

APPENDIX B

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR PINELLAS COUNTY
CRIMINAL DIVISION

STATE OF FLORIDA

REF: CRC94-02958CFANO-B

v.

UCN: 521994CF002958XXXXNO

MERYL MCDONALD,
SPN: 01527225, Defendant, E.

**ORDER DENYING DEFENDANT'S "MOTION TO VACATE JUDGMENT OF
CONVICTION WITH SPECIAL REQUEST FOR LEAVE TO AMEND;"**
**ORDER DISMISSING DEFENDANT'S "MOTION FOR COPY OF AGENT CHRIS
ALLEN FBI 1994 HAIR ANALYSIS REPORT" AND "MOTION TO ALLOW
DISCOVERY IN THE FORM OF DEPOSITIONS OF FBI AGENTS MICHAEL VICK,
CHRIS ALLEN AND AUDREY G. LYNCH"**

THIS CAUSE came before the court upon the Defendant's *pro se* "Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend," filed March 12, 2012, pursuant to Florida Rule of Criminal Procedure 3.851. On April 2, 2012, the State filed its answer to the Defendant's motion. On April 30, 2012, this court held a case management conference on this matter. Subsequently, on May 14, 2012, the Defendant filed a "Motion for Copy of Agent Chris Allen FBI 1994 Hair Analysis Report." On May 21, 2012, the Defendant filed a "Motion to Allow Discovery in the Form of Depositions of FBI Agents Michael Vick, Chris Allen, and Audrey G. Lynch." After reviewing the pleadings, the record, argument of the parties, and applicable law, this court finds as follows:

PROCEDURAL HISTORY

The joint trial of the Defendant, Meryl McDonald (hereinafter "McDonald"), and his co-defendant, Robert Gordon, began June 6, 1995, before the Honorable Susan Schaeffer, Circuit Judge. McDonald was convicted of one count of first degree murder in the above-styled case on June 15, 1995. On June 16, 1995, the jury recommended the death penalty by a 9 – 3 vote. The sentencing court followed the jury's recommendation and imposed the death penalty on November 16, 1995. The Florida Supreme Court upheld McDonald's conviction and sentence on direct appeal. McDonald v. State, 743 So. 2d 501 (Fla. 1999).

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STATE ATTORNEY

McDonald timely filed his first motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on December 15, 2000. Judge Schaeffer granted McDonald's request to proceed pro se on his motion, with Capital Collateral Regional Counsel remaining as standby counsel. The court held an evidentiary hearing on November 29 and 30, 2001. On February 10, 2003, Judge Schaeffer entered an order denying McDonald's motion for postconviction relief. [See Exhibit A: February 10, 2003, Order.] The Florida Supreme Court affirmed the order denying McDonald's motion on November 2, 2006. McDonald v. State, 952 So. 2d 484 (Fla. 2006).

In 2007, McDonald filed a pro se federal habeas corpus petition in the United States District Court, Middle District of Florida, pursuant to 28 U.S.C. § 2254. McDonald's petition raised eighteen grounds for relief. On August 12, 2008, the District Court dismissed eight of McDonald's claims for procedural reasons. The remaining ten grounds – which challenged blood, hair, fiber, and shoeprint evidence – were denied in an order entered on May 6, 2011, in case number 8:07-CV-564-T-26EAJ. [See Exhibit B: May 6, 2011, Order.]

On March 12, 2012, McDonald filed the instant motion. Thereafter, the State of Florida (hereinafter "State") filed its answer on April 2, 2012. Accordingly, pursuant to rule 3.851(f)(5)(b), the court conducted a case management conference on April 30, 2012. McDonald appeared telephonically at the hearing, as he indicated in his written waiver of appearance. Present before the court was Attorney Robert Strain from the Office of Capital Collateral Regional Counsel appearing as standby counsel for McDonald and Assistant Attorney General Katherine Blanco and Assistant State Attorney Damien Kraebel on behalf of the State. This order follows.

ANALYSIS

In his current motion, McDonald alleges that the State committed violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972). Specifically, he alleges the State failed to provide FBI reports concerning the blood, hair, and shoe print evidence that was used against him in the State's prosecution during trial. Additionally, he contends that the State purposely elicited false testimony from Agent Vick, Agent Allen, and Detective Celona regarding the above evidence during trial. However, as discussed below, the court finds McDonald's motion to be procedurally barred and, therefore, will not address the merits of his allegations.

In its response, the State contends that this motion is untimely and procedurally barred because McDonald's arguments do not fall within any of the categories provided in rule 3.851(d)(2) as proper subjects for a successive motion. First, rule 3.851(d)(1), dealing with initial motions for postconviction relief, provides that "[a]ny motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final." Rule 3.851(d)(2), governing successive motions, provides:

No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

- (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
- (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
- (C) postconviction counsel, through neglect, failed to file the motion.

Specifically, the State alleges that McDonald has not brought a proper claim under rule 3.851(d)(2)(A). This court has reviewed rule 3.851 and McDonald's pleading. McDonald does not contend that there is a fundamental constitutional right that would apply retroactively to him, under rule 3.851(d)(2)(B). Nor does he argue, as provided in rule 3.851(d)(2)(C), that counsel failed, through neglect, to file a motion. Accordingly, McDonald's motion cannot be properly considered under rules 3.851(d)(2)(B) and (C).

As McDonald alleges Brady and Giglio violations, his motion can best be considered pursuant to rule 3.851(d)(2)(A). To be considered newly discovered, evidence must have been unknown to a defendant or his attorney at the time of the original proceedings, and must not have been able to be ascertained through due diligence. Fla. R. Crim. P. 3.851(d)(2)(A); Jones v. State, 591 So. 2d 911 (Fla. 1998). Furthermore, newly discovered evidence "must be of such a nature that it would probably produce an acquittal on retrial." Id. at 915. Allegations of newly discovered evidence must be brought within one year of the date on which the evidence could have been discovered through due diligence. Byrd v. State, 14 So. 3d 921 (Fla. 2009).

As previously noted, McDonald contends that the State committed Brady violations "by failing to disclose material FBI scientific files related to prior to trial." However, in his initial motion for postconviction relief, McDonald raised multiple claims addressing the FBI reports concerning the blood, hair, and shoeprint evidence. This court found that McDonald was not

entitled to relief on these grounds. [See Exhibit A: February 10, 2003, Order, pp. 10-13, 17-30, 33-34]. Likewise, the District Court also determined that McDonald's contentions did not entitle him to relief. [See Exhibit B: May 6, 2011, Order, pp. 9-12, 42, 45-56]. McDonald neither explains how the FBI reports constitute newly discovered evidence nor does he allege that the existence of the FBI reports was unknown to him or trial counsel at the time of trial or his initial postconviction motion. To the contrary, the record makes clear that McDonald was fully aware of the FBI reports as he addressed them in both his initial motion for postconviction relief and his federal habeas corpus petition. [See Exhibit A: February 10, 2003, Order; Exhibit B: May 6, 2011, Order].

McDonald additionally argues that the State committed a Giglio violation by presenting false testimony during trial. McDonald argues that Agent Vick, Agent Allen, and Detective Celona falsely testified about the testing performed on the evidence used in the State's prosecution; namely the hair samples, shoeprints, and blood samples. However, this court addressed these issues in its order denying McDonald's initial motion for postconviction relief and found them to be without merit. [See Exhibit A: February 10, 2003, Order, pp. 12-13, 19-20]. McDonald also presented these allegations to the District Court in his federal habeas corpus petition, which the District Court denied. [See Exhibit B: May 6, 2011, Order, pp. 9-12, 42, 45-56]. McDonald has been aware of Agent Vick, Agent Allen, and Detective Celona's testimony since trial and he provides no valid argument as to how their testimony could now qualify as newly discovered evidence.

Based upon the foregoing, the court finds that the allegations McDonald puts forth in his motion do not constitute newly discovered evidence as required by rule 3.851(d)(2)(A). Consequently, McDonald has failed to bring timely, cognizable claims in this motion. Therefore, McDonald's motion for postconviction relief is denied.

Additionally, as the State contends, this court notes that McDonald's motion has not fulfilled the requirements of rules 3.851(e)(2)(C) and 3.851(f)(1). However, despite these deficiencies, the court considered McDonald's motion and such deficiencies had no bearing on this court's findings.

As a corollary to his motion for postconviction relief, McDonald also filed a "Motion for Copy of Agent Chris Allen FBI 1994 Hair Analysis Report" and "Motion to Allow Discovery in the Form of Depositions of FBI Agents Michael Vick, Chris Allen and Audrey G. Lynch."

However, as this court has denied McDonald's motion for postconviction relief, these requests are dismissed as moot.

Accordingly, it is

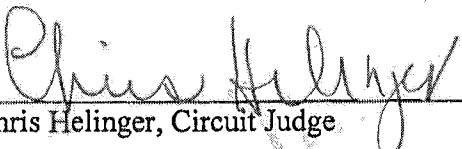
ORDERED AND ADJUDGED that McDonald's "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," is hereby **DENIED**.

IT IS FURTHER ORDERED AND ADJUDGED that McDonald's "Motion for Copy of Agent Chris Allen FBI 1994 Hair Analysis Report" and "Motion to Allow Discovery in the Form of Depositions of FBI Agents Michael Vick, Chris Allen and Audrey G. Lynch" are hereby **DISMISSED**.

IT IS FURTHER ORDERED that in accordance with Florida Rule of Criminal Procedure 3.851(f)(5)(D), the Clerk of the Circuit Court shall promptly serve a copy this order, with a certificate of service, to the parties listed below.

THE DEFENDANT IS HEREBY NOTIFIED that he has 30 days from the rendition date of this order to file an appeal.

12 **DONE AND ORDERED** in Chambers at Clearwater, Pinellas County, Florida, this day of June, 2012. A true and correct copy of the foregoing has been furnished to the parties listed below.


Chris Helinger, Circuit Judge

cc: The Honorable Bernie McCabe, State Attorney, & Damien Kraebel, Assistant State Attorney, 14250 49th Street N., Clearwater, FL 33762

The Honorable Pamela Bondi, Attorney General, & Katherine V. Blanco, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607

Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Dr., #210, Tampa, FL 33619

Meryl McDonald, DC # 180399, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4000