

IN THE SUPREME COURT OF FLORIDA

Cary Michael Lambrix,  
Appellant  
vs.  
State of Florida,  
Appellees

Case No. SC08-0064

SUPPLEMENTAL PRO SE APPEAL BRIEF

Capital (death-sentenced) Case

Cary Michael Lambrix 492053  
Union Correctional Institution  
7819 NW 228<sup>th</sup> St (P-dorm)  
Raiford, Florida 32026-4440

Appellant (pro se)

## Preliminary Statement

This proceeding involves an appeal of the Circuit Court's denial of relief following a limited evidentiary hearing on Appellant's successive motion for post conviction relief filed under Rule 3.850.

The following symbols will be used to designate references to the record in this appeal;

"DA-R\_\_\_\_" = record on direct appeal to this Court

"PCR"\_\_\_\_" = record on post conviction appeal

## Request For Oral Argument

Appellant is a death-sentenced prisoner represented before this Court by appointed post conviction counsel (but see "Introduction"). The resolution of the issues in this action will therefore determine whether Appellant will live or die. This Court has not hesitated to allow oral argument in similar capital cases in this posture. Appellant moves this Court to allow appointed counsel a full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Appellant, through counsel, accordingly urges this Court to permit this case to be heard at oral argument.

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## Introduction

In the interest of preserving the record Appellant is now compelled to submit the instant "Supplemental Pro Se Appeal Brief," and does now pray that this Court will fully consider the facts and legal arguments raised herein. See Peede v. State, 748 So2d. 253, 255, n. 5 (Fla. 1999) (recognizing that "capital post-conviction defendants own pro se supplement to appointed counsel's 'Initial Brief' was far more helpful and comprehensive than the Initial Brief submitted by counsel"); Hill v. State, 656 So2d 1271 (Fla. 1995) (recognizing that although death-sentenced prisoner not entitled to exercise self representation on direct appeal, "the Court will accept pro se supplemental brief from Appellant")<sup>1</sup>

In this instant Supplemental Pro Se Appeal Brief Appellant seeks to present this Court with the specific factual and legal arguments necessary to protect Appellant's obligation to fully present and exhaust any/all allegations of Appellant's protected Federal rights before the State Courts. As detailed in the previous pro se pleading submitted to this Court<sup>2</sup>, Appellant's currently appointed "CCRC Counsel" inexplicitly failed to present the specific argument of fact and law relevant to the deprivation of Appellant's protected Federal rights in each of the "Arguments" ("I" thru "V") CCRC Counsel presented in both the October 27, 2008 "Initial Brief" and CCRC Counsel's subsequent January 30, 2009 "Appellants Corrected and Amended Initial Brief" now presently pending before this Court.

With respect, although this Court is understandably frustrated with pro se pleadings filed by incarcerated prisoners who have been appointed legal counsel, see e.g. Lagan v. State, 846 So2d 472 (Fla. 2003), unless this Court recognizes the necessary balance between this Court's need to limit unfounded pro se filings and those pro se pleadings fundamentally necessary to protect against the unconstitutional deprivation of

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Footnote 1: As the record reflects Appellant did file the necessary motion to unequivocally discharge appointed post conviction counsel and exercise self representation pursuant to Dunbar v. Singletary, 623 So2d 482 (Fla. 1993), but in direct violation of established law, this Court "struck" this motion from the record without a court ruling.

Footnote 2: See docket entry dated January 13, 2009 "Motion To Strike Fatally Defective Appeal Brief, With Renewed Motion To Discharge Incompetent Post Conviction Counsel, And Waiver of Further Post Conviction Representation, With Request for Leave To File Pro Se Corrected Appeal Brief."

meaningful post conviction resulting from the incompetency of appointed counsel—especially in capital cases—this Court's refusal to allow and accept prose supplemental pleadings will inevitably result in a substantial constitutional challenge to the fundamental fairness of Florida's capital post conviction process itself.

Continuing to ignore the issue of incompetency of capital post conviction counsel will not conveniently make the issue go away. This Court has both a statutory and a constitutional obligation to confront and directly address allegations of incompetency by appointed post conviction counsel in capital cases; See, Fla. Statutes § 27.711 (12) ("The Court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality post conviction representation. The Court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel"); Arbalez v. Butterworth, 738 So2d 326, 327 (Fla. 1999) ("we have a constitutional responsibility to ensure that the death penalty is administered in a fair, consistent, and reliable manner")

Appellant seeks only to present the arguments inexplicitly not properly presented to this Court by appointed CRC-South counsel, as is necessary to "exhaust" these claims under Federal law. See, Jimenez v. Fla. D.A.C., 481 F.3d 1337, 1342 (11th Cir. 2007), quoting Duncan v. Henry, 513 US 364, 364 (1995) "Appellant "must alert state courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights". See also, Baldwin v. Reese, 541 US 27 (2004)

Appellant has a clearly established and recognized constitutional right to pursue meaningful post conviction relief. See, Holland v. State, 503 So2d 1250 (Fla. 1987), adopting, Michael v. Louisiana, 350 US 91, 93 (1955) ("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'"). As the Court explicitly stated in Arbalez v. Butterworth, 738 So2d 326, 331 (Fla. 1999), quoting Monge v. California, 524 US 73, 118 S.Ct. 2246, 2252-53 (1998), and State v. Dixon, 283 So2d 1 (Fla. 1973);

"Our adversarial system of criminal 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."

In all fairness, Appellant is simply attempting to accomplish what any other person, including any member of this Court, would do under identical circumstances - compel this Court to fully recognize and address the claims of constitutional deprivation relevant to Appellant's consistently pled claim of actual innocence. As is factually argued by CRC South Counsel in the Initial Brief now before this Court;

"For more than two decades (Appellant) has argued that he is innocent of the charges against him. The case against him was wholly circumstantial. There were no eyewitnesses, no physical or forensic evidence, and no confession to support the State's case of two counts of premeditated murder" Id., at 1 "A review by this Court of the collective weight of all the new evidence will support a finding that the State's theory of alleged premeditated murder was fabricated with the intent to wrongfully convict (Appellant). Mr. Lambrix's case is a legitimate actual innocence case" Id., at 5

Appellant respectfully submits that this Court must accept and fully review upon the merits the instant "Supplemental Pro Se Appeal Brief" as the Constitutional concept of "Fundamental Fairness" encompassed in both the Florida and Federal Constitution requires that Appellant be provided a "meaningful" opportunity to fully present these claims. See, Jones v State, 740 So2d 520, 523 (Fla. 1999), quoting, Skull v. State, 569 So2d 1251, 1252-53 (Fla. 1990) ("due process in context of capital post conviction proceedings" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all citizens"), Steele v. Kehoe, 747 So. 2d. 931, 934 (Fla. 1999), quoting State v. Weeks, 166 So2d 892, 896 (Fla. 1964)

As the record in this case indisputably reflects, Appellant did timely present this Court with numerous pro se pleadings specifically alleging that appointed CRC Counsel was not, and did not, adequately present Appellant's cognizable post conviction claims to this Court. Appellant specifically requested that this Court comply with this Court's statutory-created duty under Fla. Statutes §27,711 (12) "to ensure that (Appellant) is receiving quality post conviction representation" and this Court implicitly refused. See footnote 2. Subsequently, Appellant unequivocally moved to discharge post conviction counsel and exercise self-representation.

pursuant to Director v. Singletary, 623 So2d 482 (Fla 1993), and again this Court implicitly refused to comply with established law, thus virtually forcing Appellant to be represented by allegedly incompetent post conviction counsel.<sup>3/</sup>

Although it is now well-established that death-sentenced prisoners do not have a Sixth Amendment constitutional right to "effective" post conviction representation, See, Murray v. Giarratano, 492 US 1, 10 (1989); Lawrence v. Florida, 127 US \_\_\_\_ (2007), Lombrix v. State, 698 So2d 247, 249 (Fla. 1996); Kokal v. State, 901 So2d 766, 777-78 (Fla 2005) neither this Court, or the US Supreme Court, has addressed the question of whether the statutorily created right to post conviction counsel in capital cases is entitled to minimal 'due process' protection to prevent against the incompetency of such post conviction counsel effectively evolving into, and serving as, an obstruction and impediment to pursuing a capital defendant's constitutionally protected right to meaningful post conviction review. See, eg., Olive v. Maas, 811 So2d 644, 653 (Fla. 2002), quoting, Armita v. State, 559 So2d 1132, 1135 (Fla. 1990) ("the appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation")

Appellant respectfully submits that this Court must accept and address the specifically pled claim raised herein, See, "Argument VI", infra, of whether virtually forcing a capital post conviction defendant to be represented by allegedly incompetent legal counsel acts ~~as~~ as an unconstitutional obstruction and impediment to the constitutionally protected right to meaningful post conviction review. See, State v. Boyle, 520 So2d 562, 563 (Fla. 1988) (recognizing that unreasonable obstructions to pursuing post conviction review violates Due Process); Haag v. State, 591 So2d 614, 616 (Fla. 1988) ("The fundamental guarantee's [to habeas review] enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice, and not bound by technicality.")

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Footnote 3: On February 09, 2009 Appellant submitted a pro se action entitled "Motion To Disqualify Entire (En Banc) Florida Supreme Court Based Upon Newly Discovered Evidence of Misconduct by Chief Justice", which presently remains pending before this Court.

Certainly this Court must now realize that this Court is unnecessarily painting itself into a corner it cannot easily get out of. If this Court refuses to accept and fully review the instant "Supplemental Pro Se Appeal Brief", then Appellant will have no choice but to pursue a Federal Civil Action under Hill v. McDonough, 547 US 573, 126 S.Ct. 2096, 2099 (2006)<sup>4</sup> specifically challenging the fundamental fairness of Florida's capital post conviction process.

Why would this Court even want to open that door when it is not necessary? All Appellant seeks is a full and fair opportunity to meaningful post conviction review by presenting Appellants claims arguing actual innocence.

Even as much as this Court might be frustrated by pro se pleadings, this Court must recognize that at times they are necessary. This is especially true in a case such as this case, where a legitimate claim of actual innocence is being presented to and pled before this Court. As this Court itself recognized in Amendments To Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993, 797 So.2d 1213, 1214<sup>27</sup> (Fla. 2001);

"We must never lose sight of the important values being balanced in death penalty cases. On one hand society has invoked the ultimate sanction of death because an innocent life has been taken by the defendant under especially egregious circumstances. On the other hand, that same society cautions that 'death is different' and that extraordinary safeguards must be taken to ensure that only those whose guilt is certain, and who are truly deserving of the forfeiture of life, are ultimately put to death." (emphasis added)

Appellant respectfully moves this Court to now accept and fully consider upon the pled merits the instant "Supplemental Pro Se Appeal Brief" presenting the arguments Appellants appointed post conviction counsel inexplicitly failed to present.

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Footnote 4: On January 28, 2009 Appellant, pro se, submitted to this Court an action entitled "Petition For Declaratory Judgment, And/or Exercise of All-Writs Power" specifically presenting this Federal Hill v. McDonough argument, thus Appellant has now properly exhausted available state remedies relevant to this action.

## Statement of the Case and Facts

Appellant respectfully incorporates herein by instant specific reference the "Statement of the Case and Facts" provided by and contained within the "Corrected and Amended Initial Brief" submitted by CRC Counsel, and seeks only to now provide the material facts that were inexplicitly not specifically addressed by appointed counsel and provide a necessary clarification of alleged "facts" unfairly mischaracterized and grossly misstated within the states' "Answer Brief of Appellees".

Although this Court is undoubtedly skeptical of any pro se pleadings and may be inclined to believe Appellant's interpretation of pled "facts" may be less than objective, Appellant asks only that this Court objectively read the following and independently look to the record to ascertain the truth of the matter. To the extent that is possible, Appellant will provide specific record citations to support the following supplemental "Statement of the Facts and Case".

At the onset of the states' "Answer Brief", the state embarks upon a lengthy argument attempting to discredit Appellant's long and consistently pled claim of innocence. The state asserts that Appellant had engaged in a plot to compel false "alibi" testimony prior to Appellant's trial in 1983, and that Appellant gave inconsistent statements to Appellant's trial counsel compelling trial counsel to approach the trial court with an "ethical dilemma" upon the belief Appellant intended to provide false testimony.<sup>5</sup>

The state bases this unfounded assertion upon nothing more than their own subjective interpretation of an ambiguous record reference, and a deposition taken of Appellant's trial counsel Robert Jacobs, III and Kinky Engvalson in 1990. However, the state concedes that Appellant's trial counsel repeatedly insisted that Appellant maintained his innocence. See, V22/4319 "Lombrix repeatedly asserted that he did not do it."

However, what the state conveniently neglects to point out is that during evidentiary proceedings before the lower court Appellant and both of Appellant's trial counsel did personally testify and as an examination of the record reflects the state did not and

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Footnote 5: Incredibly, after the state attempted to argue these unfounded "facts" in the lower court, a formal ethics complaint was filed with The Florida Bar, in which Asst Attorney General Carol Ortman specifically denied arguing these "facts", and conceded that Appellant has consistently maintained his innocence. See, Florida Bar Complaint File No. 2008-11,545 (13-B)

could not provide any evidence to support these "outrageous" allegations.

In fact, when the state first attempted to advance these wholly unfounded allegations, Appellants counsel specifically requested that the lower court provide a hearing on these allegations. As the record shows, the state then immediately backed off and abandoned these "outrageous" allegations - only to now unfairly re-assert them.

As Appellants counsel specifically argued before the lower court, See, "Defendants Memorandum of Law In Support of Defendants Motion to Vacate - claims VI, VII, and VIII", filed before the lower court on August 12, 2005 ( pgs 4-5);

"The state improperly attempted to impeach Mr. Lambrix by asserting that at the time of trial Mr. Lambrix "was busy securing his sisters assistance with the presentation of a false alibi and insisted to his trial attorneys that he had not killed either victim" (States Answer, p. 3) This Court should not ignore that the state failed to provide any record support for this outrageous allegation.

The state argued that summary denial of relief upon this claim was appropriate partially because, in their view, (Appellants) self defense claim was not credible. However, the record plainly reflects that Mr. Lambrix announced his intent to personally testify at the ~~April 5~~, February 9, 2004 evidentiary hearing, and did then testify at the April 5, 2004 hearing. The state had two months to prepare for Mr. Lambrix's testimony, and yet when he took the stand (PCR 8317-8350) the state did not and could not present any evidence to impeach (Appellants) claim of self-defense.

Contrary to the states attempt to now discredit Mr. Lambrix by suggesting that he "crafted" this defense years after the crime, Mr. Lambrix's claim of self-defense has been consistently pled through the many years and is in fact the only statement he has ever provided directly and Mr. Lambrix's claim of events has never changed. Mr. Lambrix continues to maintain that he was unconstitutionally denied his right to testify in his own defense at trial.

Should the court consider the states allegations that Mr. Lambrix had attempted to fabricate an alibi, then Mr. Lambrix should be allowed to present evidence that when this allegation first surfaced many years ago, an investigation revealed that contrary to the states misrepresentations at NO TIME did Mr. Lambrix's sister Mary Lambrix even suggest that Mr. Lambrix had attempted to recruit

her assistance in developing an alibi defense.

Further, Mary Lambrix discussed this matter only with an investigator with the Public Defender's office and there is no evidence, or reason to believe, that Mr. Lambrix even had personal knowledge of the communication with Mary Lambrix at the time.

Additionally, this investigation established that Mr. Lambrix did not have any unsupervised contact with Mary Lambrix - that, in fact, unknown to Mr. Lambrix until long after his conviction, the Glades County Sheriff's Department was illegally photocopying all of Mr. Lambrix's mail, and providing copies to the state.

Mr. Lambrix could not have possibly discussed any alibi defense with his sister as Mr. Lambrix had virtually no unsupervised contact with any family members prior to trial. Clearly, if the state had any credible evidence that might discredit Mr. Lambrix, they would have presented this evidence when Mr. Lambrix testified - but they did not because they could not.

The state's attempt to now argue this as alleged "fact" is absolutely and unethically outrageous. When the state first attempted to assert this argument in 2004, Appellants Counsel specifically requested an opportunity to present evidence that would have proved conclusively that these allegations are false<sup>6</sup>, and the state immediately abandoned these unfounded allegations.

As the record shows, when Appellant personally took the stand and testified, the state did not attempt to raise these allegations. (PCR 8319-8350). Likewise, as the record reflects, both of Appellants trial counsel personally testified at the evidentiary hearing on July 19-20, 2006 (PCR 8701-9093) and again the state made no attempt to raise this issue during their cross-examination of Robert Jacobs, III or Kinky Engvalsen, as the state knew<sup>6</sup> that Appellants counsel was prepared to present evidence to conclusively establish that the state's allegations are completely unfounded.

With respect to this Court, Appellant submits that Justice can never prevail when the truth can be so easily perverted by the state unethically engaging in a "win by

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Footnote 6: In anticipation for such a hearing Appellants counsel obtained an "Affidavit" from Mary Lambrix, of which a copy was provided to the state. For the convenience of the Court, that Affidavit is provided as attached 'Appendix A'

any means necessary" strategy - with complete impunity." As specifically argued by Appellant's counsel; See, Initial Brief, pg 1-5, the instant capital case presents "a legitimate actual innocence case" Id. at 5. This Court must closely examine the actual record and independently ascertain the truth & so as that justice might be done - and an innocent man is not put to death.

Throughout the States "Statement of the Case and Facts" the state liberally misstates and grossly exaggerates the true weight and nature of the evidence used to support their wholly circumstantial theory of alleged "premeditated" murder, while at the same time conveniently omitting the facts that contradict that theory.

As the record itself plainly reflects, at trial the state specifically conceded to the jury that the entire theory of alleged premeditation was based upon the testimony of the key witness, Frances Smith - who the state characterized as "the hub of the case" (PCR 1950 "Frances Smith is the hub of the case"), BA-R 2520. In the current post conviction proceedings, the state was even more explicit, stating that ~~"the evidence~~ "clearly, the state's case was built on Frances Smith... the entire case, pre-meditation and everything, is proven in her testimony. And there has never been any question about that." Initial Brief, pg. 25

Now confronted with an overwhelming amount of newly discovered evidence that collectively shows that Frances Smith and the state's own agents deliberately fabricated this wholly circumstantial theory of premeditated murder with the intent to have Appellant wrongfully convicted and condemned to death, the state attempts to argue that "other evidence" somehow supports this theory of premeditation.

Although the state provides a lengthy account of the trial testimony of 14 state witnesses, who testified at trial, a close reading of the record reveals that all but two of these witnesses (Frances Smith and Deborah Hanzel) provided virtually no

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Footnote 2: In Ruiz v. State, 743 So2d 1, 9 (Fla. 1999) this Court explicitly recognized the "alarming frequency" of prosecutorial misconduct in capital cases, and warned State Counsel of "dire consequences" if State Counsel continued to unethically engage in this type of "win by any means necessary" behavior. Appellant submits that this Court should now specifically recognize that state counsel Carol M. Dittmar has improperly engaged in unethical misconduct, and refer this matter to the Florida Bar for formal disciplinary action.

relevant to the issue of whether Appellant acted with premeditated intent. Rather, these witnesses only presented testimony placing Appellant in the company of Clarence Moore, AKA Lawrence Lamberson<sup>8</sup> and Aleisha Bryant on the night they died, recovery of the bodies, and the subsequent autopsies. PCR 2652-2688

But these witnesses are simply not relevant as Appellant does not deny meeting the deceased and inviting them to Appellant's residence. Those "facts" are not in dispute. The only issue and evidence relevant is whether Appellant acted ~~to~~ with "premeditated intent" - or whether Appellant acted in involuntary self-defense when unexpectedly attacked by Moore/Lamberson. (PCR 8317-50)

The only material difference between what the state's key witness Frances Smith testified took place that night resulting in the deaths of Moore/Lamberson and Bryant, and what Appellant has consistently claimed took place is that period of time in which Appellant went outside with Moore/Lamberson and Bryant, and Frances Smith has consistently said that she did not see or hear anything that might had taken place outside. (DA-R 2243-44)

Rather, Frances Smith claims that Appellant told her that Appellant "hit the man in the back of the head and choked the girl" (DA-R 2244-45). But as the actual trial testimony of the state's own medical examiner, Dr. Shultz, shows Moore/Lamberson was not hit in the back of the head. Dr. Shultz specifically testified that Moore/Lamberson died as the result of "blunt trauma" - "multiple crushing blows to the head" (DA-R 2058-59) "resulting in severe fractures around the eyes and cheeks" Id., PCR 1757-59 consisting of "eight times - four times to the left frontal forehead, and four times to the right... applied in a continuous side ~~to~~ <sup>to</sup> side motion." (PCR 1788-89)

More importantly, Dr. Shultz found no "defensive" wounds on Moore/Lamberson and all of the blows were administered consistent with Moore/Lamberson facing his assailant, supporting a reasonable conclusion that Moore/Lamberson was not a victim of an assault - but was, in fact, the aggressor.

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Footnote 8: It should be noted that the reason the male deceased name is uncertain is because, as the state's own pretrial investigation revealed, Moore/Lamberson was a "career criminal" and "known associate" of local drug smugglers, and had a history of violently assaulting women - but the jury was not allowed to hear of Moore/Lamberson's history.

As for key witness Smith's claim that Appellant told her that Appellant "choked" the girl (Bryant) as the cause of death, the state's medical examiner Dr. Shultz testified that there is no evidence that Bryant was "choked". Although listing the cause of death as "probable manual strangulation" based solely on what Dr. Shultz described as a "process of elimination" (i.e., no gunshot wounds, no knife wounds, no blunt trauma, etc), Dr. Shultz conceded that he actually did not find any signs of hemorrhaging on Bryant's neck, no damage to the soft tissue (larynx, etc) of the neck, and no indication of periorbital hemorrhaging in Bryant's eyes. (DA-R. 2213-14)

Thus, other than Frances Smith's own testimony that Bryant was "choked", which is directly contradicted by the virtual absence of any physical signs of Bryant being "choked", or "strangled", there is actually no evidence that Bryant died as the result of any criminal act, much less at the hands of Appellant. (DA-R. 2461-62)

At trial the only evidence the state presented to corroborate Frances Smith's claim that Appellant acted with premeditated intent was the testimony of Deborah Hanzel, who testified at trial that she had asked Appellant if Appellant "had killed the guy for his car" and Hanzel claimed Appellant responded "that was part of the reason" (DA-R. 2449) Additionally, Hanzel testified that in another conversation Appellant told her "if you give me '100.' I'll take you back and show you where I killed two people and buried them" (DA-R. 2445)<sup>9</sup>

But as the record now before this Court reflects, Deborah Hanzel has now unequivocally recanted that testimony, attesting under oath that key witness Smith, and a man from the State Attorney's office, had coerced her to provide that false testimony with the intent and purpose of deliberately having Appellant wrongfully convicted and condemned to death. PCR 5984-86 (for the convenience of this Court, Hanzel's actual Affidavit, PCR 8185, Def. Exh. 3, is attached herein as "Exhibit B")

Hanzel testified before the lower court that she provided that false testimony because Frances Smith asked her to go along with what Frances was saying PCR 8147, but that, in fact, Appellant never told her that Appellant killed anyone. PCR 8145. However,

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Footnote 9: However, at trial Preston Branch also testified, and was present when Hanzel said Appellant said "I killed two people", and Branch specifically testified that he did not hear Appellant say he killed anyone - only that they were buried "back there" (DA-R. 2418-22)

Hanzel also testified that when she asked Frances Smith what really happened Smith told her "she didn't really know what happened outside, but that Lambrix had told her the guy went nuts and (Lambrix) had to hit him." (PCR 8152, 8143-44, 8155)

Appellant's post conviction counsel presented additional evidence to support Hanzel's claim that Frances Smith and "a man from the State Attorney's office" had coerced her to provide material false testimony. See, Initial Brief "Argument II", and that an actual "conspiracy and collaboration" existed to, by intent and design, wrongfully convict and condemn Appellant. See, Initial Brief, "Argument III".

In rebuttal, the State presented only the testimony of key witness Frances Smith, who ambiguously denied pressuring Hanzel to provide false testimony to "back up" her own otherwise unsupported testimony. But the lower court specifically found Smith's testimony "not credible" (PCR 7832-33), thus the State actually provided virtually no credible evidence to dispute Hanzel's sworn testimony that she was coerced to provide material false testimony and that, in truth, Appellant "never" told Hanzel that he killed anyone. (PCR 5984-86)

At trial, other than Hanzel's now unequivocally recanted testimony, the only other evidence of actual "premeditated" intent came exclusively from key witness Smith, without any independent corroboration.

Smith testified that she personally seen Appellant go through Moore/Lamberson's pockets after he was dead (PCR R 2221)<sup>DA 19</sup> and remove a "gold necklace". However, the State's own Medical examiners intern, Sam Johnson, testified that when they exhumed and recovered the body of Moore/Lamberson, they found both money and jewelry in the very same pockets that Smith claimed she seen Appellant go through. (DA-R 1992-2016)

As for Smith's uncorroborated claim that Appellant took a "gold necklace" from Moore/Lamberson, as the trial record shows, the State did not and could not produce any witness or evidence to establish that Moore/Lamberson ever even actually owned or

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Footnote 10: As this Court has consistently recognized, even IF Appellant did remove property or the vehicle from the deceased after Moore/Lamberson was already dead, this does not and cannot constitute evidence of premeditated intent as the evidence must show an actual intent to "rob" the deceased formed prior to the time of death. See, Peek v. State 395 So2d 472 (Fla 1980), Skull v. State 533 So2d 1137 (Fla 1988), Carpenter v. State 785 So2d 1182 (Fla. 2001)

otherwise possessed any such "gold necklace". In fact, the state conveniently neglects to point out that their own pretrial investigations revealed that in the days immediately prior to his death, Moore/Lamberson was systematically "pawning" virtually everything that he had of monetary value, and that if Moore/Lamberson did have a "gold necklace", he would have pawned that, too. Frances Smith's claim that Appellant took a gold necklace from Moore/Lamberson simply was not, and is not, true.

But by far the most glaring and prejudicial example of Frances Smith's deliberately fabricated testimony—and the State's own complicity in knowingly using false testimony to wrongfully convict and condemn Appellant—was the wholly unsupported testimony given by Frances Smith that Appellant had deliberately placed Alisha Bryant "face down in a pond" to ensure that she died, (DA-R 2225)

Specifically, at trial Frances Smith testified that when she first seen Bryant's body, she was face down in a pond, from her knees up in the water. (DA-R 2225, PCR 1839) She went on to tell the jury that Appellant told her that Bryant was deliberately placed in the pond "because, he said, she wasn't dead. She would finish drowning" (PCR 1836, 1948)

The State used this testimony to convince the jury that Appellant undoubtedly did act with premeditated intent to kill. But in fact, the state knew that this testimony was not true. As the record shows (PCR 7296-7331) at no time during any of her pretrial statements, or depositions, nor at Appellant's first trial (which ended in a hung jury) did Frances Smith even suggest this highly inflammatory and prejudicial testimony. Rather, Appellant's trial counsel were completely blindsided by this maliciously fabricated testimony, and not prepared to rebut it.

However, as the record shows, in post conviction proceedings Appellant's counsel did develop the necessary evidence to conclusively show that this testimony used to convince the jury Appellant did act with actual premeditated intent to kill was simply not true. See, Initial Brief "Argument III"

Appellant's counsel first obtained an Affidavit from Sally Johnson-Deller, the actual owner of the property in question both at the time of the alleged crime, and to the present. Ms. Johnson-Deller unequivocally states that there was not, and never was, any such "pond" in the relevant pasture area. (PCR 8231-32, 6241-42). For the convenience of this Court, this Affidavit is attached as "Appendix C".

To support property owner Johnson-Dellers's unequivocal statement that NO such pond ever existed, Appellant's counsel retained two expert witnesses, (PCR 7179-7217), a hydrologist Richard Thompson and Steve Wistar of AccuWeather, Inc, who examined the property in question, and reviewed the weather (rain fall, etc) around the time of the alleged crime, and both conclusively concluded that Frances Smith's testimony that Alerisha Bryant was placed 'face down in a pond up to her knees' to ensure her death could not be true. (PCR 7179-7217) See, Initial Brief, 'Argument III'.

There is simply no question that the state knew that their key witness was deliberately fabricating the material 'facts' she testified to, which provided the very foundation of the states wholly circumstantial case of alleged premeditated murder. As the record now reflects the states motive for conspiring and collaborating with Frances Smith was not revealed until twenty years after Appellant was tried and wrongfully convicted - that the state attorneys own lead investigator, Miles "Bob" Daniels, was having an illicit affair of "a sexual nature" with key witness Smith while Appellant was being prosecuted. See, Initial Brief, "Argument I."

The states own former witness Deborah Hanzel has now recanted her testimony and specifically provided sworn testimony that Frances Smith and "a man from the state Attorneys office" (Bob Daniels) had coerced her to provide the only (false) testimony to corroborate Frances Smith's claim that Appellant was motivated to kill Moore/Lamberson by an intent to steal his car. See, Initial Brief, 'Argument II'.

Appellant concedes that the vehicle was removed from the area after Moore/Lamberson was killed. But Appellant was not motivated to kill the deceased by any intent or desire to steal the vehicle. Rather, at the time Appellant was "wanted" for "escape"<sup>13</sup> specifically, for walking away from a state work release center and not

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Footnote 11: Appellant would note that the instant account is not about picking apart inconsistencies in the states case, but is intended to provide the material 'facts' the state has dis- ingenuously omitted from their own 'statement of the case and facts'.

Footnote 12: In the states 'Answer Brief', p. 16, the state prejudicially exaggerates the "escape" by omitting the fact that Appellant did not "escape" from any prison, and was not even in physical custody. Rather, Appellant simply walked away from a civilian job while assigned to "work release in relationship to Appellants ONLY prior conviction - a bounced check (PCR 1937-40)

returning, (PCR 8317-40). Both Appellant and Frances Smith agreed that going to the police that night was not an option, id. The vehicle was taken simply as a means of fleeing the scene<sup>13</sup> and in fact, the record is clear that after fleeing the area Appellant and Frances Smith subsequently parted ways and it was Frances Smith - not the Appellant - who actually kept possession of Moore/Lamberson's vehicle. Id. 8321-22

Several days later Frances Smith was arrested on "unrelated charges" while driving Moore/Lamberson's vehicle. (DA-R 2249) Smith remained in jail for the next three days, id., during which time numerous law enforcement officials attempted to question Smith specifically about Moore/Lamberson's vehicle, and how she came to possess it, and Smith told one story after another, all of which proved to be untrue. Appellant's trial counsel attempted to impeach Smith with these numerous inconsistent stories, but was not allowed to. (PCR 1937-40). Although by the state's own admission the "entire case rested upon the testimony of Frances Smith" (PCR 1950, 2225), the jury was never allowed to know that Smith actually told numerous conflicting stories. (PCR 1932-40)

On Friday February 11, 1983 Frances Smith bonded out of jail (DA-R 2249) Smith then retained a private lawyer and "consulted with counsel" for three days before finally going to the State Attorney's office (not the police) on Monday February 14, 1983 and providing this incredible story of the alleged murder of Moore/Lamberson and Bryant; a story that conveniently exonerated her of any criminal culpability while at the same time immediately making her an invaluable witness to the state, ensuring immunity.

When specifically asked at trial why she did not go to the police until almost 10 days after these alleged murders, Frances Smith testified that she was "afraid" of Appellant. (DA-R 2250). But the record plainly shows that Smith spent 3 days in police custody where she was obviously protected from any perceived threat Appellant allegedly posed. Even more telling though, is the actual picture taken of Smith on February 9, 1983 as

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Footnote 13: See, Scull v. State, 533 So2d 1137, 1143 (Fla. 1988) ("while it is true that Scull took Villegas' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain. As in Peck v. State, 395 So. 2d 492, 499 (Fla. 1980), it is possible that the car was taken to facilitate escape rather than as a means of improving his financial worth. The record simply does not support the conclusion that [the victim] was murdered for her car.")

she was being booked into the Hillsborough County Jail shortly after being arrested while driving Moore/Lamberson's vehicle. (Attached, "Appendix D") If ever a picture was worth a thousand words, this picture is it. This Court need only look at this picture ("Appendix D") to see that this clearly was not a woman who was in fear at that time.

The record before this Court now leaves no question that the State's key witness, Frances Smith, did deliberately fabricate this wholly circumstantial theory of premeditated murder as a means of manipulating the state by not only providing this incredible story that conveniently exonerated her of any criminal culpability, but also escalated her to the status of an invaluable "star witness" all but gwaranteeing her immunity - which she, in fact, was given. See, Initial Brief, "Argument I" (pgs 35-36)<sup>14</sup>

But Frances Smith knew that she could not pull this off on her own. As the record now shows, shortly after going to the State Attorney with this incredible story, she then coerced her own cousin's girl-friend, Deborah Hanzel, to provide the necessary false testimony to "back up" her story. (PCR 5984-86, 8185), See, Initial Brief "Argument II" and "Appendix B"

Finally, byf Smith's own admission (PCR 8273-80, 8281), she then formed an alliance with the State Attorney's own lead investigator, Miles Bob Daniels, by engaging in an intimate relationship "of a sexual nature" (PCR 8780-81) during the prosecution of this case. This Court cannot ignore the indisputable fact that Investigator Daniels was the very person who actually initiated these capital charges against Appellant by swearing out the arrest affidavit, and then subsequently personally supervised the entire investigation and development of the wholly circumstantial evidence used to convict and condemn Appellant. See, Initial Brief, "Argument III"

The only witness, Deborah Hanzel, the state presented at trial to corroborate Frances Smith's otherwise unsupported claims has now come forth and provided unrebutted sworn testimony that, in fact, key witness Smith and Investigator Daniels coerced her to participate in an actual conspiracy and collaboration to wrongfully convict and condemn Appellant. (PCR 5984-86, 8185)

Further, Hanzel has revealed that they knew all along that Appellant was innocent of premeditated murder, and that in truth, Appellant had acted in involuntary self

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Footnote 14: See, Gool v. United States 409 US 100, 103 (1972) (there is a "recognition that an accomplice may have a special interest in testifying, thus casting doubt upon (her) veracity")

defense. See PCR 5986 "When I asked Frances if that is what really happened, she told me that she didn't really know what happened outside, but that Mr. Lambrix told her the guy went nuts and he had to hit him"; see also, attached "Appendix B."

Throughout the prolonged history of this case Appellant has consistently insisted that the State's theory of premeditated murder simply did not happen; that this entire wholly circumstantial theory was a deliberate fabrication. Only in recent years has the virtual wealth of evidence substantiating an actual conspiracy to wrongfully convict come to light - and yet the State would have this Court believe that it is merely a coincidence that this collective new evidence completely supports what Appellant has been consistently claiming actually happened all along.

Appellant has consistently argued in every prior post conviction proceeding that Appellant was unconstitutionally denied the fundamental right to testify at trial, thus deprived of any opportunity to provide this testimony of Appellant's long and consistently pled claim of self defense<sup>15</sup>, but Appellant was not provided an evidentiary hearing in either of these prior state post conviction proceedings - thus no opportunity to provide this claim of involuntary self defense in the form of actual in-court testimony.<sup>16</sup>

Only in the current post conviction proceedings did the lower Court finally provide Appellant with an evidentiary hearing and an opportunity to testify. As the record reflects, on April 5, 2004 Appellant did take the stand and testify, providing a graphic account of what actually transpired outside that night leading up to, and resulting in, the

Footnote 15: See, Lambrix v. Singletary, 72 F3d 1500, 1506-07 (11th Cir. 1996). The State concedes that Appellant's trial counsel compelled the trial judge to specifically instruct Appellant that if Appellant did testify the Court would allow trial counsel to abruptly withdraw, leaving Appellant without legal representation. (<sup>V15</sup> ~~PCR~~ 2955-56). This unconstitutional choice between the right to testify and the right to counsel was specifically found to be per se "ineffective" assistance of counsel. Sanborn v. State, 474 So2d 309, 313-14 (Fla. 3d DCA 1985), aff'd, Florida Bar v. Ellis Rubin, 549 So2d 1000 (Fla. 1989)

Footnote 16: There can be no question that Appellant did specifically argue the deprivation of the Right to Testify, and Appellant's consistently asserted claim of self defense, in both of Appellant's prior State post conviction proceedings - and both were summarily denied without an evidentiary hearing. See, Lambrix v. State, 534 So2d 1151 (Fla. 1988) (original post conviction motion), Lambrix v. State, 698 So2d 247 (Fla. 1996) (2nd post conviction motion)

tragic deaths of Moore/Lamberson and Bryant. (PCR 8317-50) As the record shows, the State did not and could not provide any evidence to discredit Appellant's consistently and long pled claim of involuntary self defense. (PCR 8338-48)

Incredibly, now the State argues that "of course, there is nothing in the record that supports this theory (of self defense), only Lambrix's self-serving testimony twenty years after his conviction" (but see, footnote 16). Never mind for a moment that Appellant's counsel did try to present a wealth of evidence to support Appellant's claim of self-defense, only to have the lower court prohibit the presentation of this evidence under the pretense that the Court "would not allow the case to be re-tried in post conviction proceedings." (PCR 7881), see also, Initial Brief, 'Argument III'

But the State's rhetorical assertion that there is "no evidence" to support Appellant's claim of self-defense on the record is simply NOT correct. In fact, an objective reading of the actual record (testimony presented by the State at trial) reveals that Appellant's unrefuted claim of being involuntarily compelled to act in self-defense when <sup>5</sup>spontaneously and unexpectedly attacked by Moore/Lamberson is actually supported by, and entirely consistent with, the record.<sup>17</sup>

But as stated above, most of the evidence the State presented at trial is not in dispute. Appellant admits to meeting Clarence Moore, aka Lawrence Lamberson and Aiesha Bryant at a local bar on the evening of Saturday February 5, 1983, then spending the rest of that evening "drinking and dancing" at several bars with key witness Frances Smith, Moore/Lamberson and Bryant. At some time after midnight all four then returned to Appellant's

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Footnote 17: See, Initial Brief, pg 92-93, "This was a wholly circumstantial case, thus applicable law requiring proof of premeditation to the exclusion of any other reasonable hypothesis of innocence applies. See, Ballard v. State, 923 So2d 475, 482 (Fla. 2006), quoting, Davis v. State, 90 So2d 629 (Fla. 1956) ("It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence"). See also, Bigham v. State, 995 So2d 207 (Fla. 2008)

rural residence located on the Johnson Ranch in Glades County for a late-night dinner (DA-R 2188-94)<sup>18</sup>

Upon arriving at Appellant's "trailer" Frances Smith began preparing a meal while Appellant sat in the adjacent living room with Moore/Lamberson and Bryant, drinking "coke and whiskey" from plastic cups (DA-R 2204). Key witness Smith testified that Appellant, Moore/Lamberson and Bryant were all "laughing, teasing, and playing around" with each other, with no sign of animosity between the parties, up until the time that Appellant and Moore/Lamberson went outside. (DA-R 2205)<sup>19</sup>

It is at this point that the alleged "facts" come into dispute. Key witness Smith unequivocally testified that she did not see or hear anything that might have transpired outside. The crucial facts the State conveniently neglects to include in their comprehensive "Statement of the Case and Facts" is that after Appellant first ~~went~~ went outside alone with Moore/Lamberson and returned alone approximately 20 minutes later (DA-R 1819-23), Smith was absolutely certain that at that time Appellant "looked normal" and did not have any blood upon him, or possession of the alleged "murder weapon" (PCR 1822-23)

It is not disputed that Appellant then went outside with Aleisha Bryant while Smith remained alone in the trailer. (DA-R 2207-08) About 45 minutes later, Appellant again returned alone - only this time, according to Smith's testimony, Appellant was now "covered in blood", and told Smith "they're dead" (DA-R 2209-11)

Smith testified that upon seeing Appellant, she "started screaming", but that Appellant then (while still "covered in blood") "grabbed (her), shook (her), and said he would do (her), too" (DA-R 2211) but incredibly, although Smith testified that Appellant then "washed up" and changed his clothes" (DA-R 2211-12). But at no time did Smith say she had to wash up, or change clothes - certainly if Appellant did "grab her" while "covered in blood" <sup>then</sup> ~~the~~ Smith would have had to at least wash up and change her clothes, too.

The only material issue in dispute is what actually transpired outside that night that led up to, and resulted in, the tragic deaths of Moore/Lamberson and Bryant. As the record reflects, key witness Smith readily admits that she did not see or hear

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Footnote 18: The undisputed facts of this case are very similar to that of Coolen v. State, 646 So2d 1046 (Fla. 1993), where the defendant met a couple at a local bar then returned to their residence. In Coolen, this Court found the subsequent death was not premeditated murder.

anything that happened outside (DA-R 1819-20, 1932). But Smith subsequently claimed that Appellant "told her" that Appellant "hit the man in the back of the head, and choked the girl" (DA-R, 2212-13), but that Appellant "never said why" (PCR 1937-42)

It is at this point that a close reading of the trial transcript is crucial, as Smith's own testimony reveals that the state's theory of alleged premeditated murder is not consistent with Smith's testimony - and, <sup>in</sup> fact, is entirely consistent with Appellant's unwavering, long pled claim that Appellant was compelled to act in involuntary self defense when Appellant was spontaneously attacked by Moore/Lamberson.

According to Smith's own unequivocal testimony, when Appellant first returned to the trailer after going outside with Moore/Lamberson, but before Bryant went outside, Smith was absolutely certain that Appellant DID NOT have any blood on him, and "looked normal" (DA-R, 2209-11)

This point is absolutely crucial, as this unequivocal testimony conclusively establishes that Moore/Lamberson was still alive and waiting outside when Appellant returned to the trailer to ask Bryant to come outside. Thus, contrary to the state's assertion, this does provide record support for Appellant's long and consistently pled claim that Appellant acted in involuntary self defense when Appellant was unexpectedly attacked by Moore/Lamberson.

As the trial record reflects, the state's own Medical Examiner, Dr. Robert Shultz, testified at trial that Moore/Lamberson died as the result of "blunt trauma," specifically, "Multiple blows to the head" comprising of "eight times, four times to the left forehead and four times to the right forehead... applied in a continuous side-by-side (swinging) motion" (PCR 1288-89), "resulting in severe fractures to the skull and bones around the eyes and the cheek" (DA-R 2058-59)

Dr. Shultz's testimony makes it clear that Moore/Lamberson was facing his assailant, and was not hit in the back of the head. Further, the virtual absence of any "defensive" wounds strongly supports a reasonable hypothesis<sup>19</sup> that Moore/Lamberson was the actual aggressor, supporting Appellant's undisputed claim that Appellant acted in involuntary self defense when unexpectedly attacked by Moore/Lamberson when Appellant attempted to stop Moore/Lamberson from violently assaulting Bryant.

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Footnote 19: please see, 'footnote 17' and page 18, supra.

More importantly, Dr. Shultz testified that Aleisha Bryant did not suffer any physical injuries that would have resulted in any significant amount of blood loss (DA-R 2046-2077). Dr. Shultz also conceded that he found no physical evidence to support Smith's claim that Bryant was "choked," as Dr. Shultz found no signs of hemorrhaging on Bryant's neck, no damage to the neck structure (larynx, etc) and no signs of periorbital hemorrhaging in Bryant's eyes. (PCR 1766-71). There was no physical evidence that Aleisha Bryant was choked or strangled.

In fact, Dr. Shultz admitted that he actually found no evidence that Bryant died as the exclusive result of criminal agency, and Dr. Shultz could not exclude the possibility that Bryant died of accidental causes. Rather, Dr. Shultz concluded "within reasonable medical certainty" that Bryant's death was the result of "probable manual strangulation" (DA-R 2073-77) by what Dr. Shultz described as a "process of elimination"—that since Bryant was not shot, stabbed, or beaten to death, the most probable cause of death was strangulation. (DA-R 2046-50) (DA-R 2073-77)

The ONLY evidence the state produced to support their theory that Appellant killed Aleisha Bryant was Frances Smith's own testimony that Appellant told her that "he choked the girl" (DA-R 2213), which Dr. Shultz testified there was no evidence of (PCR 1766-71), and Smith testified that Appellant put Bryant "face down in a pond" (DA-R 2225, PCR 1839) "because, he said, she wasn't dead—she would finish drowning" (PCR 1836, 194B), which simply was not, and could not be true as no pond existed.

With respect, this point must be strenuously emphasized; As fully stated above, the state's own evidence indisputably shows that Appellant did not have any blood on him, and "looked normal" after Appellant went outside with Moore/Lamberson, but BEFORE Bryant went outside. (DA-R 2209-11), and Dr. Shultz's testimony conclusively established that ONLY Moore/Lamberson suffered any physical injuries that would have resulted in any significant blood loss, and that "with each blow he would have splattered more" (PCR 1987)

This is the no-brainer that the state conveniently ignores—this indisputable evidence leaves only one logical conclusion—that when Appellant returned alone the first time to ask Bryant to come outside, Moore/Lamberson HAD TO STILL BE ALIVE and waiting outside, thus whatever transpired was a spontaneous event, and the evidence is not consistent with the state's specious theory of premeditated murder.

Although Appellant was improperly prohibited from testifying at trial,<sup>29</sup> Appellant did testify before the lower court and provided a detailed account of what had actually transpired outside, leading up to and resulting in, the deaths of Moore/Lamberson and Bryant (PCR 8317-40). As the record reflects, the state did not, and could not, provide any evidence whatsoever to discredit Appellant's claim of self defense (PCR 8332-8340) when the state had a full and fair opportunity to do so.

Appellant specifically testified that after Appellant, Frances Smith, Moore/Lamberson and Bryant returned to Appellant's trailer, Appellant subsequently did go outside with Moore/Lamberson, and that while outside both Appellant and Moore/Lamberson (both at the time intoxicated) decided to play a practical joke on Smith and Bryant. See DA-R 2205 (Smith testified that immediately before Appellant went outside with Moore/Lamberson, they were 'drinking whiskey' and "laughing, teasing, and playing around." Id.)

By mutual plan, Moore/Lamberson concealed himself at a nearby cattle feed trough, while Appellant returned to the trailer to ask Bryant to come out. As Appellant then accompanied Bryant towards the feed trough, as planned, Moore/Lamberson suddenly jumped out in an attempt to playfully scare Bryant. (PCR 8319-22) But Bryant - who was not so intoxicated - was not amused. Id.

Bryant verbally confronted Moore/Lamberson and the two began to argue. At that time Appellant was not aware of Moore/Lamberson's criminal history of ~~was~~ violently assaulting women, and Appellant left the two and started to return to the trailer. (PCR 8320-22). However, just before Appellant reached the trailer Appellant heard a scream coming from the rear pasture area where Appellant had just left Moore/Lamberson and Bryant. Id.

Assuming that Moore/Lamberson and Bryant had encountered an animal in the pasture area, Appellant immediately began heading back out to the pasture. As Appellant went by Appellant's own car, which was up on a jack from being worked on earlier that day (see testimony of Billy Williams, DA-R 2387-95), Appellant impulsively grabbed the jack handle ("tire iron"), not knowing what to expect. (PCR 8323-24)

Upon returning to the pasture area at first Appellant was not able to locate the two, but then heard a noise further back in the pasture. Appellant walked

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Footnote 20: Please see, 'footnote 15' and 'footnote 16' at page 17, supra.

towards that noise and suddenly came upon them.<sup>21</sup> Moore/Lamberson had Bryant pinned down on the ground, with him straddling over (as if sitting upon) her, and he was violently assaulting her. (PCR 8321-25)

Appellant attempted to verbally compel Moore/Lamberson to stop this assault, but he refused and continued to violently assault Bryant. Appellant then physically pushed Moore/Lamberson off Bryant, but as he fell to the ground Moore/Lamberson immediately sprang back up, coming directly at Appellant from no more than a few feet away.

In fear of imminent assault, and unable to retreat, Appellant then instinctively and spontaneously swung the "tire iron" at Moore/Lamberson, and kept swinging until Appellant realized that Moore/Lamberson was down (PCR 1823-27); See testimony of Dr. Shultz, "Multiple blows to the head... applied in a continuous side to side motion", "resulting in severe fractures of the skull and the bones around the eyes and the cheeks" (DA-R 2058-59, PCR 1788-89), not the back of the head.

After defending against this unexpected attack, Appellant then attempted to assist Bryant. Believing that Bryant was only unconscious, Appellant picked Bryant up and began to carry Bryant back to the trailer, but Bryant was too heavy (as the record will reflect, Bryant weighed 185 pounds, while at the time Appellant only weighed about 140 pounds DA-R 301), and Appellant had to lay Bryant down. (PCR 8323-25)

Appellant then attempted to perform "CPR" to revive Bryant, but she did not respond. At that time, Appellant realized that Bryant was dead, and returned to the trailer and told Smith "they're dead". (PCR 8324-25). Contrary to the testimony of Smith provided at trial, Appellant did tell Smith what actually happened outside (PCR 8321-24), which has been corroborated by the testimony of state witness Deborah Hanzel (PCR 5984-86, 8185) ("When I asked Frances if that was what really happened, she told me she didn't really know what happened outside, but that Mr. Lambrix had told her that the guy went nuts and he had to hit him")

As substantiated by the testimony of state witness John Chezem, both Appellant and Smith then used Moore/Lamberson's vehicle to go to a nearby store and purchase

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Footnote 21: As the record reflects, it was in the very early morning hours thus it was dark outside, with no lights anywhere in that pasture area. (DA-R 2216)

a flashlight, and then on the way back to the trailer Appellant stopped by John Chermis trailer to borrow a shovel (DA-R, 2371-77). As Appellant went into Chermis trailer Smith waited alone in the car outside - and made no attempt to run or escape. Id.

This evidence supports Appellant's testimony that BOTH Appellant and Frances Smith mutually agreed that going to the police that night was not an option as Appellant and Smith were living together under the fictitious name of Townsend (See, testimony of Bob Johnson, DA-R 2337-40) because Appellant was "wanted" for walking away from a state work release center several months earlier, where Appellant was completing the final months of a sentence for Appellant's only prior conviction - a simple "bounced" check. See, testimony of Folly Moore, DA-R 257B-B3)

Appellant did not "force" Smith to assist in superficially concealing the two bodies, and contrary to Smith's testimony that she was in "great fear" of Appellant, the evidence shows she clearly was not. See, attached Appendix D. As state witness Deborah Hanzel has now testified, Smith's claim that Appellant was motivated by an intent to "steal" Moore/Lamberson's vehicle was deliberately fabricated (PCR 5984-86, 8185) (attached as "Appendix B"). In fact, there is no question that it was Smith - and NOT Appellant - who was actually found in exclusive possession of this vehicle. (DA-R 2249)

The record shows that the state <sup>knew</sup> knew that Frances Smith was a habitual liar as she had told police numerous conflicting stories (all of which proved to be untrue) prior to retaining her own lawyer and only after days of consulting with legal counsel and her family, only then did Smith come up with this incredible story that miraculously transformed her into an unwilling "victim", while making her an invaluable state witness, guaranteeing her complete immunity - all at Appellant's expense. See DA-R 2319-21, PCR 1937-40) see also, testimony of Kinky Engvalson, PCR 8973-9026)

There simply can be no question that the record shows that Smith did deliberately fabricate the highly prejudicial and wholly unsupported "facts" the state used to convince the jury Appellant acted with premeditated intent. Dr. Shultz's testimony directly contradicted Smith's claim that Moore/Lamberson was "hit in the back of the head" and

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Footnote 22: As this Court recognized in Peck v. State, 395 So2d 497, 499 (Fla. 1980) and Scull v. State, 533 So2d 1137, 1143 (Fla. 1988), taking the deceased vehicle after death to facilitate fleeing from the scene is not sufficient to prove premeditated intent to kill.

that Appellant "choked" the girl. Smith testified that she seen Appellant go through Moore/ Lambersons pockets, yet Sam Johnson, the medical examiners intern, testified that they found money and jewelry in the very same pockets. (DA-R 1992-2016) and the State's own pretrial investigation revealed that Moore/ Lamberson never had a "gold necklace".

Smith testified that she seen Alisha Bryant "facedown in a pond" (DA-R 2225) and that when she asked Appellant why Bryant was in the pond, Smith claims Appellant "said she wasn't dead- she would finish drowning" (PCR 1B36, 1948). But there's NO question that this highly prejudicial testimony the State used to convince the jury Appellant undoubtedly committed premeditated murder WAS NOT TRUE, as the evidence shows that there was NO pond in that area. (PCR A231-32, 6241-42) See also, attached Appendix C) See also, Initial Brief "Argument III".

The newly discovered evidence now before this Court in the instant post conviction appeal does support Appellants long and consistently pled claim of involuntary self defense- and the State has provided virtually no evidence to dispute or otherwise discredit Appellants claim. As Appellants counsel specifically argued in the "Initial Brief" now before this Court;

"For more than two decades Cary Michael Lambrix has argued that he is innocent of the charges against him and of the death penalty. The case against him was wholly circumstantial. There were no eyewitnesses, no forensic or physical evidence, and no confession to support the State's case of two counts of premeditated first degree murder. The foundation of the case of capital premeditated murder against Mr. Lambrix was based on and built upon the information and testimony provided by his former girlfriend, Frances Smith....

A review by this Court of all the collective weight of all the new evidence will support a finding upon this Court's de novo review that the State's theory of alleged premeditated murder was fabricated with the intent to wrongfully convict Mr. Lambrix. Mr. Lambrix's case is a legitimate actual innocence case"

Initial Brief, page 1, 5

## Summary of the Arguments

Argument I: The State Withheld Material Exculpatory and/or Impeachment Evidence Involving A Sexual Relationship Between Key Witness Frances And State Attorney Investigator Miles R. Daniel's In Violation of Brady v. Maryland, And Failed To Disclose A Deal of Immunity From Prosecution Given To Key Witness Smith in Violation of Giglio v United State's, Entitling Appellant To Relief From The Convictions and Sentences of Death.

Argument II: Newly Discovered Evidence Establishes That Material Witness Deborah Hanzel Has Recanted Her Trial Testimony Entitling Appellant To a New Trial Under The Fifth and Fourteenth Amendments Due Process Clause of The U.S. Constitution

Argument III: Newly Discovered Evidence Shows That The State Conspired and Collaborated With The Key Witness To Wrongfully Convict and Condemn Appellant By Fabricating Evidence And Coercing False Evidence In Violation of Appellant's Due Process Rights Under The Florida and Federal Constitution

Argument IV: Newly Discovered Evidence Shows That Appellant Was Deprived of a Fair Trial Before an Impartial Tribunal In Violation of the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution

Argument V: Appellant Is Entitled To a Directed Acquittal of the Capital Convictions Under The Federal "Fundamental Miscarriage of Justice"; And The Florida "Manifest Injustice" Doctrine's, As Appellant Is Actually Innocent of Premeditated Murder, Alternatively, Appellant Is Entitled To A New Trial Under The Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution

## ARGUMENT I

### THE STATE WITHHELD MATERIAL EXCULPATORY AND/OR IMPEACHMENT EVIDENCE INVOLVING A SEXUAL RELATIONSHIP BETWEEN KEY WITNESS FRANCES SMITH AND STATE ATTORNEY INVESTIGATOR MILES R. DANIEL'S IN VIOLATION OF BRADY V. MARYLAND, AND FAILED TO DISCLOSE A DEAL OF IMMUNITY FROM PROSECUTION GIVEN TO KEY WITNESS SMITH IN VIOLATION OF GIGLIO V. UNITED STATES, ENTITLING APPELLANT TO RELIEF FROM THE CONVICTIONS AND SENTENCES OF DEATH.

Appellant provides the following as a supplement to the previously filed "Corrected And Amended Initial Brief" submitted by Appellant's appointed counsel, incorporating that action in its entirety herein by this specific reference. (Argument I, pages 16-42)

The following is provided out of necessity as Appellant's appointed counsel has inexplicitly failed to provide this Court with crucial facts relevant and material to the claim now pled and has completely failed to specifically argue and adequately present the claim previously pled before the lower Court that the State violated Giglio v. Maryland, 405 US 150 (1972) by failing to disclose that the State provided key witness Frances Smith with a deal of immunity from prosecution in exchange for Smith's testimony, and further failed to correct key witness Smith's false material testimony when Smith testified at trial that she received no special considerations or promises from the State.

Appellant provides the following supplemental argument to ensure that the record is clear that Appellant has presented the instant claim as a violation of Appellant's recognized constitutional rights under both State and Federal law as to ensure adequate "exhaustion" of the deprivation of Appellant's protected Federal rights before the State Courts in the event subsequent Federal Court review of this claim proves necessary. See Baldwin v. Reese, 541 US 27 (2004); Duncan v. Henry, 513 US 364, 366 (1995) (to satisfy Federal "exhaustion" requirement, habeas petitioner must specifically advise the State Courts of any violations of Federal rights)

#### A) Failure To Disclose Relationship Between Key Witness Smith and Inv. Daniels

As fully pled in the "Initial Brief" now before this Court, Appellant argues that the State knowingly violated Appellant's State and Federal constitutional "Due Process" Rights

as recognized in, and under, Brady v. Maryland, 393 US 83 (1963) and Kyles v. Whitley, 514 US 419, 453 (1995) (recognizing that capital defendants Federal Constitutional Due Process are violated when prosecution failed to disclose exculpatory and/or impeachment evidence that; if disclosed, could had reasonably altered the verdict rendered)

As the state has consistently conceded, and the record plainly reflects (DA-R 195D, 252E) there is no question that Frances Smith was the states key witness, and that the entire wholly circumstantial theory of premeditated murder was built upon and established through Smith's own testimony. As the state specifically argued before the lower court, "clearly the states 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" (Transcript of Hearing, of October 6, 2000, at page 37)

Twenty years after Appellant was convicted and condemned to death, newly discovered evidence revealed that key witness Frances Smith had engaged in an illicit relationship of "a sexual nature" with the state Attorneys lead investigator Miles "Bob" Daniels during the prosecution of this case. It must be strenuously emphasized that investigator Daniels was, in fact, the very person who swore out the original "Affidavit" formally initiating these charges against Appellant (DA-R 297-301), and then subsequently personally supervised and controlled the development of the wholly circumstantial evidence used to corroborate Smith's testimony, and convict Appellant.

When unexpectedly confronted with this new evidence, at first Frances Smith denied having any relationship with Inv. Daniels (PCR 8273-80), but upon further questioning Smith admitted that she did, in fact, have a relationship "of a sexual nature" with Inv. Daniels during the time Appellant was being prosecuted on these capital charges (PCR 8273-80). Appellants counsel presented additional evidence to support that key witness Smith's testimony was true.

The lower court subsequently found that Frances Smith's testimony was "not credible" (PCR 7832, 7833). The State now argues that this court must accept that factual finding under Brown v. State, 959 So2d 146, 149 (Fa 2007). ("appellate courts do not reweigh the evidence or second guess the Circuit Court's findings on credibility")

However, this Court has consistently recognized that the lower Courts factual findings are entitled to deference only if the lower Courts findings "are supported by competent, substantial evidence"; Stevens v. State, 748 So2d 1028, 1034 (Fa. 1999)

In fact, this Court has not hesitated to overturn the lower Courts factual findings, and grant relief in similar capital cases, See, Floyd v. State, 902 So2d 775 (Fla. 2005), Mordenti v. State, 894 So2d 161 (Fla. 2004), Cardone v. State, 826 So2d 968 (Fla. 2002), Rogers v. State, 782 So2d 373 (Fla. 2001), when the weight of the evidence clearly stood contrary to the lower Courts factual findings.

Thus, the State's argument that this Court "must" accept the lower Courts factual findings is not consistent with applicable law. Rather, this Court must independently look at the evidence presented to the lower Court, and determine whether the lower Courts factual findings are supported by "competent, substantial evidence"; and if not, then this Court must grant relief; Mordenti v. State, 894 So2d 161, 164 (Fla. 2004)

As the record reflects, the lower Court completely ignored the virtual wealth of corroborating evidence that substantiated Frances Smith's reluctant admission that she did have an intimate relationship with Inv. Daniels. Instead, the lower Court found Smith's own testimony "not credible" primarily upon nothing more than Inv. Daniels own admittedly self-serving denial that any sexual relationship existed. (PCR 7832-34)

The lower Court ignored the fact that Inv. Daniels admitted that if he told the truth and admitted to having a relationship with Frances Smith, it would jeopardize his marriage and possibly subject him to the loss of his retirement pension. (PCR 8944, 8948). But Daniels did admit that during that relevant time (1983-84) he was not faithful to his wife, and had engaged in numerous extramarital affairs (PCR 8894), including a "romantic relationship" with then co-worker Carla Mitar (who also was a state witness at Appellants trial, DA-R 1901-16), whom he subsequently married after Appellants trial.

Appellant submits that the clear weight of the evidence supports a finding that witness Frances Smith was telling the truth about having a sexual relationship with Investigator Daniels while Appellant was being prosecuted. (PCR 8273-80) As fully argued in Appellants "Initial Brief" (pgs 30-35) Frances Smith did not voluntarily come forth with this information.

Rather, Appellants counsel only learned of this relationship when Frances Smith's own ex-husband Douglas Schwendeman came forward and told Appellants counsel that when he married Frances Smith in 1986, Smith had told him that she had been involved in a capital case prior to their meeting, but was protected from prosecution because of an affair she had with the State Attorneys investigator, "Bob the pilot".

(V45/8846-48)

only after receiving that information from Mr. Schwendeman did Appellants counsel question key witness Smith about this relationship. At first, Smith denied any relationship with Daniels, but then reluctantly admitted it was true (PCR 8273-80), confirming the information Mr. Schwendeman provided the court. However, the lower court found Schwendeman's "testimony" not persuasive" (V39/7829-30) because Schwendeman admitted that he harbored animosity towards Smith after their divorce. (V39/7830)

Once Frances Smith was compelled to reluctantly admit that he did have an intimate relationship with Inv. Daniels, Smith then provided specific details that were independently substantiated by Inv. Daniels own testimony and documentary evidence (Flight records, ect). Smith readily conceded that she did not want to help Appellant (PCR 7310) which reasonably explains her uncooperative and evasive nature when she testified and was involuntarily compelled to provide these details.

Smith testified that this sexual affair took place at a motel after she was flown down to Glades County by Inv. Daniels during a severe thunderstorm (PCR 8722-25). Subsequently Inv. Daniels admitted that he did stay at a motel with Frances Smith for several days during Appellants second trial (PCR 8935-42), and that when they flew down that particular time they encountered a severe thunderstorm, in which he said "I've never been so scared in my life" (PCR 8922-33). The documentary evidence (flight logs, ect) independently corroborated this testimony. (PCR 8923-42)

As stated above, Inv Daniels also admitted that during the time in question he was married to "Joan", but had engaged in numerous extramarital affairs, and was not at all faithful to his wife. (PCR 8894), and that when he stayed at the motel with Frances Smith, they did share alcoholic drinks together. (PCR 8902-04)

The bottom line is that Inv. Daniels own testimony actually substantiated everything that Frances Smith claimed took place, except that Inv. Daniels denied actually having sex with Smith - but conceded that he could not admit to actually having sex with Smith as it would jeopardize his current marriage and subject him to the possible loss of his retirement pension. (PCR 8944, 8948)

Clearly, Inv. Daniels own self-serving denial of actually having sex with Frances Smith is not credible, and the lower courts final order denying relief (PCR 7832-33) upon the finding that Frances Smith's claim of having a sexual relationship

with Inv Daniels, supported by the testimony of Douglas Schwendeman, is "not credible" is not supported by competent, substantial evidence and as in Mordenti v. State, 894 So2d 161, 164 (Fla. 2004) the collective evidence does support the existence of an undisclosed relationship, violating Brady v. Maryland, supra, requiring a new trial.

The State then argues that even if this Court finds that key witness Frances Smith and Inv. Daniels did engage in a relationship "of a sexual nature", Appellant still is not entitled to relief as (the State argues) Appellant has failed to prove that this affair actually took place before Frances Smith testified.

The State's argument is without merit. Frances Smith unequivocally testified that this sexual affair took place while Appellant was being prosecuted (PCR 8273-8280). The evidence subsequently presented, including the testimony of Inv. Daniels and the flight logs, that the very latest time this affair took place had to have been when Appellant stood trial and Smith and Daniels stayed at a local motel (PCR 8935-42). See also, PCR 7310-15. The trial transcript clearly reflects that Frances Smith did not testify until February 20, 1984 - the last day of Appellants trial, and Inv. Daniels testified that immediately after the trial, he returned home (PCR 8941). The flight records show that was late afternoon on February 20, 1984 (PCR 8923-42).

Both Frances Smith and Inv. Daniels testified that they were never again together after Appellants trial. The States unfounded assertion that this affair might had actually occurred after Appellants trial, thus would not had been available, or relevant to, impeachment of the witness is directly contradicted by the evidence.

Then the State argues that even if Smith and Daniels did have sex while Appellant was being prosecuted, as Smith testified (PCR 8273-80), the failure to disclose this relationship was not a violation of Brady v. Maryland as Appellant cannot prove that the trial court would had allowed Appellants trial counsel to use this information to actually impeach Frances Smith and Inv. Daniels.

The States argument is clearly disingenuous and patently absurd. The Federal Constitution's Sixth Amendment "Confrontation clause" specifically recognizes a criminal defendants fundamental right to confront and cross-examine adverse witnesses. See, Pointer v. Texas, 380 US 400, 403 (1965) (criminal defendant must be allowed a full and fair opportunity to cross-examine adverse witnesses), Davis v. Alaska, 415 US 308, 316-17 (1974) (failure to allow criminal defendant to fully

cross examine witness as to possible bias and prejudice will require new trial), Maryland v. Craig, 497 U.S. 836, 846 (1990) ("confrontation enhances the accuracy of the fact finding by reducing the risk that a witness will wrongfully implicate an innocent person")

In fact, in Olden v. Kentucky, 488 U.S. 227, 231 (1988) the Supreme Court specifically found that the state courts failure to allow the defendant to cross examine a key witness about a sexual relationship that arguably would have exposed prejudice or bias was clearly improper. See, Mordenti v. State, supra, 894 So2d, at 194

Florida courts have consistently ruled similarly. See, Sweet v. State, 235 So2d 40 (Fla. 2d DCA, 1970) (refusing to allow capital defendant to bring out in cross examination that witness had a sexual relationship with the state investigator was error, requiring new trial); Jones v. State, 577 So2d 606 (Fla. 4th DCA, 1991) (witness' extramarital sexual relationship must be subject to cross-examination as it goes to credibility of witness) Stanley v. State, 648 So2d 1288 (Fla. 4th DCA, 1995) (failure to allow cross examination of relationship between witnesses required new trial); Webb v. State, 336 So2d 416 (Fla. 2d DCA, 1976) (trial courts refusal to allow cross-examination of relationship between the witnesses required new trial)

In Mordenti v. State, 894 So2d 191 (Fla. 2004) this court dealt with a very similar type of capital post conviction "Brady" claim in which the state failed to disclose a relationship between the key witness and another witness. In Mordenti, this court rejected the states similar argument that even if the relationship was disclosed, it was not "material" and did not violate Brady v. Maryland. Id., 894 So2d, at 194-95 This court recognized that the defendant should have been able to cross-examine the key witness about that relationship as it was relevant to the witness' credibility, bias, and prejudice. Id. In Mordenti, this court ordered a new trial. See also, Smith v. State, 897 So2d 30 (Fla. 4th DCA, 1996) (any possible motive witnesses may have had to exaggerate or even completely fabricate their testimony must be subject to cross examination)

Finally, the state argues that even if Smith and Daniels did have an undisclosed relationship of an intimate nature, pursuant to Breedlove v. State, 580 So2d 605, 609 (Fla. 1991) the failure to disclose this relationship cannot fairly be attributed to the state. However, Breedlove involved numerous police officers who had allegedly engaged in criminal misconduct that was not disclosed.

This court found that the failure to disclose this criminal misconduct could

not be fairly attributed to the state as the police officers own Fifth Amendment right protecting against self-incrimination prevented the state from knowing of it. Breed-  
love, Id., at 606-607. In this case, neither Smith or Daniels were alleged to have engaged in any criminal misconduct - it was consensual sex between two adults - thus, there were no Fifth Amendment concerns that could have reasonably compelled Smith and Daniels to conceal this relationship from the State Attorney.

The law is now well-established that knowledge of misconduct on the part of an investigating officer is imputed to the state for purposes of determining whether the information was suppressed regardless of whether the prosecutor knew about the evidence. Brady v. Maryland, supra; Giglio v. United States, 405 US 150, 153 (1972); Kyles v. Whitley, 514 US 419 (1994); McMillian v. State, 88 F.3d 1554, 1567 (11th Cir. 1996), Arnold v. State, 117 F.3d 1308 (11th Cir. 1997), Guzman v. State, 868 So.2d 498, 503 (Fla. 2003)

In Freeman v. Georgia, 559 F.2d 65 (5th Cir. 1979)<sup>23</sup> the Federal Court specifically addressed a very similar case in which an investigating officer's deliberate concealment of a witness motivated by that officer's own romantic relationship with the witness could be fairly imputed to the state. As that Court concluded;

"We cannot accept the state's reasoning that because Fitzgerald's actions were personally motivated... Fitzgerald's actions cannot be imputed to the state. We feel that when an investigating officer willfully and intentionally conceals material information regardless of his motivation... the policeman's conduct must be imputed to the state as part of the prosecution team. Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969)

Freeman v. Georgia, Id., 559 F.2d, at 69

Appellant submits that the collective weight of the evidence supports the conclusion that key witness Frances Smith and the State Attorney's lead investigator Miles R. Daniels did engage in a relationship "of a sexual nature", and this did occur while Appellant was being prosecuted. The failure to disclose this relationship to the defense unconstitutionally deprived Appellant of the opportunity to confront and cross examine both Smith and Daniels for the purpose of exposing these material witnesses possible motivations, bias, and prejudices; see, Olden v. Kentucky,

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Footnote 23: In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) the Eleventh Circuit recognized that all 5th Circuit cases prior to 1981 are binding precedent in this circuit.

488 US, at 231, Mondenti v. State, supra, 894 So2d, at 194-95, thus violating Brady v. Maryland, 373 US 83 (1963)

Although the state attempts to dismiss Appellants specifically pled assertion that this sexual affair was actually the culmination of a much longer romantic interest that motivated Inv. Daniels to participate in a conspiracy and collaboration to wrongfully convict Appellant<sup>24</sup>, the collective evidence does support this assertion.

In addition to the specific evidence detailed above, Appellant submits that further evidence substantiating the relationship exists can be found in the undisputed testimony of witness Deborah Manzel. In fact, this relationship between Smith and Daniels did not even come out until after Manzel came forth and gave sworn testimony that Frances Smith and a man from the State Attorneys office COERCED her to provide material false testimony to corroborate Smith's testimony. See, Initial Brief "Argument II"

At the time Manzel could not had possibly known of the illicit relationship between Smith and Daniels during the time Appellant was being prosecuted. Her testimony given months before the revelation of this relationship supports the actual existence of this relationship, as it provides the logical motive for what Manzel described as an actual conspiracy and collaboration to wrongfully convict Appellant by the deliberate fabrication of this wholly circumstantial theory of premeditated murder. See 'Initial Brief', 'Argument III' (pgs 57-70)

For the purpose of determining whether the evidence supports a violation of Brady v. Maryland, supra, this Court must look to all the evidence. Appellant submits that the evidence presented in "Argument II" and "Argument III" must be fully reviewed and considered in conjunction with the evidence presented herein, see, Gunsby v. State, 670 So2d 920, 924 (Fla, 1994); Swafford v. State, 679 So2d 736, 739 (Fla, 1996), as collectively these claims support Appellants assertion that key witness Smith and Investigator Daniels did engage in an undisclosed personal relationship that did motivate both to work together to wrongfully convict Appellant.

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Footnote 24: As specifically argued throughout these post conviction proceedings, Smith and Daniels did not just coincidentally wake up in bed together. Rather, the collective evidence shows that Smith and Daniels actually consummated a much longer existing romantic interest at the first opportunity they had when alone together.

## B) Failure To Disclose Deal of Immunity From Prosecution

As stated within the 'Initial Brief' of Appellant (pgs 35-39) submitted by Appellant's counsel, incorporated herein by instant specific reference, the evidence developed and presented before the lower Court in these post conviction proceedings establishes that, by clear and convincing evidence, the State did give key witness Frances Smith a deal of immunity from prosecution in exchange for her testimony against Appellant, and the State did not disclose this "understanding or promise" of immunity from prosecution to the defense in direct violation of Giglio v United States, 405 US 150 (1972) and United States v Bagley, 473 US 667 (1985)

In Giglio v. United States, *supra*, the Supreme Court dealt with a very similar scenario in which the government's case "depended almost entirely", Id 405 US, at 154, upon the testimony of a single key witness. Only after the defendant was convicted did it come to light that the key witness was given a promise of immunity, Id, at 150-51, and the government did not disclose this promise.

in vacating the conviction, the Supreme Court specifically found that "evidence of any understanding or agreement as to future prosecution would be relevant to (the witness') credibility, and the jury was entitled to know of it" Id, at 154-55. See also United States v. Bagley, 473 US 667, 676-77 (1985) (impeachment evidence, as well as exculpatory evidence, is subject to disclose under Brady v Maryland), United States v. Ruiz, 536 US 622, 628 (2002) ("exculpatory evidence is evidence in which the suppression of would 'undermine confidence in the verdict,' quoting Giglio, 405 US, at 154")

Appellant acknowledges that the lower Court summarily concluded that "there is no credible evidence that the state offered a plea deal or a plea bargain, or any other consideration to Frances Smith O'Hinger in exchange for her testimony" (V40/7882-83) But this summary and wholly unsupported conclusion is not supported by "competent, substantial evidence", and thus is not entitled to deference by this Court.

In fact, in the very same final order denying post conviction relief, the lower Court specifically found the witness upon which this claim rests to be completely credible. See 'Order', V39/7833-37, "Robert Daniels also testified... Mr. Daniels was at all times forthright and direct. He did not evade the questions posed to him and he answered each question promptly and without delay... the Court finds that Mr. Daniels testimony is credible"

The testimony that Inv. Daniels provided, which the lower specifically found was credible, was the primary evidence presented to support this claim. Investigator Daniels' testimony was corroborated by former Asst. State Attorney Tony Pires, one of the original prosecutors assigned to this case. Both Inv. Daniels and former ASA Pires testified that based upon their personal knowledge of office policy and procedure in effect at the relevant time, Frances Smith was provided a deal of immunity from prosecution in exchange for her "cooperation" in the prosecution of this capital case.

The State argues that Inv. Daniels' testimony is not new evidence because Inv. Daniels had actually disclosed this information in a pretrial deposition, and subsequently testified at trial (upon cross-examination) that Frances Smith "probably would not be charged in these offenses as long as she was truthful" (DA-R 31B-19), but the State neglects to point out that when Appellants' trial counsel subsequently and specifically asked Frances Smith as to whether the State had given her any promises, or understanding of favorable consideration in exchange for her cooperation in the prosecution of this case, Smith unequivocally denied any deal or any form of consideration was given to her (DA-R 2327-36)<sup>25</sup>

Although at trial Inv. Daniels alluded to, but did not actually state that, key witness Smith "probably would not be charged in these offenses" (DA-R 31B-19), it was only in the current post conviction proceedings that Inv. Daniels revealed knowledge of office policy and practice, substantiated by the testimony of former ASA Tony Pires, that provided actual confirmation that Frances Smith did receive a deal of immunity from prosecution in exchange for her testimony against Appellants.

Investigator Daniels specifically testified that Frances Smith was given a polygraph test by the State Attorneys office, which pursuant to office policy and procedure at the time, was "the benchmark" for a deal of immunity. (PCR 8856-62). Inv. Daniels testified that he worked "closely" with key witness Smith, and it was his understanding that Frances Smith was given immunity from prosecution, even though Frances Smith actually showed "signs of deception" in the polygraph test. (PCR 8859-62)

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Footnote 25: For reasons unknown to Appellant, in the Initial Brief Appellants appointed counsel inexplicitly failed to point out the crucial fact that at trial, Frances Smith testified that she was not given, or received, any promise of immunity in exchange for her testimony.

Investigator Daniels testimony - which the lower court specifically found to be "credible" (V39/7833-37) (PCR 7836-37), was substantiated by former ASA Tony Pires (PCR 9022-9033). In rebuttal, the State called only ASA Randall McGruther, who actually prosecuted the case at trial, but ASA McGruther could not and did not deny that key witness Smith was given immunity from prosecution - ASA McGruther could only state that he was not personally aware of any such deal. (PCR 9066-80)

As this Court stated in Rose v. State, 787 So2d 786, 797 (Fla. 2001) "As provided by Strickler v. Greene, 527 US 263, 289-90 (1999), even where the prosecutor does not know about the existence of the exculpatory material, a suppression may still be deemed to have occurred if the state agents possess the evidence and it is not disclosed."

The fact that the prosecutor ASA McGruther claims to have not "personally" known whether key witness Smith was given immunity in exchange for her testimony is not proof that Smith did not receive such a deal. Equally so, although Inv. Daniels did testify at trial that key witness Smith "probably would not be prosecuted" (DA-R 318-19), at no time did Inv. Daniels, or anyone from the State Attorneys office, provide the specific information necessary to establish that contrary to Frances Smith's own testimony that she did not receive any deals or promises (DA-R 2327-36) in exchange for her testimony.

In State v. Huggins, 788 So2d 238, 243 (Fla. 2001) this Court granted a new trial on a similar Brady violation. In Huggins, the State provided "hundreds of pages" of discoverable material, and argued that the defense could have simply conducted their own investigation to discover the exculpatory evidence the State possessed, but did not disclose. In rejecting that argument, this Court specifically found that the State's duty under Brady v. Maryland required that the State provide the specific information in their possession. Huggins, 788 So2d, at 243

The record is clear and undisputed that at no time prior to the current post conviction proceeding did the State disclose that during the time Appellant was being prosecuted the "benchmark" (PCR 9027-33) in the State Attorneys office for entering into an agreement not to prosecute a witness was compelling the witness to take a polygraph. (PCR 8856-62)

The failure to previously disclose that specific information is in and of itself a Brady v. Maryland violation, as had Appellant been aware of this undisputed

office policy and procedure of using polygraph examinations as a "benchmark" for granting witnesses immunity from prosecution, then when key witness Frances Smith testified that she was not given, and did not receive, any promises or understanding of favorable treatment ~~DA-R 2327-36~~ (DA-R 2327-36), Appellant's trial counsel could have used that specific information to impeach this key witness.

In further support that key witness Smith actually was given immunity in exchange for her testimony against Appellant, at trial the state made a point of characterizing Smith as a "suspect" leading the jury to believe that Smith might yet face criminal charges. But in fact, Smith was actually never charged with any crime in connection with this case, even though Smith admitted to (at the very least) having exclusive possession of the victims car. Additionally, only shortly after Appellant was convicted and condemned to death upon Smith's testimony, all of Smith's own "unrelated" felony charges were completely dropped.

The lower courts' summary conclusion, without evidentiary support, that there is "no evidence" to support Appellant's claim that key witness Frances Smith was given a deal of immunity from prosecution in exchange for her testimony is not supported by "competent, substantial evidence", and this court should not accept the lower courts' findings as the weight of unrefuted testimony does show that Frances Smith was given immunity from prosecution in exchange for her testimony.

The facts and evidence clearly show that the state did provide key witness Frances Smith a deal of immunity from prosecution in exchange for her testimony, and did not disclose this deal to the defense in direct violation of Giglio v. United States, 405 US 150 (1972). Further, the state did not disclose information regarding the state Attorney office's policy and procedure of using polygraph tests as a "benchmark" for providing immunity, and/or deals to witnesses, in violation of Brady v. Maryland, 373 US 83 (1963) Had this specific knowledge been properly disclosed prior to trial, Appellant's trial counsel could have used knowledge and evidence of this office policy and procedure to impeach key witness Smith when she perjurally denied receiving any promise or understanding of favorable treatment. (DA-R 2327-36)

Last, this newly discovered evidence now shows that the state knowingly allowed key witness Smith to provide material false testimony without correcting this false testimony in direct violation of Giglio v. United States, supra, and Quinn v. State,

868 So2d 498, 503 (Fla. 2003). As this Court recognized in Rose v. State, 787 So2d 786, 796 (Fla. 2001) even though prosecutor ASA McGruther denied "personally" knowing of any deal of immunity, clearly the State agents did.

Appellant is entitled to relief from these unconstitutionally obtained convictions and sentences of death due to these specific Brady/Giglio violations.

### C) Prejudice Resulting From Brady/Giglio Violations

Appellant acknowledges that, as this Court stated in Hennon v. State, 941 So2d 1109, 1124 (Fla. 2006) "A criminal defendant alleging a Brady violation bears the burden to show prejudice; i.e., to show a reasonable probability that the undisclosed evidence would had produced a different verdict. Strickler v. Greene, 527 US 267, 281, 119 S.Ct 1936, 144 (Ed2d 286 (1999)). To demonstrate prejudice under Giglio it must be established that "there is any reasonable likelihood that the false testimony could had effected the judgement of the jury," United States v. Agurs, 427 US 97, 103, 96 S.Ct 2392 (1976)."

As this Court acknowledged in State v. Huggins, 788 So2d 238, 243 (Fla. 2001), "In reviewing the materiality of an alleged Brady violation and whether prejudice ensued, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence," quoting Strickler v. Greene, 527 US, at 289-90."

Further, "this Court must review the net effect of the suppressed evidence and determine whether the favorable evidence could reasonably be taken to put the whole case in a different light so as to undermine confidence in the verdict," Maharaj v. State, 778 So2d 944, 953 (Fla. 2000) if the suppression of the favorable evidence shakes confidence in the verdict, the defendant is entitled to relief," State v. Huggins, supra, 788 So2d, at 243.

There is simply no question that the States entire wholly circumstantial case rested upon the credibility of their key witness, Frances Smith. As the State itself has conceded before the lower Court, "clearly the States 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." (Transcript of Hearing, October 6, 2000, at page 37)

Both of the above claims that the state failed to disclose the nature of the relationship between key witness Smith and Investigator Daniels and the state's failure to disclose the deal of immunity from prosecution provided to Frances Smith would had provided crucial impeachment evidence that would had compelled the jury to question not only the testimony of Frances Smith, but the States entire wholly circumstantial case of alleged premeditated murder. See, Gunsby v State, 670 So2d 920 (Fla. 1994) (Court must consider the cumulative effect of Brady claim)

As the record reflects, at trial Appellant's entire defense was focused upon convincing the jury that Frances Smith was not a credible witness and that the numerous material inconsistencies in her testimony created substantial reasonable doubt precluding a verdict of guilt. (DA-R 2652-2680)

Appellant's trial counsel specifically attempted to convince the jury that Frances Smith had "a hidden motive to testify against Mr. Lambrix" (DA-R 2652-80), but Smith herself unequivocally (and falsely) denied receiving any favorable treatment in exchange for her testimony (DA-R 2927-36), and the trial court prohibited Appellant's trial counsel from impeaching Frances Smith's testimony by showing that Smith actually had told the police numerous other stories that directly contradicted her trial testimony prior to then retaining her own private counsel, and only then coming up with this incredible story of alleged premeditated murder. (DA-R 2319-2326)

At the evidentiary hearing held before the lower Court on this claim both of Appellant's trial counsel testified that without any doubt had they known of this alleged relationship 'of a sexual nature' between key witness Frances Smith and Investigator Daniels, ~~and~~ and the deal of immunity from prosecution provided to Smith in exchange for other testimony, they would have used this information for impeachment purposes on cross-examination. See, testimony of Kinley Engvalson (PCR 8973-9026) and testimony of Robert Jacobs III (PCR 9054-59). The State did not dispute this testimony.

Appellant has clearly met the necessary burden of establishing actual prejudice ('Materiality') resulting from the above pled "Brady" violation's as there is a "reasonable probability" that had the information been disclosed to the defendant, the result of this proceeding would had been different. Floyd v State, 902 So2d 775, 778-80 (Fla. 2005), quoting Kyle v Whitley, 514 US, at 434. As this Court said in Floyd,

"The proper test for prejudice is not whether the suppressed evidence 'would

have resulted ultimately in an acquittal'. Kyles, 514 U.S. at 434. That would be too high a bar; in fact, as we have explained, the test is not even whether the evidence 'more likely than not' would have resulted in an acquittal. Young, 739 So.2d, at 557 (quoting Kyles, 514 U.S. at 434). All we have required is a 'reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would had been different.' Id., at 559. (emphasis added). In other words the test in Brady focuses on the fairness and reliability of a trial that took place without access to the suppressed exculpatory evidence, rather than requiring an actual showing that the actual result would had been different as is required when a new trial is sought based upon newly discovered evidence. The rationale for the less restrictive standard is to acknowledge the government misconduct in withholding evidence and the effect that misconduct has on the defendant's right to due process and fair trial' Id."

Floyd v. State, 902 So.2d, at 778-80

Appellant submits that the standard of establishing prejudice is even lower when the petitioner has established "a deliberate deception of the Court and jurors by the presentation of false evidence incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153 (1972). Whether or not ASA McGruther "personally" knew that key witness Smith was promised, and did receive, immunity from prosecution in exchange for her testimony does not matter, Rose v. State, 787 So.2d 786, 796 (Fla. 2001)<sup>26</sup>, the evidence still shows that the State Attorney's office did know that Frances Smith was already given a deal of immunity, which was not disclosed to the defense in violation of Brady v. Maryland, supra, and the State did then allow key witness Smith to falsely testify that she was not given any promise or understanding of immunity in direct violation of Giglio v. United States, supra.

As this Court explicitly recognized in Guzman v. State, 868 So.2d 498 (Fla. 2003), quoting United States v. Agurs, 427 U.S. 97, 103 (1976) "where the prosecution knowingly uses

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Footnote 26: (recognizing that "as provided by Strickler v. Greene, even where the prosecutor does not know about the existence of exculpatory evidence, a suppression may still have occurred if the State's agents possess the evidence and it is not disclosed.")

perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," Guzman, id., at 502. Further, the state has the burden of proving that the presentation of the false evidence was harmless beyond a reasonable doubt. United States v. Bagley, 473 US 667, 676-77, (1985); Guzman v. State, supra, See also, Craig v. State, 685 So2d 1224, 1226 (Fla. 1996) (use of misleading testimony by the state constitutes Giglio violation even if the testimony is not clearly perjurious")

However, as fully argued by Appellants Counsel in the "Initial Brief" (pgs. 40-42), to determine whether Appellant has established actual prejudice ("materiality") resulting from the pled Brady/Giglio violations, this Court must look to the cumulative evidence. See Kyles v. Whitley, supra, 514 US, at 436; Strickler v. Greene, 527 US 263 (1999); Swafford v. State, 679 So2d 736, 739 (Fla. 1996) (instructing circuit court to consider newly discovered evidence in conjunction with evidence introduced at trial and in post conviction proceedings); Gunsby v. State, 670 So2d 920, 924 (Fla. 1994) (new trial granted on Brady claim upon finding that cumulative effect of Brady violation, ineffective assistance of counsel, and newly discovered evidence collectively established prejudice)

Assuming in arguendo that this Court does not find Appellant has established the required measure of materiality upon the record now before this Court, as the record reflects, and was specifically argued by Appellants Counsel; See, "Initial Brief" (pg. 40-42), the lower Court improperly denied Appellant a full and fair opportunity to present the available evidence relevant to establishing prejudice, thus denying Appellant's due process right to a meaningful opportunity to prove his claims. See Lightbourne v. State, 549 So2d 1364 (Fla. 1989); Scott v. State, 657 So2d 1132 (Fla. 1995); Swafford v. State, supra, 679 So2d, at 739.

The lower Court improperly limited Appellant's ability to fully present relevant evidence to establish actual prejudice. Specifically, the instant claim that the state failed to disclose this illicit relationship between key witness Smith and investigator Daniels specifically pled that Smith and Daniels did not just coincidentally wake up one morning in bed together. Rather, their sexual affair was the culmination of a much longer existing romantic interest that effected Inv. Daniels' conduct and control over the entire investigation and development of the wholly

circumstantial evidence used to corroborate Smith's testimony - and convict Appellant.

As fully stated in the Initial Briefs, 'Argument III' (pgs 57-70), former state witness Deborah Hanzel specifically testified that Frances Smith and a man from the State Attorney's Office (which had to be SAO Inv. Daniels) deliberately worked together to coerce Hanzel to provide crucial false testimony to corroborate Smith's otherwise unsupported testimony. Hanzel also specifically ~~testified~~ testified that key witness Smith told her that Smith's own story was not true, and that, in fact, all that Smith actually knew was that Appellant had told her (Smith) that the guy (Moore/Lamberson) "went nuts" and (Lamberson) had to hit him. (Attached, Appendix \_\_\_)

Deborah Hanzel's testimony on this point was not provided until February 9, 2004 almost a full year after the lower Court had rendered its July 2003 Order denying relief on this claim. (PCR 5293-5809). The state did not present any credible evidence to otherwise rebut or discredit Hanzel's claim first provided in 2004, nor any evidence to dispute Deborah Hanzel's 2004 claim that key witness Smith and SAO Inv. Daniels did knowingly engage in a deliberate conspiracy and collaboration to have Appellant wrongfully convicted, as fully argued in "Argument III," Infra.

Appellant submits that the evidence already now before this Court, as stated above, is more than sufficient to establish entitlement to relief, especially when considered in conjunction with the recantation of Deborah Hanzel's own testimony, 'Argument II', Infra; However, if for any reason this Court finds that the facts and evidence above is not sufficient to warrant relief, then before any final decision is made, this Court must remand this case back to the lower Court for a full evidentiary on pried "Argument III" to allow Appellant to present evidence that will corroborate the existence of a personal relationship between key witness Smith and SAO Inv. Daniels, resulting in their mutual personal interest and motive to work together to manipulate and fabricate evidence to wrongfully convict Appellant. See Roberts v. State, 678 So2d 1232 (Fla. 1996), quoting Johnson v. Singletary, 649 So2d 106, 111 (Fla. 1994) (remanding capital post conviction case to lower Court for further evidentiary proceedings so that defendant could present additional evidence "to demonstrate the corroborating circumstances sufficient to establish the trustworthiness of the newly discovered evidence").

## ARGUMENT II

### Newly Discovered Evidence Establishes That Material Witness Deborah Hanzel Has Recanted Her Trial Testimony Entitling Appellant To A New Trial Under The Fifth And Fourteenth Amendment Due Process Clause of the U.S. Constitution

Appellant would respectfully submit that the instant supplemental argument in support of 'Argument II' of the 'Initial Brief' (incorporated herein by this specific reference) submitted by appointed counsel is necessary as Appellants counsel did not specifically advise this Court that this claim is presented as a violation of Appellants State and Federal rights, and Appellant specifically seeks entitlement to relief under the 5th and 14th Amendment 'Due Process' clause of the US Constitution.

Additionally, Appellant presents the necessary factual argument relevant to the deprivation of Appellants protected constitutional rights to supplement the argument provided by appointed counsel, as counsel inexplicitly omitted numerous material facts.

The State concedes that material witness Deborah Hanzel provided the only actual testimony presented to corroborate key witness Frances Smith's otherwise unsupported testimony that Appellant did act with actual premeditated intent in killing Clarence Moore/Lawrence Lamberson and Aleisha Bryant.

Deborah Hanzel's testimony was crucial to the State's wholly circumstantial case. As the record shows, Appellant's first trial had already ended in a 'hung jury'. The State knew that any subsequently empaneled jury would again question the testimony of key witness Smith and that they had to provide testimony and evidence to corroborate Smith's testimony - or they could not win their case.

At Appellant's second trial Hanzel provided testimony to the effect that she had personally seen both Appellant and Frances Smith together the day after Moore/Lamberson and Bryant were killed (which was actually later that same day, Sunday February 6, 1983) as they came to her house in Plant City, driving Moore/Lamberson's vehicle (DA-R-2431) Hanzel testified that she knew Appellant and Smith, as Appellants brother was her boyfriend's best friend and Frances Smith was her boyfriend's cousin. (DA-R-2438-42)

About a week later, Hanzel claims that Appellant again came to her house, but this time a without Smith, and without the vehicle. Using Appellant's brother's truck

Hanzel and Preston Branch (Hanzel's boyfriend) drove Appellant down to LaBelle, Florida so that Appellant could retrieve his property and personal effects from the trailer where Appellant and Smith had been living. (DA-R 2443-45)

After loading Appellant's furniture and personal effects into the truck, while on the way back to Plant City, Hanzel (and Branch) testified that Appellant was consuming "a lot of beer", and at one point blurted out "if you give me \$100, I'll take you back and show you where I killed two people and buried them (DA-R 2245). However, Hanzel's testimony was specifically contradicted by Preston Branch's testimony as Branch, who was also in the truck and just a few feet away, was absolutely certain that Appellant did not say anything about actually killing anyone - that Appellant, seemingly intoxicated, only blurted out that there were two bodies buried back there. (DA-R 2418-20), and then attempted to brush it off.

Hanzel testified that a few days later Appellant called her collect (DA-R 2448-49)<sup>26</sup> and that during one of these alleged phone conversations (See, footnote 26, below!) Hanzel said she specifically asked Appellant if it was true that Appellant "had killed the guy for his car", to which Hanzel claimed that Appellant then responded "that was part of the reason" (DA-R 2449)

Hanzel's testimony was the only evidence corroborating key witness Smith's claim that Appellant had killed both victims, motivated by an intent to steal the car. But in 1998 Hanzel was contacted by Appellant's post conviction counsel regarding an ambiguity in the record (See testimony of Edward Bosley, PCR 8063-20) they needed to clear up, and at that time Hanzel told Appellant's counsel that she thought Appellant had already been executed in 1988, then Hanzel advised Appellant's counsel that her trial testimony was not true and that, in fact, Appellant had never actually told her he killed anyone. (PCR 1008, 2287-99, 2295).

Hanzel made it clear that she did not want to get involved in Appellant's case again. But based upon Hanzel's recantation, Appellant's counsel initiated a "new evidence" post conviction claim. In October, 2002 the lower court held an evidentiary hearing on

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Footnote 26: During the current post conviction proceedings Appellant called upon Verizon Communications records custodian William McMillan, who testified that Deborah Hanzel's phone records during the relevant time did not show any collect phone calls being made to her phone.

this claim, and Hanzel was compelled to testify. Hanzel was not a willing witness, and her testimony was arguably ambiguous, and uncooperative. But Hanzel did testify that contrary to the testimony she provided at trial, Appellant "never told me that he killed anyone", and she said she only provided that false testimony because law enforcement caused her to be afraid of Appellant. (PCR 8057-58)

After that evidentiary hearing the lower court denied Appellants claim that Hanzel had recanted, specifically finding that Hanzel's testimony was equivocal and unconvincing, and that, relying upon Ragsdale v. State, 720 So2d 203 (Fla, 1998) even if Hanzel's testimony was a "recantation", Hanzel's testimony was "cumulative" as at trial Frances Smith also testified that Appellant had told her that Appellant killed the two to get the vehicle. (V29/5781-82) (PCR 5806-07) ("the defendant provided no testimony or evidence that would refute or otherwise rebut the testimony provided by Frances Smith")

Appellants counsel timely filed a "Motion for Rehearing" before the lower court, and while this motion was still pending Deborah Hanzel wrote a letter directly to Judge Corbin (PCR 6000-6002) (V30/5950-52) in which Hanzel advised the court that she did not give the court the whole story when she testified in October 2002, and she wanted the court to know that, in fact, she was coerced to provide that false testimony by both Frances Smith, and a man from the State Attorneys office. Id.

The trial court advised both Appellants counsel and the state of receiving this letter from Deborah Hanzel, then following a conference with counsel, the lower court sua sponte ordered that Hanzel be brought down and provide further testimony as a witness for the court. Prior to this new evidentiary hearing Hanzel provided an Affidavit reflecting the content of her letter to Judge Corbin. (PCR 5984-86) (V30/5282-86). For the convenience of the court, a copy of that Affidavit is attached as "Appendix B"

On February 9, 2004 Deborah Hanzel again testified (PCR 8143-55) (V41/8122-V42/8204). Hanzel explained that she did not want to be involved in this case, but didn't want to live anymore with the guilt of helping to convict an innocent man.

Hanzel specifically testified that contrary to her trial testimony Appellant never did tell her that he had killed anyone. (PCR 8145), that, in fact, she was coerced to provide this material false testimony by Frances Smith and "a man from the State Attorneys office" (PCR 8154-56), as they "wanted her to go along with what (Frances) had to say" (PCR 8147). Hanzel testified that at first she refused, but then only