IN THE SUPREME COURT OF FLORIDA

NO. SC69825

ARTHUR DENNIS RUTHERFORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DEATH WARRANT SIGNED, EXECUTION SET FOR JANUARY 31, 2006 AT 6:00 P.M.

INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of an order summarily denying Mr. Rutherford's successive Rule 3.850 motion. The following symbols will be used to designate references to the record in this appeal:

"R." – record on direct appeal to this Court;

"Supp-R." - supplemental record on direct appeal to this Court;

"PC-R." - record on appeal from the denial of postconviction relief following a limited evidentiary hearing;

"App." -appendix to Mr. Rutherford's 3.850 motion in the present proceedings.

All other references are self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

Mr. Rutherford is presently under a death warrant with an execution scheduled for January 31, 2006, at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Rutherford's pending execution date. Mr. Rutherford, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE

The Circuit Court of the First Judicial Circuit, Santa Rosa County, entered the judgments of conviction and sentence under consideration.

Mr. Rutherford was indicted by a grand jury for first degree murder and robbery on September 1, 1985. Mr. Rutherford entered a plea of not guilty. On January 28, 1986, Mr. Rutherford's trial commenced before the Honorable George E. Lowrey. On January 31, 1986, the jury found Mr. Rutherford guilty as charged, and on February 1, 1986, the jury recommended the death penalty.

Pursuant to a defense motion for mistrial, the circuit court found that the State had committed a material, substantial, knowing and willful discovery violation at trial and ordered a re-trial on all issues. Venue was transferred for the re-trial to Walton County, Florida, before the Honorable Clyde B. Wells.

On September 29, 1986, Mr. Rutherford's re-trial commenced. He was convicted on October 2, 1986. The penalty phase was conducted on October 2, 1986, and the jury recommended a death sentence by a vote of seven (7) to five (5). Mr. Rutherford was sentenced on December 9, 1986, and the judge's sentencing order was entered on December 17, 1986.

Mr. Rutherford appealed his convictions and sentences, which were affirmed. Rutherford v. State, 545 So. 2d 853 (Fla. 1989).

On November 3, 1989, certiorari was denied by the United States Supreme Court. Rutherford v. Florida, 110 S.Ct. 353 (1989).

Mr. Rutherford timely filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 on August 1, 1991. An amended motion was filed on October 16, 1992. The circuit court entered an order denying relief on some claims and ordering an evidentiary hearing on Mr. Rutherford's penalty phase ineffective assistance of counsel claim.

At the evidentiary hearing, Mr. Rutherford presented testimony and exhibits regarding trial counsel's preparation for the penalty phase and regarding mental health and other mitigation available at the time of trial. Following the evidentiary hearing, the circuit court denied relief on all claims. This Court affirmed the denial of postconviction relief. Rutherford v. State, 727 So. 2d 216 (Fla. 1999).

Mr. Rutherford filed a petition for a writ of state habeas corpus on December 21, 1999. This Court denied Mr. Rutherford's petition on October 12, 2000. Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000).

On March 30, 2001, Mr. Rutherford filed a Petition for Writ of Habeas Corpus in federal court. On August 29, 2002, the district court denied relief on all claims. The Eleventh Circuit affirmed. Rutherford v. Crosby, 385 F. 3d 1300 (11th cir. 2004). On April 18, 2005, certiorari was denied by the United States

Supreme Court. Rutherford v. Crosby, 125 S.Ct. 1847 (2005).

In September of 2002, Mr. Rutherford filed a successive postconviction motion in the circuit court based on Ring v. Arizona, 122 S.Ct. 2428 (2002). Following the denial of relief by the circuit court, this Court affirmed on May 25, 2004. Rutherford v. State, Case No. SC03-243 (Fla. 2004), rehearing denied July 23, 2004.

On March 4, 2005, Mr. Rutherford filed a petition for a writ of state habeas corpus based on Crawford v. Washington, 124 S.Ct. 1354 (2004). This Court denied Mr. Rutherford's petition on July 8, 2005. Rutherford v. State, Case No. SC05-376 (Fla. 2005).

On November 28, 2005, Mr. Rutherford filed a petition for a writ of state habeas corpus based on the recent United States Supreme Court decision, Deck v. Missouri, 125 S. Ct. 2007 (2005). This Court denied Mr. Rutherford's petition on January 5, 2006.

On November 29, 2005, Governor Jeb Bush signed a death warrant setting an execution date of January 31, 2006 at 6:00 p.m. Mr. Rutherford filed a successive 3.850 motion on December 21, 2005. He subsequently filed an amendment, with the lower court's permission, on December 24, 2005. Following a Huff hearing on December 28, 2005, the lower court, on January 5, 2006, denied Mr. Rutherford an evidentiary hearing on his claims

for relief.[1] Per this Court's order designating the briefing schedule, Mr. Rutherford herein timely files his Initial Brief.

STATEMENT OF THE FACTS

On August 22, 1985, at approximately 1:15 - 1:30 p.m., Mary Francis Heaton entered the Santa Rosa State Bank with a check made out to her on the account of Stella Salamon (R. 437). Jamie Peleggi, the bank teller, testified that she assisted Heaton that day. When Heaton entered the bank, Peleggi could not process the check because the signature from Ms. Salamon was missing (R. 437). Heaton left the bank (R. 439).

Heaton returned to the bank with a signed check for $2000.00 (R. 440). The bank record indicated that the check was processed at 2:02 p.m. (R. 440). Peleggi gave Heaton $2000.00 (R. 441). As far as Peleggi could tell, Heaton "was by herself" (R. 441).

Also, on August 22, 1985, Heaton purchased an automobile from Harvey Smith (R. 443). Before arriving at the auto dealership, Heaton called and told Smith "that she had gotten her income tax check" (R. 444). She later arrived at the dealership and paid $350.00 in cash for an automobile (R. 444).

By the time of Mr. Rutherford's capital trial, Heaton had been committed to a mental institution (R. 411). However, Heaton testified on behalf of the State at Mr. Rutherford's trial.

[1]Mr. Rutherford subsequently filed a motion for rehearing, which the lower court denied on January 6, 2006.

During cross examination, she explained that she suffered from psychiatric problems and had a nervous breakdown, stroke and brain damage (R. 412). Due to her mental problems, Heaton admitted that she had difficulty "distinguishing between what is fantasy and what is fact." (R. 412). She also admitted that she was having this trouble on August 22, 1985. Heaton testified that she could "remember some things" from that time period, but "some things [she] couldn't" (R. 412).

According to Heaton's trial testimony, Mr. Rutherford arrived at her home between 11:30 a.m and 12:00 p.m. on August 22, 1985, looking for her father in order to sell him some glass doors (R. 400). While there, he asked if she knew how to fill out a check (R. 400). She told him that she did not (R. 401). Mr. Rutherford requested that she ask her niece, Elizabeth Ward, to come out to his van and Heaton complied (R. 401). Ward soon returned to the house and told Heaton that Mr. Rutherford requested to see Heaton (R. 402). Heaton testified that she then accompanied Mr. Rutherford to the Santa Rosa State Bank where he asked her to cash a check (R. 403). When Heaton was unable to cash the check, she and Mr. Rutherford left the bank and he drove into the woods (R. 405). Mr. Rutherford exited the van with a check stub, blue billfold, pen and credit card wrapped in a blue pull-over shirt and "throwed" it away (R. 406). They then returned to the bank where Mr. Rutherford produced a signed check

(R. 408). Heaton then returned to the bank and cashed the check using her driver's license (R. 408). Mr. Rutherford paid Heaton $500.00 and dropped her back at her home at 2:00 p.m. (R. 410).

Heaton's testimony conflicted on key points with her own previous statements to law enforcement and her previous testimony during pretrial depositions. In fact when confronted with her conflicting statements to the police, Heaton said that she had lied to law enforcement when asked about who signed the check (R. 420).

Her trial testimony also conflicted with the testimony of Ward and other witnesses. For example, the time frames she provided conflicted with testimony heard from Ward and Peleggi. The circumstances of filling out the check conflicted with Ward's account.

Heaton's trial testimony also conflicted with Mr. Rutherford's testimony. During his testimony, Mr. Rutherford explained that he did not commit the crimes with which he was charged. He provided detailed testimony regarding his whereabouts on August 22, 1985 (R. 637-40).[2]

After Mr. Rutherford's death warrant was signed on November

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[2]Mr. Rutherford maintained his innocence to law enforcement, the assistant state attorney who prosecuted him, his trial defense team and mental health experts. Indeed, Mr. Rutherford rejected a plea offer that would have ensured that he did not receive the death penalty because he refused to plead to crimes that he did not commit.

29, 2005, postconviction counsel learned of an individual, named Alan Gilkerson, and sought to speak with him about the whereabouts of Elizabeth Ward.[3] During the interview, Mr. Gilkerson revealed that he knew Elizabeth Ward, A.K.A. Elizabeth Watson, as he and Watson had a son together. (Appendix I, filed with Mr. Rutherford's successive Rule 3.850 motion, December 21, 2005)(hereinafter App. I). Indeed, Gilkerson and Watson had previously resided together. (App. I). Gilkerson also knew Watson's aunt, Mary Heaton, because she also resided with them. (App. I). And, surprisingly, Gilkerson was also familiar with Mr. Rutherford. Gilkerson recalled that when he shared a residence with Heaton and Ward, Heaton had told him that she had "once killed an old lady with a hammer and made it look like A.D. Rutherford committed the crime." (App. I). In an affidavit, Gilkerson stated:

> 5. At some point, I was made aware of Elizabeth and Mary Frances' involvement in a homicide and subsequent trial of A.D. Rutherford. Specifically, when I asked Elizabeth why her aunt was so mentally unbalanced I was told that Mary had not been the same since the time surrounding the murder and trial.
>
> 6. In the early 1990s, the three of us lived together in a trailer. One evening, Mary and I were alone at the trailer and I asked why she seemed so "crazy." I had witnessed her talking to herself many times in the past. She told me that she once killed an old lady with a hammer and made it look like A.D. Rutherford committed the crime. She told me that she

[3]The State stipulated in circuit court that Mr. Rutherford could not have previously located Gilkerson and that due diligence had been exercised.

> got him good and that A.D. took the rap. Mary Heaton told me her motive for murdering the old lady was to get her money.

(App. I).

Upon learning of Heaton's statement to Gilkerson, postconviction counsel sought to locate and confront Heaton with her confession.[4] Heaton was located and a meeting was arranged between Heaton and Michael Glantz, a representative from Mr. Rutherford's defense team. When Glantz confronted Heaton with her confession, she confirmed to Glantz that she knew Alan Gilkerson and that she had previously resided with him. However, she denied having told him that she killed the victim. (Appendix K, attached to Mr. Rutherford's Notice of Supplemental Proof and Request for Leave to Amend Motion to Vacate Conviction and Sentences, December 23, 2005)(hereinafter App. K). Despite denying that she had told Gilkerson that she had committed the murder, she did substantially change her story. Heaton told Glantz that she had known the victim; in fact, she knew the victim better than Mr. Rutherford. (App. K). Heaton told Glantz that she introduced Mr. Rutherford to the victim. Contrary to her trial testimony, Heaton told Glantz that she was present when the victim was killed, but that she observed Mr. Rutherford

[4]It is a common law enforcement technique to confront a witness with information obtained from another source. When the witness is so confronted and changes his or her story that is generally regarded not just that the witness has prevaricated, but also is hiding greater criminal responsibility.

strike the fatal blow. (App. K). As to the victim, Heaton stated very emphatically that she "saw her die". (App. K). Even though Heaton did not testify at trial that she observed the victim die, Heaton advised Glantz on December 22, 2005, that she had previously provided this information and had told the police that she actually witnessed the murder. (App. K).[5]

Finally, when Glantz confronted Heaton about her involvement in the victim's murder she stated, more than once: "Now listen, that lady, she's dead. I saw her die and there ain't nothing you or nobody can do for her. So I try to forget it." (See App. K).

Mr. Rutherford pleaded a newly discovered evidence of innocence claim and a Brady claim before the lower court.[6] A Huff hearing was held on December 28, 2005, at which time the parties addressed Mr. Rutherford's claims and addressed the need for an evidentiary hearing. The State informed the lower court that the State was not contesting Mr. Rutherford's diligence in locating the new information. However, it nonetheless argued that an evidentiary hearing on Mr. Rutherford's claims was

[5]Again, her trial testimony was that she was at home and that Mr. Rutherford came to her house looking for her father, and then subsequently asked her to cash a check (R. 400).

[6]Mr. Rutherford filed his initial successive motion to vacate on December 21, 2005, which included a claim of newly discovered evidence based upon the information obtained from Alan Gilkerson. He amended the motion, without objection from the State, on December 24, 2005, and added allegations of newly discovered evidence and Brady based upon the statements Heaton made to Glantz.

unnecessary. (Transcript of December 28, 2005, Huff hearing)(hereinafter Dec. 28, 2005, hearing).[7]

Following the hearing, Mr. Rutherford submitted additional proof in support of his claims: Eddie Bivin, Elizabeth Ward's current husband, attested that a few years ago he overheard a conversation between several of Heaton's family members. (Appendix L attached to Mr. Rutherford's Motion for Rehearing, January 6, 2006)(hereinafter App. L). During the conversation, one of Heaton's sister's stated: "You know, Mary Francis may have been the one that killed that lady and not the man they said did it." (App. L).

Also, postconviction counsel located Marie Pouncey, a woman who resided with Heaton in 1995. (Appendix M attached to Mr. Rutherford's Motion for Rehearing, January 6, 2006)(hereinafter App. M). Ms. Pouncey recalled how Heaton slapped her elderly father, spoke to Ms. Pouncey's young son about a murder and told Pouncey that she knew "how to kill [her] and get away with it." (App. M.).

The lower court denied Mr. Rutherford an evidentiary hearing on all of his claims, including his claim of newly discovered evidence.

[7]Postconviction counsel's transcript of the hearing is not paginated and no record on appeal has yet to be received.

SUMMARY OF THE ARGUMENT

The lower court erred in failing to grant Mr. Rutherford an evidentiary hearing on his factual claims. Mr. Rutherford presented claims regarding newly discovered evidence as to Mr. Rutherford's innocence of the crimes for which he was charged and convicted, newly discovered evidence of a Brady violation and newly discovered scientific evidence which proves that the method of execution currently being used in the State of Florida constitutes cruel and unusual punishment.

The statement of Alan Gilkerson is newly discovered evidence. See Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979), standard modified in Jones v. State, 591 So. 2d 911 (Fla. 1991). The lower court erred in denying Mr. Rutherford an evidentiary hearing and also in analysis of the claim. Gilkerson's information individually and in light of prior claims, would probably have resulted in acquittal of the first degree murder charge, either outright or through conviction of a lesser included offense. Certainly, the new evidence would have probably resulted in a life sentence even assuming a conviction was obtainable. Likewise, Heaton's latest version of events when confronted with Gilkerson's affidavit constitutes evidence of either a Brady violation of newly discovered evidence within the meaning of Jones v. State. To the extent that the State argues that Heaton is now being truthful and that she had previously

advised the State that she witnessed the murder, the State failed to disclose a prior statement inconsistent with Heaton's trial testimony in violation of Brady. To the extent that the State argues that Heaton's claim that she previously told the State that she witnessed the murder is false, her fabrication of this new story when confronted with Gilkerson's affidavit constitutes, not only significant impeachment of her trial testimony as well as other witnesses, but also evidence that she is prevaricating in order to hide her criminal responsibility.

The lower court also erred in denying an evidentiary hearing on Mr. Rutherford's claim that, based on recent scientific evidence, the State will violate Mr. Rutherford's right to be free of cruel and unusual punishment secured to him by the Eighth Amendment to the United States Constitution, by executing him using the sequence of three chemicals, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

Also, the lower court's denial of discovery prevented Mr. Rutherford from receiving a full and fair postconviction proceeding.

STANDARD OF REVIEW

The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true, even in a successor Rule 3.850 proceeding being considered during the pendency of a death warrant. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989)(the factual allegations asserted in a successor 3.850 motion under warrant must be accepted as true for purposes of determining whether an evidentiary hearing was required); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. RUTHERFORD AN EVIDENTIARY HEARING ON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE OF INNOCENCE, *i.e.* JONES V. STATE AND HIS CLAIM PLED IN THE ALTERNATIVE THAT THE STATE WITHHELD FAVORABLE EVIDENCE IN VIOLATION OF BRADY V. MARYLAND BECAUSE THE FILES AND RECORDS DO NOT SHOW THAT HE WAS CONCLUSIVELY ENTITLED TO NO RELIEF. THE NEW INFORMATION TO WHICH THE STATE HAS CONCEDED THAT MR. RUTHERFORD EXERCISED DUE DILIGENCE IN DISCOVERING IN DECEMBER OF 2005 WOULD PROBABLY HAVE PRODUCED AN ACQUITTAL OR A SENTENCE LESS THAN DEATH AND CERTAINLY UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE ADVERSARIAL TESTING CONDUCTED IN ITS ABSENCE. ADDITIONALLY THE LOWER COURT ERRED IN FAILING TO ALLOW MR. RUTHERFORD TO FULLY DEVELOP HIS CLAIM THROUGH DISCOVERY.

I. THE LOWER COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING CONSTITUTES REVERSIBLE ERROR.

A. Introduction.

In his successive Rule 3.850 motion and amendment, Mr. Rutherford presented information to the lower court that constitutes newly discovered evidence. The evidence consists of a confession made by Mary Heaton that she killed Stella Salamon. In the early 1990s, Heaton confessed that she killed Stella Salamon to Alan Gilkerson:

> 5. At some point, I was made aware of Elizabeth and Mary Frances' involvement in a homicide and subsequent trial of A.D. Rutherford. Specifically, when I asked Elizabeth why her aunt was so mentally unbalanced I was told that Mary had not been the same since the time surrounding the murder and trial.
>
> 6. In the early 1990s, the three of us lived together in a trailer. One evening, Mary and I were alone at the trailer and I asked why she seemed so "crazy." I had witnessed her talking to herself many times in the past. **She told me that she once killed an**

> **old lady with a hammer and made it look like A.D. Rutherford committed the crime. She told me that she got him good and that A.D. took the rap. Mary Heaton told me her motive for murdering the old lady was to get her money.**

(App. I)(emphasis added). Once he learned of what Gilkerson had to say, Mr. Rutherford immediately pled Gilkerson's affidavit in his motion to vacate. In fact, the State has conceded that Mr. Rutherford exercised due diligence in that regard.

Not content to merely plead Gilkerson's affidavit, postconviction sought to further investigate this information that had not been previously available.[8] Based on Heaton's confession to Mr. Gilkerson, postconviction counsel sought to locate and confront Heaton. Heaton was located, and a meeting was arranged between Heaton and Michael Glantz, a representative from Mr. Rutherford's defense team. When confronted with Gilkerson's affidavit, Heaton confirmed that she indeed knew Alan Gilkerson and had previously resided with him. Though acknowledging that she had indeed the relationship with Gilkerson that he claimed, she did deny having told him that she killed the victim. (App. K). But while making this denial, Heaton provided a scenario very much at odds with her trial testimony against Mr.

[8]Again as the State has conceded, Mr. Rutherford exercised due diligence as to Gilkerson. Once Mr. Rutherford learned of the content of what Gilkerson had to say, there was considerable follow up investigation and no time to do it. As new information has surfaced in the follow up investigation, postconviction counsel has sought to immediately plead it.

Rutherford.[9] According to Heaton, she knew the victim, and had been to her home previously (App. K). Heaton told Glantz that she introduced Mr. Rutherford to the victim. She further indicated that she was present when the victim was killed by Mr. Rutherford, who struck the fatal blow. (App. K).[10] Heaton now claims that she had provided this information when questioned by law enforcement (App. K). According to Heaton, the State had in its possession a statement from her completely contradicting the story that she told at trial. Yet, such a statement if it exists has never been disclosed to Mr. Rutherford.[11]

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[9]It is fairly well understood principle that a witness who is telling the truth about an event will tell the same story every time when asked. This is because the witness is speaking from memory of the event. However, the story of a witness who is fabricating often contains inconsistencies because the witness is not speaking from memory, but instead trying to recall what the lie was that was previously made up.

[10]If this were true and she observed Mr. Rutherford actually commit the murder, she would have so testified at trial. It is this astonishing change in her story that constitutes evidence that she is lying now and was lying at trial in order to cover her own criminal responsibility.

[11]In fact during the Huff hearing, Mr. Rutherford's counsel challenged the State to advise the Court whether Heaton was telling the truth when she claimed to have law enforcement about witnessing the murder. The State's representative responded that she did not know of such a statement. Certainly, this suggests that the State agrees with Mr. Rutherford that Heaton is a lying, although at the Huff hearing the State's representative waffled: "[Heaton] has a mental illness. She may very well have been confused, and I don't know what she said. So I don't, you know, she could be confused for all we know. This is not a matter of her definitely lying." (Dec. 28, 2005, hearing).

To be clear, it is Mr. Rutherford's position that Heaton lied at trial and that she lied to Glantz in their December 22,

When Heaton was confronted about her involvement in the victim's murder she stated, more than once: "Now listen, that lady, she's dead. I saw her die and there ain't nothing you or nobody can do for her. So I try to forget it." (See App. K). Clearly, Heaton wants to preclude further inquiry.

On December 28, 2005, a Huff hearing was held on Mr. Rutherford's successive Rule 3.850 motion and amendment. At the hearing and through his pleadings, Mr. Rutherford requested an evidentiary hearing on his claims (Dec. 28, 2005, hearing)(By Mr. McClain: "[T]his is the same kind of significant information that did not exist before. Ms. Heaton telling someone that she had committed the murder. And so an Evidentiary Hearing at which witnesses, Heaton, Gilkerson, and Kissinger, Gary Hendricks, and others can be called to inquire regarding the matter" is required).

The lower court inquired of the State as to the need for an evidentiary hearing:

> Let me ask the State. With regard to the issue on an Evidentiary Hearing on newly discovered – on Claim 4. **And a lot of the case law that I have seen, I've read over the last couple of weeks anyway dealing with this issue, indicates that an Evidentiary Hearing almost in all cases is required.** Are you taking the position that an Evidentiary Hearing is not required on Claim 4?

2005, conversation. In fact, her statements to Glantz constitute evidence of the fact that she is lying in order to hide her criminal liability for the murder.

(Dec. 28, 2005, hearing)(emphasis added). In response to the court's inquiry, the State argued that a hearing was unnecessary because the evidence "is not likely to produce, it doesn't meet the standard." (Dec. 28, 2005, hearing).[12]

The State argued that Heaton's statement to Glantz "inculpates [Mr. Rutherford] more". (Dec. 28, 2005, hearing). And, as to Gilkerson's affidavit, the State argued "that is contradictory both to the trial testimony and to the statement regarding the latest version." (Dec. 28, 2005, hearing).

The lower court probed further:

> (By the Court) I'm trying to get clear in my mind whether or not it requires an Evidentiary Hearing to properly weigh the credibility of the statement.
> I mean, would you agree that to resolve the issue without an Evidentiary Hearing I would have to assume the allegations contained in the motion are true?
>
> **MS. MILLSAPS:** Yes, Your Honor, you would have to do that. You would have, you would have to believe – No. You would have to take Gilkerson's statement that Mary Heaton said that to him to be true, to deny it without an Evidentiary Hearing.

(Dec. 28, 2005, hearing). The State, without any authority, insisted that the lower court could summarily deny Mr. Rutherford's claim.

B. The Standard for Receiving an Evidentiary Hearing.

This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the

[12]The State referenced the standard for newly discovered evidence and not the standard to obtain an evidentiary hearing.

files and records in the case conclusively show that the prisoner is entitled to no relief.'" Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. Similarly situated capital postconviction defendants have received evidentiary hearings based on newly discovered evidence. State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(noting that lower court held an evidentiary hearing on allegations that co-defendant had made inculpatory statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce and acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the

corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).[13]

Additionally, this Court, like the lower court must accept that Mr. Rutherford's allegations are true at this point in the proceedings. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989).

C. The Lower Court's Analysis Demonstrates that the Court Did Not Take Mr. Rutherford's Allegations as True and Did Not Determine that the "Motion and the Files and Records Conclusively Show that Mr. Rutherford is Entitled to No Relief".

1. Mr. Rutherford's allegations were not taken as true.

The lower court did not take Mr. Gilkerson's affidavit as true, as the court was required to do. See Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989). Indeed, the lower court repeatedly commented and determined that the information contained in Mr. Gilkerson's sworn affidavit must **not** be true. In doing so, the lower court relied on the inconsistencies

[13]Most of these defendants received evidentiary hearings under warrant. Perhaps this was the authority to which the lower court was referring when the court stated: "the case law that I have seen, I've read over the last couple of weeks anyway dealing with this issue, indicates that an Evidentiary Hearing almost in all cases is required." (Dec. 28, 2005, hearing).

between the two affidavits and the inconsistencies with the evidence presented at trial.[14] Initially, the lower court noted that "there are factual inconsistencies on the face of the affidavits". (Jan. 5, Order, at 11). And, the lower court went on to state that: "Heaton's recent statement to Glantz in and of itself refutes her alleged confession to Gilkerson." (Jan. 5, 2006, Order, at 13).[15] However, the lower court ignored postconviction counsel's argument:

> Heaton didn't make the statement that she was present until she was confronted with Gilkerson's statements that she confessed.
>
> I'm not asserting, Mr. Rutherford is not asserting that she is telling the truth now. It's our position that she's a liar and she always has been a liar. And the fact of which she is confronted with Gilkerson's statement, she makes up a new story, is actually evidence of her guilt, . . . it supports what Gilkerson has to say. And certainly if the shoe were on the other foot and the State was prosecuting Ms. Heaton for murder, her change of her story in light of Gilkerson's statement would be evidence of her guilt.

(Dec. 28, 2005, hearing).

Thus, the lower court did not accept Mr. Rutherford's factual allegations as true. The allegation was that Heaton lied

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[14]In the proceedings before the lower court, the State also argued the fact that the affidavit of Gilkerson conflicted with the evidence presented at trial and therefore it would not meet the standard enunciated in Jones. However, as postconviction counsel pointed out: "that is precisely the point. It impeaches every aspect of the State's case, every bit of evidence that the State has presented is shot down if this is true." (Dec. 28, 2005, hearing).

[15]The lower court's statements make abundantly clear that the court did not take Gilkerson's affidavit as true.

in her trial testimony and lied when she spoke to Glantz. In denying without holding an evidentiary hearing, the circuit court relied upon the trial testimony and the statements to Glantz as refuting Gilkerson's affidavit. The circuit court completely ignored the fact that Heaton's trial testimony and her statements to Glantz contradicted each other. The circuit court completely disregarded Mr. Rutherford's claim that she was lying on both of those occasions.[16]

The circuit court even ignored the State's suggestion that Heaton's mental health may undercut the credibility of her statements to Glantz. At the Huff hearing, the State's representative addressed Heaton's statement to Glantz saying that she had told the police that she witnessed the murder: "[Heaton] has a mental illness. She may very well have been confused, and I don't know what she said. So I don't, you know, she could be confused for all we know. This is not a matter of her definitely lying." (Dec. 28, 2005, hearing). Thus, Heaton's statements to Glantz that may be the product of "confusion" cannot be found as a basis to not accept the Gilkerson affidavit as true.

As argued before the lower court, Mr. Rutherford does not

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[16]Often in criminal prosecutions, it is the State's position that a criminal while denying guilt to individuals connected with the criminal justice system, truthfully confide in and confess to friends and relatives. Certainly, it is not without precedent that while guilt is denied in the formal criminal process, it is revealed in much more informal settings.

believe that Heaton's statements to Glantz are true, and Mr. Rutherford is not in a position to know whether Heaton told police as she now claims that she witnessed the murder. However, what is significant is that she changed her story, and that she changed her story when confronted with her confession to Gilkerson, *i.e.*, she now places herself at the crime scene, but claims that she was innocent of the murder. By in essence repudiating her trial testimony that she was home when Mr. Rutherford came by, Heaton's December 22, 2005, statement, provides circumstantial corroboration of Gilkerson's affidavit. When confronted with Gilkerson's statement, she does not say she does not know Gilkerson, she does not say that her trial testimony was true and that she was in her own home at the time of the murder, she, now for the first that any attorney representing Mr. Rutherford is aware, claims that she witnessed the murder. If that is true, why didn't she say so at Mr. Rutherford's trial? Equally significant, why does this version pop up when confronted with Gilkerson's affidavit?

The lower court also relied on the testimony presented at trial in finding that Gilkerson's affidavit was not true: "Specifically as to the affidavit implicating herself, Heaton's statement to Gilkerson that 'her motive to murder the old lady to get her money' is refuted in the record by Perritt's testimony that he observed Defendant with the money and her subsequent

statement to Glantz that she observed Defendant strike the fatal blow." (Jan. 5, 2005, Order, at 17).

While this again demonstrates that the circuit court did not take Gilkerson's affidavit as true, another flaw in the lower court's analysis is exposed. The lower court is taking the evidence at trial in the light most favorable to the State and using it to refute an affidavit that by law it is required to accept as true. The circuit court relied on the evidence presented by the State at Mr. Rutherford's trial, without acknowledging that there were inconsistencies, problems and impeachment of the State's case.[17] For example, while the lower court cites to Heaton and Johnny Perritt's testimony that Mr. Rutherford possessed $1500.00 of the proceeds from the victim's check that was cashed, the court fails to acknowledge that the money was never found despite the State's search of Mr. Rutherford, his belongings and his home. Therefore, the issue that Mr. Rutherford possessed proceeds from the cashed check was contested at trial and impeached with the evidence that only $61.00 was ever found in Mr. Rutherford's possession. Likewise, Mr. Rutherford presented evidence that he borrowed money after

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[17]The transcript pages attached to the lower court's order shows that the court relied upon the testimony of State witnesses on direct examination. The court ignored the contradictory evidence that was brought forth through cross examination and in the defense's case. This is not the proper analysis under Jones v. State, 591 So. 2d 911 (Fla. 1991).

the crime occurred, thus, showing that he was not in possession of any proceeds from the crime.

The only person proven to possess an unusually large amount of money following the crime was Heaton. Harvey Smith testified that Heaton contacted him on August 22, 1985, told him that she had just received her income tax refund and wanted to purchase an automobile (R. 444). In fact, later that day Heaton purchased an automobile from Smith (R. 444). So, Heaton lied to Smith about where she obtained the funds to purchase the car and was proven to possess an unusually large quantity of money, facts which corroborate Gilkerson's affidavit, impeach Heaton's testimony and show evidence of Heaton's guilt.

Additionally, Johnny Perritt's testimony was also inconsistent with the State's evidence of Mr. Rutherford's guilt, yet, the State still presented the testimony at trial.[18] Upon initially speaking to law enforcement about his interaction with Mr. Rutherford on August 22, 1985, Perritt told Deputy Paul Pridgen that Mr. Rutherford had been at his home between 12:00 and 1:00 p.m. on August 22, 1985, flashing the money from the robbery and discussing the fact that he had killed the victim (Supp. PC-R. 363-4). However, Perritt's initial statement was

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[18]The State chose to introduce conflicting evidence at the time of trial to obtain a conviction and death sentence against Mr. Rutherford. The lower court ignored the inconsistencies and impeachment of the State's case.

rendered impossible based on the evidence that the victim was at the K-Mart at 11:22 a.m., according to a receipt found and that the victim's check was not even cashed until 2:02 p.m. (R. 440).

Thus, when it came time for trial, Perritt changed his story and testified that Mr. Rutherford had arrived at his home between 1:00 and 3:00 p.m. on August 22, 1985, possessed $1500.00 and confessed to killing the victim, and stayed for 30 or 40 minutes. Perritt knew this because at 3:00 p.m. he went fishing (Supp. PC-R. 379). However, even this scenario is inconceivable. The victim's check was cashed at 2:02 p.m. If Perritt went fishing at 3:00 p.m., Mr. Rutherford had to have arrived and spoken to him between 2:15 and 3:00 p.m. But, two independent witnesses placed Mr. Rutherford at a convenience store near his home between 2:30 and 3:00 p.m. (Supp. R. 452, 464). Perritt's testimony is inconsistent with other testimony presented at Mr. Rutherford's trial, including Mr. Rutherford's. The lower court's reliance upon testimony which was challenged at trial and in fact conflicted with other evidence and testimony from trial was error and demonstrates a flaw in the lower court's analysis of Mr. Rutherford's claim.

In evaluating whether the new evidence would have caused the jury to have found a reasonable doubt about Mr. Rutherford's guilt, the evidence presented at trial by the defense refuting the State's case must be considered and given weight. The new

evidence would not have been heard in a vacuum. It would have been heard with the rest of the defense's case.

The lower court's failure to accept Gilkerson's affidavit as true is error. Accepting Gilkerson's affidavit as true means accepting as true his claim that Heaton confessed not just the murder to him, but also her claim that she made it look like Mr. Rutherford committed the murder. If a jury believed that the person who in fact cashed the check from the victim's account claimed to have committed the murder and set it up to make Mr. Rutherford committed the murder, surely reasonable doubt would exist as to Mr. Rutherford's guilt. If Mr. Rutherford's factual allegations are true, Rule 3.850 relief is mandated. Accordingly, this Court must reverse and remand for an evidentiary hearing so that Mr. Rutherford has the opportunity to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]." Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994).

2. The Motion and the Files and Records Do Not Conclusively Show that Mr. Rutherford is Entitled to No Relief

Certainly, if true, Gilkerson's affidavit that Mary Heaton confessed to the crimes with which Mr. Rutherford was charged and convicted entitles Mr. Rutherford to relief. As argued at the Huff hearing, if true, then Gilkerson's affidavit "impeaches every aspect of the State's case, every bit of evidence that the

State has presented is shot down if this is true." (Dec. 28, 2005, hearing). Indeed, Gilkerson's affidavit is significant to Mr. Rutherford's case because it impeaches Heaton's testimony and also provides the basis for a credible defense theory that Heaton committed the crime. At Mr. Rutherford's capital trial, Mr. Rutherford maintained his innocence when he testified before the jury, both at the guilt and penalty phases. During closing argument at the guilt phase, trial counsel argued that Mary Heaton was the only person directly linked to the victim's property, thus, suggesting reasonable doubt as to Mr. Rutherford's guilt and reasonable suspicion that Heaton was involved in the crime (R.744).[19]

Likewise, Mr. Rutherford argued below that the evidence would have also impacted the jury's recommendation at the penalty phase, especially considering that the jury recommended the death sentence by the narrowest of margins – seven (7) to five (5). The evidence of Heaton's confession would have affected the

[19]The victim's check was made payable to "Mary Francis Heaton" and was endorsed with the signature "Mary Francis Heaton". Heaton was identified as cashing the check at approximately 2:02 p.m. on August 22, 1985. The bank teller did not see any other individuals present with Heaton. The victim was found deceased later that day, at approximately 7:30 p.m. Heaton's fingerprints were never compared to the unidentified fingerprints found at the crime scene. Heaton's hair was never compared to the unidentified hair found on the victim's body. And, the handwriting exemplars submitted by Heaton were insufficient to exclude her as having written or signed the check. Additional samples were not submitted, though requested by law enforcement personnel.

jury’s consideration of mitigation, aggravation and provided lingering doubt. Therefore, the files and records do not rebut the affidavit and the factual allegations and conclusively show that Mr. Rutherford is entitled to no relief.

As stated previously, numerous capital postconviction defendants have received evidentiary hearings based on similar claims of newly discovered evidence. Mr. Rutherford is entitled to a full and fair evidentiary hearing. State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(noting that lower court held an evidentiary hearing on allegations that co-defendant had made inculpatory statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence of information inconsistent with trial testimony would probably produce and acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to “demonstrate the corroborating circumstances

sufficient to establish the trustworthiness of [newly discovered evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) (remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

Additionally, Heaton has now informed a member of Mr. Rutherford's defense that she previously told law enforcement about her latest version of events, i.e., that she was present at the crime scene and witnessed Mr. Rutherford "strike the fatal blow". (See App. K).

At the Huff hearing, when responding to Heaton's recent statement to Mr. Glantz that she told law enforcement that she was at the crime scene, Assistant Attorney General Charmaine Millsaps stated: "We did not have that." (Dec. 28, 2005, hearing). The lower court accepted this representation in denying Mr. Rutherford's claim: "the State represented to this Court that they had no knowledge of any statements by Heaton consistent with her testimony to Glantz. Moreover, the records request failed to produce any information to support this claim. The Court finds that the Defendant has failed to produce any information to support this claim." (Jan. 5, 2006, Order at

18).[20]

However, Ms. Millsaps was not under oath, and Mr. Rutherford's counsel did not have the opportunity to question her.[21] Ms. Millsaps was not involved in the case in 1985 and has no first hand knowledge. Certainly, Mr. Rutherford does want to

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[20]While finding that Mr. Rutherford had failed to present any evidence that the State possessed a statement from Heaton at the time of trial that contradicted her trial testimony and indicated that she was physically present when the murder occurred, the circuit court did not credit Heaton's December 22, 2005, statement to Glantz. Yet, the same circuit court used the statement to Glantz to find Gilkerson's affidavit not worthy of belief. The circuit court credited her statement to Glantz that she saw Mr. Rutherford commit the murder. Thus, it appears Heaton's statement (contradicting her trial testimony) was accepted by the circuit court when it assisted the State and was not accepted when it assisted the defense.

Again to be sure, Mr. Rutherford's position is that the statement to Glantz, like Heaton's trial testimony, was a lie. However, if it was not a lie, then she statement revealed a Brady violation. However, the circuit court refused to consistently regard the statement as either true or false. Its view of the affidavit was always in the State's favor - true when she claimed to have seen the murder, false when she claimed to have told the State that she saw the murder.

[21]Ms. Millsaps was not involved in the prosecution of Mr. Rutherford in 1985 or 1986. Postconviction counsel is uncertain as to whether she spoke to any individuals who investigated and/or prosecuted Mr. Rutherford who had contact with Heaton. It is important to note, that there were other statements made during the investigation of Mr. Rutherford which were not documented by law enforcement or revealed to defense counsel pre-trial. The discovery violations which occurred at Mr. Rutherford's first trial resulted in the trial court finding: "The recalcitrance and failure of the State to comply with discovery obligations impels this Court to the conclusion that there is no other fair alternative to redress the State's discovery violation than to grant the Defendant's Motion for Mistrial and award the Defendant a new trial on all issues . . . ." (R. 110).

determine whether law enforcement knew of Heaton's latest version of events as it would have been impeachment evidence and also provided trial counsel additional evidence to argue that Mr. Rutherford did not commit the crime, but that Heaton did.

The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). In Banks v. Dretke, 540 U.S. 668 (2004), the Supreme Court held:

> When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

Banks v. Dretke, 540 U.S. at 675-76. A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 696. The prosecutor as the State's representative has "a duty to learn of any favorable evidence known to the others acting on the government's behalf" and is responsible "for failing to disclose known, favorable evidence rising to a material level of importance." Kyles v. Whitley, 514 U.S. 419, 437 (1995).

A due process violation under Brady is established when:

The evidence at issue [was] favorable to the accused,

> either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001).

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d at 559. In addition, this Court has repeatedly held that newly discovered evidence of innocence must be evaluated cumulatively with any Brady evidence and the evidence that counsel failed to discover undermines confidence in the guilty verdict. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Mr. Rutherford was entitled to an evidentiary hearing on this claim. If Heaton's statement that she told the police in 1985 that she witnessed the murder, then the State withheld favorable evidence from the defense.[22] A statement by Heaton

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[22]In rejecting Gilkerson's affidavit, the circuit court relied upon the Heaton's December 22, 2005, as truthful.

that she was present for the murder was entirely inconsistent with her testimony that she was at her own home when Mr. Rutherford approached to cash a check.[23] This would have provided abundant ammunition to further attack Heaton's testimony. It would have supported the defense that Heaton was lying. She cashed the check, and she was fabricating a story to frame Mr. Rutherford. Certainly at a minimum, an evidentiary hearing is warranted on Mr. Rutherford's Brady claim.

In fact, because the State and the lower court relied on evidence not contained in the record, obviously the motion, files and records did not conclusively show that Mr. Rutherford was entitled to no relief.

II. MR. RUTHERFORD'S NEWLY DISCOVERED EVIDENCE OF INNOCENCE AND BRADY WOULD PROBABLY PRODUCE AN ACQUITTAL OR A SENTENCE LESS THAN DEATH.

In Jones v. State, 591 So. 2d 911 (Fla. 1991), this Court revised the standard upon which a postconviction defendant can obtain relief based upon a claim of newly discovered evidence. "In order to obtain relief on a claim of newly discovered evidence, a claimant must show, first, that the newly discovered evidence was unknown to the defendant or defendant's counsel at the time of the trial and could not have been discovered through due diligence and, second, that the evidence is of such a

[23] In fact, a mistrial was declared after the first jury convicted Mr. Rutherford because of a finding that the State intentionally withheld evidence from the defense.

character that it would probably produce an acquittal on retrial. Mills v. State, 786 So. 2d 547, 549 (Fla. 2001); see also Jones v. State, 709 So. 2d 512 (Fla. 1998). The same standard is applicable when the issue is whether a life or death sentence should have been imposed. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

A. Diligence.

At the Huff hearing, the State informed the lower court that the State was not disputing diligence. Thus, in its Order denying relief, the lower court found: "the Assistant Attorney General represented that they would not contest the diligence requirement. Thus, this Court will turn to the second prong of *Jones*." (Jan. 5, 2006, Order, at 10).

B. The Newly Discovered Evidence Would Probably Produce an Acquittal or a Sentence Less Than Death.

In Mr. Rutherford's successive Rule 3.850 motion and amendment, he pleaded allegations that another individual, Mary Heaton confessed to killing Stella Salamon and making "it look like A.D. Rutherford did it." Further, when Heaton was confronted with her confession she changed the story to which she had testified at Mr. Rutherford's trial and revealed additional information that was not previously known to Mr. Rutherford, including that she had informed law enforcement of a statement that was inconsistent with her trial testimony. Additional evidence corroborating Gilkerson's affidavit also became

available, including that one of Heaton's relatives was overheard commenting: "You know, Mary Francis may have been the one that killed that lady and not the man they said did it." (App. L); and that Heaton has previously admitted that she knew "how to kill [her] and get away with it." (App. M.).

1. The Newly Discovered Evidence Would Probably Produce an Acquittal on Retrial.

At his capital trial, Mr. Rutherford asserted his innocence and trial counsel argued to the jury that the verdict must be "not guilty" because there was reasonable doubt that Mr. Rutherford did not commit the crime (R. 749-50). Heaton's confession to Gilkerson provides ample reasonable doubt that Mr. Rutherford did not murder the victim. Heaton's confession completely absolves Mr. Rutherford. According to Heaton's confession, Mr. Rutherford's only involvement occurred when Heaton decided to make "it look like A.D. Rutherford committed the crime". (App. I).

Further, the new evidence supports the conclusion that Heaton testified falsely at Mr. Rutherford's capital trial. It also provides a logical and compelling explanation of why Heaton's niece testified as she did – because she was protecting her aunt.[24] Thus, the jury would have rejected Heaton and Ward's

[24]Also, even if Ward was testifying truthfully that Rutherford assisted Heaton in writing the check, Gilkerson's information shows that Mr. Rutherford did not kill the victim. If Heaton involved Mr. Rutherford after she committed the murder

testimony had it known of Heaton's confession.

Likewise, the evidence of Heaton's reaction when she was confronted with her confession demonstrates her culpability and again impeaches much of the testimony that was presented at Mr. Rutherford's trial.

At Mr. Rutherford's capital trial, Heaton was presented as having a minor role in a major production. She was the feeble, struggling, woman who suffered from mental problems and was forced into cashing a check that belonged to the victim.[25] At trial, Heaton even claimed that she did not know that the check she was cashing belonged to someone else, because she could not read. According to Heaton, she took the money paid to her by Mr. Rutherford because she was due babysitting money from the previous year. She took her share of the money, $500.00, bought a car and went shopping. She was an innocent.

But, when viewing the evidence from trial with Heaton's confession and her change of story, the evidence would have certainly assisted Mr. Rutherford and produced an acquittal of first degree murder. In fact, the evidence from trial supports

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in order to make "it look like A.D. Rutherford committed the crime", Mr. Rutherford could not be found guilty of first degree murder.

[25]In her second deposition, Heaton testified under oath the Mr. Rutherford struck her in the face when she refused to assist him in cashing the check. This statement differed from anything she had previously told law enforcement, or testified to during deposition or Mr. Rutherford's first trial.

Heaton's confession: Heaton's name and signature were on the victim's check; Heaton possessed a large quantity of money, and purchased an automobile after the crime; Heaton's testimony about who signed the check changed more than once; Heaton's statement, depositions and trial testimony are riddled with inconsistencies; Heaton's testimony of when Mr. Rutherford arrived at her home on the day of the crimes is impossible in light of the evidence that the victim was at the K-Mart at 11:22 a.m.[26]; Heaton was identified as being the individual who cashed the check, the only individual seen by bank personnel; although four latent prints were lifted off of the check, none of them matched Mr. Rutherford; fingerprints not matching Mr. Rutherford's or the victim's were found in the area where the victim was found; and other physical evidence was found on the victim that was not matched to Mr. Rutherford.[27]

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[26]Heaton testified that Mr. Rutherford arrived at her home between 11:30 a.m. and 12:00 p.m.

[27]In analyzing Mr. Rutherford's claim, the lower court reviewed the claim in a light most favorable to the State, in that the Court relied on testimony of State witnesses on direct examination and never even mentioned the impeachment to the witnesses and/or State's case. This is not the proper analysis under Jones v. State, 591 So. 2d 911 (Fla. 1991). Specifically, the lower court heavily relied on Heaton's own trial testimony to conclude that the new evidence would not produce an acquittal because it conflicts with Heaton's testimony. (See Jan. 5, 2005, Order at 11-12). However, the Court ignored all of the evidence that corroborates Heaton's guilt and all of the evidence that impeaches her testimony, including other evidence presented by the State. For example, Heaton testified that Mr. Rutherford arrived at her home on August 22, 1985, between 11:30 a.m. and

It is also clear that based on the newly discovered evidence, Heaton's credibility could have been destroyed. Based on her current version of events, none of her trial testimony was true other than the fact that she cashed the victim's check and received the $2000.00 from the bank teller. And, it is no surprise that she admitted this much since the bank teller identified her as the person who came to the bank, cashed the check and received the victim's money. Indeed, there was nothing Heaton could do other than admit that she cashed the check because she used her own driver's license at the bank. Defense counsel could have credibly argued that because Heaton knew she was caught, she constructed a story and testified that she had no part in any criminal conduct. Rather, she simply cashed a check, but did not know to whom the check belonged because she could not read. She "made it look like A.D. Rutherford committed the crime." (App. I). And, now when presented with evidence of her

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12:00 p.m. This testimony conflicted with the testimony of Elizabeth Ward and also with the evidence that the victim had been shopping at the K-Mart at 11:22 a.m. according to her receipt. It would have been impossible for Mr. Rutherford to have committed the crime and arrived at Heaton's home between 11:30 a.m. and 12:00 p.m. Other inconsistencies include Heaton and Ward's description of the victim's wallet, and what happened when Mr. Rutherford was at the Heaton/Ward residence. Also, Heaton admitted at trial that she had difficulty in distinguishing fact from fantasy on August 22, 1985, and some things she did not remember (R. 412). She also admitted to having lied to law enforcement in her initial statement. And she lied to Harvey Smith about where she received the funds with which she purchased the automobile. Thus, Heaton's testimony at trial does not refute the confession she made to Mr. Gilkerson.

role in the crime, Heaton changes her story, but still attempts to "make it look like A.D. Rutherford did it." The new evidence also provides a motive for Heaton to lie and color her testimony so that she could curry favor with the prosecution.[28]

Moreover, based on the new evidence, not only would Heaton's credibility have been ruined, but the prosecution's theory of the case, that Mr. Rutherford had committed the crime by himself, would have been similarly undermined. Heaton would no longer have been an innocent in a minor role, but a significant character in a violent crime. Trial counsel could have used Heaton's admissions to argue reasonable doubt as to the prosecution's case against Mr. Rutherford or to point the finger at Heaton as either the more culpable or individual killer.[29]

Likewise, Heaton's confession would have provided a motive for Elizabeth Ward to fabricate or color her testimony if she knew of her aunt's involvement in the crime and wanted to protect her.[30]

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[28]Heaton admitted that she had told law enforcement that she had witnessed the crime and been present at the victim's home.

[29]Trial counsel could have used Heaton's mental health problems to argue that she was unpredictable and more likely to commit a violent act. The trial court found that Mr. Rutherford had no significant prior criminal history and his only contact with the criminal justice system occurred when, after he returned from Vietnam, he and his brother had a physical altercation. Mr. Rutherford was drunk at the time.

[30]The lower court ignored the value of impeachment evidence Heaton's confession would have had on Ward's testimony and

In addition, while the lower court relied on the testimony of Attaway, Cook, Pittman and Perritt, that Mr. Rutherford had made inculpatory statements to them, the lower court again ignored the evidence that impeaches these witnesses. For example, Attaway was an early suspect in the case and the defense portrayed him as a suspect at the trial. The jury had reason to discredit Attaway's testimony, like the others.

The lower court's analysis of Mr. Rutherford's claim in terms of Heaton's reaction to Mr. Gilkerson's affidavit misses the point and the value of the newly discovered evidence. In its order denying relief, the lower court states: "Heaton's statement . . . that she saw the Defendant strike the fatal blow is inculpatory strengthening the State's case against the Defendant." (January 6, 2006, Order at 13). But, in making this statement, the Court ignores the facts argued at the Huff hearing that Heaton made the statement to a representative of Mr. Rutherford's defense in response to being confronted by the information that she killed Stella Salamon. She was not under oath and Mr. Rutherford is not arguing that her statement is true. Mr. Rutherford is arguing the exact opposite, i.e., what is important about Heaton's reaction and her statement is it

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instead relied on Ward's testimony to corroborate Heaton's trial testimony. (Jan. 5, 2005, Order at 12-13). However, a review of Heaton and Ward's testimony actually shows several critical inconsistencies.

substantially differs from her trial testimony and shows that Heaton is not a credible witness. When confronted with evidence that she committed the crime, Heaton made up a story, like guilty people tend to do. The statement is critical in showing that Heaton's trial testimony cannot be believed nor should her current statement be believed.

Had the jury heard the new evidence, it would have probably acquitted Mr. Rutherford of first degree murder. Mr. Rutherford need not negate each and every item of circumstantial evidence that had been offered against him at his original trial in order to prevail on his claim. He simply must show that the evidence would have probably produced an acquittal.

Mr. Rutherford is entitled to an evidentiary hearing and relief based upon Heaton's confession to Alan Gilkerson and the other newly discovered evidence of innocence and Brady violation.

2. The Newly Discovered Evidence Would Probably Produce a Sentence Less than Death on Retrial.

Mr. Rutherford's newly discovered evidence of Heaton's admissions would have affected the outcome of the penalty phase. Heaton's confession requires the jury, sentencing court and this Court to consider issues such as culpability, disparate treatment, proportionality and statutory mitigation. See Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987).

The lower court failed to make any analysis as to the effect

of the new evidence in regard to Mr. Rutherford's sentence of death.[31] The lower court never acknowledged that Mr. Rutherford's jury recommended death by the narrowest of margins, seven (7) to five (5). Had only one juror been swayed, Mr. Rutherford would have been sentenced to life. See State v. Mills, 788 So. 2d 249 (Fla. 2001); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

Indeed, at trial, the jury's recommendation of death was based upon the theory that Mr. Rutherford solely committed the crimes. However, in light of Heaton's confession, Mr. Rutherford did not kill the victim and at the most was a minor participant, after the fact. Mr. Rutherford is ineligible for the death penalty. See Enmund v. Florida, 458 U.S. 782 (1982).

Heaton's confession defeats all of the aggravators, because according to the confession Heaton "killed [the victim] with a hammer" and Mr. Rutherford's was only involved because Heaton set him up.

Heaton's confession also establishes mitigation: Mr. Rutherford did not commit the murder and at the most Mr. Rutherford was a minor participant in the crimes. Thus, Mr.

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[31]In its response to Mr. Rutherford's successive Rule 3.850 motion, the State incorrectly argued: "Collateral counsel oddly states that the new evidence would probably result in a life sentence assuming a conviction was obtainable. The newly discovered evidence pertains to guilt only, not a life sentence. It does not relate to the penalty phase." (State's Response to Successive 3.851 Motion, filed December 23, 2005, p. 21).

Rutherford was ineligible for the death penalty. The death penalty is disproportionate for the crime of felony murder (the only crime Mr. Rutherford could arguably be guilty of if Heaton killed the victim) where the defendant was merely a minor participant in the crime and the state's evidence of mental state does not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that results in murder is not enough culpability to warrant the death penalty. Jackson v. State, 575 So. 2d 181, 190-191 (Fla. 1991)(discussing Tison and Enmund).

In Garcia v. State, 622 So. 2d 1325 (Fla. 1993), this Court found that the failure to present evidence of inculpatory statements by a co-defendant undermines confidence in the outcome of a sentencing phase. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). This Court's conclusion in Garcia that the defendant was prejudiced by his counsel's failure to present evidence of another's inculpatory statements supports Mr. Rutherford's argument that his newly discovered evidence of Heaton's culpability entitles him to relief. Also, pursuant to Garcia, the unavailability of impeachment evidence at trial may undermine confidence in the outcome of the trial and require relief during postconviction.

Also, in State v. Mills, 788 So. 2d 249 (Fla. 2001), this Court affirmed the lower court's grant of relief based on newly

discovered evidence concerning the true culpability of those individuals involved in the crime. The newly discovered evidence consisted of the testimony of an inmate who had been incarcerated with Mills' co-defendant, Ashley, in 1980, and obtained a confession from Ashley. Id. at 250. Ashley did not provide Mills' attorneys with the evidence until twenty years after he obtained it. Mills received a new penalty phase based upon this evidence. Id.

And, because Mr. Rutherford reasserted his innocence at his penalty phase, Heaton's confession would have corroborated his testimony and provided a reasonable basis for lingering doubt as to Mr. Rutherford's guilt. See Oregon v. Guzek, ___ U.S. ___ (2005)(certiorari review was granted to determine if lingering doubt is a mitigating circumstance under the Eighth Amendment).[32]

Also, the mitigating value of Heaton's confession must be considered with the other evidence of mitigation presented at trial and at Mr. Rutherford's postconviction evidentiary hearing. At trial, the court found that Mr. Rutherford had no significant history of prior criminal activity.

Mr. Rutherford's background and childhood establish significant mitigation. Mr. Rutherford was raised in an impoverished, strict home. He was made to work on the farm and

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[32]Oral argument in the United States Supreme Court was conducted on December 7, 2005.

in the fields and eventually dropped out of school to help support his family. His parents were often violent to their children. The children, including Mr. Rutherford were often beaten with various implements, including switches. And, Mr. Rutherford's father was physically and emotionally abusive to his wife.

Also, at the time of trial and in postconviction proceedings, compelling evidence about Mr. Rutherford's dedication and honor of his country which he demonstrated in his service in the United States Marine Core, during the Vietnam War, was presented. Mr. Rutherford spent thirteen months in Vietnam, five of those months in active combat. At the penalty phase of his capital trial, he told the jury that he saw "action" every day on the "DMZ". Mr. Rutherford described that he had killed many and seen many killed, including friends. Mr. Rutherford was awarded the Vietnamese Service Ribbon, Vietnam National Campaign Medal, National Defense Medal, Good Conduct Medal, and two Presidential Unit Citations. Despite Mr. Rutherford's honorable service, he characterized his experience as "hell".

Unfortunately, Mr. Rutherford's "hell" did not cease when he returned to the States in 1974, after being honorably discharged. Mr. Rutherford soon learned that he brought much of his Vietnam experience home with him. Mentally and emotionally Mr. Rutherford was a completely different person than before he went

to Vietnam. He had nightmares and tremors and would act bizarrely. He had difficulty discussing his experiences and like many veterans, he developed a severe dependence on alcohol.

Mr. Rutherford was instructed to seek counseling, and was immediately diagnosed with an anxiety disorder, and Post-Traumatic Stress Disorder (PTSD). Mr. Rutherford was using alcohol to cope with the effects of the war; he was self-medicating.

The only aspect of Mr. Rutherford's life that was not in turmoil was his love and concern for his children. Despite his own horrific childhood, Mr. Rutherford was committed to being a good parent. He tried to provide for his children, spend time with them, love and support them. He seemed to have done what most parents who were victims of child abuse cannot – he broke the cycle of violence and never physically abused his kids. However, Mr. Rutherford soon learned that he had caused his children great harm – he had been exposed to the chemical referred to as Agent Orange on several occasions during his service in Vietnam.

The United States military has confirmed where and when Mr. Rutherford was exposed to Agent Orange. In addition, Mr. Rutherford was exposed to other dangerous chemicals. These chemicals, including Agent Orange have had serious effects on veterans' health as well as produced health problems for the

offspring of veterans. Mr. Rutherford is one such veteran. The chemicals to which he was exposed caused him health problems, as well as his children. And, most recently, Mr. Rutherford has learned that his grandchildren are still suffering from birth defects and other problems due to his exposure to Agent Orange.

Mr. Rutherford's service for his country had a profound impact on his adult life. Prior to serving as a United States Marine and seeing combat, Mr. Rutherford was described as happy-go-lucky. Upon his return, he was withdrawn, unpredictable, troubled and suffering from a major mental health disorder. At the time of this crime his life was in a downward spiral.

During Mr. Rutherford's penalty phase, the jury recommended death by the narrowest of margins, seven (7) to five (5). There is no doubt that Heaton's confession to Mr. Gilkerson and her inconsistent statements[33] about her involvement in the crime would have swayed one more juror to vote for life.

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[33]According to Heaton, she was present at the victim's home, assisted Mr. Rutherford in disposing of the victim's property and cashed the victim's check. (See App. K). This confession could have been used by defense counsel to present evidence that Heaton was an equal participant in the crime. Thus, Mr. Rutherford was not eligible for the death penalty, especially because Heaton was never even charged for her role in the crime.

3. The lower court failed to consider Mr. Rutherford's claim cumulatively.

The lower court also failed to review Mr. Rutherford's claims cumulatively, as required by existing caselaw. See Mordenti v. State, 894 So. 2d 161, 174-5 (Fla. 2004); State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Mr. Rutherford presented allegations of newly discovered evidence of innocence and Brady. Also, this evidence must be analyzed with the evidence previously presented and the errors already found. Mr. Rutherford is entitled to relief.

III. THE LOWER COURT ERRED IN FAILING TO ALLOW MR. RUTHERFORD TO FULLY DEVELOP HIS CLAIM THROUGH DISCOVERY.

A. The Lower Court Erred in Denying Mr. Rutherford Discovery.

On December 7, 2005, subsequent to his death warrant being signed, Mr. Rutherford sent public records requests, pursuant to rule 3.852(h)(3), to several state agencies. Within the records received from the Santa Rosa County Sheriff's Office, there was a letter dated October 26, 2005, from the Office of the Governor to the State Attorney's Office, First Judicial Circuit. (Mr. Rutherford's Motion to Compel, Dec. 21, 2005, Att. B.). The letter sought to determine whether DNA was collected at the time of the offense; if so, whether the evidence was, in fact, tested; and if the evidence was not tested or the results were inconclusive, whether the evidence is still available for testing today.

Subsequent to a motion to compel for more documents relating to this issue, on December 22, 2005, counsel for Mr. Rutherford received two letters from the State Attorney's Office, First Judicial Circuit, to the Governor's Office. The first letter, dated November 28, 2005, states in part that:

> The clerk's office in Santa Rosa County was unable to provide me with a list of the exhibits introduced in the trial of Rutherford. The Santa Rosa Sheriff's Office has informed me that the evidence that was not introduced at his trial is no longer available.

(Mr. Rutherford's Second Motion to Compel, Dec. 23, 2005, Att. B).

The second letter, dated December 19, 2005, states in relevant part that,

> Dear Miss. Brennan:
>
> I apologize if my letter of 11-28-05 was unclear. The letter I received from you regarding Arthur Rutherford and Clarence Hill asked (3) questions:
>
> 1. Whether evidence suitable for DNA testing was collected at the time of the offense;
>
> 2. If so, whether the evidence was in fact tested;
>
> 3. If the evidence was not tested or the results were inconclusive, whether the evidence is still available for testing today.
>
> **As to Arthur Rutherford**: Assistant State Attorney John Molchan is handling his case. All inquiries should be directed to him. His address is the same as mine. His phone number is 850-595-4737.

(Mr. Rutherford's Second Motion to Compel, Dec. 23, 2005, Att.

C).[34]

On December 27, 2005, Mr. Rutherford filed a Motion to Get the Facts, in an effort to determine whether there was in fact any evidence to be tested. Mr. Rutherford explained that to this point, he had been led to believe that the evidence had been destroyed. (See Mr. Rutherford's Motion to Get the Facts, Dec. 27, 2005, p. 1-2). Yet, the December 19th letter to the Governor's Office indicated some confusion as to this issue and simply referred the matter to Mr. Molchan.

As counsel for Mr. Rutherford explained at the December 28, 2005, hearing:

> There appears to be some confusion about whether or not there is any evidence available for testing in this case. To be quite honest, we were under the impression that there was not any evidence due to the fact that we had received in the postconviction proceedings records what appeared to demonstrate that the evidence had been destroyed without any notice to defense counsel in 1989.
>
> However, based on some of the documents that have been turned over within the past week or two weeks, it seems like there may be some evidence available. And certainly if there is any evidence available we would be interested in conducting any post (sic) testing.
>
> I just want to point out that in the list of evidence that was collected at the time of the original investigation into this case there were several things that would be sufficient for doing some sort of physical evidence, physical testing, including DNA testing. There was blood obtained from the scene, there was saliva samples from cigarette butts found at

[34] In response to a second motion to compel, Assistant State Attorney John Molchan informed the Court there was no other written correspondence relating to the above-mentioned letters.

> the scene. There were hairs actually found on the victim, and there were fibers likewise found on the victim.
>
> So just in sort of reviewing this evidence certainly there would be evidence -- if this exists -- there would be potential evidence for testing on these kinds of items.

(Dec. 28, 2005, hearing).

The State responded that it believed the Santa Rosa County Sheriff’s Office had no physical evidence from Mr. Rutherford’s case in their custody. (Dec. 28, 2005, hearing). With regard to the Clerk’s Office the State was unsure as to what evidence, if any, they had. (Dec. 28, 2005, hearing).

Subsequently, testimony was taken from the Evidence Technician for the Santa Rosa County Sheriff’s Office:

> We found that the initial check that there was no physical evidence in the vault on that case. And since then we've had a few items turned over to us from Records Division that was deemed to be better off in the Evidence vault, such as some fingerprint cards and photographs contact sheets, stuff like that.

(Dec. 28, 2005, hearing). The Evidence Technician also testified that he did not know why this evidence would have been destroyed:

> Q: When did you do, when did you conduct this search?
>
> A: When the initial request was made, last month, I believe.
>
> Q: Do you know any reason why this evidence would be destroyed?
>
> A: No, ma'am. I have no idea. I don't know how much original evidence existed, whether or not it was all submitted to the Clerk during the trial phase.

> Q: So is it routine to destroy evidence in capital cases?
>
> A: No, ma'am. It is not.
>
> Q: What is the retention policy in your county in terms of physical evidence?
>
> A: We keep it until we are told to get rid of it. On a capital case we have evidence from cases much older than this one.
>
> Q: Do you have any explanation as to why it would have been destroyed in this case?
>
> A: If in fact it was, no, I have no idea.
>
> Q: So it could still exist?
>
> A: I don't know where it would be, but conceivably it might. If it ever existed.

(Dec. 28, 2005, hearing).

According to the Evidence Technician, documentation should have been sent to the Records Division. (Dec. 28, 2005, hearing). However, he did not personally check for documentation there.[35] (Dec. 28, 2005, hearing). The witness did not check with any of the investigators who worked on the case to see if they might have knowledge of where the evidence was located. (Dec. 28, 2005, hearing).

The testimony of the Evidence Technician adds more uncertainty to whether the evidence was actually destroyed, leading to Mr. Rutherford's request for further inquiries and

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[35]A woman by the name of Ms. Brown searched the actual documentation of records, but Ms. Brown was not present to testify at the hearing on December 28, 2005.

depositions:

> The Destruction Form that I have a copy of from 1989 suggests that things that Mr. Lowery just mentioned that still exist were destroyed. So I don't think that we can have any confidence that this Destruction Form is accurate since we now know that things that were listed in here, for example, there was the receipt, the handwriting sample, things like that. And specifically the Check 1896 was mentioned, and the Destruction Form. And I've attached that as Exhibit A to my motion.
>
> Those were listed in there as being destroyed, and we now know they were not destroyed. So I certainly don't think that this is an accurate document. Also, just because we know the Retention Policy would be to not to destroy evidence in capital cases -- I guess, Your Honor, I don't know that this evidence has been destroyed. And so it seems like there is a possibility that it may have been sent to the Clerk's office. And Mr. Lowery was not certain of that, but I would certainly want to inquire of them. And obviously take any available method of searching for the evidence that we possibly can. And that may mean deposing some of the original investigators in the case or something of that nature. But certainly, I would like to pursue this issue.

(Dec. 28, 2005, hearing).

The Court found that he was satisfied that the Sheriff’s Office was not in possession of any evidence.[36] (Dec. 28, 2005, hearing).

If any evidence exists, including blood samples, hair, cigarette butts or fibers Mr. Rutherford must be allowed to test this evidence, particularly in light of Heaton’s confession to

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[36]With regard to the Clerk’s Office, the lower court issued an order on December 28, 2005, that a search be conducted to determine if they had any physical evidence in Mr. Rutherford’s case. The Clerk’s Office responded that it only had possession of those items that marked and received during trial.

Gilkerson and her recent change of her testimony. At the time of trial, Heaton's fingerprints were not compared to the unidentified latent prints located in the bathroom, where the victim was found. However, we know that Heaton ultimately possessed property belonging to the victim. Additionally, the State argued and the lower court relied, in part, on physical evidence placing Mr. Rutherford at the victim's residence, in her bathroom where her body was located, to deny Mr. Rutherford's claims. Yet, it is uncertain whether or not the evidence has been destroyed.

According to the destruction forms the evidence was destroyed, without notice to Mr. Rutherford or his counsel, in 1989. However, evidence listed on the destruction form has now been determined to exist. (See Dec. 28, 2005, hearing). Also, the Santa Rosa County Sheriff's Office has a policy not to destroy evidence in capital cases. The Evidence Technician presented by the State could not testify that the evidence had been destroyed or that it did not exist. He only testified that he could not find it. However, the evidence technician only looked through some bins of evidence and in places where it was supposed to be. Therefore, the physical evidence which could be tested may exist.

Because of the seriousness and finality of Mr. Rutherford's sentence, he requests that this Court allow him further discovery

to determine whether or not the physical evidence exists. Specifically, Mr. Rutherford should be allowed to depose other individuals employed with the Santa Rosa County Sheriff’s Department and any other relevant witnesses.

B. The Lower Court Erred in Denying Mr. Rutherford Access to Mary Heaton’s Psychological Records.

At the time of Mr. Rutherford’s capital trial, Heaton testified that she was residing in a mental institution because she had suffered from a nervous breakdown, stroke and brain damage (R. 412). Due to Heaton’s mental problems she informed the jury that she had difficulty distinguishing fact from fantasy on August 22, 1985, and had problems with her memory.

On December 21, 2005, postconviction counsel moved the lower court to permit postconviction counsel access to Heaton’s mental health records. The next day, after having interviewed Heaton postconviction counsel supplemented her motion for access to Heaton’s mental health records. During the interview with Heaton, she revealed that she has discussed the facts of the crime **and her presence at the victim’s home** with mental health professionals individually and during group therapies over the years, since 1985. (App. K; Appendix A to Mr. Rutherford’s Supplement to Motion for Disclosure of Witness’ Mental Health Records, Dec. 22, 2005).

On Friday, December 23, 2005, a hearing was held at which time postconviction counsel requested that the lower court grant

her access to Heaton's mental health records. At the hearing, postconviction counsel argued that, at a minimum, Heaton's latest version of events constituted impeachment of her trial testimony.

The State did not dispute the fact that Heaton spoke to mental health counselors about her role in the crime. The State told the court: "just because she has spoken, you know, it would be natural for a person to speak about a case. That does not mean that she did anything different from what she said at her trial testimony." (Dec. 23, 2005, hearing, morning session). Rather, the State argued that Heaton's statements to Glantz were consistent with her trial testimony: "And her testimony, her statements to this investigator can be viewed as consistent exactly with her trial testimony. She was there that day in the sense there she was the one that took the check to the bank." (Dec. 23, 2005, hearing, morning session).

The lower court ruled that postconviction counsel had not made "a sufficient showing for the Court to release mental health records". (Dec. 23, 2005, hearing, morning session).

In light of the fact that Heaton has confessed to the crimes with which Mr. Rutherford was convicted and sentenced to death, and in light of the fact that Heaton has revealed that she has in fact spoken to mental health counselors about her role in the crimes and presence at the scene, Mr. Rutherford is entitled to access to her mental health records. Heaton clearly made

inconsistent statements to others which could have been used to impeach her trial testimony and show that she was guilty of the crime. Without the records, Mr. Rutherford cannot fairly litigate his claim. Mr. Rutherford requests access to Heaton's mental health records.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. RUTHERFORD'S CLAIM THAT THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT. ADDITIONALLY, THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR SEROLOGICAL SAMPLES, INDEPENDENT TESTING AND DISCOVERY.

A. Lethal Injection

In his 3.850 motion, Mr. Rutherford argued that in light of new scientific evidence that was not previously available to the Florida Supreme Court in Sims v. State, 754 So. 2d 657 (Fla. 2000), it is now clear that the existing procedure for lethal injection that the State of Florida uses in executions violates the Eighth Amendment to the United States Constitution, as it will inflict upon Mr. Rutherford cruel and unusual punishment.

In denying an evidentiary hearing on this issue, the lower court stated:

> The Florida Supreme Court has stated that lethal injection is "generally viewed as a more humane method of execution." *See Bryan v. State*, 753 So.2d 1244, 1253 (Fla.2000). Moreover, the Florida Supreme Court has held that the lethal injection procedures as administered do not constitute cruel and unusual

> punishment and has rejected the list of horribles argument. *See Sims v. State*, 754 So.2d at 667-668 (Fla. 2000)(holding that execution by lethal injection is not cruel and unusual punishment). In fact, the *Sims* court considered with great detail what mishaps could occur during the administration of the lethal injection. *See Id.* at 668.
>
> The denial of postconviction relief on issues regarding the lethal injection procedures and their constitutionally has been consistently affirmed. *See Suggs v. State*, 2005 WL 3071927 (Fla. November 17, 2005)(rejecting a claim that execution by electrocution or lethal injection constitutes cruel and unusual punishment as "without merit because this Court has consistently rejected arguments that these methods of execution are unconstitutional" citing *Sims v. State*, 754 So.2d 657, 668 (Fla.2000)(holding that execution by lethal injection not cruel and unusual punishment)); *Elledge v. State*, 911 So.2d 57, 78-79 (Fla. 2005); *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005); *Parker v. State*, 904 So.2d 370, 380 (Fla. 2005). Therefore, this Court finds that Defendant's claim challenging the constitutionality of the chemicals used in the lethal injection has been fully litigated and is procedurally barred.

Order at 7-8.

The lower court's order is erroneous. Here, Mr. Rutherford is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is challenging the use of specific chemicals and the quantity of chemicals used, **based upon recent scientific evidence**, that the Department of Corrections uses to carry out executions. Unlike Sims, this claim is no longer about the "ifs" of what could go wrong, but rather what actually is going wrong during executions by lethal injection.

As Mr. Rutherford argued in his 3.850 motion, in Sims, 754

So. 2d at 668, in denying a lethal injection challenge, this Court determined that the possibility of mishaps during the lethal injection process was insufficient to support a finding of cruel and unusual punishment:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. n20

(note omitted). Subsequent to this opinion, and contrary to the lower court's order, recent empirical evidence has established that the infliction of cruel and unusual punishment and the wanton infliction of pain is no longer speculative.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Rutherfords's motion) and three co-authors detailed the results of their research on the effects of

chemicals in lethal injections.[37] See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[38] The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (App. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

The chemical process utilized in executions in Florida is identical to that identified in the study:

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[37]The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars. (App. B).

[38]Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (App. B).

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal,[39] an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So. 2d at 666 (footnote added).[40]

As set forth in greater detail in the declaration of anesthesiologist, David A. Lubarsky, M.D. (App. C), the use of this succession of chemicals (sodium pentothal, pancuronium bromide, and potassium chloride) in judicial executions by lethal injection creates a foreseeable risk of the unnecessary infliction of pain and suffering.

Sodium pentothal, also known as thiopental, is an ultra-short acting substance which produces shallow anesthesia.

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[39]The authors of the study note that it is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss of sensation, especially considering that personnel administering it are unskilled, that the execution could last up to 10 minutes, and that people on death row are extremely anxious and their bodies are flooded with adrenaline, thus necessitating more of the drug to render them unconscious. (App. B).

[40]While Mr. Rutherford requested updated information from the Department of Corrections, the lower court denied this request. Thus, at the present time, Mr. Rutherford can only assume that the Florida Department of Corrections has not changed this chemical process since the Sims opinion.

(App. C). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is **supposed** to be able to wake up and signal the staff that something is wrong.[41]

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (App. C).

Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (App. C). Its only relevant function is to prevent the media and the Department

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[41]Sodium pentothal is unstable in liquid form, and must be mixed up and applied in a way that requires the expertise associated with licensed health-care professionals who cannot by law and professional ethics participate in executions.

of Corrections' staff from knowing when the sodium pentothal has worn off and the prisoner is suffering from suffocation or from the administration of the third chemical.

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (App. C). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Rutherford will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (App. C).

Significant is the fact that the American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the use of pentobarbital with a neuromuscular blocking agent to kill animals. (App. B, E). Additionally, 19 states have expressly or implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness. (App. B).

Because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and

which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Rutherford will not be anesthetized at the time of his death. (App. C).

It is no wonder that the chemicals used in lethal injection are inadequate and to a reasonable degree of medical certainty cause pain and torture to condemned inmates. When the chemicals were suggested it was merely a "recommendation" by a doctor in Oklahoma. (App. D). There were no studies conducted on the use of the chemicals, the potential pain that an inmate might suffer or what alternative chemicals could be used. (App. D). Likewise, no testing was conducted prior to the adoption of the chemicals used in Florida – two of which were specifically contained in the original "recommendation" in Oklahoma. (App. D).

In denying an evidentiary hearing, the lower court relies on a number of post-Sims cases in finding that "Defendant's claim challenging the constitutionality of the chemicals used in the lethal injection has been fully litigated and is procedurally barred."[42] Order at 8. However, the lower court's order is erroneous for two reasons. First, in none of the cases which the lower court refers to was the issue of lethal injection fully litigated. Contrary to the lower court's statement, the lethal

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[42]The lower court cites to Suggs v. State, 2005 WL 3071927 (Fla. November 17, 2005), Elledge v. State, 911 So.2d 57, 78-79 (Fla. 2005); Johnson v. State, 904 So.2d 400, 412 (Fla. 2005); Parker v. State, 904 So.2d 370, 380 (Fla. 2005)." (Order at 8).

injection issue in Suggs, Elledge, Johnson and Parker were summarily denied without evidentiary hearings. Second, in none of these cases did the appellant rely on the scientific evidence presented by Mr. Rutherford.[43]

Here, the study upon which Mr. Rutherford relies was published in 2005. It is new. It is post-Sims and post-Suggs. No cases in Florida prior to now have relied on this study. This Court did not have the benefit of this study when finding that the protocols used in 2000 were constitutional.[44] In fact, to Mr. Rutherford's knowledge, this study constitutes the first empirical research published regarding lethal injection, thus making it unique.[45]

Under the present circumstances, the State will violate Mr. Rutherford's right to be free of cruel and unusual punishments secured to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals (sodium

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[43]In fact, in another case in Florida where the defendant will be presenting this new scientific evidence, an evidentiary hearing has been ordered. See Knight v. State, Palm Beach County Case No. 97-05175.

[44]Therefore, the lower court's reliance on Sims is misplaced.

[45]Mr. Rutherford's claim is no different than in cases where new scientific DNA techniques were developed after those cases had concluded. Just as in those cases where courts are reconsidering prior rulings in light of subsequent scientific research, so should Mr. Rutherford's claim be considered in light of new scientific evidence.

pentothal a/k/a thiopental, pancuronium bromide, and potassium chloride) which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the **risk** of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," Id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370 (emphasis added). Under the present circumstances, Mr. Rutherford will be unnecessarily subjected to the wanton infliction of pain, in violation of the Eighth Amendment.

The lower court erred in denying Mr. Rutherford an

evidentiary hearing on this issue as he has presented facts that were not known at the time the Florida Supreme Court decided Sims v. State, 754 So. 2d 657 (Fla. 2000), and the motion, files and records in this action fail to conclusively show that Mr. Rutherford is entitled to "no relief." See Lemon v. State, 498 So. 2d 923 (Fla. 1986); Fl. R. Crim. P. 3.851(f)(5)(B). Accordingly, an evidentiary hearing is required.

B. Motion for Independent Testing

As stated above, Mr. Rutherford has asserted that the existing procedure for lethal injection that the State of Florida uses in executions violates the Eighth Amendment to the United States Constitution, as it will inflict upon Mr. Rutherford cruel and unusual punishment.

The lower court, however, denied Mr. Rutherford's public records requests relating to previous autopsy reports. See Argument IV. Moreover, the lower court erroneously denied Defendant's Motion for Serological Samples and for Independent Testing. Through this motion, Mr. Rutherford sought to have independent testing of blood samples from Clarence Hill following his execution in order to determine the post-mortem concentrations of thiopental and/or any other toxins present in his body.

Despite having the opportunity to disprove Mr. Rutherford's claim that post-mortem concentrations of thiopental in the blood

will have concentrations consistent with awareness, the State instead urged, and the lower court acquiesced, in the denial of this motion as well as Mr. Rutherford's requests for public records. Any failure in developing evidence in support of his claim for relief cannot be attributed to Mr. Rutherford. Mr. Rutherford requests that the lower court's order be overturned and that his Motion for Serological Samples and for Independent Testing be granted.

C. Motion for Discovery

On January 5, 2006, undersigned counsel learned that on or about January 4, 2006, Mr. Rutherford was informed that he was going to be examined by two doctors, for the purpose of determining whether his veins were suitable for the lethal injection process.

That evening, Mr. Rutherford was escorted into a room, where he encountered two individuals wearing masks. Neither individual identified himself. One of the individuals placed a rubber band around Mr. Rutherford's arm. Mr. Rutherford was asked about his health and "whether he had anything in his lungs".

On January 6, 2005, postconviction counsel filed a motion for discovery requesting "any files, records, reports, letters, memoranda, notes, drafts and/or electronic mail in the possession or control of the Department of Corrections (DOC), regarding the "examination" which occurred on or about January 4, 2006". (See

Mr. Rutherford’s Motion for Discovery, Jan. 6, 2006).

Additionally, if the Department of Corrections were to claim that no documentation were to exist, Mr. Rutherford requested that he be permitted to depose all individuals involved in the “examination”.

Mr. Rutherford also requested any protocols enacted subsequent to Sims regarding the lethal injection process because this “examination” clearly does not comport with the protocol examined by this Court during the Sims proceedings.

The lower court ordered the Department of Corrections to respond. On January 9, 2006, DOC responded and admitted that an “examination occurred”. However, DOC claimed that “There is no documentation connected with the aforementioned examination.” DOC also objected to Mr. Rutherford’s deposing the individuals because they are “part of the execution team whose identities remain secret”.

The lower court denied Mr. Rutherford’s motion. (Order, Jan. 9, 2006). In doing so, the lower court relied on DOC’s representations that no documentation was produced and that this procedure is in accordance with the procedure used in Sims.

Mr. Rutherford must be allowed to depose these individuals involved with his “examination”, especially in light of the fact

that DOC claims no documentation was produced.[46] This procedure raises serious questions: What were the results of the "examination"? What are these individuals' opinions as to the suitability of Mr. Rutherford's veins for the lethal injection process? Do these individuals anticipate having to use any "cut-down" procedures that are not considered in the execution protocols? Who are these individuals conducting the "examination"? What are there qualifications? If they are part of the "execution team" do they have the medical training to conduct a medical examination? Why, if given a thorough examination were no documents produced indicating Mr. Rutherford's blood pressure, temperature, heart rate or other information that is obtained in a "thorough medical examination"? Why, if a comprehensive medical history is obtained was only one question asked – "Do you have an anything in your lungs?" And what does that question even mean? Why were no questions asked about any injuries or problems Mr. Rutherford suffered during his active combat in Vietnam? Do these individuals have any knowledge or experience about the effects of Agent Orange exposure on an individual's health, like Mr. Rutherford? Why were no questions asked about this?

Obviously Mr. Rutherford has an interest in determining how

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[46]That no documentation was produced demonstrates that DOC is attempting to thwart public records laws and operate in a cloak of secrecy.

his execution will be conducted. He has a right to know this information. The lower court erred in denying Mr. Rutherford discovery. This Court must grant the requested relief.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. RUTHERFORD'S CLAIM THAT THE ADMINISTRATION OF PANCURONIUM BROMIDE VIOLATES MR. RUTHERFORD'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

During the 3.850 proceedings, Mr. Rutherford asserted that if he is executed in accordance with the chemical combination set out in Sims, he will be denied his first amendment right to free speech. The administration of pancuronium bromide during the execution procedure will paralyze Mr. Rutherford's voluntary muscles, resulting in his inability to speak or move. In the event that he has not been properly anaesthetized, Mr. Rutherford wants to be able to communicate this as well as the fact that he is experiencing excruciating pain.

Mr. Rutherford wants to communicate this information so that other defendants, the State, the judiciary, as well as the public, can evaluate whether Florida's execution procedures violate the Eighth Amendment prohibition against cruel and unusual punishment.

In summarily denying this claim, the lower court stated,

> This claim is summarily denied. *See Beardslee v. Woodford*, 395 F.3d 1064, 1076 (9th Cir. 2005), *cert. denied*, -U.S.-, 125 S.Ct. 982, 160 L.Ed. 2d 910 (2005)(holding Defendant failed to establish the

> likelihood that he would be conscious during administration of lethal drugs); *See Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989)(holding that prison regulations impacting First Amendment rights are valid if they are reasonably related to legitimate penological interests rather than the normal "strict" or "heightened" scrutiny).

(Order at 9).

Contrary to the lower court's order, the Ninth Circuit opinion in Beardslee does not constitute controlling authority here. Aside from the fact that Florida is not bound by rulings of federal courts from other circuits, Beardslee is distinguishable both procedurally and factually.

Procedurally, the petitioner in Beardslee was attempting to proceed under a 1983 action in federal court. 395 F.3d at 1066. He was seeking a preliminary injunction to prevent the State from executing him. Id. The Ninth Circuit addressed the granting of a preliminary injunction under the following legal standard:

> In order to obtain a preliminary injunction on his claim, Beardslee was required to demonstrate "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995)* (internal quotation marks and citation omitted). Alternatively, injunctive relief could be granted if he "demonstrated '*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor.," *Id.* (citation omitted)

Id. at 1067. Clearly, this is not the standard to be applied for

determining whether an evidentiary hearing should be granted in a postconviction case in Florida. See Lemon v. State, 498 So. 2d 923 (Fla. 1986)(defendant is entitled to an evidentiary hearing if the motion, files and records in the action fail to conclusively show that the defendant is entitled to "no relief.") See also Fl. R. Crim. P. 3.851(f)(5)(B). Here. the lower court's reliance on Beardslee is erroneous.

Further, it is equally clear that the facts upon which the Ninth Circuit relies are distinguishable from those in Mr. Rutherford's case. First, the opinion in Beardslee preceded the published study upon which Mr. Rutherford relies. Second, unlike in California, see Beardslee, 395 F.3d at 1075, there was no evidentiary development in Mr. Rutherford's case, Mr. Rutherford's experts have not conceded that any State expert has more expertise in this area, and in fact the State here has presented no expert to rebut Mr. Rutherford's proffer of evidence.[47] As the lower court denied an evidentiary hearing, the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). Since the motion, files and records in Mr. Rutherford's case failed to conclusively show that he is entitled to no relief, an evidentiary hearing should have been

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[47]Moreover, the quantities of chemicals used in executions in California differ from those used in Florida.

granted.

The second basis for the denial of relief by the lower court relies on Thornburgh v. Abbott, for the proposition that restrictions of a defendant's first amendment rights are appropriate when they are reasonably related to a legitimate penological interest.

In his 3.850 motion, Mr. Rutherford argued that the First Amendment to the United States Constitution prohibits laws "abridging the freedom of speech."[48] Mr. Rutherford acknowledged that while "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Saffley, 482 U.S. 78, 84 (1987), nonetheless, because of the unique characteristics of the prison setting, restrictions on inmates' constitutional rights are not subject to strict scrutiny. Rather, a restriction on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests." Id. at 89.[49] When First Amendment rights

[48]The free speech clause of the First Amendment applies to the states through the Due Process clause of the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229, 235 (1963), DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

[49]A court must consider 1) whether there is a valid rational connection between the regulation and the assertedly legitimate penological goal, 2) whether the inmate has alternate means of exercising the right at issue, 3) the impact that exercise of the right has on the institution, and 4) the availability of alternatives to the restriction. Id. at 89-91.

are restricted, the legitimacy of the government's stated objective depends on whether the restriction is content neutral. Id. at 90. Therefore, a restriction will not be upheld if it is an "exaggerated response" to the otherwise legitimate penological goals. Id. at 87, Pell v. Procunier, 417 U.S. 817, 827 (1974).

Here, while the lower court asserts a "legitimate penological interest", it never actually explains what interest is served in using the paralyzing agent during the execution protocol. Order at 9. Thus no "reasonable relation" has been established, much less asserted.

Mr. Rutherford maintains that, in fact, there is no legitimate penological purpose that can be served by paralyzing Mr. Rutherford and preventing him from communicating that the execution process has not functioned as stated and that he is being tortured. This restriction on Mr. Rutherford's speech is impermissibly content based. If the execution protocol works properly, Mr. Rutherford will be unconscious for the duration of the execution and, obviously, will have nothing to bring to anyone's attention. If the protocol does not work properly, Mr. Rutherford will want to communicate that fact but will not be able to. As a result, Mr. Rutherford's First Amendment right to free speech will be denied.

Here, having identified no "legitimate penological interest" in utilizing the paralyzing agent, the lower court erred in

denying Mr. Rutherford an evidentiary hearing on this issue. Relief is warranted.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. RUTHERFORD'S REQUEST FOR PUBLIC RECORDS PURSUANT TO CHAPTER 119, FLORIDA STATUTES, THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

During the warrant proceedings, Mr. Rutherford sought public records pursuant to Fla. Stat. Ch. 119 and Fla. R. Crim. P. 3.852 (h)(3). On December 7, 2005, Mr. Rutherford sent public records requests to a total of six agencies.[50] These records were requested pursuant to Rule 3.852 (h)(3).[51] Subsequently, on December 13, 2005, written objections were filed by the Department of Corrections and by the Attorney General's Office, who filed a "Global Objection" on behalf of all agencies. Following a hearing on the State's objections, the lower court issued an order on December 14, 2005, in which it denied Mr. Rutherford's records requests to the Department of Corrections and the Medical Examiner's Office relating to lethal injection issues. The lower court stated that, since this Court has

[50]Mr. Rutherford requested records from the Office of the State Attorney for the First Judicial Circuit, the Santa Rosa County Sheriff's Office, the Florida Department of Law Enforcement, the Medical Examiner's Office, First and Eighth District of Florida, and the Florida Department of Corrections.

[51]Mr. Rutherford had made previous requests to these agencies, and now requested updated documents that were not produced in previous requests.

previously rejected a lethal injection challenge, Mr. Rutherford's requests are not relevant because they do not relate to a colorable claim for post conviction relief. (Order at 4).[52]

In making this decision, the lower court overlooked the fact that in cases subsequent to Sims, defendants have been permitted to obtain documents relating to lethal injection. See, e.g., Bryan v. State, 753 So. 2d 1244, 1251 (Fla. 2000)("In response to Bryan's request for 'any and all' records concerning lethal injection, the State disclosed the chemicals and procedures that will be used to carry out Bryan's execution by, among other things, submitting evidence developed in State v. Sims, No. E78-363-CFA (Fla. 18th Cir. Ct. Feb. 12, 2000), into the record in the instant case.").[53]

On January 5, 2006, the lower court issued its order denying Mr. Rutherford's 3.850 motion. In again addressing the denial of records by the Department of Corrections and the Medical Examiner's Office, the court stated:

Regarding the records request to the Department of

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[52]In Sims v. State, 754 So. 2d 657 (Fla. 2000), this Court first held that execution by lethal injection is not cruel and unusual punishment.

[53]As Mr. Rutherford pointed out to the lower court, the Attorney General's "Global Objection" is simply false where it states that "[h]ere, as in *Bryan*, the public record request should be denied." "Global Objection" at 13. In actuality, in Bryan, the Department of Corrections did disclose documents concerning lethal injection pursuant to a public records request. 753 So. 2d at 1251.

Corrections and the Medical Examiner's Office, Eighth District of Florida, the Court stated:

> "It is clear from the face of the Motion for Production that the only reason Defendant would be making such a request would be to obtain records which are unrelated to a colorable claim for post conviction relief contrary to the prior rulings of the Court. *Mills v. State*, 786 So.2d 547, 552 (Fla. 547, 552 (Fla. 2001)."
>
> Defendant has failed to direct this Court's attention to any facts or law that it may have misapprehended or overlooked in denying the previous requests. As such, this claim is denied. See generally *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000)(citing *Downs v. State*, 740 So.2d 506, 510-11 (Fla. 1999)(rejecting the argument that an evidentiary hearing is required to resolve every postconviction motion that alleges a public records violation.))

Order at 6 (footnote omitted).

Effective collateral representation has been denied Mr. Rutherford because of the lower court's erroneous denial of his request for pertinent public records. First, In denying these public records requests, the lower court has not followed the dictates of Rule 3.852 (h)(3). In accordance with this provision, Mr. Rutherford must show: 1) that a death warrant has been signed; 2) that he has filed his requests within ten days of the date of the warrant; and 3) that he has previously "requested public records from a person or agency" to which he is currently requesting records. Mr. Rutherford previously requested records from the Department of Corrections and the Office of the Medical

Examiner.[54] Thus, the requirements of this provision have been fulfilled.[55] However, despite the fact that Mr. Rutherford's requests for public records were in fact narrowly tailored[56] and fall squarely within the confines of Rule 3.852 (h)(3), the lower court erroneously denied his request.

Second, contrary to the lower court's order, Mr. Rutherford has directed the lower court's attention to facts and law it misapprehended or overlooked in denying the public records requests as not relating to a colorable claim of relief. Mr. Rutherford's claim that the current method of lethal injection, in light of recent empirical evidence, constitutes cruel and

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[54]Mr. Rutherford maintains that while his most recent request is to a different district of the Medical Examiner's Office, it is still the same agency and thus the request was properly filed under 3.852(h)(3). However, in light of the lower court's opinion to the contrary, Mr. Rutherford resubmitted his request under Rule 3.852 (i). Nevertheless, even under this provision, the lower court denied Mr. Rutherford's request for public records.

[55]The first two requirements have also been met.

[56]Here, Mr. Rutherford filed a limited number of requests to agencies that were subject to previous requests. This is unlike the situation in several other previous warrant cases. See, e.g., Glock v. Moore, 776 So. 2d 243, 253-4 (Fla. 2001) (defendant made at least 20 records requests of various persons or agencies. The Court stated, "It is clear from a review of the record and the hearing that most of the records are not simply an update of information previously requested but entirely new requests."). See also Sims v. State, 753 So. 2d 66 (Fla. 2000), (the Court affirmed the denial of public records requests of twenty-three agencies or persons, most of whom had not been the recipients of prior requests for public records).

unusual punishment, is a colorable claim for relief.[57] Mr. Rutherford is challenging the use of specific chemicals, **based upon recent scientific evidence**, that he believes the Department of Corrections uses to carry out executions.[58] Certainly, public records requests relating to lethal injection procedures and to prior executions are relevant to such a challenge.

Further, the lower court's reliance on Florida Supreme Court cases that pre-date the newly discovered scientific evidence is erroneous. In no previous cases did the appellants have the benefit of new scientific evidence when raising their claims. In essence, the effect of the lower court's order, if upheld, would be to permanently prevent any defendant from ever obtaining records or challenging a method of execution previously upheld by this Court, even when there is a change in circumstances.[59]

Mr. Rutherford asks this Court to remand the case to the

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[57]This claim was presented to the lower court in Mr.Rutherford's 3.850 motion and to this Court on appeal.

[58]As Mr. Rutherford has been denied access to records from the Department of Corrections, he is unable to verify that they are still utilizing these chemicals.

[59]It is worth noting that despite repeated opinions of the Florida Supreme Court that the electric chair did not constitute cruel and unusual punishment, this Court subsequently ordered an evidentiary hearing on the issue in the case of Thomas Provenzano. See Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999). During these proceedings, public records were disclosed by the Department of Corrections regarding the electric chair. And the proceedings in that case led to the Florida Legislature's adoption of lethal injection as the method of execution in Florida.

circuit court for full public records disclosure and to permit amendment of this motion based upon future records received. Here, the lower court failed to apply the dictates of Rule 3.853(h)(3), and the denial of access to records precludes the full and fair development of Mr. Rutherford's Rule 3.851 motion.

Additionally, on December 7, 2005, Mr. Rutherford filed a Motion to Compel Access to Public Records by the Office of the State Attorney for the First Judicial Circuit, the Santa Rosa County Sheriff's Office, the Florida Department of Law Enforcement and the Medical Examiner's Office, First District of Florida. With regard to Mr. Rutherford's motion to compel access to public records, the lower court stated:

> In denying Defendant's records request, this Court noted Rule 3.852(h)(3) does not provide for additional *access* to agency records and that counsel's allegation she *fears* her file was not complete fell short of the requirements for additional records as required pursuant to Rule 3.852(i)(emphasis added).

Order at 6. The lower court's ruling denies Mr. Rutherford his due process and equal protection rights. As explained in his Motion to Compel Access to Public Records, Mr. Rutherford merely sought an opportunity for his counsel to inspect files that are public records under Chapter 119 in order to verify the completeness of his files and records and to obtain copies of any missing files.[60] Normally, a copy of all of the public records

[60] Mr. Rutherford was not asking the State to waste any resources to make additional copies of their files. Rather, Mr.

is maintained with the records repository and is available for counsel to access at any time. However, in Mr. Rutherford’s case these files were never provided to the records repository and thus are not available there, and so counsel has no other recourse to inspect and compare the State agency files that are public record. See Rule 3.852(i), Fla.R.Crim.Pro.

It is clear that those death sentenced individuals whose public records were delivered to the records repository have the ability to access the records at the repository at any time. There can be no valid basis for distinguishing between death sentenced individuals who can inspect the public records at any time because the records repository was provided with their records and those death sentenced individuals whose public records were not provided to the records repository. The lower court’s denial of Mr. Rutherford’s request for access to the public records that are available at any time to other death sentenced individuals constitutes a denial of equal protection. Mr. Rutherford requests that his case be remanded to the circuit court so that he can obtain those records to which he is entitled.

Rutherford requested that a representative of his defense team be permitted to look at the files at the offices of each of these agencies.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. RUTHERFORD'S CLAIM THAT HIS CONVICTION AND SENTENCE OF DEATH VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The affidavit of Alan Gilkerson presents compelling evidence of Mr. Rutherford's actual innocence. (See App. I, K, L and M). This new information, alone, and when combined with the evidence of Mary Heaton's involvement, and the lack of physical evidence support the conclusion that Mr. Rutherford is innocent of the crime for which he stands convicted.

In Herrera v. Collins, 506 U.S. 390 (1993), and Schlup v. Delo, 513 U.S. 298 (1995), the United States Supreme Court recognized that when a capital petitioner presents compelling evidence of innocence the federal courts may need to allow for the evidence to be presented and considered despite procedural and technical requirements that might foreclose such a petitioner, because, to do otherwise, may violate the Eighth and Fourteenth Amendments to the United States Constitution.

Certainly, in the years following the Supreme Court's decisions in Herrera and Schlup, the country and the courts throughout the states have come to realize the fallibility about our system of justice. And, these lessons have not been lost on Florida. Even in the past four years, persons convicted and sentenced to death have proven that their convictions were unreliable due to compelling evidence of actual innocence. Some

of those cases involved the advances of science, but others did not. Some, like Mr. Rutherford have shown that another individual, in this case Mary Heaton, likely committed the crime. Also, the Florida Legislature and Governor have realized that injustices do occur in our legal system and have provided for DNA testing to those convicted of a crime, not matter when the conviction resulted or what technical and procedural issues would have precluded those who would have requested testing without the legislation.

Considering the affidavit of Mr. Gilkerson (App. I), and the evidence previously presented, Mr. Rutherford can make a compelling case of actual innocence. In his affidavit, Mr. Gilkerson stated:

> 5. At some point, I was made aware of Elizabeth and Mary Frances' involvement in a homicide and subsequent trial of A.D. Rutherford. Specifically, when I asked Elizabeth why her aunt was so mentally unbalanced I was told that Mary had not been the same since the time surrounding the murder and trial.
>
> 6. In the early 1990s, the three of us lived together in a trailer. One evening, Mary and I were alone at the trailer and I asked why she seemed so "crazy." I had witnessed her talking to herself many times in the past. She told me that she once killed an old lady with a hammer and made it look like A.D. Rutherford committed the crime. She told me that she got him good and that A.D. took the rap. Mary Heaton told me her motive for murdering the old lady was to get her money.

(App. I).

Armed with the information provided by Mr. Gilkerson,

postconviction counsel confronted Heaton with her confession. Rather than reassert her sworn testimony from trial, Heaton revised her story and told the defense that she was present at the crime scene. She also revealed that she knew the victim, a fact not known at trial. Heaton's change of story demonstrates evidence of guilt and also constitutes impeachment of her and other State witnesses.

In considering Mr. Gilkerson's affidavit, Heaton's response when confronted with her confession and the other evidence, this Court must not substitute its own judgement for the "independent judgement as to whether reasonable doubt exists". Schlup, 513 U.S. at 329. While Mr. Rutherford must meet the high standard of the "no reasonable juror test", he need not entirely dismantle the pillars of the prosecution's case or affirmatively demonstrate innocence. See Schlup, 513 U.S. at 329, 331. Certainly, the evidence provides reasonable doubt as to Mr. Rutherford's conviction and meets the "no reasonable juror test".

Further, this Court must consider that the prosecution's case against Mr. Rutherford was entirely circumstantial. The case consisted of a few prints matched to Mr. Rutherford in the victim's bathroom, where she was found, Heaton's testimony that Mr. Rutherford possessed the victim's wallet and checkbook and disposed of the wallet in the woods, Ward's testimony that Mr. Rutherford requested that she fill out the check, and finally,

various statements made to individuals that Mr. Rutherford planned to rob the victim and did rob and kill the victim.[61]

However, there is no denying that Mr. Rutherford had been in the victim's home the day before the crime working. Mr. Rutherford explained that he entered the victim's bathroom to work on the sliding doors. Furthermore, Heaton's confession to Mr. Gilkerson undermines her testimony and Ward's testimony.[62] Heaton's confession also undermines Mr. Rutherford's alleged statements.

Mr. Rutherford has presented a colorable claim of actual innocence. The lower court erred in denying Mr. Rutherford's claim. Relief is proper.

CONCLUSION

Mr. Rutherford submits that this case should be remanded for an evidentiary hearing on each of his issues, and that he should receive full public records disclosure and be permitted to amend his Rule 3.850 motion based upon future records received. Based on his claims for relief, Mr. Rutherford is entitled to a new trial and/or sentencing proceeding. Finally, Mr. Rutherford

[61]It must also be remembered that Mr. Rutherford rejected a plea which would have spared his life. But, he rejected the plea because he refused to plead to crimes that he did not commit.

[62]Or, it is entirely possible that Ward was being truthful, but that Heaton had recruited Mr. Rutherford to assist her in cashing the check after she had committed the crimes. If that were the case, then Mr. Rutherford is actually innocent of the first degree murder charge and ineligible for the death penalty.

submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, FL 32399, this 10th day of January 2006.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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