APPENDIX A

Filing # 47796039 E-Filed 10/19/2016 09:28:19 AM

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC14-973

MERYL S. McDONALD,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PINELLAS COUNTY

****

INITIAL BRIEF OF APPELLANT

J. RAFAEL RODRIGUEZ
Specially Appointed Public
Defender for Appellant

LAW OFFICES OF
J. RAFAEL RODRIGUEZ
6367 Bird Road
Miami, Florida 33155
(305) 667-4445
(305) 667-4118 (FAX)
jrafrod@bellsouth.net

Oral Argument Requested

Appellant, McDonald does not request oral argument on the claims asserted in the present brief.

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INTRODUCTION

This appeal is from the circuit court's summary denial of relief without an evidentiary hearing on Appellant's motion for post-conviction relief filed under Rule 3.851, Florida Rules of Criminal Procedure. The symbol "PCR" will designate the record on appeal in the instant post-conviction appeal, "Supp. PCR" will designate the supplemental record on the instant post-conviction relief, and "2nd Supp. PCR" will designate the supplemental record on the instant post-conviction appeal.

STATEMENT OF THE CASE

Procedural History

The Direct Appeal

Defendant Meryl McDonald and co-defendant Robert Gordon were tried together before a single jury. Both men were convicted of the first degree murder of Dr. Louis A. Davidson on January 25, 1994. Following the penalty phase of the trial, the jury recommended death by a nine to three vote as to each defendant. The trial court sentenced both defendants to death.

This Court in *McDonald v. State*, 743 So.2d 501 (Fla. 1999), considered McDonald's direct appeal. McDonald raised eight (8) issues.[1] This Court noted

[1] These issues were: (1) McDonald entitled to a new trial because he was convicted by a jury from an all-white venire; (2) the trial court erred in denying McDonald's motion for judgment of acquittal; (3) the trial court erred in denying

that several of McDonald's claims were identical to those claims raised by codefendant Gordon in his appeal, which were adversely decided by this Court in *Gordon v. State*, 704 So.2d 107 (Fla. 1997). In particular, this Court pointed out that McDonald had not demonstrated any error in the Court's analysis and conclusions as to those issues and, as such, McDonald's claims were rejected for the same reasons asserted in *Gordon*. *McDonald, supra* at 503.[2] This Court did consider McDonald's challenge to the heinous, atrocious or cruel jury instruction, and ultimately, rejected the challenge. *McDonald, supra* at 503-504. This Court also considered McDonald's challenge to the prosecutor's improper closing argument comments. This Court rejected this challenge. *McDonald, supra* at 504-505. This Court assessed McDonald's challenge to the admissibility of the DNA test results but rejected the claim as there had been no objection at trial to the

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McDonald's request for a separate penalty phase jury from his codefendant and separate guilt and penalty phase juries; (4) McDonald's death sentence is disproportionate; (5) the trial court erred in finding the murder cold, calculated and premediated; (6) the trial court erred in finding the murder heinous, atrocious or cruel; (7) the trial court erred in denying McDonald's motion for a new penalty phase based on improper prosecutorial comments during closing argument; and (8) the trial court erred in not holding a Frye hearing on the admissibility of the DNA test results and the basis of statistical conclusions. *McDonald v. State, supra*, at 502 n.7.

[2] This Court delineated the issues as: (1) the alleged error arising from the fact that Defendant was convicted by a jury drawn from an all-white jury; (2) the denial of the motion for judgment of acquittal; (3) the denial of the request for a separate penalty phase jury from his codefendant and a different penalty phase jury; (4) the applicability of the cold, calculated and premeditated aggravating circumstance; and (5) the applicability of the heinous, atrocious or cruel aggravating circumstance. *McDonald v. State, supra*, at 503 n.8.

admission of the DNA evidence. *McDonald, supra* at 506. Finally, this Court found that McDonald's death sentence was not disproportionate. *McDonald, supra* at 506-507.

The initial post-conviction motions

Following this Court's decision in *McDonald v. State*, 743 So.2d 501 (Fla. 1999), McDonald filed a motion for post-conviction relief, raising sixteen claims. On July 25, 2001, the circuit court conducted a *Huff*[3] hearing. At this hearing, McDonald abandoned two claims. (*Huff* Hearing, pp. 31-32; pp. 71-72). On November 29-30, 2001, the court conducted an evidentiary hearing. The circuit court denied all relief. In *McDonald v. State*, 952 So.2d 484 (2006) [*McDonald II*], this Court affirmed the ruling. According to the opinion in *McDonald II*, McDonald raised the following claims in his motion: (1) trial counsel was ineffective with regard to the jury selection; (2) there was no waiver of defendant's rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); (3) trial counsel was ineffective for failing to challenge the hair evidence; (4) trial counsel was ineffective for failing to challenge the carpet fiber evidence; (5) the State's cashmere fiber testimony was false and trial counsel was ineffective for not challenging it; (6) trial counsel was ineffective with regard to the bloodstain evidence; (7) trial counsel was ineffective by failing to raise an argument

[3] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

concerning the contamination of the sweatshirt; (8) trial counsel was ineffective by failing to challenge the shoe print and tennis shoes evidence; (9) trial counsel was ineffective for failing to keep Susan Shore from testifying; (10) State witnesses lied about identification issues; (11) trial counsel was ineffective for not pursuing a severed trial; (12) trial counsel was ineffective for failing to investigate and present an alibi defense; (13) trial counsel was ineffective for failing to object to an improper closing argument by the prosecutor; (14) trial counsel was ineffective for failing to file a motion for speedy trial; (15) the trial court lacked jurisdiction because the autopsy failed to establish the cause of death; and (16) when the claims are examined collectively, trial counsel provided ineffective assistance of counsel. *McDonald II, supra*, 952 So.2d at 488.[4]

In the opinion affirming the denial of McDonald's motion for post-conviction relief, this Court found that the circuit court properly allowed McDonald to represent himself. As such, this Court concluded that certain issues[5] raised by McDonald's stand-by counsel, CCRC, would not be considered because McDonald failed to raise them at the circuit court level, and because some were

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[4] The *Miranda* and witness identification claims were dropped by McDonald.

[5] These issues were: (1) trial counsel was ineffective for failing to challenge physical evidence; (2) trial counsel was ineffective for failing to challenge the expert shoe imprint testimony; (3) trial counsel was ineffective to challenge the testimony of the coconspirator; (4) trial counsel was ineffective for failing to move to sever; and (5) trial counsel was ineffective for failing to investigate an alibi defense. (Raised as Issues 8 through 12 in the CCRC brief). *McDonald II, supra*, 952 So.2d at 489 n.2.

procedurally barred.[6] Additionally, some claims were merely conclusory arguments and insufficient to raise an issue.[7] *McDonald II, supra*, 952 So.2d at 489.

This Court did address, however, the claim that the trial court conducted an inadequate *Faretta*[8] hearing when it allowed McDonald to represent himself. This Court concluded that the circuit court properly conducted a thorough *Faretta* inquiry, setting forth an extensive colloquy between the court and McDonald. *McDonald II, supra*, 952 So.2d at 490-494. This Court also considered McDonald's *Brady*[9] and *Giglio*[10] claims, raised in CCRC's amended brief. This claim alleged that the State withheld crucial DNA evidence and that the State presented false evidence. This Court denied this claim because the circuit court denied the claims on grounds that all of McDonald's criticisms of Agent Michael Vick were refuted by the trial testimony of Agent Vick and McDonald offered no evidence at the evidentiary hearing to refute Vick's testimony or the DNA

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[6] These issues were (1) trial counsel was ineffective because for failing to challenge the racial composition of the jury venire; and (2) trial counsel was ineffective for failing to object to the prosecutor's closing argument concerning pain and suffering felt by the victim. (Raised as Issues 2 and 3 in the CCRC brief). *McDonald II, supra*, 952 So.2d at 489 n.3.

[7] This issue raised the ineffectiveness of trial counsel for failing to challenge the State's fiber testimony. (Raised as Issue 6 in the CCRC brief). *McDonald II, supra*, 952 So.2d at 489 n.4.

[8] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[9] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[10] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

evidence. Further, this Court pointed out that CCRC only resurrected some of McDonald's arguments that were denied by the circuit court and asserted no basis, other than conclusory arguments, for a *Brady* or *Giglio* claim. *McDonald II, supra*, 952 So.2d at 494.

Lastly, this Court considered a series of ineffective assistance of counsel claims. As to bloodstain evidence, this Court ruled that (1) where evidence is lost or destroyed, the burden is on the defendant to show bad faith by the State and that, even if the bloodstain evidence had been consumed by testing, the DNA materials from the test (such as photographs, autoradiographs, x-rays) are still available; (2) trial counsel made a strategic, informed decision not to challenge the DNA evidence because the defense theory was that Gordon and McDonald went to the victim's apartment to retrieve a document from the victim and Leo Cisneros killed the victim after they left and planted the DNA evidence on McDonald's shirt, and that McDonald had not shown that counsel's tactical decision was deficient; and (3) the circuit court properly concluded that at the time of McDonald's trial there was general acceptance in the scientific community for forensic population genetics to permit Agent Vick's testimony, including his population frequency testimony and, as such, counsel was not ineffective for not requesting a *Frye*[11] hearing. *McDonald II, supra*, 952 So.2d at 496.

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[11] *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923).

On the issue concerning the suppression of the hair evidence, this Court found that the hair samples collected from McDonald, and later compared to those found on the sweatshirt, were legally seized from the Days Inn. The Court noted that the detectives in the case asked McDonald for his hair samples in order to eliminate him as a suspect and he agreed. This Court also noted that the hair samples would have been inevitably obtained, as stated by the circuit court. Consequently, trial counsel's failure to move to suppress the hair samples did not amount to ineffective assistance. *McDonald II, supra*, 952 So.2d at 497. This Court also ruled that there was no hair evidence that trial counsel could have moved to suppress due to false testimony. Detective Celona testified he received McDonald's hair sample from Detective Noodwang and this evidence was sent to the FBI. Agent Allen testified that McDonald's hair samples matched with trace evidence hair he collected from the sweatshirt. Agent Allen explained that hair comparison is not a positive identification, as is fingerprint comparison, but he did identify the hairs as included in a possible match. Trial counsel did not file a motion to suppress but did cross-examine the witnesses about the hair evidence. Based on the foregoing, this Court found no error in the circuit court's conclusion that trial counsel was not ineffective for failing to file a motion to suppress that would not have been granted. *McDonald II, supra*, 952 So.2d at 497. Lastly, this Court noted that Agent Allen only conducted a microscopic and visual comparison

of the hair evidence, and that visual and microscopic hair comparison is not based on new or novel scientific principles requiring a *Frye* hearing. *McDonald II, supra*, 952 So.2d at 498.[12]

McDonald pursued federal litigation *pro se*, filing a petition for habeas corpus challenging his state conviction and sentence of death in the Middle District of Florida. (Case No. 8:07-cv-564-T-26EAJ). On May 6, 2011, the district court entered an order denying McDonald's petition and denying a certificate of appealability. (PCR. 259-317). The Eleventh Circuit denied a certificate of appealability. (Case No. 11-12685-P). McDonald's petition for writ of certioarari to the U.S Supreme Court was denied. *McDonald v. Tucker*, 132 S.Ct. 1638 (2012).

McDonald filed a second successive *pro se* motion. This motion was summarily denied and the denial was affirmed on appeal. *McDonald v. State*, 117 So.3d 412 (Fla. 2013), *cert. denied*, 134 S.Ct. 438 (2013). In its order, this Court reviewed McDonald's claims, including a claim that the State failed to disclose an FBI report concerning analysis of DNA on a sweatshirt found in a motel room occupied by McDonald and co-defendant Gordon. This Court noted that the same

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[12] This Court also denied McDonald's petition for habeas corpus, denying McDonald's claim that he is entitled to relief based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and based on the trial court's inadequate *Faretta* inquiry. *McDonald II, supra*, 952 So.2d at 498. Subsequently, this Court denied McDonald's *pro se* motion for habeas corpus. *McDonald v. McNeil*, 991 So.2d 387 (Fla. 2008)(table).

claims were raised and rejected in *Gordon v. State*, 97 So.3d 823 (Fla. 2012)(table). Also, this Court noted that all the evidence relied upon by McDonald was known to him or his counsel, or was discoverable by due diligence, in 2002 or earlier. Finally, this Court ruled that even if McDonald's claims were not procedurally barred under the rule, the claims are conclusively refuted by the record and without merit. *McDonald v. State*, 117 So.3d 412 (Fla. 2013).

The Instant Appeal

On December 24, 2013, McDonald filed his third *pro se* Rule 3.851 motion (erroneously titled second successive pro se Rule 3.851 motion). (PSR. 1-156). In this motion, McDonald raised two claims. The summary denial of this motion is subject of the present appeal.

The motion raised the following claims:

CLAIM I

> DEFENDANT'S McDONALD WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING FLORIDA CONSTITUTION DUE TO THE STATE COMMITTING VIOLATIONS OF *BRADY v. MARYLAND*, 373 U.S. 83; AND *GIGLIO v. U.S.*, 405 U.S. 150; AND THE KNOWINGLY USE [*sic*] OF FABRICATED EVIDENCE, IN THE FORM OF AGENT ALLEN'S JUNE 22ND LAB REPORT AND AGENT VICK'S TESTIMONY TO OBTAIN McDONALD'S CONVICTION (PCR. 8).

CLAIM II

> DEFENDANT McDONALD WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH

AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING FLORIDA CONSTITUTION DUE TO THE STATE COMMITTING VIOLATIONS OF *BRADY v. MARYLAND* AND *GIGLIO v. UNITED STATES,* AND THE KNOWINGLY USED [*sic*] OF FABRICATED EVIDENCE, IN THE FORM OF THE FALSE STATEMENTS IN THE AFFIDAVITS ABOUT HAIR AND FIBERS LAB TEST RESULTS, AND AGENT ALLEN JUNE 9TH LAB REPORT AND TESTIMONY TO OBTAIN McDONALD'S CONVICTION (PCR. 16).

McDonald attached twenty-five (25) exhibits (Exhibits A-Y). On January 21, 2014, the State of Florida filed a motion to dismiss McDonald's motion as time-barred, procedurally barred and an abusive successive motion. The State also requested a status of collateral counsel. (PCR. 157-174). The circuit court entered an order setting a case management conference. (Supp. PSR. 1-2). McDonald filed a motion to hold his post-conviction motion in abeyance on grounds that he was informed that his case was one of the cases the FBI and the Department of Justice was reviewing regarding the introduction of flawed evidence and was awaiting additional documentation. (PCR. 175-183). Thereafter, McDonald filed a reply to the State's motion to dismiss. (PCR. 184-191). McDonald also filed a motion to compel FBI's Lab to Release the FBI's 1994 hair and fiber lab report. (PCR. 192-197).

On February 3, 2014, the circuit court conducted a case management conference. (Supp. PCR. 4-36). The court conducted a *Faretta* hearing and permitted McDonald to represent himself. The court appointed CCRC as stand-by counsel. (Supp. PCR. 7-15). McDonald argued that the State's position seeking

dismissal was improper because he had raised new and different facts. In particular, McDonald pointed out that he had recently learned that his case was one of the cases the FBI lab is reviewing for flawed evidence. (Supp. PCR. 18-19). McDonald pointed out that the information he was seeking from the FBI was crucial and critically essential in the case and, should the FBI produce the March, 1994 hair and fiber lab report, the report would become newly discovered evidence that was unknown to the defense either at time of trial or at the time of the initial 3.851 motion, and could not be discovered by the exercise of due diligence. (Supp. PCR. 22-23). McDonald maintained that his present claims were not the same claims previously raised. (Supp. PCR. 26). McDonald argued that he was still awaiting documents from the FBI. (Supp. PCR. 27). The State countered that nothing new had been raised by McDonald. Moreover, the State noted the motion to hold in abeyance was, in effect, an admission that there was nothing new. The State conceded that should there be something newly discovered, McDonald may be able to raise it at that time. However, that was not the case presently. (Supp. PCR. 28). McDonald answered that there was a new report which the State had not released. (Supp. PCR. 29). In conclusion, McDonald argued that the CCRC rendered ineffective assistance of counsel during the first post-conviction appeal when it failed to raise certain issues which should have been raised. (Supp. PCR.

32). As such, McDonald maintained that there existed an actual conflict of interest with CCRC. (Supp. PCR. 32-33).

On February 28, 2014, the circuit court entered an order denying McDonald's second successive motion for post-conviction relief, an order dismissing McDonald's motion to hold in abeyance and an order dismissing McDonald's motion to compel. The court attached as exhibits the June 12, 2012, order of the circuit court denying McDonald's motion to vacate judgments of conviction and sentence and special request for leave to amend, the February 3, 2003, order of the circuit court denying McDonald's motion for post-conviction relief, and the May 6, 2011, federal district court order denying McDonald's petition for habeas corpus. (PCR. 198-317).

In its order, the circuit court ruled that a review of McDonald's motion shows that McDonald did not allege a fundamental constitutional right that would apply retroactively to him and did not argue that his counsel failed, through neglect, to file a time rule 3.851 motion. As such, McDonald's motion could not be properly considered under Rule 3.851(d)(2)(B) and (C), Florida Rules of Criminal Procedure. (PCR. 200). However, the court found that McDonald did allege newly discovered *Brady* and *Giglio* violations and, therefore, could be considered under Rule 3.851(d)(2)(A), Florida Rules of Criminal Procedure. (PCR. 200-201). The court concluded that in his first claim, McDonald contended that

the State committed a *Brady* violation by failing to disclose an FBI report concerning DNA evidence and that necessarily the State committed a *Giglio* violation by presenting contrary evidence at trial. However, the court pointed out that in its June 12, 2012 order, the court noted that McDonald had raised multiple claims regarding the FBI reports concerning the blood and hair evidence and that McDonald was not entitled to relief on these grounds. The circuit court cited to this Court's decision in *McDonald v. State*, 117 So.3d 412 (Fla. 2013), *cert. denied*, 134 S.Ct. 438 (2013), where this Court affirmed the court's order, noting that the evidence McDonald relied upon was known to him or his counsel, or was discoverable by due diligence in 2002 or earlier. Also, the circuit court cited to this Court's decision upholding the finding that McDonald's claims were refuted by the record. Based on the foregoing, the circuit court found that McDonald's current claims were both untimely and successive. (PCR. 201). As to the second claim (and in his motion to hold in abeyance and motion to compel), the circuit court noted that McDonald admits that he is merely further investigating the existence of a written March, 1994, FBI hair and fiber report. The court pointed out that McDonald's exhibits show that the existence of a March, 1994 FBI hair and fiber report was known to him or his counsel, or was discoverable at the time of trial through the use of due diligence. Because the records were continually available throughout the post-conviction relief proceedings, they do not qualify as

newly discovered evidence. The circuit court denied McDonald's motion for post-convicted relief, motion to hold in abeyance and motion to compel. (PCR. 202). On April 7, 2014, McDonald submitted a notice of appeal (filed on May 5, 2014). (PCR. 327-328).

The circuit court appointed CCRC-Middle Region as McDonald's appellate counsel. (Supp. PCR. 37-38). The Office of CCRC-Middle Region filed a motion for re-consideration of conditional appointment based on certification of conflict. (Supp. PCR. 42-44). McDonald filed a motion to discharge CCRC-Middle Region and a motion to appoint conflict-free counsel. (Supp. PCR. 49-54). On April 10, 2014, the court held a hearing on the motion for reconsideration of conditional appointment. The court reset the matter to allow the State to file a written response. (Supp. PCR. 55-71).

On April 11, 2014, McDonald filed a legal memorandum with the clerk explaining that the FBI had provided to him 246 pages of documents, all of which he already had except for 12 pages. McDonald pointed out that the FBI had not yet provided the March, 1994, lab report. In addition, McDonald noted that the Office of the State Attorney had requested discovery of the June 13, 1994 report and an affidavit explaining the meaning of the entry: "processing not complete." McDonald asserted that the State had not provided the affidavit requested. (Supp. PCR. 82-86). McDonald filed a motion for leave to supplement the record and

supplemental directions to the clerk, referring to his legal memorandum. (Supp. PCR. 96-111). On April 30, 2014, the circuit court entered an order dismissing McDonald's motion for leave to supplement the record and supplemental directions to the clerk. (Supp. PCR. 119-120). On May 12, 2014, McDonald's letter was filed requesting the filing of the documents attached to his legal memorandum be filed. (Supp. PCR. 150-151). McDonald's refiled a motion for leave to supplement the record and supplemental directions to the clerk. (Supp. PCR. 152-167). The circuit court entered an order striking McDonald's motion for leave to supplement the record on grounds that McDonald was currently represented by counsel and his motion was an unauthorized *pro se* pleading. (Supp. PCR. 173-174).

On April 18, 2014, the State filed a response to the motion for reconsideration of conditional appointment. The State maintained that CCRC's motion be denied. The State cited to *Lambrix v. State*, 124 So.3d 890 (Fla. 2013), where this Court recognized that the right to self-representation was not without limits and that where a defendant has exhausted all of his legal remedies with current counsel having a new counsel appointed would create unnecessary delays. The State argued that McDonald was in the same position as the defendant in *Lambrix*. As such, the State averred that CCRC-Middle should remain counsel of record. The State also pointed out that CCRC-Middle had only provided general

information about an alleged conflict of interest. (Supp. PCR. 87-95). On April 24, 2014, the circuit court conducted a hearing on the conflict of interest issue, at which time McDonald orally argued his position. (Supp. PCR. 121-127). On April 28, 2014, McDonald submitted a reply to the State's response to the motion for reconsideration. (Supp. PCR. 112-118). On May 1, 2014, the court reconvened the hearing. The court considered argument of counsel and argument by McDonald. (Supp. PCR. 129-149). On June 6, 2014, the court entered an order granting CCRC-Middle's motion for reconsideration of conditional appointment and appointing CCRC-South for appeal. (Supp. PCR. 168-170).

Subsequent Post-Conviction Pleadings/Proceedings

During the pendency of the present appeal, CCRS-Southern Region filed a fourth successive amended post-conviction motion, pursuant to Rule 3.851(e)(2), Florida Rules of Criminal Procedure. This motion was based on newly discovered evidence. CCRC-Southern Region alleged that newly discovered evidence regarding hair comparison evidence, along with the introduction of the inadmissible scientific evidence, establish that McDonald was denied an adversarial testing at his capital trial. The motion attached a copy of Agent Allen's testimony, which is part of this Court's record on appeal in Florida Supreme Court Case No. 87,059. The motion also attached portions of the opening and closing statements regarding the hair evidence, which is also part of this Court's record on

appeal in Florida Supreme Court Case No. 87,059. This motion attached correspondence from Special Counsel Norman Wong of the U.S. Department of Justice, making reference to the fact that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in McDonald's trial case.[13] The circuit court is presently holding this motion in abeyance pending the outcome of this appeal. (2nd Supp. PCR. 32).

On March 4, 2016, the State of Florida announced that it lacked possession of any affidavit allegedly drafted by the FBI describing or otherwise defining the meaning of the term "processing not complete" in the relevant FBI DNA lab reports. The State maintained that it had fully complied with the aforementioned public records request and provided to CCRS-Southern Region all the FBI records in its possession. The State Attorney also provided an un-redacted copy of their fax cover sheet and letter of November 21, 2001 to the FBI, from ASA C. Marie King to FBI DNA Lab Bureau Chief Jennifer Lindsay-Smith. (2nd Supp. PCR 16-

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[13] A September 15, 2015 letter from Agent Wong to State Attorney Bernie McCabe, in Case No. 94-4391/CR9402958CFANO, referred to the amended results of the review reiterated that "a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." (2nd Supp. PCR. 7-8). Additionally, Agent Wong indicated that "the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science" in several ways. (2nd Supp. PCR. 9). The microscopic hair comparison analysis result of review are also part of the present record. (2nd Supp. PCR. 11-14).

22; 24-30). CCRC-Southern Region accepted the State's representation that no affidavit existed. (2nd Supp. PCR. 19-20).

On March 29, 2016, this Court granted McDonald's motion to relinquish jurisdiction for the purpose of amending McDonald's second successive motion for post-conviction relief. On April 22, 2016, the circuit court entered an order on this Court's order of temporary relinquishment of jurisdiction. (2nd Supp. PCR. 31-34). In its order, the circuit court made reference to CCRC-Southern Region's Fourth Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, which was premised on newly discovered evidence in the form of the 2014 letter from FBI Special Agent Wong advising that the testimony provided by FBI Analyst Chris Allen at McDonald's trial regarding hair analysis exceeded the limits of science. The court held this motion in abeyance pending the present appeal. (2nd Supp. PCR. 32). The circuit court granted CCRC-Southern Region's request that pubic records relating to an alleged FBI affidavit pertaining to McDonald's first claim in the second successive motion, and the transcripts of March 4, 2016 be included in the record on appeal. (2nd Supp. PCR. 32). The circuit court referred to the parties' agreement that the 45-day relinquishment period was insufficient to address McDonald's proposed amendments to Claim Two. (2nd Supp. PCR. 33). The circuit court found it significant that the parties have filed no amendments to McDonald's *pro se* second

successive motion which the court could consider and, as such, a hearing on any such amendment would be premature. (2nd Supp. PCR. 33). In particular, the circuit court pointed out that Special Agent Wong's letter and supplement were not included in any pleadings or argument which the court could consider. (2nd Supp. PCR. 33). The circuit court directed the clerk to supplement the record with CCRC-Southern Region's Notice of Filing. (2nd Supp. PCR. 33).

CCRC-Southern Region filed an initial brief with this Court in the present appeal. McDonald filed a motion to discharge CCRC-Southern Region. McDonald also filed a motion to strike the initial brief. This Court granted McDonald's motion to discharge CCRC-Southern Region and granted McDonald's motion to strike the initial brief. Upon relinquishment of jurisdiction, the undersigned was appointed.[14]

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[14] As noted above, the circuit court entered an order holding McDonald's fourth successive motion for post-conviction relief in abeyance. In view of this Court's recent decisions in *Perry v. State*, ___ So.3d ___, 2016 WL 6036982 (Fla., October 14, 2016), and *Hurst v. State*, ___ So.3d ___, 2016 WL 6036978 (Fla., October 14, 2016), McDonald may now have additional grounds to raise in post-conviction proceedings below.

STATEMENT OF THE FACTS

In *McDonald v. State*, 743 So.2d 501 (Fla. 1999), this Court considered Defendant's direct appeal. This Court noted that Defendant was tried together with Robert Gordon, whose conviction and sentence were affirmed in *Gordon v. State*, 704 So.2d 107 (Fla. 1997). This Court noted that the facts in Defendant's case were fully set forth in the *Gordon* opinion. *McDonald, supra* at 502 n.1.

In *Gordon, supra*, the facts in Defendant's case were set forth as follows:

"Dr. Louis A. Davidson and his wife Denise were in the midst of a bitter custody battle and divorce. Both were engaged to other people at the time of Dr. Davidson's murder; Mrs. Davidson was engaged to another co-defendant Leonardo Cisneros.

Mrs. Davidson and Cisneros arranged for McDonald and Gordon to kill her husband. To that end, they made several trips from Miami to Tampa in late December 1993 and early January 1994, where several witnesses, including Gordon's friend Clyde Bethel, testified that they met Cisneros, met with a lady about some money they were owed, drove past a hospital to see an emergency room, and went to the Thunder Bay Apartments to see about renting an apartment.

On January 24, 1994, McDonald and Gordon hired Susan Shore to drive them from Miami to Tampa so that they could visit a friend and 'pick up a piece of paper.' Upon arriving in Tampa, they met with a lady Shore later identified as

Mrs. Davidson and someone named `Carlos,' whom Shore later identified as Cisneros. After McDonald, Gordon, and Shore checked into a Days Inn, Cisneros came by and left with McDonald and Gordon. McDonald and Gordon returned later than night.

Early the next morning, January 25, 1994, they drove to Thunderbay Apartments in St. Petersburg to `where their friend lived,' presumably Dr. Davidson. While they waited for Dr. Davidson to return from his night shift at Bayfront Hospital, McDonald got out of the car and said he was going jogging. Shore and Gordon played catch with a cricket ball on the apartment grounds. When Dr. Davidson pulled into the parking lot a short time later, Gordon told Shore, `Here is my friend. You can go sit in the car now.' While Gordon went over and talked to Dr. Davidson, Shore sat in the car and read a newspaper. Shore testified that Davidson and Gordon then walked toward Davidson's apartment, with Gordon following Davidson. She last saw Davidson and Gordon going underneath the stairwell immediately adjacent to Davidson's apartment door. Gordon came back to the car about twenty to twenty-five minutes later; McDonald returned five to ten minutes after Gordon. McDonald told Gordon that `he had the piece of paper.' McDonald patted his stomach and Shore heard something crinkle.

Shore testified that as they drove back to the hotel, McDonald called `Carlos' on his cell phone and said `he had it.' `Carlos' came to the hotel, talked

with McDonald and Gordon, and then left. `Carlos' later returned with the lady they had met with upon their arrival in Tampa. Shore identified a picture of Mrs. Davidson as the lady she had seen. A short time later, Shore, McDonald, and Gordon drove back to Miami.

Dr. Davidson's body was discovered later that day by his fiancée, Patricia Deninno. She found him blindfolded, bound, gagged, and hogtied, lying face down in a bathtub full of bloody water. He was tied with a vacuum cleaner cord and a cashmere belt. Pieces of towel were wrapped around his head and used as a gag. The toilet bowl had been broken off its foundation and the resulting water leak had partially flooded the apartment. Blood was spattered on the bathroom walls and the apartment had been ransacked. There was no indication of forced entry. Shoe prints were found on a tiled floor in the apartment. Dr. Davidson's watch, a camera, and a money clip with several hundred dollars were missing. Although the apartment had been ransacked, $19,300 in cash and some credit cards remained.

The police placed Mrs. Davidson under surveillance shortly after Dr. Davidson's murder. Using the name `Pauline White,' Mrs. Davidson subsequently made numerous trips to Western Union. Evidence was later presented that twenty-one money transfers were made, both before and after the murder, with nineteen

going to Gordon. McDonald's girlfriend, Carol Cason, picked up two of the transfers at his request.

The police also obtained phone records which showed numerous contacts among the codefendants both prior to and after the murder. The records showed that on the day of the murder, Mrs. Davidson called McDonald's beeper fifty times during a period of two and a half hours. Mrs. Davidson also bought a cell phone and gave it to McDonald and Gordon, which was then used repeatedly to make hang-up calls to Dr. Davidson's home and place of work. Several Thunder Bay employees testified that McDonald and Gordon were in the management office on January 18, 1994, and received a copy of the floor plan to Dr. Davidson's apartment. Gordon's friend, Clyde Bethel, confirmed that McDonald and Gordon visited Dr. Davidson's apartment complex that day.

Physical evidence was also recovered from the Days Inn where McDonald, Gordon, and Shore spent the nights of January 24-25, 1994. A sweatshirt and a pair of tennis shoes were found in their room. The tennis shoes had the same sole pattern as the shoeprints found in Dr. Davidson's apartment. Flecks of human blood were found on the shoes, but the sample was too small to match. The sweatshirt contained fibers from Dr. Davidson's carpet and Deninno's cashmere belt, as well as hairs that matched McDonald's. Dr. Davidson's blood sample matched the DNA found in stains on the sweatshirt. Receipts confirmed that on

the day before the murder, Denise Davidson had purchased a pair of sneakers, a gray sweatshirt, and a purple sweatshirt.

The associate medical examiner, Dr. Marie Hansen, testified that Dr. Davidson had bruises on his face and shoulders, three broken ribs, and multiple lacerations on the back of his scalp, probably caused by a blunt object. The cause of death was drowning. The medical examiner could not determine whether Dr. Davidson was conscious when he died, saying it was possible that he was knocked unconscious by the first blow to his head. Dr. Hansen also testified that from the multiple bindings on this wrists, Dr. Davidson had probably freed one of his wrists during the altercation, only to be retied with the belt." *Id.*, 108-110.

ISSUES PRESENTED

(I)

THE CIRCUIT COURT ERRED IN DENYING McDONALD'S MOTION TO HOLD HIS SECOND SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF IN ABEYANCE TO ALLOW FOR EVIDENTIARY DEVELOPMENT

STANDARDS OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. There was no evidentiary hearing in the circuit court and, therefore, there was no evidentiary development below. The circuit court's legal analysis is subject to *de novo* review by this Court. *See Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999)(citing *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

SUMMARY OF ARGUMENT

(I)McDonald filed a motion for post-conviction relief in December, 2013, alleging two claims. McDonald claimed that the State of Florida willfully withheld relevant and material evidence throughout the pretrial, trial and post-conviction proceedings, noting that the State had failed to provide the FBI scientific discovery, police reports and newspaper clippings. As to Claim I, McDonald noted that the State never mentioned the existence of a third DNA report, dated June 13, 1994. McDonald concludes by stating that Agent Allen intentionally fabricated the June 22, 1994 lab report on the DNA testing. This error was compounded by

Agent Vick's testimony, which relied on the June 22, 1994 report. As to Claim II, McDonald maintained that the March, 1994 hair and fibers FBI report was never provided in discovery. In particular, McDonald averred that the June 9, 1994, FBI report relied on by the prosecution at trial was false. McDonald averred that the State of Florida willfully withheld relevant and material evidence throughout the pretrial, trial and post-conviction proceedings, noting that the State had failed to provide the FBI scientific discovery, police reports and newspaper clippings. As to Claim II, McDonald noted that the State and the FBI never released a copy of the FBI's March, 1994 hair and fibers lab report to the defense. Rather, the defense was provided a June 9, 1994, FBI report concerning hair and fibers comparison. McDonald claimed that the June 9, 1994 document was false because it was manufactured three months after the state fabricated the hair and fibers lab result in March, 1994. McDonald concludes by stating that Agent Allen was aware of the March, 1994 false hair and fibers analysis, which was prior to the preparation and submission of the June 9th lab report, and that Agent Allen manufactured his June 9th report.

McDonald also asserted that his case was one of the cases the FBI is still reviewing where flawed evidence, in the form of exaggerated expert testimony, related to hair samples were used to secure a conviction. In addition, McDonald filed a motion to hold in abeyance the pendency of the motion for post-conviction

relief noting, in relevant part, that he had received information that his case was one of the cases the FBI and the Department of Justice were beginning to review where flawed evidence, in the form of exaggerated expert testimony relating to hair samples, was used to secure convictions.

The information dealing with the hair sample is crucial. Only hairs that were associated with McDonald were found on the sweatshirt, based on the testimony of FBI Agent Allen that there was a microscopic match with his known sample. This evidence was important in linking McDonald to the murder of Dr. Davidson. The September, 2014, information revealed to the defense shows that Agent Allen has now been discredited. This fact is newly discovered evidence. In addition, this information is at least tangentially tied to McDonald's claims raised in his second successive post-conviction motion, summarily denied by the circuit court. Indeed, McDonald's assertion that information had been withheld from the defense was borne out by the information provided by the FBI concerning the State Attorney request in 2001. The circuit court should have held the McDonald's second successive motion for post-conviction relief in abeyance and allow the defense to develop the evidence so as to permit a full evidentiary hearing on McDonald's claims. This would have permitted this Court to fully and adequately assess McDonald's claims, as amended. The undersigned concludes that at present the files and records in this case do conclusively refute McDonald's allegations (in

Claims I and II) concerning the DNA and hair evidence. However, the undersigned does believe that newly discovered evidence supports a claim that the hair evidence and FBI testimony concerning the hair evidence was false and exceeded the limits of science. To that degree, the circuit court should have granted McDonald's motion to hold his motion in abeyance, especially as McDonald had clearly and adequately alerted the circuit court that his case was one of the cases the FBI was still reviewing where flawed evidence, in the form of exaggerated expert testimony related to hair samples, was used to secure a conviction. Moreover, CCRC-Southern Region should have amended the motion's claims with the newly-discovered evidence as the newly discovered evidence was at least tangentially related to Claim II, which maintained that McDonald was denied due process due to violations of *Brady* and *Giglio* based on the knowing use of fabricated evidence related to the hair and fiber evidence. Rather than amending the motion, CCRC-Southern Region filed a notice of filing, which the circuit court found was insufficient for it to consider.

ARGUMENT

(I)

THE CIRCUIT COURT ERRED IN DENYING McDONALD'S MOTION TO HOLD HIS SECOND SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF IN ABEYANCE TO ALLOW FOR EVIDENTIARY DEVELOPMENT

The circuit court erred in denying McDonalds' motion to hold his second successive motion for post-conviction relief in abeyance to allow for evidentiary development. McDonald raised two claims in the motion which is the subject of the present appeal.

Claim I stated as follows:

CLAIM I

> DEFENDANT'S McDONALD WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING FLORIDA CONSTITUTION DUE TO THE STATE COMMITTING VIOLATIONS OF *BRADY v. MARYLAND*, 373 U.S. 83; AND *GIGLIO v. U.S.*, 405 U.S. 150; AND THE KNOWINGLY USE [*sic*] OF FABRICATED EVIDENCE, IN THE FORM OF AGENT ALLEN'S JUNE 22ND LAB REPORT AND AGENT VICK'S TESTIMONY TO OBTAIN McDONALD'S CONVICTION (PCR. 8).

Under this Claim, McDonald maintained that Agent Allen fabricated a June, 1994 lab report concerning the DNA testing of a sweatshirt, and that Agent Allen's testimony about a match of the victim's blood on the sweatshirt relied on a false report. McDonald also claimed he had recently discovered a second DNA report, dated June 13, 1994. (PCR. 2). In particular, McDonald claimed that his prior

claims on blood evidence and hair and fibers evidence were not the same as the present claims because the initial claims were based on claims of ineffective assistance of counsel. (PCR. 2). Rather, McDonald maintained that his present claims were based on denial of due process, *Brady/Giglio* violations, and newly discovered evidence. (PCR. 2). McDonald averred that the State of Florida willfully withheld relevant and material evidence throughout the pretrial, trial and post-conviction proceedings, noting that the State had failed to provide the FBI scientific discovery, police reports and newspaper clippings. (PCR. 6). As to Claim I, McDonald noted that the State never mentioned the existence of a third DNA report, dated June 13, 1994. (PCR. 12-13). McDonald concludes by stating that Agent Allen intentionally fabricated the June 22, 1994 lab report on the DNA testing. This error was compounded by Agent Vick's testimony, which relied on the June 22, 1994 report. (PCR. 16). The CCRC-Middle Region never adopted McDonald's *pro se* claim, finding no persuasive evidence in the records or files of the case to support his allegations. The circuit court summarily denied this claim.

Claim II stated as follows:

CLAIM II

> DEFENDANT McDONALD WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING FLORIDA CONSTITUTION DUE TO THE STATE COMMITTING VIOLATIONS OF *BRADY v. MARYLAND* AND *GIGLIO v. UNITED STATES,* AND THE KNOWINGLY USED [*sic*] OF

FABRICATED EVIDENCE, IN THE FORM OF THE FALSE STATEMENTS IN THE AFFIDAVITS ABOUT HAIR AND FIBERS LAB TEST RESULTS, AND AGENT ALLEN JUNE 9TH LAB REPORT AND TESTIMONY TO OBTAIN McDONALD'S CONVICTION (PCR. 16).

Under this claim, McDonald maintained that the March, 1994 hair and fibers FBI report was never provided in discovery. In particular, McDonald averred that the June 9, 1994, FBI report relied on by the prosecution at trial was false. In particular, McDonald claimed that his prior claims on blood evidence and hair and fibers evidence were not the same as the present claims because the initial claims were based on claims of ineffective assistance of counsel. (PCR. 2). Rather, McDonald maintained that his present claims were based on denial of due process, *Brady/Giglio* violations, and newly discovered evidence. (PCR. 2). McDonald averred that the State of Florida willfully withheld relevant and material evidence throughout the pretrial, trial and post-conviction proceedings, noting that the State had failed to provide the FBI scientific discovery, police reports and newspaper clippings. (PCR. 6). As to Claim II, McDonald noted that the State and the FBI never released a copy of the FBI's March, 1994 hair and fibers lab report to the defense. Rather, the defense was provided a June 9, 1994, FBI report concerning hair and fibers comparison. McDonald claimed that the June 9, 1994 document was false because it was manufactured three months after the state fabricated the hair and fibers lab result in March, 1994. (PCR. 17). McDonald concludes by stating that Agent Allen was aware of the March, 1994 false hair and fibers

analysis, which was prior to the preparation and submission of the June 9th lab report, and that Agent Allen manufactured his June 9th report. (PCR. 22). The CCRC-Middle Region never adopted McDonald's *pro se* claim, finding no persuasive evidence in the records or files of the case to support his allegations. The circuit court summarily denied this claim.[15]

In McDonald's motion, McDonald makes following assertion: "The Defendant's case is one of the cases the FBI is still reviewing where flawed evidence, in the form of exaggerated expert testimony, related to hair samples were [*sic*] used to secure a conviction." (PCR. 23, Exhibit W-PCR. 147-150). McDonald maintained that "this constituted newly discovered evidence unknown to Defendant and the court at the time of the filing of his initial and *pro se* successive post-conviction relief motion." (PCR. 23). McDonald repeats this assertion later in the motion. (PCR. 25, Exhibit Y-PCR. 155-156). In addition, McDonald filed a motion to hold in abeyance the pendency of the motion for post-conviction relief noting, in relevant part, that he had received information that his case was one of the cases the FBI and the Department of Justice were beginning to review where flawed evidence, in the form of exaggerated expert testimony relating to hair samples was used to secure convictions. (PCR. 176, ¶2). *See also* Hearing 2/3/14, p. 17)(Supp. PCR. 20).

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[15] It should be noted that at the time that McDonald filed his December, 2013, motion for post-conviction relief he was not represented by counsel.

Following the denial of both of his claims, McDonald received new documents from the FBI which pertained to his *pro se* claims. McDonald moved to supplement the record with these documents. (Supp. PCR. 162-167). The circuit court initially denied the request for supplementation. (Supp. PCR. 173-174). Subsequently, these documents were allowed as part of the present record in 2016 as part of notice of filing. (2nd Supp. PCR. 3-14; 2nd Supp. PCR. 33). While the circuit court summarily denied McDonald's motion on grounds that "[b]ecause the records upon which McDonald's claims are based are public records continually available throughout all postconviction relief proceedings they do not qualify as newly discovered evidence" (PCR. 202), this finding must be viewed in light of future developments when McDonald did receive newly discovered evidence, as evinced by McDonald's fourth successive motion for post-conviction relief. Most importantly, the parties and the circuit court *were aware* of McDonald's claims that his case was one of the cases the FBI was still reviewing where flawed evidence, in the form of exaggerated expert testimony related to hair samples, was used to secure a conviction. Exhibits were attached in support of this assertion. (PCR. 23, Exhibit W-PCR. 147-150; PCR. 23; PCR. 25, Exhibit Y-PCR. 155-156). A motion to hold the post-conviction motion in abeyance reiterated this assertion. (PCR. 176, ¶2).

It is undisputed that the FBI production of documents to McDonald included, for the first time, a copy of a November 21, 2001, letter from the Pinellas County State Attorney to the FBI requesting discovery of copies of paperwork associated with the FBI's DNA report of June 22, 1994. In this letter, the State Attorney requested that the FBI provide an affidavit explaining the term "processing not complete" for the category "Match" on a June 13, 1994 FBI DNA case report. (Supp. PCR. 103; Supp. PCR. 109).[16]

On April 6, 2015, CCRC-Southern Region filed a motion to relinquish jurisdiction with this Court in the present appeal. This motion was premised on information obtained by CCRC-Southern Region. In September, 2014, the Department of Justice provided CCRC-Southern Region a letter dealing with the results of a review by the United States Department of Justice and the FBI of the laboratory reports and testimony of the FBI Laboratory examiners in cases involving microscopic hair comparison analysis. The letter enclosed a letter dated July 28, 2014, which revealed that "a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used" in McDonald's case. Consequently, new evidence was uncovered that the FBI examiner's testimony "exceeded the limits of science" and were, therefore,

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[16] On March 4, 2016, the State Attorney represented that no such affidavit was received from the FBI. CCRC-Southern Region accepted this representation. (2nd Supp. PCR. 18-20).

"invalid." (*See* Motion to Relinquish Jurisdiction, 4/6/15, Attachment 2). CCRC-Southern Region requested an opportunity to allow McDonald to file an amendment to Claim I and Claim II based, in part, on the FBI information. *See* Motion to Relinquish Jurisdiction, 4/6/15, pp. 7-8). On March 29, 2016, this Court granted the motion to relinquish jurisdiction to the circuit court for 45 days for the purpose of amending McDonald's second successive motion for post-conviction relief.

The information dealing with the hair sample is crucial. The hair evidence in McDonald's case was integral to the State's pretrial and trial posture. Only hairs that were associated with McDonald were found on the sweatshirt, based on the testimony of FBI Agent Allen that there was a microscopic match with his known sample. This evidence was important in linking McDonald to the murder of Dr. Davidson. The September, 2014, information revealed to the defense shows that Agent Allen has now been discredited. This fact is newly discovered evidence. In addition, this information is at least tangentially tied to McDonald's claims raised in his second successive post-conviction motion, summarily denied by the circuit court. Indeed, McDonald's assertion that information had been withheld from the defense was borne out by the information provided by the FBI concerning the State Attorney request in 2001. The circuit court should have held the McDonald's second successive motion for post-conviction relief in abeyance and allow the

defense to develop the evidence so as to permit a full evidentiary hearing on McDonald's claims. This would have permitted this Court to fully and adequately assess McDonald's claims, as amended. Notably, at the hearing of February 3, 2014, the State announced that if in the future he [McDonald] discovers something that is actually newly discovered evidence, then maybe he could raise it at that time and the Court could consider it, "but that's not where we're at today." (Supp. PCR. 28). Certainly, the new information obtained in September, 2014, fits this scenario. It is apparent that new information and evidence was forthcoming which could readily relate to McDonald's filed claims.

The undersigned concludes that at present the files and records in this case do conclusively refute McDonald's allegations (in Claims I and II) concerning the DNA and hair evidence. However, the undersigned does believe that newly discovered evidence supports a claim that the hair evidence and FBI testimony concerning the hair evidence was false and exceeded the limits of science. To that degree, the circuit court should have granted McDonald's motion to hold his motion in abeyance, especially as McDonald had clearly and adequately alerted the circuit court that his case was one of the cases the FBI was still reviewing where flawed evidence, in the form of exaggerated expert testimony related to hair samples, was used to secure a conviction. (PCR. 23, Exhibit W-PCR. 147-150;

PCR. 23; PCR. 25, Exhibit Y-PCR. 155-156; PCR. 176, ¶2). *See also* Hearing 2/3/14, p. 17)(Supp. PCR. 20).

Post-conviction litigation is governed by principles of due process. *See Easter v. Endell*, 37 F.3d 1343, 1345 (8th Cir. 1994)(post-conviction proceedings must confirm to due process requirements)(citing *Evitts v. Lucey*, 469 U.S. 387, 400-401, 105 S.Ct. 830, 838-839, 83 L.Ed.2d 821 (1985), and *Branch v. Turner*, 37 F.3d 371, 374-75 (8th Cir. 1994)). *See also Holland v. State*, 503 So.2d 1250, 1253 (Fla. 1987)(once a determination has been made that a defendant is entitled to an evidentiary hearing on a motion for post-conviction relief, denial of that right would constitute denial of all due process). This Court has encouraged the circuit courts to allow amendments of Rule 3.850 motions. *See Woods v. State*, 531 So.2d 79, 83 (Fla. 1988).

When this Court affirmed the circuit court's denial of McDonald's *pro se* claims regarding hair analysis in his case by the FBI in his initial post-conviction motion, it was noted that FBI Agent Chris Allen had "conducted only a microscopic and visual comparison of the hair evidence. Visual and microscopic hair composition is not based on new or novel scientific principles and, therefore, does not require a *Frye* analysis." *McDonald v. State*, 952 So.2d 484, 498 (Fla. 2006). Based on the newly discovered evidence, which would have come to light had the court granted McDonald's motion to hold in abeyance the pendency of the

motion for post-conviction relief, it would have been readily ascertained that Agent Allen's conclusions were unreliable and exceeded the bounds of science. A review of the trial transcripts shows that the State relied on the hair evidence analysis conducted by the FBI to support McDonald's conviction: (Opening Statement, Record on Appeal, Florida Supreme Court, Case No. 87,059 (Tr. 350-352); Agent Allen's testimony, Record on Appeal, Florida Supreme Court, Case No. 87,059 (Tr. 1256-1257); Closing Argument, Record on Appeal, Florida Supreme Court, Case No. 87,059 (Tr. 2144-46)).[17]

Clearly, the newly discovered evidence, had it been presented while the motion for post-conviction relief was held in abeyance as requested, would have been of such a nature as to weaken the case against the defendant and give a reasonable doubt as to his culpability. *See Jones v. State*, 678 So.2d 309, 315 (Fla. 1996)(newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial, a prong satisfied where the evidence weakens the case so as to give rise to a reasonable doubt as to defendant's culpability). *See also Swafford v. State*, 125 So.3d 760, 767 (Fla. 2013); *Hildwin v. State*, 141 So.3d

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[17] In *Gordon v. State*, 704 So.2d 107, 109 (Fla. 1997), this Court affirmed the co-defendant's conviction and sentence. In the course of discussing the sufficiency of the evidence in the case, this Court mentioned the physical evidence in the case, and noted: "The sweatshirt contained fibers from Dr. Davidson's carpet and Dennino's cashmere belt, *as well as hairs that matched McDonald's*." (emphasis supplied).

1178, 1188 (Fla. 2014). Agent Allen's testimony would have been excluded had the trial court been informed that his conclusions were unreliable and unscientific.

A fair trial is one in which evidence is subject to adversarial testing before an impartial tribunal. *See Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). A prosecutor has an obligation to disclose to the defense evidence that is both favorable to the accused and material to either guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 3379, 87 L.Ed.2d 481 (1985). A defense attorney is charged with bringing such skill and knowledge as is necessary to accord defendants the ample opportunity to meet the case of the prosecution. Counsel's role plays a crucial role in this adversarial system. *Strickland, supra* 466 U.S. at 685, 104 S.Ct. at 2063. In cases involving the State's knowing use of false evidence, the defendant's conviction must be set aside if the falsity could, in any reasonable likelihood, have affected the jury's verdict. *Bagley, supra*, 473 U.S. at 678-679 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

Where newly discovered evidence is uncovered, that evidence must be reviewed along with admitted *Brady* violations in assessing the reliability of the outcome. *See State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996). Consequently, the newly discovered evidence should be considered with McDonald's other allegations regarding the lack of adversarial testing. *See Swafford v. State*, 679

So.2d 736, 739 (Fla. 1996)(circuit court to consider newly discovered evidence along with evidence introduced in first 3.850 motion and trial evidence); *Spann v. State*, 91 So.3d 812, 815-816 (Fla. 2012)(circuit court should evaluate newly discovered evidence and should be evaluate the weight of both newly discovered and the evidence which was introduced at trial). *See also Jones v. State*, 709 So.2d 512, 522 (Fla. 1998)(newly discovered evidence should be considered along with newly discovered evidence at prior hearing and trial evidence)(citing *Swafford, supra*, 679 So.2d at 739, and *Kyles v. Whitley*, 514 U.S. 419. 441, 115 S.Ct. 1555, 1569, 131 L.Ed.2d 490 (1995)).

The new evidence recognizing that Agent Allen's analysis was unreliable and unscientific establishes that the State presented misleading and inaccurate testimony at trial. Clearly, Agent Allen misled and misinformed defense counsel as to exculpatory evidence. The newly discovered evidence also establishes a *Giglio* violation pursuant to *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). False testimony is imputed to the prosecution. The State has an obligation and duty to correct what he or she knows to be false and elicit the truth. *Napue v. Illinois*, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1979). Here, Agent Allen told the jury that he could match the hairs found on the sweatshirt to McDonald's hair samples. Agent Allen knew that his conclusion was

misleading because he should have been aware of the weakness of the science behind his testimony. His false testimony was imputed to the State.[18]

Under the foregoing circumstances, it is apparent that the circuit court should have granted McDonald's motion to hold his motion for post-conviction in abeyance in order to allow for evidentiary development.

Moreover, when this Court granted a motion for temporary relinquishment of jurisdiction to the circuit court for the purpose of amending McDonald's second successive motion for post-conviction relief, CCRC-Southern Region should have amended the motion's claims with the newly-discovered evidence as the newly discovered evidence was at least tangentially related to Claim II, which maintained that McDonald was denied due process due to violations of *Brady* and *Giglio* based on the knowing use of fabricated evidence related to the hair and fiber evidence. Rather than amending the motion, CCRC-Southern Region filed a notice of filing, attaching thereto the November 10, 2015 letter sent by Special Counsel Wong with the attachments from the Department of Justice's review of laboratory results and testimony by the FBI examiners, the transcripts of March 4, 2016, and a demand for additional public records. (2nd Supp. PCR. 3-30). The circuit court, in its order pointed out:

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[18] *See, e.g., Mungin v. State*, 79 So.3d 726, 738 (Fla. 2011)(*Giglio* is satisfied where the lead detective testified falsely at trial because knowledge of the detective is imputed to the prosecutor who tried the case)(quoting *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003)).

> "Significantly, the parties have filed no amendments to McDonald's *pro se* `Second Successive Motion,' which the court can consider. Furthermore, consideration of Special Agent Wong's July 28, 2014 letter, presumably the subject of an amendment, would likely require consideration of Special Agent Wong's November 10, 2015 supplement. No pleadings or argument regarding the November 10, 2015 letter have been presented to this court other than CCRC-South's April 15, 2016 `Notice' which merely attaches a copy of the November 10, 2015 letter to co-defendant Robert Gordon." (2nd Supp. PCR. 33).

Clearly, the circuit court would have considered any amendments presented by adequate pleading or argument. Consequently, the opportunity to fully develop the record with the newly discovered evidence was not taken. Should this Court affirm the circuit court's order in the present case, this Court should direct the circuit court to consider McDonald's fourth amended post-conviction motion currently being held in abeyance pending this appeal (*See, e.g., Tompkins v. State*, 894 So.2d 857, 859-860 (Fla. 2005)), and allow for such other amendments as are supported by new developments in the law regarding capital punishment.

CONCLUSION

The argument in support of relief herein present federal and state constitutional issues are based on Appellant Meryl S. McDonald's protected federal rights under the 5th, 6th, 8th, and 14th Amendments of the United States Constitution and applicable Florida law. This Court is provided an opportunity to review and correct the claimed violations of Mr. McDonald's federal and state constitutional rights.

Respectfully submitted,

J. RAFAEL RODRÍGUEZ
Specially Appointed Public
Defender for Meryl McDonald
LAW OFFICES OF
J. RAFAEL RODRIGUEZ
6367 Bird Road
Miami, FL 33155
(305) 667-4445
(305) 667-4118 (FAX)
jrafrod@bellsouth.net

By: s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ
FLA. BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this on this 19th day of October, 2016, and opposing counsel will be served on this date.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his initial brief is 14 Times New Roman.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ