

In The Circuit Court of the
Twentieth Judicial Circuit, In
And For Glades County, Florida

State of Florida,
Plaintiff

v.

Cary Michael Lambrix,
Defendant

Case NO. 83-12 CF (RTC)

(Files kept in Lee County)

MOTION TO COMPEL DNA TESTING OF EVIDENCE

Comes now, Cary Michael Lambrix, Defendant (pro se) before this Court by and through the above styled cause, and does now move this Court for DNA Testing of evidence pursuant to Fla. R. Crim Proc, Rule 3.853 and Florida Statutes § 925.11 (2008). Specifically, as fully stated below, Defendant seeks to compel Mitochondrial DNA analysis on several "blonde to blondish brown" hairs found on the alleged "murder weapon" which in light of additional newly discovered evidence, will provide material exculpatory evidence sufficient to exonerate Defendant of the capital crimes this Defendant has been wrongfully convicted of, and sentenced to death for.

Defendant states that as reflected by the record in this case, Defendant has consistently insisted ^{on} actual innocence of these two counts of wholly circumstantial "premeditated" murder, and does now provide the attached "Affidavit" attesting to this Defendants actual innocence of these capital charges, and that the DNA evidence sought to be tested will exonerate Defendant of these capital charges, by providing substantial newly discovered evidence supporting Defendants long and consistently pled claim that the states key witness Frances Smith and agents of the State deliberately fabricated this wholly circumstantial theory of alleged premeditated murder with the intent and purpose of having this Defendant wrongfully convicted and condemned to death.

Further, as specifically argued below, Mitochondrial DNA analysis of the hairs found on the alleged murder weapon will provide irrefutable evidence to support Defendants claim that the State knowingly presented material false evidence against Defendant at trial in violation of Giglio v. United States, 405 U.S. 150 (1972), Guzman v. State, 868 So.2d. 498 (Fla.

2003) and Gair v. State, 685 So2d 1224 (Fla. 1996) (Id., at 1226, recognizing that the use of misleading evidence violates Giglio even if the evidence is not necessarily false)

Last, as specifically argued below, compelling mitochondrial DNA analysis upon the hairs found on the alleged murder weapon will provide irrefutable "reliable scientific evidence" to support Defendant's specifically pled "fundamental miscarriage of justice" claim brought pursuant to House v. Bell, 126 S.Ct. 2064 (2006) and Schulp v. Delo, 513 U.S. 298 (1995)

This instant motion is timely brought as only recently has newly discovered evidence in the form of previously undisclosed FDLE Crime Lab records been obtained that cast substantial doubt as to the origin and authenticity of the alleged murder weapon introduced into evidence at trial. Although the state did turn over "hundreds" of pages of documents in prior discovery proceedings, the documents that were not previously disclosed provides substantial newly discovered evidence supporting this Defendant's long and consistently pled claim of actual innocence. See, State v. Huggins, 788 So2d 238 (Fla. 2001) (vacating capital conviction upon finding that although the state provided hundreds of pages of discoverable documents, the documents the state did not disclose that were previously discovered established clear Brady v. Maryland violation)

Further, a motion to compel DNA testing of evidence is not subject to statutory limitations and may be brought at anytime. Defendant would specifically note that this defendant stood trial and was convicted in early 1984 years before the science of DNA evidence was developed and made available. Thus, these hairs at issue could not had previously been tested prior to defendant's trial, and as stated above, it is only in light of previously undisclosed FDLE Crime Lab records that have recently been discovered that substantial questions as to the origin and authenticity of the alleged murder weapon have been raised. There can be no question that this Motion is timely brought in good faith.

Standard of Law Applicable to Post Conviction DNA Testing

Under Fla.R.Crim.Proc. Rule 3.853 and Florida Statutes § 925.11 (2008) a criminal defendant is entitled to the DNA testing of evidence if a good faith argument can be made that the results of the DNA testing "will exonerate the movant of the crime for which the movant was sentenced." In this case, defendant was convicted and condemned to death for two contemporaneous counts of capital premeditated (not felony) murder. Defendant has consistently pled and argued actual innocence of these alleged crimes, insisting

that this wholly circumstantial theory of alleged premeditated murder, and the evidence presented to support it, were deliberately fabricated with the intent and purpose of having this defendant wrongfully convicted and condemned to death.

Under Rule 3.853 this defendant must specifically argue that "movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant is sentenced." Rule 3.853 (b)(3). However, as the Florida Supreme Court has stated, Hitchcock v. State, 866 So2d 23 (Fla. 2004), a request for DNA testing "is not intended to be a fishing expedition", Id., at 23, "Rather, it is the defendants burden to explain, with reference to specific facts, about the crime and the items to be tested, how the DNA testing will exonerate the defendant of the crime." Robinson v. State, 865 So2d 1259, 1265 (Fla. 2004), citing to Hitchcock v. State, supra, 866 So2d, at 23

Additionally, "the defendants burden is to show a demonstratable 'nexus between the potential results of DNA testing on each piece of evidence and the issues in the case'" Consulvo v. State 34 ^{FLW} ~~So2d~~ 588, 589 (Fla. 2009), quoting Hitchcock, supra, 866 So2d, at 27. For this reason, the instant motion is rather long and comprehensive so that there can be no question that this defendant has met this burden.

As recently recognized in Bates v. State, 34 ^{FLW} ~~So2d~~ 5166 (Fla. 2009), quoting, Knights v. State, 829 So2d 249, 252 (Fla. 2d DCA, 2002), "a defendants motion is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that the defendant would had been acquitted if the DNA evidence had been admitted at trial."

Defendant submits that this "reasonable probability" standard has been deliberately adopted from the same "materiality" standard applicable to constitutional post conviction claims brought under Strickland v. Washington, 466 So2d 668 (1984) and Brady v. Maryland, 373 U.S. 83 (1963), which has consistently defined a "reasonable probability" as a probability "sufficient to undermine confidence in the verdict." See, e.g., Strickler v. Green, 527 U.S. 263, 281-82 (1999) ("the materiality prong of Brady requires that the defendant demonstrate that there is a reasonable probability of a different outcome expressed as a probability sufficient to undermine confidence in the verdict.")

Equally so, Florida Courts have consistently defined this "reasonable probability" in the same manner. See, e.g., Morderiti v. State, 894 So2d. 161, 168 (Fla. 2004) (applying Strickler v. Green to find that "a reasonable probability is a probability sufficient to

undermine confidence in the verdict." Jones v. State, 709 So2d. 512, 521 (Fla. 1998) (recognizing that the materiality of the evidence satisfies the reasonable probability standard "if the evidence weakens the case against (the defendant) so as to give reasonable doubt as to his culpability") See also, State v. Higgins, 788 So2d. 238, 243 (Fla. 2001) ("In reviewing the materiality... 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."

Further, it must be emphasized that both Florida Statutes § 925.11 (2008) and Fla. R. Crim. P., Rule 3.853 only require that the DNA evidence establish a reasonable probability that the defendant would be exonerated by acquittal, meaning that in light of this DNA evidence there is a reasonable probability that the jury would had returned a verdict of NOT GUILTY. Florida law applicable to post conviction DNA testing does not require that the defendant conclusively prove that this DNA evidence establishes the defendant's actual innocence - only that in light of this DNA evidence and in context to evidence presented at trial, the defendant has established a reasonable probability that had the jury been presented this DNA evidence, the defendant would be exonerated by acquittal.

It is important that this Court appreciate this substantial distinction between evidence that would exonerate by acquittal and evidence that establishes conclusive "actual innocence" of the crime. Florida law only requires a reasonable probability of exoneration, not proof of actual innocence. See, Knowles v. Diversity Enterprises - Fla, Inc., 898 So2d 1, 5 (Fla. 2004) ("It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis") Holly v. Auld, 450 So2d 217, 219 (Fla. 1984), quoting AR Douglas, Inc. v. McAlaney, 137 So. 157, 159 (Fla. 1931) ("When the statute is clear and unambiguous, the statute must be given its ^{this Court} plain and obvious meaning.")

Applicable law thus requires ¹ to consider the alleged DNA evidence in context with the evidence presented at trial - as well as the evidence previously presented in the post conviction proceedings. This effectively requires this Court to conduct a "cumulative analysis" as applied and adopted in Swafford v. State, 679 So2d 736, 739 (Fla. 1996) and Gunsby v. State, 670 So2d. 920, 924 (Fla. 1994). See also, Bates v. State, 34 So.2d 5166 (Fla. 2009) (applying cumulative review to motion for DNA testing), Hitchcock v. State, 866 So2d. 23, 27 (Fla. 2004) (accord)

Additionally, this Court must be especially mindful of the fact that the States case of alleged "premeditated" murder⁴ was wholly circumstantial in which the State has consistently conceded was based upon the testimony of their sole key witness, Frances Smith. See, e.g., states argument before this Court on October 6, 2000 "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." At trial, the state specifically characterized Frances Smith as 'the hub of the case' (R. 1950)

For this reason, this Court must consider whether the DNA evidence now sought would had impeached or otherwise undermined the credibility of key witness Frances Smith. As the trial record shows, Defendants defense at trial was to convince the jury that Frances Smith was not credible, and that there was substantial reasonable doubt as to Smith's testimony that precluded the jury from returning a verdict of "guilty."

As fully argued below, Defendant specifically asserts that this DNA evidence sought to be tested will show that the 'blonde to blondish brown' hairs found on the alleged murder weapon belong to key witness Frances Smith, and that in conjunction with other evidence now known, this DNA evidence supports a conclusion that Frances Smith - perhaps with the assistance of state agents - deliberately fabricated this alleged murder weapon to falsely bolster her own testimony.

Had this DNA evidence been available at trial to conclusively show that the only forensic evidence found on this alleged murder weapon was hairs from Frances Smith even though Smith specifically claimed that she never touched this alleged murder weapon, then any reasonable juror would have had substantial cause to question Frances Smith's credibility, and if the jury rejected Smith's credibility then the States entire wholly circumstantial theory of alleged premeditated murder would had collapsed like a house of cards - and Defendant would had been exonerated by a acquittal, which is exactly what applicable law requires this Court to determine.

Further, this Court must keep in mind that because this case was wholly circumstantial (no eyewitnesses, no physical or forensic evidence, no confessions, etc) and Defendant

Footnote 1: In the capital cases in which the Florida Supreme Court affirmed the denial of DNA testing, the defendants were convicted of "felony murder", not wholly circumstantial premeditated murder. See, Hitchcock v State, 866 So2d 23 (Fla 2004), Bates v State, 34 So2d 5166 (Fla 2009)

was indicted, tried, and convicted exclusively upon the theory of alleged "premeditated" murder - not "felony murder" - a special standard of law applies. See Heiney v. State, 447 So2d 210, 212 (Fla. 1984), quoting McArthur v. State, 351 So2d 973, 976 (Fla. 1977) ("where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypotheses of innocence.")

As the Florida Supreme Court recently held when ordering the directed acquittal and release of death row inmate Herman Lindsay in Lindsay v. State, 34 ^{FLW} So2d 5399 (Fla. 2009), (Fla. 5th Case No. SC07-1167, opinion of July 09, 2009);

"where a conviction is based wholly upon circumstantial evidence, a special standard of review applies." Reynolds v. State, 934 So2d 1128, 1145 (Fla. 2006), quoting Darling v. State, 808 So2d 145, 155 (Fla. 2002). The special standard requires that the circumstances lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with guilt. They must be inconsistent with innocence. Frank v. State, 163 So.2d. 223, 233 (Fla. 1985). And in order for the facts to be 'consistent with the defendant's guilt,' the state must establish every element of the offense. Pagan v. State, 830 So2d 792, 803 (Fla. 2002)

There can be no question that both at trial and throughout the prolonged post conviction proceedings in this case, Defendant has consistently insisted that Defendant is actually innocent of the charges of premeditated murder upon which this Defendant now stands convicted of and condemned to death for. Both at trial and throughout the post conviction review, Defendant has specifically argued that key witness Frances Smith had a reason to deliberately fabricate her allegations of intentional murder.

The State cannot argue in good faith that the evidence was somehow "overwhelming" as by the State's own admission the entire theory of alleged premeditated murder was based upon the testimony of their key witness, Frances Smith - which it must be noted that this Court has itself specifically found as a "fact" that Ms. Smith was not a credible witness. For this reason, this Court must examine the alleged DNA evidence to determine whether, mindful of the "special standard of

law applicable to wholly circumstantial cases, this DNA evidence - if available at trial - would have provided sufficient impeachment of Frances Smith's credibility to create a reasonable probability that had the jury known of this DNA evidence, the jury would have formed sufficient reasonable doubt to reject the testimony of Frances Smith - and exonerate defendant by returning a verdict of not guilty.

Defendant would also briefly address the State's recent assertion that this "is a 25 year old case", and arguing that this Court should simply say enough is enough. Under the circumstances of this capital case, such an assertion is morally and ethically reprehensible. When it comes down to it, putting an innocent man to death should never be governed by what the state deems to be convenient or expeditious.

As provided above, recently in Lindsay v. State, supra, the Florida Supreme Court specifically emphasized the importance of "a moral certainty of guilt" in capital cases based upon wholly circumstantial evidence of alleged premeditated murder. The Florida courts that have not been politically corrupted² and still value the concept of moral conscience and judicial integrity have recognized that the 'finality' of a capital case is far less important than the fundamental moral certainty of guilt.

Further, because of relatively recent use of DNA testing, only recently have courts become aware that the conviction and condemnation of innocent defendants is far more prevalent than ever imagined - and that in a substantial number of capital cases in which the conviction was affirmed by the courts both on direct appeal and numerous post conviction appeals, only through subsequent DNA testing was it realized that the defendant actually was innocent all along. As the Court recognized in United States v. Quinones, 205 F.Supp2d. 256, 264 (NY 2002):

"What DNA testing has proved, beyond cavil, is the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases. In each of the 12 cases of DNA exoneration referenced in Quinones, 196 F.Supp2d 1416 (NY2002), the defendant had been found guilty by a unanimous jury that concluded there was proof of his guilt beyond a reason-

Footnote 2: See, "Motion for the Disqualification of Judge R. Thomas Corbin, et al", based upon newly discovered evidence of the personal and political corruption of Judge Corbin, submitted to this Court on September 01, 2009 (posted on www.southerninjustice.com)

able doubt; and in each of the 12 cases the conviction had been affirmed on appeal, and collateral challenges rejected by numerous courts that had carefully scrutinized the evidence and the manner of conviction. Yet for all this alleged "due process" the result, in each and every one of these cases, was the conviction of an innocent man, who because of the death penalty would shortly had been executed were it not for the fortuitous development of a new scientific technique (DNA testing) that happened to be applicable to their particular case."

As the Supreme Court recognized in Herrera v. Collins, 506 U.S. 390, 415, 113 S.Ct. 853, 868 (1993) "it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible," and that id., 506 U.S., at 419 "the execution of a legally and factually innocent person would be a constitutionally intolerable event." In Herrera, Justices Blackmun, Stevens and Souter were even more concise, id., 506 U.S., at 446, 113 S.Ct., at 884, "of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder."

As a matter of moral conscience, this Court should not facilitate a state-sanctioned murder. As the Supreme Court recognized, "the central purpose of any system of criminal justice is to convict the guilty and free the innocent." United States v. Nobles, 422 U.S. 225, 230 (1975) and constitutionally "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." Kuhlmann v. Wilson, 497 U.S. 436, 452 (1986)

In this capital case, the DNA evidence at issue - as fully argued below - clearly would establish a reasonable probability that had this DNA evidence been available at trial, this defendant would had been exonerated by acquittal of these wholly circumstantial charges of alleged premeditated murder, as this DNA evidence at issue substantially "undermines confidence in the verdict" by providing powerful evidence questioning the credibility of the State's key witness, Frances Smith, and providing "reliable scientific evidence" that this wholly circumstantial theory of alleged premeditated murder was deliberately fabricated with the ^{intent} ~~purpose~~ and purpose of convicting defendant of a crime defendant is actually innocent of.

DNA Evidence Sought To Be Tested

Under Fla. Crim. Proc. Rule 3.853 (b)(1) Defendant must include "a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained." Further, pursuant to Rule 3.853 (b)(2) the defendant must also allege that the evidence was not previously tested, or that the results of such testing were inconclusive.

Pursuant to these provisions, Defendant states that the specific evidence sought to be tested is several "blonde to blondish brown" hairs that were found to be present on the alleged murder weapon, a common "tire iron" that was turned over to the FDLE Crime Lab in Sanford, Florida on February 25, 1983 by State Attorney Investigator Miles "Bob" Daniels, docketed as FDLE Crime Lab Case # 83-02-31411.

As reflected in the attached FDLE Crime Lab documents only recently provided to this Defendant, upon the discovery of these "blonde to blondish brown" hairs, FDLE Crime Lab technician David K. Jernigan, (the FDLE Crime Lab analyst specializing in "micro-analysis") did then contact the original prosecutor, Asst. State Attorney Randall McGruther and advised ASA McGruther of these "blonde to blondish brown hairs" - and specifically advised ASA McGruther that these hairs were not consistent with "the victim" in this case. These only recently disclosed documents show that ASA McGruther then instructed the FDLE Crime Lab not to process this evidence further.

At no time prior to trial, or during any subsequent post conviction proceeding, has DNA testing of this evidence been done. It should be noted that Defendant was tried and convicted in early 1984, many years before DNA testing was developed and available. In fact, the type of DNA testing used to examine hair evidence, known as "mitochondrial DNA analysis" has only recently evolved and become available, and prior to this scientific development this type of DNA testing could not had been done.

Defendant submits that pursuant to applicable law governing evidence collected in a capital case, these "blonde to blondish brown" hairs recovered from the alleged murder weapon must still be in the exclusive care, custody, and control of the State. The last known location of this evidence was at the FDLE Crime Lab in Sanford, Florida as FDLE Crime Lab Case Number # 83-02-31411 (see attached)

Facts Supporting Materiality of DNA Evidence

Pursuant to Fla. R. Crim Proc. Rule 3.853 (b) (3), as provided in Robinson v. State, 865 So2d 1259, 1265 (Fla. 2004), "it is the defendant's burden to explain, with reference to specific facts about the crime and the items to be tested, how DNA testing will exonerate the defendant of the crime or mitigate the defendant's sentence." As stated above, the provisions governing DNA testing only require that the Defendant establish a "reasonable probability" that had this DNA evidence been available to the jury, Defendant would have been acquitted of the charges that Defendant currently stands convicted of.

Applicable law mandates that this Court consider the question as to the materiality of the potential DNA evidence in context of the case presented at trial. See, e.g., Bates v. State, 34 ^{FLW} ~~So2d~~ 5166 (Fla. 2009); Hitchcock v. State, 866 So2d 23 (Fla. 2004); Robinson v. State, Supra. As the Florida Supreme Court recently recognized in Bates v. State, supra, quoting Knighten v. State, 829 So2d 249, 252 (Fla. 2d DCA, 2002), "a defendant's motion (for DNA testing) is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial."

For this reason, this Defendant must provide "the specific facts" in context of the State's case presented at trial to demonstrate how the DNA evidence now sought to be tested would establish a reasonable probability that if this DNA evidence had been available at time of Defendant's trial and presented to the jury, this Defendant would have been exonerated by acquittal - meaning that the jury would have been compelled to return a verdict of not guilty. As stated above, applicable law defines a "reasonable probability" as a probability "sufficient to undermine confidence in the verdict," See, Strickler v. Green, 527 US, 263, 281-82 (1999); Mordenti v. State, 894 So2d 161, 168 (Fla. 2004), or otherwise "weaken the case against the defendant so as to give reasonable doubt as to his culpability." Jones v. State, 709 So2d, 513, 521 (Fla. 1996)

Further, in that applicable law clearly requires this Court to consider the context of the State's case presented at trial, this Court must bear in mind that this particular case was wholly circumstantial and that as such, "a special standard of proof" applies, See, Lindray v. State, 34 ^{FLW} ~~So2d~~ 5399 (Fla. 2009), quoting Reynolds v. State, 934 So2d 1128, 1145 (Fla. 2006) ("where a conviction is based upon wholly circumstantial evidence, a special standard of review applies"); Henney v. State, 447 So2d, 210, 212 (Fla. 1984), out-

ing, McArthur v State, 351 So2d 973, 976 (Fla, 1977) ("where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypotheses of innocence.")

The question at issue in this motion is whether the DNA evidence sought to be tested would had provided substantial support for this Defendants asserted "reasonable hypotheses of innocence" sufficient to compel the jury to harbor reasonable doubt and return a verdict of "not guilty." As the record clearly shows, by the States own admission, the entire wholly circumstantial case of alleged premeditated murder was built upon the testimony of their key witness, Frances Smith. See States argument before this court on October 6, 2000 "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." Even at trial, the prosecutor specifically instructed the jury that Frances Smith "was the hub of the case" (R. 1950)

As the trial record reflects³ at trial this Defendants asserted defense was to convince the jury that key witness Frances Smith was not a credible witness, and that Smith had a personal reason to fabricate the allegations advanced against Defendant, and that substantial reasonable doubt existed which required the jury to find this Defendant "not guilty." Additionally, Defendants trial counsel specifically moved for a Judgment of Acquittal, arguing that under applicable law the States wholly circumstantial theory of alleged premeditated murder was legally insufficient and that Defendant was entitled to entry of acquittal on these charges.

Thus, any evidence that would had assisted this Defendant in establishing that asserted "reasonable hypotheses of innocence" - that Frances Smith was not a credible witness, and had reason to deliberately fabricate her testimony, or otherwise provided evidentiary support for Defendants asserted defense that as a matter of law the wholly circumstantial case of alleged "premeditated murder" was legally insufficient and that this Defendant was entitled to entry of Judgment of Acquittal on these capital charges would be "material" under the circumstances of this particular case.

Footnote 3: If this Court does not currently have a copy of the actual trial transcript, then a copy is readily available, posted online in its entirety at www.southerninjustice.com (a website featuring Defendants claim of innocence)

As the Florida Supreme Court has consistently held, a conviction of premeditated murder based upon circumstantial evidence cannot be sustained unless the evidence is not only consistent with defendant's guilt, but "inconsistent with any reasonable hypotheses of innocence," Belgado v. State, 948 So2d 681, 689-91 (Fla. 2006), quoting Orme v. State, 677 So2d 258, 261 (Fla. 1996). In a similar double homicide prosecuted by the same Asst. State Attorney, Randall McGinty, the Florida Supreme Court was compelled to vacate the capital convictions and order the defendants release. See, Ballard v. State, 923 So2d 475, 482 (Fla. 2006) quoting Davis v. State, 90 So2d 629 (Fla. 1956), upon finding that;

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

Although this standard of law generally applies to a post conviction review of the sufficiency of evidence to convict and whether the defendant was entitled to entry of a Judgment of Acquittal, it is relevant to this Court's analysis of the probative value and materiality of the DNA evidence, as this Court must determine whether the DNA evidence at issue is sufficient to establish a reasonable probability that had this DNA evidence been available at, and presented to the jury, at trial, this Defendant would had been exonerated of these charges of alleged premeditated murder, which must include an analysis how this DNA evidence would had supported this defendant's asserted trial defense that the wholly circumstantial evidence was legally insufficient to support the convictions.

Defendant submits that this Court cannot blindly rely upon the "fact" that there were two victims in this case, or that the deceased female Alisha Bryant allegedly died of "manual strangulation." The Florida Supreme Court has consistently vacated many similar double homicide/strangulation cases upon finding insufficient evidence. See, e.g., Ballard v. State, 923 So2d 475 (Fla. 2006); Bigam v. State, 995 So2d 207 (Fla. 2008); Randall v. State, 760 So2d 892 (Fla. 2000); Green v. State, 715 So2d 940

(Fla. 1996); Kirkland v State, 684 So2d 782 (Fla. 1996), ect. As the Court most recently explained in Bigham v State, supra, 995 So2d, at 212-13,

"Prior to Green, and in a case that also involved death by strangulation, we concluded that the evidence of premeditation was insufficient despite evidence that the strangled victim was found partially nude and the defendant had a history of strangling women while raping them. Hoefert v State, 617 So2d 1046 (Fla. 1993). Subsequently, we found ~~insufficient~~ insufficient evidence of premeditation in two strangulation murders in Randall v State, 760 So2d 892 (Fla. 2000). In Randall, we relied upon our earlier decision in Kirkland v State, 684 So2d 782 (Fla. 1996), also holding that evidence of premeditation was lacking in a strangulation case. Randall, 760 So2d at 902. Hence, we have concluded in a number of cases that evidence of premeditation was insufficient ~~even~~ even though the defendant had killed the victim by strangulation." (emphasis added)

There simply is no question that this Defendant's asserted defense at trial was to convince the jury that the State's key witness was not credible, and that the wholly circumstantial evidence of alleged premeditated murder was legally insufficient to support a conviction in either count of alleged "premeditated" murder.

Had this Defendant been able to present the DNA evidence at issue now to the jury at trial, there is no question that this DNA evidence would have created substantial reasonable doubt as to the credibility of the State's key witness, Frances Smith - and the State's entire wholly circumstantial case of alleged "premeditated murder", therefore establishing a "reasonable probability" that Defendant would have been exonerated by acquittal of these charges of premeditated murder.

Defendant further submits that the DNA evidence at issue would have unquestionably compelled the jury to reject the testimony of the State's key witness Frances Smith by providing irrefutable evidence that Smith did deliberately fabricate material evidence to support her specious testimony provided at trial.

To address this context of the relevant evidence, this Court must look to the facts of the case. As the record reflects, this case began on the evening of February 5, 1983 when this Defendant and Frances Smith - who were living together at the time -

went to the "Town Tavern" in Labelle and by chance met the two now deceased, Clarence Moore, aka Lawrence Lamberson and Alisha Bryant. There is no dispute that after drinking alcohol at several bars all four - Defendant, Smith, Moore/Lamberson, and Bryant - ended up at Defendants residence, and continued "partying." According to Frances Smith's testimony at trial, the Defendant, Moore/Lamberson, and Bryant sat in the living room, drinking from a bottle of whiskey while "laughing, teasing, and playing around." (R. 2205).

According to the testimony Smith provided at trial, Defendant then went outside with Moore/Lamberson only to return alone about 20 minutes later. (R. ~~1822-23~~¹⁸¹⁹⁻²²). At that time Smith was absolutely certain that Defendant "looked normal" and did not have any sign of blood on him, nor have the "tire iron" (R. 1822-23). Smith testified that this Defendant then went outside with Alisha Bryant, leaving Smith in the trailer alone. Smith claimed that she could not, and did not, see or hear anything that transpired outside, (R. 1819-20, 1932), and that about 45 minutes later Defendant again returned alone and was now "covered in blood," holding the tire iron, and told her (Smith) that "they're dead." (R. 2209-11)

Smith testified that Defendant then washed up and "changed his clothes" (R. 2211-12) then the Defendant - accompanied by Smith - drove to a store to purchase a flashlight, and borrowed a shovel, then returned to the trailer. Smith testified that Defendant then "forced" her to assist in concealing the two bodies, and then both Defendant and Smith left Glades County, using Moore/Lamberson's vehicle to travel to Hillsborough County where both had family.

Several days later Smith was arrested while driving Moore/Lamberson's vehicle alone, and then remained in jail for 3 days on an "unrelated charge." During this time Frances Smith told law enforcement officers numerous different stories about how she came to be in possession of Moore/Lamberson's vehicle - but specifically denied knowing Moore/Lamberson, or anything that had transpired in Glades County.

On Friday February 11, 1983 Smith was bonded out of jail and then admits that she talked to her family about her options, and retained private counsel before she then walked into the state attorneys office on Monday February 14, 1983 and told them that she had knowledge of a double homicide - the alleged "murder" of both Moore/Lamberson and Bryant. On February 15, 1983 Smith provided a sworn statement claiming that this Defendant had "hit" Moore/Lamberson in the back

of the head, and had "choked" Alisha Bryant, then "forced" her (Smith) to help bury the bodies. Smith claimed that Defendant took the alleged "murder weapon," a common "tire iron" and wrapped it up in a "bloody t-shirt", tying it with a coat hanger, then threw it into a nearby creek.

To support Frances Smith's story the State called upon Deborah Hanzel, who claimed that Defendant also told her that Defendant killed Moore/Lamberson and Bryant - but Hanzel has since recanted, claiming that Smith and the State had coerced her to provide that false testimony. See, attached "Appendix B" (Affidavit of Deborah Hanzel)

Additionally, the State called upon the State Attorneys lead investigator, Mikes "Bob" Daniels,⁴ and Hendry County Sheriff's Deputy Larry Bankert, who testified that Frances Smith showed them where the Defendant allegedly threw this tire iron/t-shirt into the creek, and that at Frances Smith's direction, they did retrieve a tire iron/t-shirt from the creek.

Through this testimony the State did then introduce into evidence before the jury this specific "tire iron" as the alleged "murder weapon." As the trial record shows, Defendant's trial counsel did attempt to challenge the origin/authenticity of this alleged murder weapon, but the trial court let this into evidence.

Only recently has newly discovered evidence been disclosed consisting of numerous FDLE Crime Lab reports/memos that cast substantial doubt upon the origin/authenticity of this alleged "murder weapon." This "new evidence" is now before this Court in a successive Rule 3.051 Motion To Vacate Judgments of Conviction filed by appointed counsel on April 8, 2009. Defendant specifically incorporates this April 8, 2009 "Motion To Vacate Judgments of Conviction, ect" into this instant motion by this specific reference, and submits that this Court must consider the claims presented therein in conjunction with this instant "Motion To Compel DNA Testing of Evidence."

Collectively these previously undisclosed FDLE Crime Lab documents establish that the alleged "murder weapon" introduced into evidence at trial was deliberately fabricated to support key witness Smith's testimony. Defendant submits that DNA testing of the

Footnote 4: It must be emphasized that in prior post conviction proceedings key witness Frances Smith swore under oath that at the time the Defendant was being prosecuted, she was having an illicit affair of a sexual nature with SA Inv. Daniels. This issue is now before the Florida Supreme Court in Lumbrix v State, Fiscal Case No. SC08-0064.

numerous "blonde to blondish brown" hairs found on this alleged murder weapon by the FDLE Crime Lab will provide irrefutable scientific evidence that key witness Frances Smith - perhaps with the assistance of the state - deliberately fabricated this material evidence to bolster her trial testimony by deceiving both the court and the jury.

In light of the previously undisclosed FDLE Crime Lab records, it is now known that Crime Lab technician David Jernigan conducted a microanalysis of these "blonde to blondish brown hairs" in 1983 and concluded that these hairs did not match hair samples of either Moore/Lamberson, or Bryant. Newly discovered evidence now shows that Lab Tech Jernigan then advised the State Attorneys Office of this unexpected discovery, only to have the prosecutor, SA Randall McGruther, implicitly instruct the FDLE Crime Lab not to conduct any further tests to determine the origin of these hairs.

Equally important is the fact that the FDLE Crime Lab thoroughly examined both the tire iron and t-shirt, and could not find any forensic evidence to support that this tire iron was used in this alleged crime. What is significant is that according to the evidence presented at trial, this tire iron was used to inflict at least 8 blows upon Moore/Lamberson's head (in a continuous "swinging" motion) with sufficient force to literally crush Moore/Lamberson's skull. There can be no doubt that if this tire iron was the alleged murder weapon, it would have had a substantial amount of blood, hair, and even bone/skull particles on it - but virtually nothing was found.

According to Smith's trial testimony, this Defendant took a bloody t-shirt, and wrapped it around this tire iron, securing it by then wrapping a wire coat hanger around it, and only then threw this into the creek. Although arguably the cold water of the creek might had effectively "washed" the blood from the t-shirt, it would not had washed away hair and/or bone/skull particles, as the t-shirt (wrapped around the tire iron and tied with wire) would had acted as a filter containing any forensic evidence - and yet virtually nothing was found.

Last, the irrefutable documents now before the Court show that the t-shirt found around the tire iron was a size small. The record reflects that at the time of this alleged crime this Defendant was 5'10", while key witness Smith was a petite 5'2". It is inconceivable that this Defendant, at 5'10", would had worn a "size small" t-shirt, but certainly a petite 5'2" woman would had.

Collectively, this newly discovered evidence supports the asserted conclusion that