit "the guy in the back of the

head and choked the girl." (R. 1812-12). He, according to Smith, then commented to her "at least now we have a car." (R. 1813).[3]

Smith testified that after Lambrix washed up, they traveled together to a local store using Moore's vehicle and purchased a flashlight. On the way back to the trailer they stopped at the home of a friend, John "Tex" Chezem, to borrow a shovel. Chezem also testified at trial and confirmed that Lambrix and Smith did borrow a shovel from him in the early morning hours of February 6, 1983. He said that Smith remained alone in the car, making no attempt to flee, while he and Lambrix retrieved a shovel from his shed.

Smith testified that upon their return to the trailer, Lambrix forced her to assist him in superficially concealing the bodies of Moore and Bryant, and that while doing so she witnessed Lambrix going through Moore's pockets. The State medical examiner investigator Samuel Johnson testified that he assisted in the recovery of the bodies at the crime scene and that he found both money and jewelry in the pockets of the victims. (R. 1992-2016).

Smith testified that Lambrix removed a gold necklace from Moore's body. (R. 2221-22). The State presented no other evidence that Moore owned a gold necklace or that Lambrix was ever in possession of a gold necklace.

[3] The State theory that Lambrix committed murder to steal Moore's 1976 Cadillac is questionable considering that Lambrix had a 1973 Plymouth Fury and Smith had a 1974 Chrysler New Yorker, both parked in the yard near the trailer.

Smith added new testimony at the second trial. She said that when she first saw Bryant's body, it was "face down in a pond, from her knees up in water." (R. 2225). Smith said that when she asked Lambrix why Bryant was in this pond he told her "because if she wasn't dead, she would finish drowning." (R. 2225-26). During postconviction litigation, the owner of the crime scene property provided a sworn affidavit that there was no pond on her property. In addition, reliable scientific evidence shows that Frances Smith's testimony was demonstrably false. *See* Claim II, incorporated in its entireity.

Deborah Hanzel was called as a State witness at trial to corroborate Frances Smith's testimony that Lambrix's motive was to steal Moore's vehicle. Hanzel testified that in early 1983 she was living with Smith's cousin, Preston Branch. Her testimony was that, in the days following the alleged murders, she and Branch assisted Lambrix in retrieving his personal property from the trailer. She said that Lambrix was consuming a large quantity of beer during the drive back and that he blurted out "If you give me $100, I will take you back and show you where I killed two people and buried them." (R. 2445). She also testified that in a subsequent conversation a few days later she asked Lambrix if he killed the man for the car, and that Lambrix told her "that was part of the reason." (R. 2449).

Preston Branch also testified at trial. He stated that he was present during Lambrix's conversation with Hanzel, but he did not hear Lambrix say he killed

anyone. Instead, his recollection was that Lambrix said there were "two people buried back there." (R. 2418-20).

The State also presented the trial testimony of the judicial circuit medical examiner, Dr. Robert Shultz, to establish the cause of death of Clarence Moore and Aleisha Bryant. Again, Frances Smith testified that Lambrix told her that he "hit the man in the back of the head and choked the girl." (R. 2244-45) (emphasis added). However, this account conflicts with the finding of the medical examiner, who testified that the blunt trauma to victim Moore was caused by "multiple crushing blows" on the front of the head "resulting in severe fractures around the eyes and cheeks." (R. 2058-59) (emphasis added). Specifically, the blows were administered "eight times – four times to the left frontal forehead, and four times to the right…applied in a continuous side-to-side motion." *Id.*

More importantly, although Moore must have been facing his opponent when struck in the frontal forehead, Dr. Shultz found virtually no signs of any defensive wounds. (emphasis added). This indicates that rather than being the victim, as the State theorized, Moore was the aggressor. This fact pattern is entirely consistent with Lambrix's claim of self-defense.

As to the death of Ms. Bryant, contrary to Frances Smith's testimony, Dr. Shultz found no evidence to support that Bryant had been choked or drowned in a pond. Dr. Shultz conceded on cross-examination that his unscientific finding that

Bryant's cause of death was "probable manual strangulation" was based on a process of elimination of potential causes. He saw no evidence of gunshot wounds, blunt trauma, or other physical injury. Thus, he assumed that the cause of death was strangulation although he conceded that he had found no direct evidence to support this finding. (R. 2213-14).[4]

Smith testified that after she and Lambrix superficially concealed the bodies of Moore and Bryant, they then packed a change of clothes and took Moore's vehicle towards Plant City, Florida in Hillsborough County. They subsequently parted ways and Smith retained the exclusive possession of the vehicle.

On Wednesday, February 9, 1983, Hillsborough Co. Sheriff's Deputy Steve Laungkitis pulled Moore's vehicle over after receiving information that Lambrix had been seen in Smith's company in that vehicle. When Smith was questioned after the stop, she stated that she did not know Lambrix and that the vehicle belonged to her boyfriend. The deputy advised Smith that he knew she had been with Lambrix earlier in the week, and Smith changed her story. She told the deputy that Lambrix had picked her up that morning and had asked her to drop him at the bus station in Plant City. She stated he would take a bus to Chicago, and she was then to abandon

[4] In prior postconviction proceedings the State pointed to decomposition of Bryant's body as the reason for the absence of supporting evidence of strangulation when Lambrix raised this issue. Lambrix will proffer the autopsy photographs at a hearing to counter this argument since the photos do not support the State argument.

Moore's vehicle at a nearby highway intersection. Deputies Laungkitis and Thomas contacted the Plant City bus station and ascertained that no busses left that morning for Chicago. Smith was immediately placed under arrest and taken into custody.

Smith was booked into the Hillsborough Co. Jail that same day, February 9, 1983. She remained in custody for three days and was again questioned.[5] Hillsborough Co. detective Kenneth Mizell searched the vehicle that Smith was driving when arrested. He was aware of a B.O.L.O. (be on the lookout for) that had been issued by the Hendry Co. Sheriff's Office in connection with a missing persons report that had been filed in the preceding days by the parents of Aleisha Bryant.

Detective Mizell communicated with Hendry Co. Sherriff's detective Tommy Vaughn, who advised Detective Mizell that Ms. Bryant was last seen in the vehicle belonging to Moore. Detective Mizell then went to the Hillsborough Co. Jail to interview Frances Smith in regards to the missing persons report issued on Ms. Bryant.

Mizell asked Smith if she had been in the LaBelle area on the weekend of February 5-6 and whether she knew anything about the disappearance of Bryant. Smith denied being in LaBelle and claimed she had no knowledge concerning

[5] Smith told the State investigators that she was in great fear of Lambrix and for that reason she had failed to initially report the alleged homicides. Her initial booking photograph, never seen by the jury, rebuts her later statements in that it shows her smiling or laughing See Appendix C.

Bryant. She also claimed she did not know how Lambrix obtained Moore's vehicle. Shortly thereafter, Smith posted bail and was released.

According to Smith, she then spent the next three days discussing her "options" with her family and seeking legal counsel. On February 14, 1983, on the advice of counsel, she went to the State Attorney's office – not the police department – and reported that she had information about the deaths of Bryant and Moore and could lead the investigators to their concealed bodies. Despite her delay in reporting the alleged murders, being arrested in possession of Moore's vehicle, and admitting to being an accomplice to the alleged crime, Frances Smith was never charged with any crime relating to the case.

b) <u>Why the Jury Never Heard Lambrix's Consistently Maintained Claim of Actual Innocence</u>

Lambrix has consistently argued that he was deprived of his fundamental right to testify in his own defense at trial. See *Lambrix v. Singletary*, 72 F. 3d 1500, 1508 (11th Cir, 1996) (recognizing that Lambrix was improperly prohibited from testifying at his first trial – but concluding that because the record is silent at the second trial, it was assumed Lambrix acquiesced to not testifying).[6]

[6] Years after the initial habeas court made this assumption of acquiescence previously undisclosed FBI records revealed that Lambrix's trial counsel harbored a substantial conflict of interest based on his own interview with the FBI in which he violated the duty of loyalty and client confidentiality. This conflict provides a rationale for why trial counsel failed to preserve Lambrix's right to testify at his second trial. *See Lambrix v. State*, Case SC16-08 (*Cronic* claim).

As provided herein, witness Frances Smith conceded that she did not see or hear anything that transpired outside the trailer leading up to and resulting in the deaths of Bryant and Moore. Lambrix was the only living person who could have testified as to those events and refuted Frances Smith's second hand account based on what she said he said to her: that he had murdered both victims. When Lambrix was prohibited from personally testifying, he was denied any opportunity to establish his innocence at trial. *See Rock v. Arkansas*, 483 U.S. 44, 49-52 (1987) ("In fact, the most important witness for the defense in many criminal cases is the defendant himself"). At trial, trial counsel attempted to convince the jury that Smith's story was incredible and that she was acting in collaboration with the State Attorney's Office to fabricate a case of premeditated murder.[7]

In previous successive postconviction proceedings, there was substantial evidence presented in support of Lambrix's claim that he was wrongfully convicted due to the State's lack of professionalism or Smith's attempts at avoiding incarceration. For instance, state trial witness Deborah Hanzel testified in postconviction that Frances Smith and state attorney investigator Robert Daniels

[7] Lambrix's prosecutor, Assistant State Attorney Randall McGruther, prosecuted two other capital cases in which this Court vacated the convictions and ordered directed acquittals finding there had been overzealous prosecution based on a circumstantial theory of alleged premeditated murder comparable to the instant case. *See Ballard v. State*, 923 So. 2d 475 (Fla. 2006); *Scott v. State*, 581 So. 2d 887 (Fla. 1991).

coerced and convinced her to provide false testimony to corroborate Smith's testimony. Smith herself testified that, during the prosecution of the Lambrix case, she had engaged in a previously undisclosed sexual affair with investigator Daniels. *See Lambrix v. State*, 39 So. 3d 260 (Fla. 2010); *Lambrix v. State*, 124 So. 3d 890 (Fla. 2013).

Lambrix has never denied being in the joint company of Smith and victims Bryant and Moore on the night of February 5, 1983. Rather, Lambrix has consistently claimed that after he and Moore spent many hours consuming whiskey, a practical joke by the two intoxicated men went horribly wrong when Moore violently assaulted and killed Bryant. When Lambrix tried to intervene to stop Moore's assault on Bryant, Moore turned on Lambrix, forcing him to act in self-defense.

Lambrix was deprived of the opportunity to testify at trial but he did testify during the 1998-2008 postconviction proceedings. The State of Florida had years to prepare for his testimony, but the State was unable to produce any evidence to discredit or impeach Lambrix's account of being compelled to act in self-defense, resulting in Moore's death. *See* Appendix D (Transcript of April 5, 2004 evidentiary hearing testimony of Cary Michael Lambrix).

In prior proceedings, the State of Florida has claimed that Lambrix's claim of self-defense was manufactured <u>many years after the 1984 trial</u>. (emphasis added).

But, the State was well aware of the self-defense claim in 1987, which refutes its allegation that the self-defense theory was engineered many years after the 1984 trial. *See* Appendix E., (December 1987 Clemency Counsel's Presentation to Governor, Members of Cabinet [Clemency Commission] with Lambrix's written Statement of Facts).[8] His written statement of facts provided a detailed account of Moore's assault on Bryant and Lambrix's subsequent actions in self-defense. It was included as part of direct appeal counsel/clemency counsel's presentation during the clemency proceedings following his direct appeal. The clemency proceedings were the first post-trial opportunity available to Lambrix to supplement the trial record

[8] The transcript of clemency counsel's presentation is numbered pages 1-10. The attached Statement of Facts prepared by Lambrix is numbered pages 1-28. His account of the events which lead to the deaths of Bryant and Moore/Lamberson/"Chip" is found at page 6: "After a few moments, going towards the sound, I came up on them. Although it was more like shapes than actual figures I seen, it was very obvious that Chip was straddled over Alicia and was shaking her with both hands, like a rag-doll. She was lying on her back, facing up, with him somewhat on his knee's over her. As soon as I got up to them I said something to the effect of "let her get up" to which he told me in no exact way to mind my own business and get the hell out of there. All of this was happening so fast, within seconds and there was no time to think. I pushed at him with the tire iron, hard enough to knock him to the far side and as he went to the ground, he immediately came at me, springing like a cat. It all happened as if by one continuous motion, and as he came [at me] I swung the tire iron at him, again knocking him down. It would have been impossible to think it over before swinging and as I swung, he stopped coming towards me. I know I hit him several times before I got control of myself. I then dropped the tire iron and bent over Alicia. I thought she was just unconscious, and so picked her up and started back towards the trailer."

after he had been obstructed from testifying. Clemency counsel's live transcribed statement also included a description of Lambrix's account:

> I have presented to this Board, a 28 page document labeled "STATEMENT OF FACTS", which tells Mike's side of the story. Mike told me that he did not inform his attorneys at the time of the trial of this information. When you read it, it will be the first time it has been considered by an official of the State of Florida.
>
> Mike tells me that at the time of trial he was young, naïve, and never realized that a person is confined on death row for numerous years before execution. He had been in prison before and did not want to be there again. He believed that if he revealed the true facts of that fatal night, that he would probably be convicted of manslaughter and sentenced once again to prison. He made the decision at the time of trial to remain silent about his side of the story.
>
> Mike's STATEMENT OF FACTS admits that on the night in question, after spending several hours drinking, Lamberson and Bryant drove Mike and Frances Smith back to their trailer for dinner.
>
> While Frances Smith was preparing dinner, Michael and Lamberson went outside and were listening to music on the car radio. Lamberson requested that Michael bring Bryant outside so that Lamberson could play a joke on her.
>
> When Michael brought Bryant outside, Lamberson jumped out of the dark, scaring her. Keep in mind, all these people were inebriated. In her intoxicated state Bryant became angry. These are normal reactions of people who have been drinking.
>
> At this time Michael left. Lamberson and Bryant engaged in their own squabble. On arriving back at the trailer, Mike heard Bryant screaming. He instinctively picked up a tool and went back to the area where he had left them. He discovered Lamberson on top of Bryant, strangling her.
>
> When he realized that Lamberson was strangling Bryant, Michael attempted to break them apart. Lamberson then started towards him, threatening to kill him also. Mike swung the tire tool and kept swinging it until Lamberson was dead. In his stuporous state Mike had no intent to kill him, only to stop Lamberson from killing Bryant.

Appendix E (Clemency Counsel's presentation at 7-9). Prosecutor McGruther personally represented the State of Florida in the 1987 clemency hearing and subsequently represented the State in both the original and subsequent state postconviction proceedings as well as during the federal habeas corpus proceedings. (emphasis added). Therefore, the State was on notice of clemency counsel's statement and of Lambrix's 1987 statement of facts. Lambrix also wrote a letter to the family of victim Bryant during 1987-88 that they provided to the State laying out the same facts concerning his innocence. Appendix F (Letter to Bryants). The State has repeatedly misrepresented the facts about the consistency of Lambrix's innocence claims since 1987.

Lambrix's version of events has been remarkably consistent, and the State has failed to produce any inconsistent statement directly attributable to him. In an affidavit provided November 25, 1998 during the postconviction proceedings, proffered in both the state and Federal collateral postconviction proceedings, the material facts that the jury never heard were consistent with the statements made 11 years earlier during the clemency proceedings:

> When we got to the trailer, we all went inside and Aleisha, Chip and I sat in the living room, while Frances began cooking a spaghetti dinner. Chip and I continued drinking, now from the bottle of whiskey we had brought with us.
>
> k. After a short while, it began getting stuffy inside the small trailer. Chip and I went outside, played a tape in his car stereo, and continued to drink. By this time, we were both drunk.

l. We decided to play a joke on the girls. I went to get them while Chip hid. Frances was still cooking and didn 't want to go outside, but Aleisha readily went with me. We went back into the pasture behind the trailer and Chip jumped out, yelling. Both Chip and I thought this was very funny and began laughing, but Aleisha became angry and started yelling at Chip. They began to argue, so I left them and went back to the trailer.

m. After I got back to the trailer, I heard screams from the pasture. I hurried back out towards the pasture, grabbing a tire iron from the car I had been working on as I went.

n. I tried to go towards the area where I heard the screams. As I came up towards the rear pasture fence, I could hear a thumping sound.

o. I went directly towards the sound, and when I got closer I began making out the.shapes of Chip and Aleisha. Aleisha was lying face-up on the ground with Chip on his knees straddled across her stomach. Chip had his hands at her shoulder/neck area and was picking her upper body up and slamming it to the ground.

p. I yelled at Chip to let her up. He turned towards me and told me to get the hell out of his business. He continued to assault Aleisha, and as I got up to them, I struck Chip with the tire iron hard enough to force him off Aleisha and to the ground on the far side.

q. Chip immediately jumped back up at me. I was only a couple feet away and did not have time to back up. As he came up at me, I swung the tire iron at him. In fear, I continued swinging Ehe tire iron wildly until he fell at my feet. I then dropped the tire iron to the ground.

r. After a short period of time, I looked back to Aleisha, who lay motionless on the ground. Her clothes were disarrayed, and it seemed that she was unconscious. I tried to carry her back towards the trailer, but she was too heavy for me to carry, so I soon had to set her back down. She still was motionless. I checked her breathing and pulse, but could not detect either. I tried to give her CPR, but nothing I did helped. I then realized she was dead.

See Appendix G (Affidavit of Cary Michael Lambrix, November 25, 1998, at 3-5). Lambrix has not asked the courts to simply accept his word for what actually

took place on February 5, 1983 resulting in the deaths of Bryant and Moore. He has asked for a fair and meaningful opportunity to present the readily available evidence that no state or federal court has allowed to be addressed on the merits. If that cumulative evidence is heard, it will substantiate Lambrix's consistently pled claim of factual and legal innocence.

c) Readily Available Evidence Substantiates Lambrix's Claim of Innocence and Establishes a Truly Persuasive Showing of Innocence Necessary For Entitlement to Equitable Relief

This Court is required to conduct a holistic review of all available evidence, exempt from procedural bar. This includes evidence that was previously suppressed. The only question before this Court is whether the totality of all available evidence establishes "a truly persuasive showing of innocence" that would make Lambrix's execution (or continued incarceration) constitutionally intolerable.

As provided herein, to the extent any material factual disputes exist, Lambrix is entitled to have this case remanded to the trial court for a full and fair evidentiary process. *In re Troy Davis*, 130 S. Ct. at 1 ("the substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing").

i) Facts and Evidence Substantiating Lambrix's Consistently Pled Claim of Being Compelled to Act in Self-defense

Lambrix has consistently maintained that Moore was the party exclusively responsible for Aleisha Bryant's death and that he acted in self-defense after Moore came at him. Lambrix was deprived of the opportunity to testify before the jury at trial. *See* Claim II. This Court must now address not only Lambrix's theory of innocence but also the wealth of available evidence that substantiates Lambrix's claims. This Court may be skeptical of postconviction claims of innocence. But, it is significant that Lambrix's claims of actual and legal innocence have been consistent. It is all the more significant that the State's own evidence substantiates Lambrix's claim. No court has addressed the cumulative weight of the totality of the available evidence.

This Court should now look at the State's theory of the case as presented to the jury at trial. Smith testified that she did not witness any indication of animosity between any one at the trailer. Smith testified that Lambrix and Moore then went outdoors, leaving her and Bryant in the trailer. She said that about 20 minutes later Lambrix returned alone and told Bryant that Moore wanted to show her something outside.

Smith testified with unequivocal certainty that when Lambrix returned after going outside with Moore, Lambrix had no signs of blood on him and that he "looked normal." (R. 2209-11). Once Lambrix returned alone, after another 45 minutes.

Smith testified that he was then "covered in blood" and that he told her "They're dead." (R. 2209-11).[9]

A review of the testimony of medical examiner Robert Shultz, M.D., provides a context for the significance of Smith's testimony. Dr. Schultz testified that Moore died as the result of blunt force trauma, which he described as consisting of eight blows, four to the left frontal temporal area and four to the right frontal temporal area, inflicted in a swinging type motion. He further testified that the nature of the injuries sustained resulted in significant blood loss by Moore. Further, with each blow, blood would have splashed on the person inflicting the blows, presumably Lambrix. (R. 2058-59). In contrast, Dr. Schultz testified that Bryant did not appear to have suffered any form of trauma that resulted in blood loss. (R. 2046-50, 2073-77).

Based on Smith's and Dr. Schultz's testimony the clear inference is that the State's evidence indicates that the trauma to Moore had not yet occurred when Lambrix returned to the trailer alone to retrieve Bryant. Smith testified that Lambrix did not have any blood on his person at that time. Thus, Moore would have still been alive and died at some point after Bryant exited the trailer.

[9] Smith also testified that Lambrix "grabbed" her and shook her, but there was no blood found on any of Smith's clothing.

This fact pattern is in complete contradiction to the State's theory before the jury, which was that Lambrix lured Moore out first and killed him "for the car" and then returned to the trailer to retrieve Bryant in order to strangle her to death. The facts simply do not support Lambrix killing both Moore and Bryant separately or contemporaneously. Indeed, because their causes of death were not the same, it is ridiculous—as the state's theory seems to assert—that either would stand idly by while the other was killed. Surely, prospective victims do not twiddle their thumbs, awaiting their own death, when they witness another person's murder.

Thus, the totality of the evidence indicates that Moore was actually the person responsible for the assault on Bryant, which resulted in her death.

Frances Smith testified that Lambrix did not have any bruises or scratches consistent with a physical altercation. The State's evidence via the medical examiner showed that Moore had scratches on his upper body that were not inconsistent with what may have been inflicted by Bryant on her true assailant as she fought for her life. Photographs taken prior to autopsy show signs of blood at the upper body scratches, indicating that they were inflicted prior to Moore's death. These facts support Lambrix's account that Moore assaulted Bryant.

The medical examiner testified as to the causes of death of both Moore and Bryant. As to Moore, Dr. Schultz said that all the blows administered upon Moore were in a side-to-side "swinging pattern." Schultz found no signs of defensive

wounds and all the blows were to the frontal temporal area. In other words, Moore was facing Lambrix, and both the absence of defensive injuries and the angle of the blows indicate that Moore was coming at Lambrix as an assailant, not as a victim. This is entirely consistent with what Lambrix has claimed.

As to Bryant, Dr. Schultz testified that Bryant died of 'probable manual strangulation." Dr. Schultz conceded that he found no physical evidence to support that finding as the cause of death.[10] Rather it was speculation based on finding no other signs of physical trauma. Death by manual strangulation frequently results in substantial bruising and hemmoraging around the neck, as well as petechial hemmoraging in and around the eyes. There is also frequently damage to bones in the throat and larynx. Dr. Schultz found none of these signs of possible manual strangulation.

Lambrix is prepared to present expert testimony to establish that there is no substantive evidence to support the finding by the medical examiner that the cause of death of Aleisha Bryant was manual strangulation. Evidence concerning an alternate cause of death will substantiate Lambrix's account of what happened in support of his claim of innocence. *See* Appendix H (Report of Edward Willey, M.D.).

[10] Trial counsel unsuccessfully moved for a Judgment of Acquital in Bryant's case, arguing that the State completely failed to prove that Bryant was the victim of death by criminal agency.

Dr. Schultz's trial testimony as to Bryant's cause of death was unsupported speculation. He testified that he reached his conclusion of "probable manual strangulation" only by engaging in a subjective 'process of elimination' because he found no gunshot or knife wounds, no physical trauma, or death by natural causes. He failed to even consider mechanical asphyxiation as a possibility. Dr. Willey is prepared to testify that the evidence presented by the State is consistent with a cause of death of mechanical asphyxiation, where a substantial weight or pressure was placed on top of Bryant's body, depriving her of the ability to breathe.

Dr. Willey's proposed testimony and the evidence supporting his conclusions will substantiate Lambrix's claim and account that he came upon Moore pinning down Bryant and he was straddled on top of her. The record reveals that Moore weighed 195 pounds, sufficient weight to cause death by mechanical asphyxiation.

Collectively, this evidence substantiates Lambrix's version of events – and establishes that the State's theory of the case is not accurate. Moore could not have been killed before Bryant went outside with Lambrix. If he had been, Lambrix would have already been "covered in blood." In addition, the absence of defensive wounds on Moore and the frontal head wounds indicate that Moore was the aggressor. Finally, Bryant's likely cause of death substantiates Lambrix's account that Moore was on top of Bryant during a violent assault upon her.

ii) The State Relied Upon Material Misrepresentations to Convince the Jury That Lambrix Acted with Premeditated Intent

The substance of the facts pled herein have been procedurally barred from any state and federal review due to initial review postconviction counsel's failure to present this claim to the state courts in Lambrix's original postconviction motion. *See Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996).[11] Now, that procedural bar must yield to the constitutional obligation of this Court to conduct a 'holistic' review of all available evidence.

To convince the jury at trial that Lambrix unquestionably acted with premeditated intent to kill, the prosecutor elicited from key witness Smith testimony that Lambrix told her he had placed Bryant's body "face down in a pond" up to her knees, and that part of the reason he did so was to assure "that if she wasn't already dead, "she would drown." (R.2225-26).[12] The State relied on Smith's testimony in closing argument as proof of premeditation. But Smith's testimony was demonstrably false. They was evidence available to show that there was not a pond located on the crime scene property. The State introduced into evidence aerial

[11] Lambrix is pursuing equitable relief from this fundamentally unfair procedural bar in federal court pursuant to *Martinez v. Ryan*, 132 S. Ct. 1301 (2012). An aspect of this issue is currently pending in a Petition for Writ of Certiorari to the 11th Circuit Court of Appeals before the Supreme Court of the United States in *Lambrix v. Jones*, Case No. 17-5153.

[12] The medical examiner found no evidence to support that Bryant drowned.

photographs of the area that were taken by the lead investigator on the Lambrix case for the state attorney's office, Robert Daniels, who was also a pilot.

Lambrix has never been provided an opportunity to rebut this testimony and evidence and to show that the "pond" simply did not exist. Establishing that the evidence used to prove and support premeditation was false substantiates Lambrix's claim of innocence. Specifically, the owner of the property, Susan Johnson-Dellar, can testify that there was no pond located on her property. See Appendix I., (Affidavit of Susan Johnson-Dellar).

When this issue was previously raised, the State re-characterized the fictional pond as a "puddle" and attempted to support their new argument by relying on the aerial photographs taken in 1983 by Robert Daniels. The photographs show significant amounts of standing water in the area of the crime scene. However, the photographs were taken at least 10 days after the alleged crime following a significant rainfall event in the area. Lambrix has not been allowed to present supporting scientific evidence and be heard on same that will demonstrate that there was no standing water on the property on February 5, 1983.

The presentation of testimony from Steve Wistar, a certified meteorologist, and Richard Thompson, a hydro-engineer, will establish through reliable, scientific evidence, that the State's photographic evidence at trial was misleading and did not accurately reflect the conditions on the crime scene property on February 5-6, 1983.

The testimony and associated evidence developed by meteorologist Wistar will establish that official records show that there was only minimal rainfall in the crime scene area immediately prior to February 6, 1983 – the date of the alleged murders. The evidence shows that in the days that followed, up to and including February 16, 1983 (when the bodies of Moore and Bryant were recovered) there was torrential rainfall that resulted in flooding in the crime scene area. There was no ponding, flooding, or puddling on the night of February 6, 1983, the date when Smith said in her testimony that she had seen Bryant's body "face down in a pond." *See* Appendix J. (Composite report of Steve Wistar and official rainfall records).

Through testimony and corroborating evidence prepared by hydro-engineer Thompson, who personally surveyed the pasture area where the crime allegedly occurred, Lambrix will establish that there was a unique composition of sandy soil and the geographical contours of the property slightly sloped downward from the trailer area along Ferndale Lane westward towards Bee Branch Creek. It was in that lower pasture area where the bodies of Moore and Bryant were recovered. Had any significant volume of water collected there, that water would have drained to the west and collected at the lowest point in the area between the rear fence line and the Bee Branch Creek. It would have been impossible for Lambrix and Smith to have buried the two bodies there on February 6, 1983 in such conditions. *See* Appendix K (Report of Richard Thompson).

The State deliberately[13] mislead the jury with false and misleading evidence and testimony in a successful attempt to convince them that Lambrix acted with a premeditated intent to kill, which contributes significantly to his claim of innocence.

iii) This Court's obligation to conduct a holistic review of all evidence includes revisiting previously pled *Brady/Giglio* claims

Although this Court has previously addressed and denied Lambrix's *Brady/Giglio* and newly discovered evidence claims on the merits,[14] this Court's obligation to conduct a holistic review of all available evidence requires this Court to now revisit these previously pled claims. The evidence that lends support to these claims was procedurally barred from review during the prior state postconviction proceedings. The required cumulative review of all available evidence will lend powerful support to these previously pled claims.

First, there is the trial testimony of state witness Deborah Hanzel. The record reflects that the State presented 14 witnesses at trial, but only Hanzel provided testimony that tended to support Frances Smith's account, that Lambrix confessed to killing Moore and Bryant.

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[13] Even if the State acted with reckless disregard, as opposed to deliberate actions, this too would reveal that the investigation was so unprofessional and biased that it obfuscated Lambrix's opportunity to have a fair trial.

[14] *See Lambrix v. State*, 39 So. 3d 260 (Fla. 2010); *Lambrix v. State*, 124 So 3d 890 (Fla. 2013).

During subsequent postconviction proceedings, Hanzel came forward and recanted her trial testimony. She testified, that contrary to her trial testimony, Lambrix had never told her that he killed anyone. When she testified before the postconviction court, she was even clearer. She said that Smith and the state attorney investigator had influenced her to provide false testimony by convincing her that if she did not do so, her children could be endangered by Lambrix. Lambrix's counsel produced telephone records at the evidentiary hearing that supported communications between Hanzel and Smith during the time period when Hanzel said she was influenced by Smith and Daniels to lie.

In an attempt to rebut Hanzel's recantation, the State called Frances Smith to testify. However, in an interview with Lambrix's counsel Smith's ex-husband had advised that Smith had bragged about being protected from prosecution in the Lambrix case due to a sexual affair she had with the state attorney investigator, Miles "Bob" Daniels. When she was confronted with this information, Smith reluctantly admitted under oath that, during the prosecution of the case, she had a sexual relationship with Daniels and that the two never disclosed this relationship.

Investigator Daniels also testified. He denied that he had any sexual relations with Smith. However, he admitted that, prior to his testimony, he spoke with Smith outside the courtroom. He also volunteered that if he had engaged in sexual relations with Smith he would never admit to doing so, as such an admission would place his

state retirement pension at risk and cause problems in his marriage to another state attorney investigator.

Lambrix also attempted during the evidentiary hearing to present the testimony of Dr. William Gaut, an expert in homicide investigation. See Appendix L, Resume of William T. Gaut, P.hD. Gaut's opinion was based on his years of experience in law enforcement and in homicide investigation. He also conducted a review of the record in Lambrix's case. He was prepared to testify that there was significant evidence that investigator Daniels manipulated the course of the investigation from the very beginning to favor and protect key witness Smith. He also concluded that such action was consistent with the evidence of sexual involvement based on Smith's testimony Dr. Gaut updated his review in 2017 and produced a supplementary report. Appendix M (Report(s) of William T. Gaut).

Upon a finding that a postconviction court does not "re-try" a case, the trial court refused to allow Dr. Gaut or any of the other proffered expert witnesses to testify. This action deprived Lambrix of any meaningful opportunity to corroborate either Deborah Hanzel's account of coercion by Smith and Daniels resulting in false testimony or Smith's admission of a sexual affair with the state attorney investigator. Dr. Gaut's findings provide powerful support for Lambrix's consistently pled claim that from the very beginning of this capital case key witness Frances Smith and investigator Daniels worked together to manipulate evidence and coerce false

evidence with the intent of having Lambrix convicted and sentenced to death for crimes that he was innocent of. Lambrix must be provided a fair and meaningful opportunity to present and be heard. Dr. Gaut's proposed testimony and the evidence substantiating his expert opinion supports Lambrix's claim that he was wrongfully convicted and sentenced to death for crimes that he is both legally and factually innocent of.

iv) The integrity of the prior postconviction review has been corrupted by the state's material misrepresentations

This Court has previously recognized that:

> Our adversarial system of justice depends entirely upon the procedural fairness and integrity of the process. This Court and the United States Supreme Court have held that the integrity of the process is of unique and special concern in cases where the state seeks to take the life of the defendant.

Arbaleaz v. Butterworth, 738 So. 2d 326, 331 (Fla. 1999) (quoting *Monge v. California*, 524 U.S. 731, 118 S. Ct. 2246, 2252-53 (1998)). Just as the State is constitutionally prohibited from relying upon false or materially misleading evidence at trial, basic principles of Due Process and Fundamental Fairness dictate that the State is constitutionally prohibited from engaging in similar misconduct during postconviction proceedings, especially in capital cases. *See*, *Jones v. State*, 740 So. 2d 520, 523 (Fla. 1999) (quoting *Scull v. State*, 569 So. 2d 1251, 1252-53 (Fla. 1990)) ("Due Process in context of capital postconviction proceedings

embodies a fundamental conception of fairness that ultimately derives from the natural rights of citizens").

Just as this Court has repeatedly condemned a "win by any means necessary" in the trial context in capital cases, *see e.g., Ruiz v. State*, 743 So. 2d 1, 8 (Fla. 1999); *Garcia v. State*, 622 So. 2d 1325, 1332 (Fla. 1993); *Nowitzy v. State*, 572 So. 2d 1346, 1356 (Fla. 1990), this Court must show the same measure of intolerance to such misconduct in the capital postconviction stages. As this Court explained in *Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998):

> The conduct of the prosecutor was antithetical to his responsibilities as an officer of the court… While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike "foul blows." *See* *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*… The prosecutor in this case exceeded the bounds of proper conduct and professionalism and provided a "textbook" example of overzealous advocacy. This type of excess is especially egregious in this, a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects.

Lambrix has suffered substantial prejudice as the result of the state's consistent material misrepresentations, and the integrity of prior collateral postconviction proceedings has been irreparably undermined, especially when these

misrepresentations are intended to discredit Lambrix's consistently pled claim of actual innocence. The three most egregious examples are summarized herein.

The State has reluctantly acknowledged that Lambrix has maintained his innocence of premeditated first degree murder since 1983. But state counsel has also argued that he has changed his story of innocence over the past 34 years of litigation. But the State has failed to produce any inconsistent statements attributable to Lambrix in support or their argument, relying instead on various constitutional and legal claims pled by counsel over the years, such as voluntary intoxication. The intent of these misrepresentations by the state is two-fold: to discredit Lambrix's claim of innocence and to portray him as a manipulator. In reality, the evidence shows that Lambrix has consistently advanced a single theory of innocence: Moore violently and fatally assaulted Bryant and that when he attempted to intervene to stop Moore's assault on Bryant, Moore turned on Lambrix, requiring him to respond in self-defense.

In a prior oral argument on November 4, 2009 before this Court in Case No. SC08-64, the State conceded that the evidence is consistent with Lambrix's claim of self-defense. The State has not presented any evidence to discredit his account and failed to impeach his sworn testimony at the 2004 evidentiary hearing. So, while the State has often argued that Lambrix's explanation and account of his innocence has changed, that is simply not true and it obfuscates the fact that all of the evidence

supports his account over the palpably false theory that was presented before the jury.

Lambrix has also consistently argued that he was deprived of his fundamental constitutional right to testify at trial. *See Lambrix v. State*, 72 F. 3d 1500, 1508 (11th Cir. 1996). After being convicted, Lambrix did formally provide a written account of what happened on the night Bryant and Moore died at his first opportunity at the post direct appeal clemency proceeding in 1987. *See* Appendix E. Subsequently, throughout the state and federal postconviction process Lambrix has consistently and without exception proffered into the record his detailed affidavit setting forth his account of events. See Appendix G.

Additionally, in July 2004 Lambrix had an opportunity to testify. The State of Florida failed to impeach his account of self-defense during that testimony despite having 20 years to prepare for cross-examination. *See* Appendix D. The State also argued in response to the self-defense claim that at the time of trial Lambrix attempted to get one of his sisters, Mary Lambrix, to testify in support of a false alibi defense. However, the State has never provided any evidence to support the argument. When the State repeated this accusation before the postconviction court, counsel moved for an evidentiary hearing on the issue and proffered into the record an affidavit from Mary Lambrix in which she denied ever being asked to lie by her brother about anything related to his case. The State then abandoned further

litigation, only to continually bring the issue back up in state and federal appellate proceedings. *See* Appendix N (Affidavit of Mary Lambrix). Rules of Procedure applicable in 1984 would have required Lambrix's counsel to provide the trial court and the prosecution with advance notice of any intention to pursue an alibi defense in the case, and the record reflects that Lambrix's counsel never gave notice of any intent to do so.

Finally, the State attempted to bolster its case when Lambrix litigated the postconviction claims regarding Deborah Hanzel's recantation and key witness Smith's admission of a sexual affair with a member of the prosecution team. The State repeatedly claimed that Hanzel's testimony was unbelievable because witness Preston Branch had also testified at trial that Lambrix had admitted to him to killing Moore and Bryant. This material misrepresentation simply is not true. Preston Branch, who was then Deborah Hanzel's boyfriend, never testified or implied that Lambrix told him that he had killed anyone.

In reality, during his trial testimony, Branch was adamant that Lambrix only made a comment that there were two bodies buried "back there" but he insisted that Lambrix never told him that he had killed anyone. Branch also testified that he was not more than five feet away at the time Deborah Hanzel claimed that Lambrix had told her that he killed Moore and Bryant, and he heard nothing of the kind. And later,

during postconviction, Hanzel testified under oath that her trial testimony was not true because Lambrix never told her he killed anyone.

The substantial prejudice resulting from these material misrepresentations is that both this Court and the Federal Courts have adopted these misrepresentations as fact, thus undermining the integrity of the trial and the postconviction process. To the extent that counsel for the State attempts to again advance these material misrepresentations, Lambrix moves this Court to remand the case to the circuit court for a full evidentiary hearing and an opportunity to engage in a process capable of producing the evidence necessary to establish that there is no truth to these misrepresentations of fact.

Conclusion

For the reasons stated above and supported by the proffered evidence, Lambrix has established a sufficient showing of a truly persuasive claim of innocence that warrants a full and fair evidentiary process. *In re Davis*, 130 S. Ct. 1 (2009) ("the substantial risk of putting an innocent man to death clearly provies an adequate justification for holding an evidentiary hearing"). Under applicable Florida law, as set forth above, the State courts are constitutionally obligated to address this substantive claim on the merits, and to provide the full measure of equitable relief Lambrix is entitled to in the interest of preventing a constitutionally intolerable

miscarriage of justice. This Court cannot proceed to weigh the merits of Lambrix's claim of innocence without providing a proper evidentiary record.

CLAIM II

DENIAL OF THE RIGHT TO TESTIFY MUST BE REVISTED ALONG WITH CLAIMS I & III

The Florida courts have refused to address the denial of Lambrix's right to testify at his trial due to procedural default. *See Lambrix v. State*, 698 So. 2d 247 (Fla. 1996). This procedural default must now be set aside by this Court under the fundamental miscarriage of justice doctrine and then the denial of the right to testify issue must be fully addressed on the merits along with Claims I and III. *See Lottt v. State*, 931 So. 2d 807, 817-19 (Fla. 2006) ("[T]he United States Supreme Court has made it clear that a criminal defendant 'has the ultimate authority to make certain fundamental decisions regarding his case', one of which is whether to 'testify in his or her own behalf' citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983).").

Less than a year before Lambrix stood trial, the Supreme Court in *Jones v. Barnes, supra*, made it unequivocally clear that the right to testify was fundamental and that as such, only the defendant could ultimately decide whether or not to testify. Relying on *Barnes*, in *Rock v. Arkansas*, 483 U.S. 44 (1987), the Supreme Court later held that the right to testify is "even more fundamental to a personal defense then the right of self-representation, which was found to be necessarily implied by the structure of the [Sixth] Amendment…". *Id*. at 52, (quoting *Faretta v. California*,

422 U.S. 806, 819 (1975), as "the most important witness in many cases is the defendant himself."). This Court has subsequently recognized that the right to testify in one's own behalf is "a fundamental right under both the Florida and United States Constitution" in *McCray v. State*, 71 So. 3d 848, 872 (Fla. 2011).

No state court has addressed this substantial claim of ineffective assistance of trial counsel. To the limited extent that it was not procedurally barred, this claim was presented to the federal courts in Lambrix's federal habeas petition. The federal courts recognized that Lambrix did assert his right to testify only to have trial counsel improperly compel the trial court to instruct Lambrix that if he insisted on testifying contrary to trial counsel's advice, the Court would allow trial counsel to abruptly withdraw and force Lambrix to represent himself. *See Lambrix v. Singletary*, 72 F.3d 1500, 1508 (11th Cir. 1996).

However, the Eleventh Circuit denied relief upon a finding that although Lambrix clearly asserted his right to testify before his first trial, which ended in a mistrial, the record of his second trial was silent as to any assertion of the right to testify. The Eleventh Circuit, consistent with *Parke v. Raley*, 506 U.S. 20, 29 (1992), assumed that Lambrix had "apparently acquiesced" in the trial counsel's decision not to call him as a witness in his own behalf at his second trial. Under *Parke*, the federal courts may assume a waiver of a fundamental constitutional right in collateral

habeas proceedings of a state conviction, but this Court found that *Parke* does not apply to state court proceedings.

This Court has recognized that Florida courts are prohibited from assuming the waiver of a fundamental constitutional right from a silent record. *See State v. Kelly*, 999 So. 2d 1029, 1036-37 (Fla. 2008), relying on *State v. Beach*, 592 So. 2d 237, 239 (Fla. 1992). Had Lambrix's initial-review state postconviction counsel properly presented this claim to the state courts in Lambrix's original Rule 3.850 proceeding, consistent with Florida law the assumption of a waiver of Lambrix's fundamental right to testify from a silent record would not have been permitted. Lambrix would have been entitled to a new trial, as recognized under the Florida Constitution are entitled greater protection in the state courts then in the federal courts. *See generally, Kelly; Beach; and Traylor.*

When deprived of his right to personally testify, Lambrix was also denied his *equally fundamental right* to present a defense.[15] His sworn November 25, 1998 affidavit reflects that if he had testified at trial, he would have explained to the jury his account of acting in self-defense in the death of Moore and his actual innocence

[15] Lambrix has pled that due to deficient performance of initial-review collateral counsel, evidence that Lambrix actually *did re-assert his desire to testify at his second trial* was not presented. Had this evidence been properly presented, Lambrix would have been granted relief in his original federal habeas petition.

in the death of Bryant. *See* Appendix G. *See also* Appendix E (1987 Clemency statement of facts).

Lambrix was not afforded any opportunity to testify until state court postconviction proceedings based on alleged newly discovered evidence in April 2004. When Lambrix did actually testify in detail about how he was compelled to act in self-defense, the State did not, and could not, present any evidence to discredit or otherwise impeach Lambrix's testimony. Appendix D. The State argued in prior proceedings that Lambrix's claim of self-defense was undermined by initial review CCR counsel's pursuit of a voluntary intoxication claim. This assertion is meritless, and stands contrary to Florida law. *See Merck v. State*, 124 So. 3d 785, 794 (Fla. 2013). Lambrix, Moore, Bryant and Smith spent many hours consuming alcohol on the night of the events when he was compelled to act in self-defense against Moore.

The State has also asserted that even had Lambrix testified at trial, the jury could have rejected any testimony of self-defense. That assertion is contrary to Florida law. *See McArthur v. State*, 351 So. 2d 972, 976 n. 12 (Fla. 1977). *See also, Fowler v. State*, 492 So. 2d 1344-47 (Fla. 1st DCA 1986). The State's key witness Smith admitted that she did not actually see or hear anything that happened outside leading up to and resulting in the deaths of Moore and Bryant. Smith testified that Lambrix "never said why" he killed anyone, therefore the State's case for premeditation was wholly circumstantial. Had Lambrix been allowed to testify at

trial, his testimony concerning self-defense as to Moore's death and actual innocence of Bryant's death would have clearly established a "reasonable hypothesis of innocence" which would have mandated his acquittal. *See e.g., Bingham v. State*, 995 So. 2d 207 (Fla. 2008); *Long v. State*, 689 So. 2d 1055, 1057-59 (Fla. 1996).

Lambrix's concealment of the bodies with Frances Smith's assistance likewise fails to prove premeditated intent. *See Norton v. State*, 709 So. 2d 87, 93 (Fla. 1997). At oral argument on *Lambrix v. State*, SC08-0006, the State conceded that the evidence is consistent with self-defense. Depriving Lambrix of his right to testify at trial deprived Lambrix of his fundamental right to present a defense.

Had Lambrix's initial-review collateral counsel properly presented this claim to this Court in his original Rule 3.851 proceedings before the state courts, applicable Florida law, and provisions of the United States Constitution, would have required the state courts to vacate Lambrix's convictions, and remand this case for a new trial.

This Court's case law recognizes that the Court can and should set aside prior rulings and revisit issues when necessary in the interests of justice. Consequently, this Court should set aside the previously attached procedural bars and fully address the claim of the denial of the right to testify, and order a remand to the trial court for a full and fair evidentiary hearing on the claim. No consideration was given as to what comparable equitable relief is actually constitutionally mandated under the Florida Constitution, nor as to how failure to apply some comparable form of

equitable relief under extraordinary circumstances would effectively invalidate Florida's own long standing and consistently recognized manifest injustice doctrine, especially in the context of a capital case. *See Preston v. State*, 444 So. 2d 939 (Fla. 1985) (revisiting claims especially necessary in capital cases and low of the doctrine must yield to protect against manifest injustice); *State v. Atkins*, 69 So. 3d 261 (Fla. 2011) (relying on *Muehlmann v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) and *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2007)) ("under Florida law, [the] courts have the power to recognize and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.").

Under the doctrine that the Florida Constitution provides greater protections than its federal counterpart, there is a fundamental right to have the substantive issue of the deprivation of the right to testify addressed by the state courts. Because the claim of the denial of the right to testify is central to the claim of Lambrix's legal and actual innocence, the argued doctrine of equitable state and federal law that demands a full evidentiary process on the supported claim of innocence instructs that this must encompass a full evidentiary process on the denial of the right to testify. The manifest injustice doctrine demands that this claim be fully addressed on the merits in conjunction with Claim I and Claim III herein.

CLAIM III

AS A DEATH SENTENCED PRISONER, DOES LAMBRIX HAVE A SUBSTANTIAL RIGHT UNDER THE FLORIDA AND

FEDERAL CONSTITUTIONS TO ACCESS POTENTIALLY EXCULPATORY DNA EVIDENCE THAT, IF TESTED, COULD PROVIDE THE NECESSARY NEWLY DISCOVERED EVIDENCE SUPPORTING ACTUAL INNOCENCE THAT WOULD ENTITLE HIM TO RELIEF FROM THE CONVICTIONS?

a) Introduction

At the onset, Lambrix respectfully states that this Court should not confuse the instantly pled claim with the claim previously addressed by this Court concerning the DNA testing of material evidence. Rather, Lambrix submits that by virtue of those prior proceedings, the issue here is the constitutional adequacy of Florida's existing statutorily created right to DNA testing under Florida Statutes § 925.11 and Fla. R. Crim. P. 3.853.[16]

Consistent with other states, the Florida Legislature established a statutorily created protected liberty interest in having material evidence subjected to DNA testing provided that the statutorily enumerated prerequisites are met. This Court adopted Fla. R. Crim. P. 3.853 to facilitate the availability of that statutorily created right. Principles of fundamental fairness that inform Due Process and Equal protection dictate that the statutorily created protected liberty interest cannot be

[16] *See Zinerman v. Burch*, 494 U.S. 113, 126 (1990) ("The constitutional violation actionable…is not complete when the deprivation occurs; it is not complete until and unless the state fails to provide Due Process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided, and whether it was constitutionally adequate.").

arbitrarily or unfairly denied without violating both procedural and substantive Due Process under both the Florida and Federal Constitution. That deprivation is its own substantive claim.

To the extent that the result of the deprivation will be the constitutionally intolerable execution of an innocent person, the Eighth Amendment's prohibition against infliction of cruel and unusual punishment is directly implicated.[17] Lambrix has a fundamental right to a meaningful opportunity to establish that he is factually and legally innocent. *Hall v. Florida*, 134 S. Ct. at 2001 (death sentenced prisoner "must have the opportunity to show that the Constitution prohibits [his] execution"). Putting a person to death for a crime that he or she did not commit is presumably unconstitutional. *Herrera v. Collins*, 506 U.S. at 419 (O'Connor concurring) ("the execution of a legally and factually innocent person would be a constitutionally intolerable event").

The instant claim is further informed by *District Attorney's Office v. Osbourne*, 557 U.S. 52 (2009), which in the context of DNA testing of evidence the Supreme Court recognized that the state process becomes subject to constitutional challenge if it is shown that a state process proves to be "fundamentally inadequate

[17] *See Lightbourne v. McCollum*, 969 So. 2d 326, 334 (Fla. 2007) ("Article I, §17 of the Florida Constitution…shall be construed in conformity with the decisions of the United States Supreme Court which interpret the prohibition…in the Eighth Amendment to the United States Constitution")

to vindicate the substantive rights provided" by "transgress[ing] any recognized principle of fundamental fairness in operation." *Id.* at 69.[18]

Lambrix properly pursued first time DNA testing of material evidence held by the State of Florida in compliance with Florida Statutes § 925.11 and Fla. R. Crim. P. 3.853. He was denied DNA testing on false pretenses, which this Court refused to correct in spite of full notice in a properly filed motion for rehearing in *Lambrix v. State*, 217 So. 3d 977, 987 (Fla. 2017) ("Further, DNA testing was performed on Bryant's panties.").

The denial of a substantive protected liberty interest on false pretenses constitutes an arbitrary and fundamentally unfair process and establishes the constitutional deprivation pled herein. This Court relied on three false findings of fact in support of its denial of DNA testing.

First, this Court found that DNA testing of Aleisha Bryant's clothing had been previously conducted when it had not been. No DNA testing has ever been done in this capital case dating to 1983.

Second, this Court found as a fact that because preliminary chemical testing that was done in 1983 was negative for the presence of blood or semen, no DNA

[18] In *Osbourne*, a plurality of the Court strongly condemned the petitioner for failing to present the claim to the state courts before seeking Federal review, For that reason, Lambrix is now presenting this substantive claim to the state courts with the intent to seek subsequent Federal relief if an adequate remedy is not provided.

evidence could exist to test. This finding is patently false because the presence or absence of indications of blood or semen is not determinative as to the presence of DNA evidence.[19] This finding also ignored that Lambrix sought DNA testing for epidermal skin cells.

Third, this Court concluded that Lambrix had failed to present a legally sufficient Rule 3.853 motion by failing to identify how the DNA evidence that he requested testing be performed on would exonerate him or entitle him to a reduction of sentence. To reach this clearly erroneous conclusion, this Court ignored the specifically pled facts advanced by Lambrix, which detail how failure to find his DNA would prove that the State conducted a biased investigation. *See* Motion for Rehearing, Case No. SC16-08. The state process failed and now the constitutional inadequacy of that process establishes the substantive claim pled herein.

b) <u>Under Florida law Lambrix must have access to material evidence held in the exclusive possession of the state which is necessary to establish entitlement to relief from the convictions</u>

Under long established Florida law, Lambrix need not conclusively prove his actual innocence in order to be entitled to equitable relief from the wrongful convictions. All that he is required to establish entitlement to relief is the production of "newly discovered evidence" that either undermines confidence in the outcome

[19] *See Osbourne* at 2326-28, providing a comprehensive analysis of how modern DNA testing and technology can identify even minute samples of DNA from non blood sources with remarkable accuracy.

or could probably produce a different outcome at retrial. *Swafford v. State*, 125 So. 3d 760 (Fla. 2014); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1988). The production of DNA results casts the State's theory of the case in a light that so undermines confidence in the verdict and in the investigation because it corroborates defendant's theory, meaning a different outcome would be likely at a new trial or confidence in the outcome that wsa reached has been undermined. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014); *Swafford v. State*, 125 So. 3d 760 (Fla. 2014).[20]

Lambrix has maintained his claim of actual and legal innocence and as set forth in Claim I, *supra*. There is a substantial wealth of readily available evidence, including Lambrix's own testimony that was never heard by the jury.

The State has failed to produce any evidence to discredit Lambrix's account of the events. As noted *supra*, in oral argument before this court on November 4, 2009, the State conceded that their own evidence was consistent with the claim of self-defense advanced by Lambrix. *See Lambrix v. State*, Case No. SC08-64. Applicable Florida law establishes an entitlement to relief from a wrongful conviction when the defense produces the measure of "newly discovered evidence" that is necessary to show that a different outcome is likely or that confidence in the verdict has been undermined under *Jones v. State*, *Hildwin v. State* and *Swafford v.*

[20] Hildwin and Swafford did not bear the burden of proving their innocence. Instead, they only had to show that a different outcome was likely. Both discussed how previously unavailable DNA evidence impacted the State's theory.

State. Here, Lambrix is entitled to reasonable access to evidence which the State is in exclusive possession of for the purpose of DNA testing of that specifically identified evidence. The Office of the State Attorney has never denied being in possession of the evidence after it was returned by FDLE at the request of the prosecutor, as memorialized in the FDLE lab notes withheld from Lambrix for decades.

The State's evidence at trial revealed that Ms. Bryant's pants had been partially removed and pulled down to her knees, and that her blouse was pushed upwards. At trial the State introduced photos of Bryant's body with her clothing is disarray. As was the case in *Hildwin v. State*, the prosecutor implied without any evidentiary support that Bryant had been the victim of a sexual assault at the hands of Lambrix. The State's pretrial investigation also established that Moore lived in the Miami, Florida area and had only recently visited the LaBelle, Florida area, temporarily residing at a local motel.[21] Moore apparently met the much younger teenager, Bryant, who was working as a waitress at a nearby restaurant. They were apparently on a date on the evening they met Lambrix and Smith at a bar. At no time has the State ever implied or produced any evidence to support that Moore and

[21] Discovery provided by the State established that Moore was a thirty-five (35) year old career criminal and according to FDLE, a known associate of South Florida drug smugglers. He also had a criminal history that included violent assaults upon women while has was intoxicated.

Bryant were in a relationship that involved consensual sexual relations. In the context of these facts, Bryant's clothing as a source of DNA evidence becomes material.

As noted *supra*, the State's evidence showed that when Bryant's body was recovered, her pants had been pulled down around her knees and her blouse was pushed up above her breasts, suggesting a sexually motivated attack. Prior to the trial the FDLE Crime Lab used a chemical agent to screen for the presence of semen on Bryant's panties without success. The lab notes indicate that the FDLE specifically advised the prosecutor that Bryant's clothing and panties should be subjected to additional testing, but at the instruction of the assistant state attorney no additional testing was conducted. (emphasis added). There was never any testing except for the screening test on the panties.

Preliminary chemical testing in 1983 was unreliable. The science of DNA testing was in its infancy at that time, and no DNA testing of any kind has ever been done in this case. Such testing has advanced to the point where, with remarkable accuracy, it can identify the presence of DNA and touch DNA even when the presence of blood or semen is not apparent. Such testing can detect a few epidermal skin cells that are embedded in clothing fabric independent of the presence of bodily fluids. *See District Attorney's Office v. Osbourne,* 129 S. Ct. at 2316 ("Modern DNA testing can provide powerful new evidence unlike anything known before.")

The individual responsible for the assault and murder of Bryant, and in the course thereof forcibly removing her clothing would have left his DNA including epidermal cells on her clothing, and as has been shown in numerous cases, recovery of that DNA evidence can be accomplished even several decades later.[22]

Testing the clothing recovered from the body of Bryant for non blood DNA and semen will establish the identity of Bryant's assailant. Lambrix has consistently pled – and the State has never produced any credible evidence to discredit – that Moore physically assaulted and killed Bryant, and that only Moore's DNA will be found on her clothing in the specific areas of the pants and blouse that were disarrayed. This will be newly discovered evidence substantiating Lambrix's claim that he is actually innocent of Bryant's murder and that Moore was exclusively and has always been responsible for her death.

Given the state of Bryant's clothing when her body was recovered, there is reason to believe that a non-consensual sex act occurred in conjunction with the assault. And while the FDLE crime lab did a preliminary screening test for blood or semen on her panties, at no time has her remaining clothing been tested in any

[22] Of the 20 known death row exonerations by DNA evidence, at least two cases relied exclusively on non-bodily fluid evidence (i.e., epidermal DNA, skin cells found on clothing) See www.innocenceproject.org, (Ryan Matthews, exonerated by epidermal DNA found on ski mask) (Michael Blair, exonerated by skin cells found on the victims clothing). This accounts for at least 10% of death row DNA exonerations.

manner despite the specific FDLE recommendation of further testing prior to the 1983-1984 trial.

Allowing the testing for DNA evidence to proceed and be developed provides for the potential of powerful new evidence to be fulfilled. For the reasons noted in *Hildwin* and *Swafford* such new evidence would entitle Lambrix to relief from his wrongful convictions and prevent a constitutionally intolerable miscarriage of justice.

Equally so, as the record reflects, Lambrix's specifically pursued defense at trial was to convince the jury that Frances Smith fabricated the theory of alleged premeditated murder and conspired with members of the prosecution team to wrongly convict him. Notably, Lambrix's trial counsel specifically challenged the authenticity of the tire iron that was introduced into evidence as being the murder weapon used against Moore.

Any "reliable, scientific evidence" unavailable at the time of trial (DNA testing was not available until many years later) that would have substantiated Lambrix's defense in a capital case in which the State itself concedes that "the entire case, premeditation and everything" rested on the credibility of Frances Smith, would constitute "newly discovered evidence" sufficient to warrant relief from the convictions under *Jones v. State*, *Hildwin v. State* and *Swafford v. State*.

The record reflects that it was not until 2009, a full 25 years after trial, was it revealed that the prosecution failed to disclose numerous FDLE crime laboratory reports and notes that collectively show that forensic evidence was found on the alleged murder weapon—contrary to the State's past assertions. The State also failed to disclose that the t-shirt recovered with the tire iron was a size small shirt.[23]

These previously undisclosed FDLE records also revealed that in 1983 the FDLE crime lab's microscopic analysis of the found hairs determined that they did not "match" either Lambrix or either of the victim. When the FDLE notified the state attorney of these results they were advised to terminate any further testing and to return the evidence to the state attorney. This was not disclosed to the defense.

During postconviction proceedings the state conceded that the undisclosed hairs probably belonged to Frances Smith, but that concession is simply a red herring. The real issue that has been unreasonably ignored by the Florida courts is the authenticity of the alleged murder weapon and the small t-shirt that was wrapped around it. Given the physical force necessary to crush Moore's skull, established by the testimony of the medical examiner, it is inconceivable that skin, blood and other tissue would not have been imbedded in the micro scratches of the actual tire iron.

[23] As the arrest records show, in February 1983 Lambrix was a muscular 5' 10" male and Frances Smith was a petite 5' 2" female. A small t-shirt would not have fitted Lambrix but would have fitted Smith, which suggests that the t-shirt belonged to Smith. Certainly, Smith had reason to fear that she would be charged for murder or as an accessory in light of this fact.

Although the State's evidence established that the tire iron wrapped in a t-shirt introduced by the State at trial was thrown into a creek and that water may have effectively washed away blood, it would not have washed away DNA evidence. The State's evidence established that the t-shirt was firmly wrapped around the tire iron and secured with a coat hanger. Thus, this t-shirt would have acted as a filter, trapping DNA evidence in its fibers and preserving any DNA embedded upon the tire iron.

Under these circumstances, and in context of Lambrix's defense, DNA testing of both the alleged murder weapon and the small t-shirt would produce newly discovered evidence substantiating Lambrix's innocence by showing that this alleged murder weapon and t-shirt had no connection to the case and that the actual tire iron used by Lambrix was never recovered.

In determining the probative weight of the DNA evidence, this Court must look to the unique circumstances of each case. In this case, had Lambrix been able to inform the jury that only Smith's hair was found on the alleged murder weapon and that the t-shirt wrapper could not have been the one worn by Lambrix, in conjunction with the absence of any other evidence connecting these items to the alleged crimes, the jury would have been compelled to find Lambrix's defense of conspiracy to fabricate testimony and evidence was supported by the evidence. The

result would be a full acquittal on all charges.[24] This previously unavailable evidence would cast the State's case in an entirely new light, undermining confidence in the verdict.

c) <u>Principles of due process and fundamental fairness under both the Florida and Federal Constitution require that Lambrix be provided access to potentially exculpatory evidence held in the exclusive possession of the state</u>

As both this Court and the United States Supreme Court have instructed, "death is different." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), and that "extraordinary safeguards must be taken to insure that only those whose guilt is certain…are ultimately put to death," *Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.853*, 797 So. 2d at 1214, and that "[p]ersons facing that most severe sanction must have the opportunity to show that the constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. at 2001.

Lambrix is not advocating a *per se* constitutional right to postconviction DNA testing, but rather submits that in a capital case that presents a legitimate colorable claim of innocence, constitutional principles of Due Process and the Eighth Amendment mandate that the State must allow meaningful access to potentially

[24] This is especially true when the potential DNA evidence is considered in conjunction with the wealth of evidence set forth in Claim I supporting the conclusion that key witness Smith and the State Attorney's lead investigator Miles "Bob" Daniels were working together from the earliest stages of the case to coerce false testimony and to fabricate material evidence.

exculpatory (DNA) evidence in the State's exclusive possession, especially if the State legislature has established a statutorily created protected liberty interest in DNA testing when the enumerated prerequisites have been pled.

As stated above, and supported by the record, Lambrix previously has pursued DNA testing of the relevant evidence in conformity with Fla. Stat. §925.11 and Fla. R. Crim. P. 3.853. This Court subsequently denied Lambrix his statutory right to DNA testing based on false findings of fact that DNA testing had previously been performed. Only a preliminary chemical screening test for semen or blood on Bryant's panties was initiated in 1983 by the FDLE Lab. The results of the screening test were negative. This Court's finding that no DNA could exist based on the 1983 findings is inaccurate. The presence or absence of blood or semen in a screener on the panties, and not any other clothing, simply has no bearing on the likely existence of non-fluid based DNA. This Court's finding that Lambrix failed to present a legally sufficient Rule 3.853 motion is based in erroneous premises.

When a statutorily created right to DNA testing can so easily be denied upon unreasonable and even false findings, then the State process does "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "transgresses any recognized principle of fundamental fairness in operation." *Osbourne*, 129 S. Ct. at 2320, *quoting Medina v. California*, 505 U.S. 437, 446 (1992).

When the Florida Courts elected to engage in fundamentally unfair practices to circumvent the issue of innocence, additional constitutional protections are required.

Contrary to the presumption that the Constitution does not require the State to disclose exculpatory evidence in its exclusive possession in the postconviction stages, there is support for a limited right to compulsory production. In *Brady v. Maryland*, 383 U.S. 83, 86-87 (1987) the Supreme Court instructed that a state's duty to disclose was "on-going." *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("[T]he duty to disclose is ongoing"); *Imbar v. Patchman*, 424 U.S. 409, 427 (1976) ("[A]fter a conviction is obtained, the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction").

As the *Osbourne* Court recognized, "DNA evidence will undoubtedly lead to changes in the criminal justice system." 129 S. Ct. at 2323. Courts have already addressed this substantive issue and have concluded that in the limited context of DNA evidence, the postconviction duty to disclose is constitutionally mandated. *See, e.g., Smith v. Roberts*, 115 F. 3d 818, 820 (10th Cir. 1997) ("[T]he duty to disclose is ongoing and extends to all stages of the judicial process"); *Thomas v. Goldsmith*, 979 F. 2d 746, 749-50 (9th Cir. 1992) ("we do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory

evidence relevant to the instant (postconviction) proceedings"); *Godschalk v. Montgomery County District Attorney*, 177 F. Supp. 2d 1079 (D. Alaska 2006) (recognizing a due process right in postconviction to potentially exculpatory biological evidence for the purpose of DNA testing); *Wade v. Brady*, 406 F. Supp 226, 231 (D. Mass. 2006) ("2006 Order") ("the Due Process principles underlying Brady…support a DNA testing right in both the pre-trial and postconviction settings"); See also *Wade v. Brady*, 612 F. Supp. 2d 90 (D. Mass 2009) (prisoner was entitled to access biological evidence for DNA testing despite procedural default).

The suggestion that a State may maintain exclusive possession of potentially exculpatory evidence and refuse to provide any access to that evidence for purposes of DNA testing that has the potential to prove a condemned person's innocence violates long established principles of constitutional law. Accessibility in such circumstances is governed by the principles of Due Process, which "is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 123, 127 (1990). *See also Holland v. Florida*, 560 U.S. 631, 649-50 (2010) (quoting *Baggett v. Bullit*, 377 U.S. 360, 375 (1964)) ("we have made it clear that often 'exercise of a court's equity powers…must be made on a case by case basis…the flexibility inherent in 'equitable procedure' enables courts to 'meet new situations

[that] demand equitable intervention, and accord all the relief necessary to correct…particular injustices").

Although this case is one of first impression, this is not a difficult issue. The legislatively created right to DNA testing has proven fundamentally inadequate, thereby necessitating the adoption of greater protections in the interest of ensuring that "only those whose guilt is certain…are ultimately put to death." When statutorily created procedures prove inadequate, then sufficient constitutional protections are required to protect the individual from fundamentally unfair state action that would "shock the conscience." The Supreme Court stated in *United States v. Salerno,* 481 U.S. 739, 743 (1987):

> The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law...." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325–326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). This requirement has traditionally been referred to as "procedural" due process.

Lambrix submits that both a substantive and procedural Due Process to DNA testing of potentially exculpatory evidence held in the exclusive possession of the state exists in a capital case that presents a legitimate claim of innocence. Proceeding

with the execution of a death sentence of a person who has been deprived of any meaningful access to the evidence that might substantiate his or her innocence violates the Eighth Amendment, and comparable provisions of the Florida Constitution.

CONCLUSION

Lambrix has a fundamentally protected right under both the Florida and Federal Constitution to a fair and meaningful opportunity to prove his factual and legal innocence. *Hall v. Florida*; 134 S. Ct. at 2001 (explaining persons facing execution "must have a fair opportunity to show that the Constitution prohibits their execution"); *In re Davis*, 130 S. Ct. at 1 ("The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing") The facts and the evidence presented herein establish a truly persuasive showing of innocence sufficient to compel a "holistic review" of all the evidence, exempt from procedural bars, with the singular objective of determining whether the cumulative weight of all available evidence substantiates Lambrix's consistently pled claim of innocence.

Further, Lambrix has a constitutional right to access to the evidence, held in the exclusive care, custody and control of the State. If the evidence is tested, the potential DNA results would be sufficient to establish that same measure of "newly discovered evidence" consistent with *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014)

and *Swafford v. State*, 124 So. 3d 760 (Fla. 2013) that would entitle Lambrix to relief because it would either undermine confidence in the verdict or would probably result in a different outcome at retrial.

For the reasons stated above, Lambrix requests and is entitled to a full and meaningful evidentiary process and the equitable relief sought herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to: Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Ste. 200, Tampa, FL 33607-7013, *Scott.Browne@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com*; via e-portal service this 31st day of August 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Petition has been produced in 14 point Times New Roman Type and complies with all other font requirements.

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