IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,
Appellant,

v.

CASE NO.: SC16-8

STATE OF FLORIDA,
Appellee.
_____/

CARY MICHAEL LAMBRIX,
Petitioner,

v.

CASE NO.: SC16-56

JULIE L. JONES,
Respondent.
_____/

APPELLANT/PETITIONER'S MOTION FOR REHEARING

COMES NOW THE APPELLANT/PETITIONER, CARY MICHAEL LAMBRIX, by and through his undersigned counsel, and herein moves the Court for rehearing and/or reconsideration of its decision issued March 9, 2017, affirming the denial of postconviction relief and denying habeas corpus relief. In support of his motion, Mr. Lambrix states:

1. On March 9, 2017, this Court issued its decision in *Lambrix v. State*, 2017 WL 931105 (Fla. Mar. 9, 2017), in which the Court affirmed the denial of Mr. Lambrix's successive Rule 3.851 motion for postconviction relief and denied his Petition for Writ of Habeas Corpus. In affirming the denial of Mr. Lambrix's

successive Rule 3.851 motion and in denying his habeas petition, he submits that the Court overlooked points of law and/or facts and that therefore rehearing is warranted. This Motion for Rehearing is timely filed pursuant to Florida Rule of Appellate Procedure 9.330(a).

2. Rehearing is warranted because the Court overlooked or misapprehended points of fact and law which require relief be granted in this case. Due to the shortness of time in which a Motion for Rehearing is to be filed, this motion does not and cannot raise all arguments that Mr. Lambrix has with respect to the Court's decision. Mr. Lambrix only addresses a few of the more salient arguments and the errors he believes permeate the Court's conclusions. Mr. Lambrix in no way abandons and/or waives any claims or arguments previously presented which are not expressly addressed in this motion for rehearing.

I. HURST

1. In this Court's March 9th opinion, it addressed Mr. Lambrix's claim that his death sentences stood in violation of the Sixth Amendment under *Hurst v. Florida*, 136 S. Ct. 616 (2016).[1] This Court stated:

[1] In the introductory paragraphs of this Court's March 9th opinion, this Court wrote:

> After the United States Supreme Court issued its opinion in *Hurst v. Florida*¸ 136 S. Ct. 616, this Court stayed his execution and permitted supplemental briefing and oral argument in order to fully consider the impact of *Hurst v. Florida* in this case. In accordance with our opinion in *Asay v. State*, ___ So. 3d ___, 41 Fla. L. Weekly S646, 2016 WL 74106538 (Fla. Dec. 22, 2016), we

> While this case was pending, the United States Supreme Court reversed our decision in *Hurst v. State* and, for the first time, expressly overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), two decisions that had held Florida's capital sentencing scheme did not violate the Sixth Amendment. *Hurst v. Florida*, 136 S. Ct. at 624. Lambrix contends that he is entitled to retroactive application of Hurst v. Florida and thus, his sentences of death must be vacated.
>
> **For the reasons cited in *Asay*, 41 Fla. L. Weekly at S646, we reject Lambrix's claim. Lambrix's conviction was final in 1986 and accordingly he is not entitled to relief based on *Hurst*.**

Lambrix v. State, ___So. 3d ___ 2017 WL 931105, *8 (Fla. Mar. 9, 2017)

> conclude that Lambrix is not entitled to a new penalty phase based on *Hurst v. Florida*, **and our opinion in *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016)**, and we further reject the other grounds for relief that he raised as devoid of merit.

Lambrix v. State, 2017 WL 931105 at *1 (emphasis added). The highlighted reference to *Hurst v. State* is never explained in this Court's opinion. The decision in *Hurst v. State* issued on October 14, 2016, over eight months after Mr. Lambrix's case was orally argued before this Court. The parties did not brief or even refer to *Hurst v. State* because it did not issued until over eight months after the submission of Mr. Lambrix's case to this Court. There was no *sua sponte* request for the parties to provide supplemental briefs regarding *Hurst v. State*, something this Court did in numerous cases after *Hurst v. Florida* issued. Mr. Lambrix did prepare and seek to file and raise claims based upon *Hurst v. State* and other recent case law in a successive 3.851 motion. However, this Court denied the motion to relinquish on February 7, 2017. So Mr. Lambrix's claims based upon *Hurst v. State* were not briefed by the parties and were not before the Court, and this Court's subsequent one sentence analysis of Mr. Lambrix's *Hurst v. Florida* claim does not reference of even cite *Hurst v. State*. It is well established that courts do not address or decide issues not raised and/or briefed by the parties. Judicial power is limited to only deciding the specific issues presented by the parties to cases or controversies pending before a particular court. *See, e.g., Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (judicial power limited to resolving a "concrete, living contest between adversaries.").

(emphasis added). The entirety of this Court's analysis of Mr. Lambrix's claim based upon *Hurst v. Florida* is highlighted.[2]

2. In *Witt v. State*, 387 So. 2d 922 (Fla. 1980), this Court adopted the

[2] In the opinion's introductory paragraph this Court noted that Mr. Lambrix's execution was stayed on February 2, 2016, on the basis of *Hurst v. Florida* so that this Court could determine "if that opinion was entitled to retroactive application to a death sentence that was final in 1986." *Lambrix* 2017 WL 931105 at *1. Over thirteen months later, this Court's opinion issued with a one sentence analysis rejection of Mr. Lambrix's claim. In that one sentence, this court did rely on the decision in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The oral argument in *Asay* was one month after the oral argument in Mr. Lambrix's case, and the decision in *Asay* issued on December 22, 2016, some seventy-seven days before this Court issued the opinion disposing of Mr. Lambrix's claim in one sentence. As reflected at the end of the March 9th opinion, Justice Quince was recused from the matter. Two justices concurred in the per curium opinion. Justice Canday concurred in the result without a separately written opinion. Justice Pariente concurred in the result, but as she explained in a separate opinion that while she would vacate Mr. Lambrix's death sentences and remand for a new penalty phase on the basis of *Hurst v. Florida* she concurred in the result because she recognized that she was bound by the decision in *Asay v. State* which became final when rehearing was denied on February 1, 2017. Justice Lewis concurred in part and dissented from the per curium opinion. At the time of the February 2nd oral argument, Justice Perry was the sixth justice who heard the matter. He dissented from the decision in *Asay*. His retirement from the Court and his subsequent service as a senior justice ended on January 31, 2017. As a result, the March 9th opinion does not reference him, instead noting that his replacement on the Court, Justice Lawson, did not participate. Given Justice Perry's dissent in *Asay*, it appears that the Court was split 3-3 until Justice Perry's mandatory retirement from the Court and his service as a senior judge ended on January 31, 2017. The next day on February 1st, the Court denied rehearing in *Asay*, and Justice Pariente concluded that she was then bound by the decision though she had believed that Mr. Lambrix was entitled a resentencing up until then. Thus, the denial of Mr. Lambrix's *Hurst v. Florida* claim appears to have resulted when an impasse was broken by Justice Perry's mandatory retirement.

retroactivity analysis set forth in *Stoval v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). The binary nature of the *Stoval*/*Linkletter* analysis is clear on the face of those opinions. *Stoval*, 388 U.S. at 294 ("This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively."); *Linkletter*, 381 U.S. at 622 ("we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion."). *See Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) ("**the retroactivity or nonretroactivity** of a rule is not automatically determined by the provision of the Constitution on which the dictate is based.") (emphasis added); *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 409 (1966) ("The *Linkletter* opinion reviewed in some detail the competing conceptual and jurisprudential theories bearing on the problem of **whether a judicial decision that overturns previously established law is to be given retroactive or only prospective application**.") (emphasis added).

3. When *Asay v. State* issued on December 22, 2016, this Court's decision in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), also issued. Without either decision deciding that partial retroactivity was permissible under *Witt v.*

State or the *Stoval*/*Linkletter* analysis *Witt* was derived from, this Court by the separate results in *Asay* and *Mosley* made *Hurst v. Florida* partially retroactive. None of the parties to *Asay* and *Mosley,* advocated for partial retroactivity. Certainly, neither Mr. Lambrix nor the State argued that partial retroactivity was even a possible outcome since until *Asay* and *Mosley* case law had not recognized that partial retroactivity was even a possibility.

4. Because this Court did not address partial retroactivity head on in either *Asay* or *Mosley*, it is clear that partial retroactivity resulted not from any overriding judicial principle, but instead from the ad hoc decisions in those two cases.

5. A review of the various concurring and dissenting opinions in *Asay* and *Mosley* show that a clear majority of this Court did not view partial retroactivity as legitimate under *Witt*. When both *Asay* and *Mosley* are analyzed together, five justices of this Court complained that the Court through the two ad hoc rulings had injected unacceptable arbitrariness into Florida's capital sentencing process and/or destroyed the basic character of *Witt*. This means that who gets the benefit of *Hurst v. Florida* and 3.851 relief and who doesn't and gets executed is the product of ad hoc rulings in *Asay* and *Mosley* which were not based upon an overriding judicial principle and not consistent with the view of a majority of this Court that *Witt* does not provide for partial retroactivity. It was, and at least had

been, binary in nature. The ad hoc results in *Asay* and *Mosley* are reached when two justices, Chief Justice Labarga and Justice Quince,[3] join the per curium opinion in *Asay* denying retroactivity under *Witt* as to Asay, and then also join the per curium opinion in *Mosley* finding *Hurst v. Florida* retroactive under *Witt* as to Mosley.

6. The ad hoc line drawing that resulted must of course be arbitrary, as ad hoc rulings are by definition, and do not comport with *Witt*. *See Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result) ("As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002—the days before and after the case name *Ring* arrived. *See* Perry, J., dissenting op. at 58. However, that is where the majority opinion **draws its determinative, albeit arbitrary**, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay.") (emphasis added); *Id*. at 33 (Pariente, J., concurring in part, dissenting in part) ("a faithful application of the *Witt* test for retroactivity compels full retroactivity of *Hurst*."); *Id*. at 37 (Perry, J., dissenting) ("I can find no support in the jurisprudence of this Court where we have previously determined that a case is only retroactive to a date certain in time. Indeed, retroactivity is a

[3] Justice Quince recused herself from Mr. Lambrix's case because she had worked in the Attorney General's Office in Tampa that represented the State in Mr. Lambrix's direct appeal.

binary—either something is retroactive, has effect on the past, or it is not."); *Mosley*, 209 So. 3d at 1291 (Canady, J., concurring in part, dissenting in part) ("Based on an indefensible misreading of *Hurst v. Florida* and **a retroactivity analysis that leaves the *Witt* framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years**. I strongly dissent from this badly flawed decision.") (emphasis added). Justice Polston concurred in Justice Canady's dissent in *Mosley*.

7. Thus, five of the Court's seven justices expressed the view that the well-established judicial principles did not provide for the partial retroactivity that resulted when two justices of the Court rejected the all-or-nothing approach to retroactivity that had previously been the law, and voted on an ad hoc basis in the two cases.[4]

8. Once the binary approach is abandoned and the issue is no longer between just a prospective (nonretroactive) application of *Hurst v. Florida* and a

[4] The State filed a motion for rehearing in *Mosley* asserting that this Court "has created confusion and caused an unnecessary unsettling of the law." (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). The State noted that only "on rare and limited occasion, [had the] Court [ ] permitted retroactive application of new law out of a concern for fairness without performing the three-part analysis from *Witt*." (Motion for Rehearing at 3, *Mosley v. State*, Case No. SC14-2108). The State expressed its disagreement with partial retroactivity when it embraced Justice Canady's dissent and his assertion that the Court had left "the *Witt* framework in tatters."

retroactive application to cases final when *Hurst v. Florida* issued, the line drawing becomes ad hoc. This is apparent from the *Asay* and *Mosley* per curium opinions that in the two cases reached different conclusions on the same prongs of *Witt*. For example, the second prong of *Witt* requires an analysis of the extent of reliance factor on pre-*Hurst* law. In *Asay* the court found that the extent of reliance on Florida's unconstitutional death penalty scheme weighed "heavily against" retroactive application to Asay, while in *Mosley*, the court reached the opposite conclusion, holding that the extent of reliance on the same pre-*Hurst* law weighed "in favor" of retroactive application. *See Asay*, 210 So. 3d at 20; *Mosley*, 209 So. 3d at 1281. The distinction is simply arbitrary. *Asay* and *Mosley* also differed as to the third *Witt* retroactivity factor (the effect on the administration of justice), finding that it weighed "heavily against" retroactive application in *Asay*, but in favor of retroactive application as to Mosley. *See Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d 1282-83.[5]

[4] While in *Asay* this Court concluded that he was not entitled to the retroactive benefit of *Hurst v. Florida* because his death sentence was final before *Ring v. Arizona* issued, this Court did not address or consider whether those death sentences that were final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), issued should receive the benefit of *Hurst v. Florida*. Post-*Apprendi*, pre-*Ring* have strong arguments to make that *Hurst v. Florida* was based on the principle established in *Apprendi*. Given that different conclusion were reached on the three prongs of the *Witt* analysis in *Asay* and *Mosley*, the analysis was conducted on a case specific or ad hoc basis. That means that individual death row inmates may have arguments to make about the unique circumstances of their cases and when their death sentences became final that were not part of those considered in *Asay* or *Mosley*. Yet inexplicably, this Court has

9. A bedrock principle of the American judicial system is the doctrine of *stare decisis*. In *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 494-95 (1987), the United States Supreme Court explained: "the doctrine of *stare decisis* is of fundamental importance to the rule of law. For this reason, 'any departure from the doctrine ... demands special justification.' *Arizona v. Rumsey*, 467 U.S., at 212, 104 S. Ct., at 2311." Yet, this Court abandoned the binary nature of *Witt v. State* and *Stoval*/*Linkletter* without even acknowledging it was doing so,

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begun to seemingly treat *Asay* and *Mosley* as having conclusively established a bright line when neither case considered whether *Apprendi v. New Jersey* or its predecessor *Jones v. United States*, 526 U.S. 227 (1999), would flip the result of a *Witt* analysis in a post-*Apprendi* or post-*Jones* case to be more like *Mosley* than *Asay*. Because this Court has yet to grapple with partial retoactivity as a judicial principle, this Court has yet to deal with the fact that it means that there is no rational basis for concluding that the *Witt* analysis conducted in *Asay* can, consistent with due process, bind non-parties whose circumstances are different than Asay's and could lead to different conclusions as to the three prongs of *Witt*. It is not rational or logical to shed the binary approach embodied in *Witt v. State* to reach ad hoc results in two cases, and maintain that other capital defendants are not entitle to what *Asay* and *Mosley* received, ad hoc consideration of their arguments for the retroactive benefit of *Hurst v. Florida*. This Court has only dodged this defect in partial retroactivity by never actually deciding whether partial retroactivity is permissible under *Witt*. As Justice Canady said, this Court has left "the *Witt* framework in tatters." *Mosley*, 209 So. 3d at 1291. *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) ("The doctrine of res judicata demands that a decision made by the highest court, whether it be a determination of a fact or a declaration of a rule of law, shall be accepted as a final disposition of the particular controversy, even if confessedly wrong. But the decision of the court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of *stare decisis*, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile.").

let alone providing justification.

10. In *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), the United States Supreme Court explained:

> [I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving **a jurisprudential system that is not based upon "an arbitrary discretion**." The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). *See also Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S. Ct. 617, 624, 88 L.Ed.2d 598 (1986) (***stare decisis* ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals"**).

(emphasis added). However here, the ad hoc rulings in *Asay* and *Mosley* that simply ignore the well-established binary foundation on which *Witt v. State* are at odds with these principles.

11. Further compounding this deviation from decisions resting on precedent and principle is the variation between justices of this Court as to the effect of this Court's precedent on a justice's vote in a particular case. The binary nature of *Witt* was shredded by two justices of this Court when five justices found the binary nature of *Witt* controlling. While Justice Pariente expressed her view that Mr. Lambrix was entitled to the retroactive benefit of *Hurst v. Florida*, she concurred in the denial of relief because she felt bound by the decision in *Asay v. State* once it became final on February 1. Meanwhile, Justices Canady and Polston have continued to dissent from decisions granting new penalty phases under *Hurst*

v. Florida on the basis of their dissenting position in *Hurst v. State* even though *Hurst v. State* was final. *See McGirth v. State*, ___ So. 3d ___ 2017 WL 372095 (Fla. Jan. 26, 2017); *Armstrong v. State*, ___ So. 3d___, 2017 WL 224428 (Fla. Jan. 19, 2017); *Orme v. State*, ___ So. 3d ___, 2017 WL 1177611 (Fla. Mar. 30, 2017); *Bradley v. State*, ___ So. 3d ___, 2017 WL 1177618 (Fla. Mar. 30, 2017).

12. The varying standards among justices further undermines the public's confidence this Court's decisions "are founded in the law rather than in the proclivities of individuals." *Patterson v. McLean Credit Union*, 491 U.S. at 173.

13. What the ad hoc decisions in *Asay* and *Mosley* ignored is the overriding principle set forth in *Griffith v. Kentucky*, 479 U.S. 314, 327 28 (1987). To be sure, that decision specifically concluded all cases pending on direct appeal should receive the benefit of new law issued while the direct appeal was pending. But the basis of the opinion was an all or nothing approach to cases pending on direct appeal. This was to insure that justice would be administered with an even hand:

> Justice POWELL has pointed out that it **"hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary the lucky individual whose case was chosen as the occasion for announcing the new principle enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine."** *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S. Ct. 2339, 2347, 53 L.Ed.2d 306 (1977) (opinion concurring in judgment), quoting *Desist v. United States*, 394 U.S., at 255, 89 S. Ct., at 1037 (Douglas, J., dissenting). *See also Michigan v. Payne*, 412 U.S. 47, 60, 93 S. Ct. 1966, 1973, 36

> L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) **("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule**. *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S. Ct., at 2590, n. 16 (emphasis omitted).
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> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

(emphasis added).[6] "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Id*. at 323. This Court's abandonment of the binary foundation of *Witt v. State* violated the underlying basis of *Griffith v. Kentucky*. This Court's action has been made all the more problematic by its failure to actually address whether it constitutionally permissible to drop this aspect of *Witt v. State*, and *Stoval*/*Linkletter*. This Court has failed to provide a

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[6] Justice Harlan in his dissent in *Desist v. United States* wrote:

> We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.

394 U.S. at 258-59.

principled basis for this change in manner in which the *Witt* analysis is conducted.

14. This glaring omission will not only haunt this Court as it is not a principled basis for denying Mr. Lambrix's *Hurst v. Florida* claim, particular given that this Court took over thirteen months to issue an opinion, and then disposed of the issue on which a stay had been issued in one sentence. It appears that the Court was split as to Mr. Lambrix's entitlement to relief, and simply waited for Justice Perry's mandatory retirement to break the deadlock. Mr. Lambrix's execution should not be dependent upon such matters.

15. This Court should grant rehearing and actually address whether it is abandoning and overturning the binary nature of *Witt* in favor of ad hoc consideration of the three *Witt* factors.

II. MR. LAMBRIX WAS DENIED A FULL AND FAIR HEARING ON HIS RULE 3.853 DNA MOTION

1. This Court has overlooked or misapprehended the law and facts concerning the lower court's denial of Mr. Lambrix's Rule 3.853 motion for DNA testing.

2. The finding of this Court that "Lambrix has failed to explain how DNA testing of any of the items would lead to his exoneration of the crime or a reduced sentence" is not supported by the postconviction record. *Lambrix v. State*, 2017 WL 931105 at *6.

3. In his motion for DNA testing, Lambrix specifically identified "facts

about the crime and the items requested to be tested, [and] how the DNA testing will exonerate [him] of the crime [and/or] will mitigate [his] sentence." *Consalvo v. State*, 3 So. 3d 1014, 1016 (Fla. 2009) (quoting *Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004)). In his motion, Mr. Lambrix explained:

> As for Aleisha Bryant's clothing: The State argued that Mr. Lambrix was responsible for the death of Aleisha Bryant. Mr. Lambrix maintains that it was Clarence Moore who killed Bryant. Given the fact that Bryant's body was discovered partially nude from the waist down, and that **Mr. Lambrix maintains that on the night of the crime, he came upon Moore who had Bryant pinned down on the ground violently assaulting her, DNA testing of this evidence has a reasonable probability of discovering evidence that exculpates Mr. Lambrix and/or mitigates his sentence**.
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> As for the tire iron (alleged murder weapon): The State argued that this was the murder weapon that Mr. Lambrix used to kill Clarence Moore. **Given that records from FDLE indicate that there was no blood evidence found on the tire iron, there is reasonable doubt about whether that tire iron was in fact the murder weapon. Therefore, DNA testing of this evidence has a reasonable probability of discovering evidence that exculpates Mr. Lambrix and/or mitigates his sentence**.
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> As for the T-shirt: The State argued that this was the T-shirt that was wrapped around the alleged murder weapon**. Given that records from FDLE indicate that there was no blood evidence found on the T-shirt and notably, that there were hairs found on the T-shirt that do not belong to Mr. Lambrix nor the victims, there is reasonable doubt about whether the tire iron was in fact the murder weapon Therefore, DNA testing of this evidence has a reasonable probability of discovering evidence that exculpates Mr. Lambrix**.

(PCR. Vol. 6 p. 1144) (emphasis added).

4. This Court has denied Mr. Lambrix access to DNA testing by

improperly relying on numerous erroneous factual findings. Contrary to this Court's findings, no form of DNA testing has ***ever*** been conducted in this capital case. Rehearing is necessary to correct this extremely prejudicial factual error.

5. This Court's departure from well-established law governing its *de novo* review of the lower court's summary denial of Mr. Lambrix's Rule 3.853 motion has arbitrarily denied him access to a legislatively created right to DNA testing, thus violating his constitutional rights established by the Eighth and Fourteenth Amendments to the United States Constitution. "[T]he purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d. DCA 2002). Constitutional due process is a crucial element in Rule 3.853 proceedings and Mr. Lambrix has long maintained his innocence.

6. While it is true that Florida is afforded flexibility in its administration of postconviction procedures in a death penalty case, including access to DNA testing, that flexibility must not arbitrarily deprive a defendant of his constitutional rights to due process and equal protection of the law. *See generally Skinner v. Switzer*, 562 U.S. 521 (2011). Further, this Court's denial of access conflicts with its prior decisions in *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), and *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).

7. At a minimum, this Court should grant rehearing to clarify as to why *Swafford*/*Hildwin* are not applicable to Mr. Lambrix. In cases presenting a legitimate claim of innocence, strict adherence to the application of law is the very foundation upon which public confidence and the integrity of our judicial process stands–this is especially so in the context of capital cases. Notably, as is the same in Mr. Lambrix's case, both *Swafford* and *Hildwin* were capital cases with a lengthy and complicated procedural history, and through a labyrinth of successive postconviction proceedings raised substantial allegations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) violations that though the years were repeatedly denied by this Court. This Court subsequently vacated the convictions of both Swafford and Hildwin based upon newly discovered evidence established by DNA testing.

8. This Court's rule of law governing review of a summarily denied Rule 3.853 motion calls for a *de novo* review requiring this Court to engage in an analysis of the individual facts of this case and address with specificity the evidence presented at trial and Mr. Lambrix's allegations of how the DNA testing he seeks will support his claims of innocence. This Court has ignored Mr. Lambrix's specifically pled facts pertaining to the materiality of the DNA evidence he seeks to be tested. In the context of Mr. Lambrix's consistently pled claims that Clarence Moore was solely responsible for Aleisha Bryant's death, and that the

death of Moore was self-defense, the materiality of such evidence is evident. Mr. Lambrix urges this Court to allow for rehearing on the matter.

9. At the time of his initial arrest, prosecution, and trial, Mr. Lambrix maintained that he was innocent. He continues to this day to maintain that he is innocent of the death of Aleisha Bryant, that Clarence Moore is responsible for her death, and that the death of Clarence Moore was self-defense. The DNA results may provide irrefutable proof that Clarence Moore attacked and killed Aleisha Bryant and that the death of Clarence Moore occurred in self-defense by Mr. Lambrix. Each piece of evidence for which DNA testing is required will be discussed in turn.

A. The Tire Iron and T-shirt.

10. This Court's determination that "prior testing [by the FDLE in 1983 of the tire iron and the T-shirt] has already established that there was no blood on these items" simply fails to recognize that the absence of blood does not equate to the absence of DNA evidence. This Court grossly underestimates the evolving technology and capability of modern DNA testing. In fact, the presence or absence of blood is irrelevant to the existence of what is commonly referred to as touch DNA. Modern DNA testing is capable of identifying the presence, or absence, of epidermal skin cells, which do not contain blood cells, that may be embedded in the tire iron itself or in the fabric of the T-shirt. This Court's conclusions that no

DNA exists is speculative. Modern DNA testing methods have repeatedly been successful in identifying the presence of DNA under similar circumstances.

11. More importantly, this Court's opinion entirely failed to acknowledge and address the hairs found during the FDLE lab analysis with the T-shirt and the tire iron. The hairs, *hairs that did not belong to Mr. Lambrix or either of the victims,* found on the T-shirt are readily available for DNA testing. This evidence was concealed from the defense for more than twenty-five years.

12. The State has alleged that this tire iron was the one used by Mr. Lambrix to kill Moore. The fact that there were hairs found on the T-shirt that, that according to the Florida Department of Law Enforcement ("FDLE"), did not belong to Mr. Lambrix or either of the victims raises doubts as to whether this tire iron was in fact the one used by Mr. Lambrix in defending himself against the attack by Moore.

13. From the time of his arrest, Mr. Lambrix has consistently maintained that the State's theory of alleged premeditated murder was fabricated by key witness Frances Smith in collaboration with members of the prosecution team. It was Smith who helped the state investigators recover this alleged murder weapon, and the fact that the FDLE determined in 1983 that the found hairs did not belong to Mr. Lambrix, Moore, or Bryant raises serious concerns about the credibility of Smith's claim and the state's allegation that this tire iron was the one used by Mr.

Lambrix in self-defense. DNA testing would conclusively rule out Mr. Lambrix as a source.

14. The State upon its own admission acknowledges that Smith's testimony was the crux of the case. It has consistently conceded that their entire case, "premeditation and everything," rested upon the credibility of their sole key witness, Smith. Mr. Lambrix's ability to attack the credibility of Smith's testimony is critical to his ability to demonstrate that it was Moore who killed Bryant, and that Moore was killed in self-defense. The fact that the FDLE determined in 1983 that the hairs did not belong to Mr. Lambrix or either of the victims supports Mr. Lambrix's long-maintained position that the tire iron entered into evidence at trial is not the tire iron he used in self-defense and therefore, *Smith's account that this is the tire iron used by Mr. Lambrix is not credible*. Therefore, DNA testing to determine the source of the hairs, and testing of the tire iron and the T-shirt to rule out Mr. Lambrix is warranted.

B. Aleisha Bryant's Clothing.

15. This Court's assertion that "DNA testing was performed on Bryant's panties" is blatantly false. There has never been ***any*** DNA testing conducted on ***any*** of Bryant's clothing or on any other item in the case. Bryant's panties were only screened for a blood marker for seminal fluid. Modern DNA testing would provide a definitive result as to the presence of Moore's DNA. A positive match on

the panties would answer this Court's determination that Mr. Lambrix "provides no reason how Moore's DNA on Bryant['s clothing] would exonerate" him. This Court has failed to consider all of the relevant facts.

16. As noted there never has been any further testing of any of the other items of clothing even though the FDLE lab recommended that such testing be conducted. The FDLE lab specifically recommended that testing for seminal fluid be conducted on various other items of her clothing, and despite that recommendation, the State requested that the evidence been returned without any further testing on the clothing or other items and the FDLE lab complied with that request.

17. There is no evidence in the record to establish that Moore and Bryant were, or had ever, been engaged in a consensual sexual relationship. The State's own evidence shows that Moore lived in the Miami area and was only in town for few days. According to the State's evidence, Bryant, who did live in town, had agreed to a date with Moore, and met him at a local tavern that evening. The fact that Bryant was found partially nude from the waist down supports Mr. Lambrix's account that he came upon Moore, who had Bryant pinned down on the ground while he was violently assaulting her and that it was Moore who killed Bryant.

18. The FDLE lab recommended that Bryant's clothing be tested for the presence seminal fluid. However, *only the panties were screened*. There has never

been any DNA testing of the panties or of any item of evidence in the case. The Medical Examiner was unable to point to any physical evidence to support his speculative finding that Bryant was strangled. Chest compression resulting in suffocation during a violent assault by Moore is an equally likely cause of death based on the physical evidence. That explanation would also support the account by Mr. Lambrix that Moore had Bryant pinned down to the ground while violently assaulting her and that it was Moore who caused Bryant's death.

19. Given that Bryant was in Moore's presence, it is not unreasonable to expect Moore's DNA to be present on Bryant's clothing. A prospective finding of Moore's DNA on Bryant's clothing standing alone may not "tend to exonerate Lambrix" and/or mitigate his sentence. However, this Court must take into account the fact that Bryant's body was found partially nude from the waist down. Given that there is no record evidence of a consensual relationship, that fact, if coupled with a finding of Moore's DNA on her panties and other clothing, would lend support to Mr. Lambrix's exculpatory account that he came upon Moore violently assaulting Bryant and it was Moore who actually killed her. The testing of Bryant's clothing for DNA evidence could lead to evidence that supports Lambrix's account of the death of Bryant and exculpates Mr. Lambrix and/or mitigates his sentence.

C. Conclusion.

20. The DNA testing of Bryant's clothing and the hairs found on the T-

shirt could lead to evidence that exculpates Mr. Lambrix and/or mitigates his sentence. *See Consalvo*, 3 So. 3d at 1016. DNA testing has the potential to support Mr. Lambrix's actual innocence of the death of Aleisha Bryant and his account that the death of Clarence Moore was in self-defense. At the very least, the DNA testing will mitigate Mr. Lambrix's sentence if it undermines the authenticity of the alleged murder weapon, reveals that the hairs found were not Mr. Lambrix's or the victims', and implicates Moore in a sexual assault on Bryant.

21. The jury vote for death was not unanimous in either case: 10-2 as to Moore and 8-4 as to Bryant. Had the jury heard that physical evidence corroborated his version of the murder and directly contradicted the State's theory of the murders, and had Mr. Lambrix been able to challenge the credibility of Smith's testimony, there is a reasonable probability that Mr. Lambrix would have been acquitted of the murders, or at the least, received two life-sentences. Therefore, Mr. Lambrix has a constitutional right to access this evidence. *Cole v. State*, 985 So. 2d 398, 403 n.1 (Fla. 2004).

22. Mr. Lambrix urges the Court that it is necessary to conduct an evidentiary hearing on this issue to ascertain what evidence may, or may not, exist. Mr. Lambrix has exercised due diligence in attempting to locate the evidence he seeks to be tested. While the tire iron and T-shirt are readily available for testing, the State has not identified the location of Bryant's clothing. The State's own

records indicate that the last known location of Bryant's clothing was when they were in possession of the FDLE. The clothing was then released to the custody of State Attorney Investigator, Bob Daniels. In determining whether rehearing is warranted, this Court should consider that at no time has the State Attorney's Office explicitly denied having possession of this evidence. Mr. Lambrix respectfully asserts that rehearing on this issue is warranted. Consistent with *Swafford*/*Hildwin*, this Court should remand with instructions to the lower court that DNA testing be conducted on the items that Mr. Lambrix seeks to be tested.

III. WHETHER THE POSTCONVICTION JUDGE WAS BIASED

1. Mr. Lambrix previously challenged circuit court Judge Greider's denial of his motion to disqualify her from his proceedings. (*see* Case Nos.: SC10-1845: Appeal of denial of 4th Successive Rule 3.851 motion & SC11-1845 Petition for Writ of Prohibition Challenging the Postconviction Court's Denial of Motion to Disqualify). This Court upheld the denial of that motion. *See Lambrix v. State*, 124 So. 3d 890 (Fla. 2013). That decision was grounded in an erroneous finding that Judge Greider was a successor judge as defined by Florida Rule of Judicial Administration 2.330(g).[7] Mr. Lambrix has argued that as a result of this Court's

[7] "If a judge has been previously disqualified on motion for alleged prejudice or partially under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion."

affirmance of the lower court's denial of the motion to disqualify, Mr. Lambrix was deprived of his fundamental constitutional right to a fair and impartial tribunal. It is well-settled that "[t]his Court has the power to reconsider and correct erroneous rulings made in earlier appeals in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) (brackets omitted) (citing *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004)); *see also State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). The fairness and integrity of this Court's affirmation in those previously pled claims is tainted and this Court has a duty to remedy that deprivation in this instance.

2. This Court's recent opinion characterizes Mr. Lambrix's judicial bias claim only in the limited context that "the judge failed to reveal that she had been previously employed as an Assistant State Attorney" and does not encompass the entirety of what Mr. Lambrix argues. *Lambrix*, 2017 WL *8.

3. Specifically, prior to the appointment of Judge Greider by the Chief Judge, Mr. Lambrix filed a Motion to Disqualify then serving Judge Thomas Corbin pursuant to Fla. R. Jud. Admin. 2.330(f) and he also filed a successive Rule 3.851 motion based on newly discovered FDLE laboratory records and notes. He argued in the Rule 3.851 motion that the previously withheld FDLE evidence provided substantial impeachment of the State's case and amounted to a *Brady/Giglio*

violation. Had Mr. Lambrix been made aware of this evidence at trial, he could have used it to impeach the State's representations that the tire iron presented to the jury was the one used in self-defense against Moore. Further, he would have been able to demonstrate that the State's representation at trial regarding the lack of available forensic evidence for testing was patently false based on the content of the previously undisclosed FDLE records.

4. Mr. Lambrix's motion to disqualify Judge Corbin was denied. But thereafter, the Chief Judge of the Twentieth Judicial Circuit *sua sponte* removed Judge Corbin from the case and reassigned the case to Judge Christine Greider. In the appointment Order Chief Judge Cary stated:

> This cause comes before this Court on its own motion. The above captioned case is hereby reassigned to the Honorable Christine Greider, who is duly qualified to preside over capital cases pursuant to Fla. R. Jud. Admin. 2.215(b)(10). Judge Greider will review the matter and advise counsel as to how this case might best progress in accordance with the applicable rules of judicial administration and criminal procedure.

(R. Vol. 4 p. 674) (emphasis added).

5. This order in no way relied on Mr. Lambrix's prior motion and made no mention of the motion to disqualify Judge Corbin that had been previously denied. Nor did the order note any reliance upon the grounds stated in Rule

2.330(d)(1) which were alleged by Mr. Lambrix.[8] Mr. Lambrix was personally aware that Judge Greider had been appointed to the circuit court bench and that she had a personal and professional relationship with both the elected State Attorney– in whose office she had been employed in before her appointment to the bench– and with the prosecutor in his case, Assistant State Attorney Randall McGruther. In the Rule 3.851 motion filed at the time of the motion to disqualify Judge Corbin, Mr. Lambrix had alleged that his trial prosecutor, McGruther, was responsible for the *Brady/Giglio* violations related to the newly discovered FDLE lab records.[9]

6. Once Judge Greider was appointed, Mr. Lambrix again filed a motion to disqualify because of his reasonable fear that Judge Greider's long relationship with McGruther would result in her bias against him. He moved to disqualify her pursuant to Rule 2.330(f), which mandates disqualification upon the presentation of a legally sufficient motion. In her denial of the motion to disqualify, Judge Greider mischaracterized the motion as a ***successive*** disqualification motion pursuant to Rule 2.330(g). The result was that she declared herself to be a successor judge to Judge Corbin, which authorized her to rule upon the motion

[8] Subsection (d)(1) states: "A motion to disqualify shall show: (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge."

[9] McGruther also appeared as counsel in Mr. Lambrix's postconviction litigation, and he would ultimately testify at the evidentiary proceedings before Judge Corbin.

which she ultimately denied. Mr. Lambrix's motion to disqualify was filed pursuant to Rule 2.330(f) and not 2.330(g) and therefore, was not, and has never, been reviewed under the applicable standard of review.

7. After denying the motion to disqualify, Judge Greider thereafter denied both Mr. Lambrix's *Brady/Giglio* claims in the pending Rule 3.851 motion and his Rule 3.853 motion for DNA testing of the forensic evidence revealed in the FDLE lab notes without any evidentiary development or opportunity to show materiality.

8. Requiring Mr. Lambrix to meet the actual, "in fact" bias standard of Rule 2.330(g) violated Florida law. Mr. Lambrix was entitled to have his claim considered under the "legally sufficient" standard of Rule 2.330(f), which this Court acknowledged he had met. (Order of Jan. 4, 2012, at 1 (finding that the allegations of the motion "raise significant concerns")). The applicable facts were fully set forth in the briefing submitted to this Court. *See Lambrix v. State*, Case No. SC16-56. Those facts illustrate why this Court erred in denying Mr. Lambrix's claim regarding the disqualification of Judge Greider when she was not a successor judge as defined by Rule 2.330(g).

9. The denial of access to an impartial tribunal to adjudicate the issues below in a capital case, including the *Brady/Giglio* issues and the denial of DNA testing, raises substantial doubt as to the fairness and integrity of the prior

proceedings overseen by a judge who should have recused herself. Here, this Court has relied upon prior proceedings, tainted by the risk of bias, to deny relief on the judicial bias claim.

10. This Court's attachment of a procedural bar in denying the judicial bias claim stands contrary to established law. This Court has a constitutional obligation to revisit previously pled claims that have been denied when such action is deemed necessary to prevent a manifest injustice. *See Preston v. State*, 444 So. 2d 939 (Fla. 1985)[10] (recognizing that revisiting claims is especially necessary in capital cases and that the law of the case doctrine must yield to protect against manifest injustice); *See also State v. Atkins*, 69 So. 3d 261 (Fla. 2011), relying on *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) and *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2007) ("Under Florida law, appellate courts have 'the power to reconsider and correct erroneous rulings [ ] in exceptional circumstances and where reliance on the previous decision would result in a manifest injustice.'").

11. All orders issued below by Judge Greider should be vacated, and this Court should remand to the circuit court for new proceedings to be conducted before an unbiased judge concerning the issues previously addressed in *Lambrix v. State*, 124 So. 3d 890 (Fla. 2013). To allow Mr. Lambrix's execution to proceed in

[10] Preston was denied relief but his sentence was later vacated and resentencing ordered based on vacation of a prior violent felony. See *Preston v. State*, 564 So. 2d 120 (Fla. 1990).

circumstances where he was deprived of his constitutional right to have his claims adjudicated before an impartial tribunal serves only to compromise the integrity of the judicial system and Florida's capital punishment system. *See Rippo v. Baker*, No. 16-6316, 2017 WL 855913, at *1, (U.S. Mar. 6, 2017) ("The Nevada Supreme Court did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.").

IV. CONFLICT OF INTEREST AND THE *CRONIC* CLAIM

1. At the heart of this issue is the deprivation of the right to proper legal representation under the Sixth Amendment. "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system…Indeed, the right to counsel is the foundation for our adversary system." *Martinez v. Ryan,* 566 U.S. 1, 12 (2012). By attaching a procedural default and denying the conflict/*Chronic* claim this Court, and the lower court, ignored the relevant rules for litigating claims under Florida law and rules of procedure.

2. Counsel has argued that before the second trial, Mr. Lambrix's assistant public defender counsel Robert Jacobs placed himself in an adversarial position as to Mr. Lambrix when he spoke to the FBI. This Court failed to mention in its opinion the affidavit provided to post conviction counsel by surviving trial co-counsel Kinley Engvalson which was attached to the under warrant Rule 3.851

motion as Appendix 3 and included in the instant record on appeal. Jacobs was not allowed to testify below. However, in his affidavit he clearly indicates that he believes that the FBI interviewee was Jacobs. In paragraph nine of the affidavit, Engvalson stated:

> I do not recall knowing about the assault on Mike Lambrix, an FBI investigation, or any involvement by Robert Jacobs in an FBI investigation. I do not recall Bob ever discussing this with me and I do not believe he ever told me that he was interviewed by the FBI. I was never interviewed by the FBI. However, it appears from the context of the other two pages of FBI records provided to me by CCRC-South that Robert Jacobs was interviewed by the FBI and a transcription of a January 4, 1984 interview was done on January 9, 1984.

Appendix 3 at 17. There was no attempt made by the attorney Jacobs of the Public Defender's Office to either disclose the content of the information that he provided in secret to the FBI or the fact that information had been provided to the FBI. Neither co-counsel Engvalson, Mr. Lambrix, nor any other individual relevant to the FBI investigation of the assault knew about the interview with Jacobs. This concealment clearly amounts to subterfuge and bad faith by Jacobs.

3. This Court also failed to acknowledge in its opinion that there was no mechanism in which to properly present this issue in an initial or successive 3.851 motion. No one but Jacobs knew about the conflict based on the comments by defense counsel to the FBI which reflected a complete breakdown between lead counsel and Mr. Lambrix until 1999. This communication was known to trial counsel Jacobs but never shared with Engvalson. Jacobs never shared his

comments during the FBI interview with anyone else and they were unknown until 1999.

4. Given that Engvalson had no knowledge of the comments by Jacobs–which accused Lambrix of lying, of making it difficult to prepare a legitimate defense, and of threatening to charge his public defenders with being incompetent, uninterested, and refusing to prepare a legitimate defense–he was in no position to advise Mr. Lambrix, postconviction counsel, or anyone else about them.

5. This Court has also failed to consider the impact of the restraints on filing claims imposed on CCRC counsel by the Florida Legislature in Chapter 27 of the Florida Statutes and this Court's interpretation of same in *Kilgore v. State*, 976 So. 2d 1066 (Fla. 2007). CCRC counsel was handcuffed by the fact that by the time the relevant FBI redacted documents were first made available in 1999, it was clear that one of Mr. Lambrix's trial counsel knew about the interview since 1983. In addition, the facts supporting a conflict of interest and complete loss of counsel are not the kinds of facts that would "probably produce an acquittal on retrial."

6. As this Court stated in *Jones v. State:*

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, **the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence**." *Torres–Arboleda v. Dugger*, 636 So. 2d 1321, 1324–25 (Fla. 1994).

> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 591 So. 2d at 911, 915. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916.
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. *See Johnson v. Singletary*, 647 So. 2d 106, 110–11 (Fla. 1994); *cf. Bain v. State*, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (emphasis added).

7. In the instant case the new evidence in the form of the redacted transcript of the FBI interview was "not available to trial counsel at trial" because it was not produced to counsel until 15 years after the trial. However at least one member of the defense team, most likely trial counsel Jacobs, knew about the FBI interview and the *per se* conflict that it memorialized. The State and this Court have not disputed that the FBI failed to provide information about the interview with the member of Mr. Lambrix's public defender team in response to the Freedom of Information Act request in the 1987-1988 original postconviction proceedings. Nor has it been disputed that the evidence which provided the evidentiary foundation for the claim was unavailable to Mr. Lambrix until 1999.

8. This Court's opinion stated that "Lambrix never explains how such a

justification [CCRC South obtaining the 1999 FBI records more than a year after CCRC Middle received them] would excuse a seventeen year delay" to file the *Cronic* claim under warrant. *Lambrix v. State* at *4. The explanation is uncomplicated. Mr. Lambrix was unable to present this issue in a prior postconviction pleading because the plain language of Fla. R. Crim. P. 3.850/3.851 only allows for the filing of a successive motion in two circumstances: either the retroactive application of new law or, upon the presentation of newly discovered evidence sufficient to establish innocence. Neither circumstance fit the facts of the instant *Cronic* claim. And this Court has never interpreted these restrictive provisions to prevent a claim of the deprivation of the right to counsel under *Cronic*. They do not fit. Contrary to this Court's holding, this is a cognizable *Cronic* claim where the circumstances revealed are "egregiously prejudicial". Such a claim is akin to fundamental error or lack of jurisdiction and can be brought at any time if the facts support it.

9. This Court must also reconsider its conclusion that "[i]n this case, counsel was never denied so Lambrix cannot rely on the *per se* rule [regarding prejudice] from *Cronic* to avoid establishing prejudice." *Lambrix* at *5. This Court's conclusion is objectively unreasonable and in conflict with established constitutional law. A member of Mr. Lambrix's public defender defense team, based on co-counsel Engvalson's affidavit, almost certainly lead counsel Robert

Jacobs, knowingly and deliberately violated attorney/client privilege by providing inflammatory and defamatory statements to an FBI investigator who was investigating Mr. Lambrix's charges that he had been beaten by a Glades Co. Sheriff's deputy. The interview and its content effectively made defense counsel an adversarial witness against Mr. Lambrix. The record of this action supports Mr. Lambrix's claim of a conflict of interest with his trial counsel.

10. At the moment that trial counsel, or counsel's agent, breached the sanctity of attorney/client privilege and became an adversarial witness against Mr. Lambrix, a *per se* denial of counsel existed, and under *Cronic,* Mr. Lambrix is relieved from the necessity of establishing prejudice. The briefing explained the deprivation of counsel, but the existing prior record of the case below further supports a finding of denial of counsel.

11. Specifically, the record below shows that trial counsel, including Jacobs, deprived Mr. Lambrix of his right to testify and to present a defense at the first trial. The Eleventh Circuit assumed that Mr. Lambrix waived his right to testify at the second trial based solely on a silent record. *Lambrix v. Singletary,* 72 F.3d 1500, 1508-10 (11th Cir. 1996).[11] That decision was entered three years

[11] In 1987 clemency documents prepared by Mr. Lambrix's clemency counsel were submitted to the Governor. This was more than a year before his initial postconviction litigation. Those documents were included as an appendix to the instant appeal and state habeas litigation and included Mr. Lambrix's personally prepared "Statement of Facts". See State Habeas Appendix 8 at 257-271. Contrary

before the FBI documents were finally produced to CCRC. If there had been a timely disclosure of the FBI interview documents in 1996, it would have exposed the existence of a *per se* conflict of interest and the self-evident resulting prejudice to Mr. Lambrix would have provided powerful support for his claim of deprivation of his fundamental right to testify at the second trial.

12. The deprivation of that right resulted in the deprivation of the right to subject the state's case to a true adversarial testing where Mr. Lambrix had no opportunity to tell the jury what actually transpired. *See Lott v. State*, 931 So. 2d 807, 817-19 (Fla. 2006) (recognizing that the "United States Supreme Court has made clear that a criminal defendant 'has the ultimate authority to make certain fundamental decisions regarding his case,' one of which is whether to 'testify in his or her own behalf.'") (*citing Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

13. These facts refute this Court's conclusion that Mr. Lambrix was not deprived of counsel at any critical stage of the proceedings and that counsel did not fail to subject the State's case to a true adversarial testing. The fundamental imperative of preventing a manifest injustice trumps application of a

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to the State's claim of a recently manufactured account of the events surrounding the deaths of Moore and Bryant, Mr. Lambrix's 1987 statement includes a very specific and detailed account of the deaths of Bryant and Moore including Moore's attack on Bryant and Mr. Lambrix's actions in self-defense as to Moore. Appendix 8 at 261-63. It also includes the assertion that trial counsel was responsible for depriving Mr. Lambrix of the opportunity to subject the state's case to a meaningful adversarial testing. Appendix 8 at 270-71.

fundamentally unfair attachment of a procedural bar.

14. This Court has provided relief in similar circumstances. In *Robinson v. State*, the defendant was granted a new trial by this Court "to maintain the integrity and credibility of the judicial process" because of the unethical behavior of counsel in circumstances where there was essentially a failure to provide counsel. 702 So. 2d 213, 214 (Fla. 1997). More recently, in *State v. Dougan*, this Court found a "classic breakdown in the adversary process." 202 So. 3d 363, 387 (Fla. 2016) ("Because there is the additional conflict of interest as well as deficient performance, we need not probe into whether the affair was the reason for [trial counsel's] substandard performance, or whether the reason was his solicitation of the codefendants or simply his own inability to adequately represent Dougan. Suffice it to say, this relationship just emphasizes how poorly Dougan was represented by counsel who had apparent interests other than attempting to effectively and diligently represent Dougan.").

15. This Court's holding is inconsistent with its holdings in *Robinson* and *Dougan* and under the unique circumstances of this case and given the circumstances in which the *Cronic* claim was plead, Mr. Lambrix is entitled to an equitable exemption to attachment of procedural default, and a grant of the relief warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to: Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Ste. 200, Tampa, FL 33607-7013, *Scott.Browne@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com*; via email service at *warrant@flcourts.org* this 4th day of April 2017.

/s/William M. Hennis, III
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