IN THE SUPREME COURT OF FLORIDA

NO. SC06-18

ARTHUR DENNIS RUTHERFORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF

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I. THE LOWER COURT=S FAILURE TO HOLD AN EVIDENTIARY HEARING AND USE THE CORRECT STANDARDS CONSTITUTES REVERSIBLE ERROR.

Initially, the State asserts: AThe standard of review for a newly discovered evidence claim, where no evidentiary hearing was conducted, is not clear. Federal courts review for a motion for new trial based on newly discovered evidence for an abuse of discretion@ (Answer at 23). It is clear that the State is suggesting that this Court utilize the federal standard of review employed in a direct appeal in federal court of the denial of a motion for new trial made after the jury=s verdict, but before sentencing. See United States v. Jernigan, 341 F.3d 1273 (11th Cir. 2003). However, the State simply misrepresents the State of Florida law when it describes the standard of review as Aunclear@ in appeals of the summary denial of Rule 3.850 motions. This Court has been abundantly clear about the standard of review:

> This Court also has enunciated the proper standard of appellate review when an appellate court reviews a summary denial of a rule 3.850 claim, including a claim of newly discovered evidence:
>
> To uphold the trial court=s summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant=s factual allegations to the extent that they are not refuted by the record.

McLin v. State, 827 So. 2d 948, 954 (Fla. 2002); see also Foster v. State, 810 So. 2d 910, 914 (Fla. 2001); Peede v.

State, 748 So. 2d 253, 257 (Fla. 1999).[1] The same standard of review has been applied to successive Rule 3.850 motions that have been heard by this Court during the pendency of a death warrant. Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(newly discovered evidence claims under Jones v. State are cognizable under rule 3.850, which provides that a motion for postconviction relief should only be denied without hearing Aif the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief.@).[2]

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[1]Certainly, the State=s refusal to address the well-established Florida standard of review of the summary denial of Rule 3.850 motions which was set out in the Initial Brief clearly demonstrates that the State recognizes that it cannot prevail in this appeal if that standard of review is employed.

[2]The same standard has been applied in successive Rule 3.850 motions that were not being heard during the pendency of a death warrant. 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

Because the State failed to enunciate the correct standard in its Answer, the State failed to properly address Mr. Rutherford=s argument that the lower court erred in summarily denying his claim because it was not refuted by the record, much less conclusively so. Under the proper analysis, it is clear that, as in Roberts, a stay must issue and the case must be remanded for an evidentiary hearing.

The State did not argue and the lower court did not find that Mr. Rutherford=s claim was legally insufficient. Thus, the sole focus of the inquiry before this Court is whether the files and records conclusively refute the allegations contained in Mr. Rutherford=s motion.

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inconsistent with trial testimony would probably produce and acquittal).

In his Rule 3.850 motion, Mr. Rutherford alleged that Mary Heaton, a State witness at trial, confessed to Allen Gilkerson that she committed the murder and made it look like Mr. Rutherford did it. To support the factual allegation, Mr. Rutherford submitted Alan Gilkerson=s affidavit recounting Heaton=s confession. (Att. I). Mr. Rutherford also alleged that Heaton, when confronted with her confession to Gilkerson, changed her story from the false one she told at trial. Heaton concocted a new, but equally false story, in which she put herself at the scene of the crime and claimed that she saw Mr. Rutherford Astrike the fatal blow@. (Att. K). Nothing in the record conclusively refutes Mr. Rutherford=s factual allegations.[3] Accordingly, the circuit court erred in denying the claim without benefit of an evidentiary hearing.

At one point in its Answer, the State says, AWhere no evidentiary hearing is held below, the court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Foster v. State*, 810 So.2d 910, 914 (Fla.
2002).@ (Answer at 24). Yet despite this statement, the State refused in its brief to accept Mr. Rutherford=s allegation that Heaton lied at trial and lied in 2005 to Mr. Rutherford=s

[3]In a perversion of the proper standard of review, the State does argue that the trial evidence is inconsistent with the newly discovered evidence, and therefore refutes it. However, inconsistency with the State=s theory of the case and the evidence it presented at trial is in fact the requisite element of the claim.

investigator, Mike Glantz.[4] The State refused in its brief to accept the factual allegation that Heaton=s statement to Glantz, though different from her trial testimony, was a lie. This is the same error that the lower court at the State=s urging committed. Both, the circuit court and the State failed to treat the factual allegations made by Mr. Rutherford as true. In its brief, the State completely ignored Mr. Rutherford=s argument in his Initial Brief regarding this issue.[5] Indeed, the Answer is replete with the argument that the affidavits Acannot be true@; AGilkerson, who is a convicted felon, has not explained his delay in coming forward with this evidence@[6] and AHeaton=s mental illness and brain damage, no doubt, affect her memory.@[7] (Id. at 19, 25,

[4]It is not uncommon for prosecutors to present evidence of statements made by a criminal defendant asserting innocence as lies that the State argues reveals guilt. See Riechmann v. State, 581 So. 2d 133 (Fla. 1991). In this instance, Mr. Rutherford has alleged that the change in Heaton=s story when confronted with Gilkerson=s statements reveals that her claims of innocence are a fabrication.

[5]The fact that the lower court failed to take Mr. Rutherford=s allegations as true was extensively argued at pages 20 - 27 of his Initial Brief.

[6]At an evidentiary hearing, the State could have asked Gilkerson this question; instead, it convinced the circuit court to summarily deny Mr. Rutherford=s claim without benefit of an evidentiary hearing.

[7]At an evidentiary hearing, the State could have called witnesses to discuss Heaton=s condition and could have asked Heaton, herself, about her memory; instead, the State argued for a summary denial of Mr. Rutherford=s claim. At this point, it is not proper to inject conjecture in order to argue that her confession to Gilkerson should not be believed.

29).

Thus, the State=s arguments that this Court, like the lower court should consider Athe length of delay@, Athe reason the witness failed to come forward sooner@, are in reality a refusal to accept the factual allegations as true. Those arguments undoubtedly could and would be made after an evidentiary hearing. But at such a point in time, it would be after the testimony, subject to cross-examination, had been heard in open court. The State opposed an evidentiary hearing on the basis that even accepting the factual allegations as true, Mr. Rutherford was not entitled to relief. Because the State convinced the circuit court to not hold an evidentiary hearing, this Court has no context in which to make the credibility determinations that the State seeks.

Quite simply, the State=s argument to the lower court for summary denial was devoid of any legal authority and contrary to existing law. The lower court erred in summarily denying Mr. Rutherford=s claim.

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

A. Diligence.

In its Answer, the State asserts: AThe State did NOT concede due diligence.@ (Answer at 28)(emphasis in original). However, that simply isn=t true.[8]

[8]The only explanation for the State=s sudden change of heart in this regard is some kind of buyer=s remorse. Apparently, the State now recognizes that this Court, if it follows its own precedent is going to have to remand for an

The State=s response to Mr. Rutherford=s Rule 3.850 shows that not one word in the its response was devoted to whether or not Mr. Rutherford was diligent in discovering the evidence of Heaton=s confession. After receipt of the response, Mr. Rutherford=s counsel was uncertain if the State was challenging diligence. The circuit court had tentatively scheduled the evidentiary hearing for December 29th, the day after the Huff hearing. Because many of the diligence witnesses were located in other states and their availability for a hearing in Milton on December 29th was in doubt, Mr. Rutherford had filed a motion seeking to depose the witnesses to perpetuate their testimony. During a hearing on this motion on December 23, 2005, the State opposed the motion to depose because testimony from the diligence witnesses was unnecessary. The State=s counsel informed the court, AI did not contest due diligence.@ (Dec, 23, 2005, morning, hearing). Thus, the motion was denied because the diligence witnesses were determined to be unnecessary at an evidentiary hearing since the State was not Acontest[ing] due diligence.@

Further, at the December 28, 2005, Huff hearing, Mr. Rutherford=s counsel sought clarification of the State=s position, given that the State was arguing that Gilkerson=s delay in coming forward was a basis for rejecting his

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evidentiary hearing, and the State now wants to contest diligence at that hearing.

affidavit. The State=s argument in this regard posed a problem since the motion to depose had been denied. Testimony regarding Mr. Rutherford=s prior collateral counsel=s failure to know of Gilkerson was relevant to rebut the State=s argument, but the testimony would not be available on one days notice given the position that the State had taken conceding diligence. Again, the State informed the lower court: AI am not disputing due diligence, Your Honor.@ (Dec. 28, 2005, hearing).

When used as a verb Adispute@ is defined as: Ato engage in argument@. WEBSTER=S NINTH NEW COLLEGIATE DICTIONARY, Merriam-Webster Inc., 9th Ed. Thus, if one is Anot disputing@ an allegation, one is not arguing or questioning it; one is accepting it as true, or conceding it. In fact here, the question arose in the context of what witnesses would be necessary at the evidentiary hearing that had tentatively been set for the day after the Huff hearing. The State=s position was that Mr. Rutherford did not have to call witnesses to address diligence because the State was not Acontest[ing]@ or Adisputing@ diligence. Indeed, the lower court relied on the State=s representations in ruling on motions and in his final order denying Mr. Rutherford=s claim. See Jan. 5, 2006, Order (Athe Assistant Attorney General represented that they would not contest the diligence requirement. Thus, this Court will turn to the second prong of *Jones*.@).

This Court has explained that the contemporaneous

objection rule applies to the State just as it applies to the defense. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (AContemporaneous objection and procedural default rules apply not only to defendants, but also to the State@). Given that the State asserted that it was not disputing diligence and that evidence on the issue would be unnecessary at an evidentiary hearing, the State has waived any claim that Mr. Rutherford was not diligent. See Jones v. Butterworth, 701 So. 2d 76, 78 (Fla. 1997)(the failure to make a Frye objection while the witness was on the stand constituted a waiver of the objection, and precluded raising the matter after the witness left the witness stand, but was still present in the courtroom).[9] Indeed, the State has defaulted any argument regarding diligence.

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

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

[9]Essentially, the State=s deception in the lower court and changing its position before this Court has caused Mr. Rutherford to be harmed as he did not raise the denial of motions to perpetuate testimony by the lower court in his Initial Brief, based on the State=s representations below.

Taking Mr. Rutherford=s allegations as true, Heaton confessed to the crimes with which Mr. Rutherford was convicted and sentenced to death. And, Heaton has made inconsistent statements which provide further evidence of her guilt. The newly discovered evidence contradicts all of the evidence presented by the State at Mr. Rutherford=s capital trial. When considered with the evidence that Heaton is the only person seen to be in evidence of the victim=s belongings on the day of the crime, it is exactly the type of evidence which would probably produce an acquittal on retrial, or at a minimum a sentence less than death.[10]

In arguing that the newly discovered evidence would not probably produce an acquittal or undermine confidence in the outcome, the State argues that the Gilkerson affidavit and affidavit regarding Heaton=s response to being confronted with her confession are Acontradictory@.[11] (Answer at 17, 19, 36-37). The State also argues that Heaton=s statements made to member of Mr. Rutherford=s defense team are not exculpatory, but inculpatory since Heaton told Glantz that she was present at the victim=s house when Mr. Rutherford struck Athe fatal

[10]The State, in fact, inadvertently concedes that her confession to Gilkerson contradicts its case at trial when it argues that the trial testimony refutes Gilkerson=s affidavit.

[11]The State argues that a cumulative review cannot be conducted because both affidavits Acannot be true@. (Answer at 37). Thus, the State refused to address Mr. Rutherford=s argument concerning cumulative review which cited legal authority for his position.

blow@.[12] (Answer at 30). However, in arguing that the affidavits are contradictory and that Heaton=s recent statement is not exculpatory the State fails to recognize that Mr. Rutherford maintains that Heaton=s statements to Glantz are false; and as a result, the State misses the point.

Indeed, the State fails to address the argument presented in Mr. Rutherford=s Initial Brief and before the lower court: Mr. Rutherford does not believe that Heaton told Glantz the truth, or told the truth when she testified at the time of trial. Mr. Rutherford maintains that she has repeatedly lied when confronted about the matter. See Initial Brief at 21-23. The fact that she changed her story when confronted with Gilkerson=s statement that she confessed to him, and claimed to have witnessed Mr. Rutherford commit the murder, actually constitutes evidence of guilt. Her recent statement in which she acknowledged knowing Gilkerson, but tried to explain away his claim that she confessed by placing herself at the murder scene as merely a witness actually constitutes evidence of her guilt.

Indeed, this Court has frequently found a criminal

[12]As to Mr. Rutherford=s Brady claim, the State, through Ms. Millsaps, insists that the State did not have Heaton=s inconsistent statement. (Answer at 40). However, the State=s insistence is not evidence.

defendant=s change of story when confronted with other evidence to be evidence of guilt. For example, in Floyd v. State, 497 So. 2d 1211, 1212-13 (Fla. 1986), this Court found that Floyd=s inconsistent statements, including his Arevised [] story when confronted with the police knowledge that he had cashed the [victim=s] $500 check@ was evidence of Floyd=s guilt. See also Carpenter v. State, 785 So. 2d 1182, 1995 (Fla. 2001); Shere v. State, 742 So. 2d 215, 200 (Fla. 1999); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995); Bedford v. State, 589 So. 2d 245, 250-51 (Fla. 1991) ("Because each of Bedford's several versions of events was inconsistent with the others, the jury reasonably could have concluded that each of these accounts was untrue.").

The State has simply ignored Mr. Rutherford=s factual allegations by repeating its mantra that the Gilkerson affidavit is inconsistent with the Glantz affidavit.

This Court has repeatedly reviewed cases in which a defendant=s statements to law enforcement, while exculpatory on their face, are presented by the State in the guilt phase of a criminal trial to demonstrate evidence of guilt. For example, in Brooks v. State, this Court reviewed a sufficiency of evidence claim and held that:

> **Record evidence also demonstrates the guilty knowledge of Brooks regarding the murders. In contrast to the multitude of witnesses who placed Brooks in Crestview near the crime scene on the night of the murders, Brooks consistently denied being in the community during his police interviews.** According to Air Force Office of Special Investigations Agent Karen Garcia, Brooks claimed

> that he and his cousin remained in Davis's apartment near Eglin Air Force base assembling a waterbed on the night of the murders, leaving only briefly to walk Davis's dog. At one point during his interview with Agent Garcia, Brooks stated, "Walker is on his own. If he did something, he's on his own." The investigator from the office of the State Attorney, Michael Hollinhead, also interviewed Brooks shortly after the murders. Hollinhead testified that when he attempted to develop information from Brooks regarding the person named "Mark" (subsequently identified as Gilliam), who had accompanied Brooks to Davis's home on April 21, Brooks became "evasive."

2005 Fla. LEXIS 1339, *31-32 (Fla. June 23, 2005). This Court relied on the defendant=s statements, though exculpatory, as showing evidence of guilt under the circumstances presented and in light of the other evidence presented at trial. Likewise, Heaton=s substantial change of story when confronted with her confession to Gilkerson demonstrates her guilt.

In Rodgers v. States, this Court held that it was within the province of the fact finder to judge the reliability of conflicting pre-trial statements made by a defendant when one statement is exculpatory and one inculpatory. 2004 Fla. LEXIS 2120, *30-1 (Fla. Nov. 24, 2004)(AResolving the conflict was within the discretion of the trial court@. In Mr. Rutherford=s case, Heaton has made numerous inconsistent statements, including that she killed the victim. Her statement to Gilkerson is supported by the evidence presented at Mr. Rutherford=s trial that she possessed the victim=s check and received the proceeds as well as her response when confronted with her confession, i.e., again changing her story.

Undoubtedly, Heaton=s inconsistent statements, even

without her confession to Gilkerson would support probable cause to arrest her for first degree murder in the State wished to prosecute her. See Francis v. State, 808 So. 2d 110, 125 (Fla. 2001)(holding that inconsistent statements establish probable cause for arrest); Walker v. State, 707 So. 2d 300 (Fla. 1997). Her inconsistent statements also demonstrate and can be relied upon by the State to show guilt.

The State=s assertion that Heaton=s response when confronted with her confession is inculpatory fails to accept Mr. Rutherford=s factual allegations as true. Mr. Rutherford has alleged that her confession to Gilkerson is true and then when confronted with it, she lied. Prosecutors often rely on exactly the same type of inconsistent statements made by a suspect, even when some statements are exculpatory, to establish probable cause and proof of guilt. Heaton=s confession and recent change of story when confronted about her involvement in the crime constitute evidence of her guilt and are exculpatory to Mr. Rutherford. Accepting the factual allegations as true, the newly discovered evidence would probably produce an acquittal on retrial.

The State repeatedly relies on the fact that the newly discovered evidence refutes the trial evidence as defeating Mr. Rutherford=s claim. But of course, newly discovered evidence that was consistent with the State=s case at trial would be pretty meaningless. It is the fact that it refutes the trial testimony that makes new evidence of innocence, and

thus a claim warranting post conviction relief.

In this regard, the State argues that Ward=s testimony corroborated Heaton=s trial testimony and refutes the newly discovered evidence. (Answer at 17, 25, 40). The State avers: AMary Heaton=s trial testimony was corroborated by her niece, Elizabeth Ward.@ (Answer at 25), and AThe new statement [by Heaton] is not truly impeaching of the State=s case because it does not affect the testimony of the niece.@ Again, the State=s argument ignores the impact that Heaton=s confession to Gilkerson and her latest version of events would have on both she and her niece=s testimony. The new evidence undermines both witnesses testimony and provides a motive for Ward to have testified falsely at trial **B** Heaton is her aunt and she wanted to protect her, and/or she made it look to Ward like Mr. Rutherford was the mastermind in order to make it look like he was guilty. The new evidence supplies impeachment evidence to both Heaton and Ward=s testimony; alternatively, it may corroborate exactly what Gilkerson has stated - that Heaton made it look like Mr. Rutherford was guilty.

The State avers that both witnesses place the victim=s check with Mr. Rutherford. But of course, Heaton may have previously placed the check in Mr. Rutherford=s hand after she committed the murder. Moreover, a witness totally unconnected to Heaton, the bank teller, placed the check in Heaton=s hands, not Mr. Rutherford=s. And, Harvey Smith confirmed that Heaton paid him $350.00 later that day for a car.

Additionally, the State=s assertion that Ward corroborated Heaton is misleading. A review of the witnesses= testimony actually shows that Heaton=s version of events and Ward=s version of events differed on key points. For example, the time table provided by the witnesses is different: Heaton testified Mr. Rutherford arrived at her home between 11:30 a.m. and 12:00 p.m; Ward testified that Mr. Rutherford arrived between 1:00 and 1:30 p.m. Also, Heaton testified that she did not know who filled out the check, because she was not present when it was done, but Ward testified that Heaton was in the van at the time the check was written. The witnesses= descriptions of the wallet and what Mr. Rutherford was supposedly wearing were different.

In terms of the prejudice analysis, the State also argues that Heaton=s testimony was not critical to obtaining a conviction against Mr. Rutherford.[13] (Answer at 30). However, Heaton=s explanation for how she came to be in possession of the check and the fact that she cashed the check was critical to the State=s case. Without an explanation from Heaton, the

[13]The State also claims that Heaton=s latest inconsistent statement is not significant because Heaton was already impeached at trial. However, in Cardona v. State, this Court held: A[T]he fact that a witness is impeached on other matters does not necessarily render the additional impeachment cumulative.@ 826 So. 2d 968, 974 (2002). Heaton=s explanation of the circumstances by which she came into possession of the victim=s check was critical to the State=s case against Mr. Rutherford. Information showing that Heaton was lying was critical to the defense.

defense could have made a strong case that she was the only person to be seen in possession of the check by an unbiased witness. Heaton's possession of the check, without any explanation, makes her a logical other suspect and provides reasonable doubt as to Mr. Rutherford's guilt.

Also, as to the physical evidence, Mr. Rutherford was present at the victim's home the day before the crime.[14] He explained that he had adjusted the bathroom sliding shower doors for the victim. So, the newly discovered evidence supports Mr. Rutherford's explanation. However, the State never explained the unidentified fingerprints that were found in the same area as the victim. In light of Heaton's confession to Gilkerson and her admission that she was present at the crime scene the defense could certainly make a reasonable argument that those prints belonged to Heaton.

Likewise, the State fails to address Mr. Rutherford's argument concerning the statements attributed to him that the State presented at trial, and the impact the newly discovered evidence would have had on those statements. (See Initial Brief at 25-26, 41-42). If Heaton's confession to Gilkerson is

[14]It is odd that the State continues to rely on the physical evidence to argue that Mr. Rutherford's claim be denied, but that the State objects to Mr. Rutherford's requesting additional discovery to find the evidence that was collected at the time of the crime, including unidentified hairs found on the victim. In light of Heaton's confession, the other physical evidence that was never compared to Heaton is relevant and would certainly corroborate his claim.

true, which this Court must accept, the alleged statements made by Mr. Rutherford are certainly undermined. Moreover, the witnesses who testified at trial that Mr. Rutherford made these statement were impeached when they testified, though the State and the lower court failed to acknowledge the impeachment and the evidence that contradicted this testimony at trial.[15]

A review of all of the evidence, including the evidence from trial that impeached the State=s case, and newly discovered evidence, an acquittal on retrial is probable.

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

The State argues: ACollateral 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. Heaton=s statements concern who the perpetrator of the crime is, which is a guilt, not sentencing, issue.@ (Answer at 27). Because the State takes such a position, Mr. Rutherford=s argument as to the impact of the new evidence at his penalty phase is completely ignored.

[15]Mr. Rutherford testified in his defense and he refuted the testimony from the State=s witness regarding these statements. Gilkerson=s affidavit is evidence that would have supported Mr. Rutherford=s trial testimony.

However, the State is incorrect. The new evidence certainly impacts all of the aggravators. If Mr. Rutherford did not commit the crime, or was a minor participant, after the fact, then none of the aggravators would have applied to him. In fact, Mr. Rutherford would be ineligible for the death penalty. See Enmund v. Florida, 458 U.S. 782 (1982). Heaton's confession also establishes mitigation.

Indeed, in asserting that the new evidence is solely a Aguilt issue@, the State ignores this Court=s precedent reviewing evidence which impacted the determination of guilt, but also penalty. See State v. Mills, 788 So. 2d 249 (Fla. 2001) (reviewing conflicting evidence regarding who was the actual shooter and finding that the evidence affected the penalty phase); Garcia v. State, 622 So. 2d 1325 (Fla. 1993)(finding inculpatory statements by a co-defendant undermines confidence in the outcome of a sentencing phase). This Court has said that Acredibility problems could have served to mitigate [a capital defendant=s] crime.@ Keen v. State, 775 So.2d 263, 286 (Fla. 2000); Pomeranz v. State, 703 So.2d 465, 472 (Fla. 1997).

Further, the State=s argument that Alingering doubt@ is not mitigation, but a standard of proof is incorrect. The United States Supreme Court is currently reviewing a case presenting this issue. See Oregon v. Guzek, ___ U.S. ___ (2005)(certiorari review was granted to determine if lingering doubt is a mitigating circumstance under the Eighth

Amendment).[16] The State fails to acknowledge that the jury recommendation in Mr. Rutherford=s case was only seven (7) to five (5). Reviewing the evidence presented previously along with the newly discovered evidence, there is no doubt that Heaton=s confession to Mr. Gilkerson and her inconsistent statements about her involvement in the crime would have swayed one more juror to vote for life.

C. Conclusion.

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

Mr. Rutherford is entitled to an evidentiary hearing. The State=s reliance on Kokal v. State, 901 So. 2d 766 (Fla. 2005), and Melendez v. State, 718 So. 2d 746 (Fla. 1998), is misplaced. In both Kokal and Melendez, the Supreme Court denied relief after an evidentiary hearing was held.[17] And, subsequent to the denial of relief, Mr. Melendez litigated a second successive Rule 3.850 motion, raising claims similar to those raised in his first successive motion **B** that another individual had confessed to the crime. The trial court considered the evidence and found that based on all of the evidence, including that from the previous hearing,[18] initial 3.850 motion and trial, Mr. Melendez was entitled to relief. Thereafter, the State did not appeal the trial court=s decision.

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.

[17]The State also relies upon Jones v. State, 709 So. 2d 512 (Fla. 1998), another case in which this Court affirmed the denial of relief following an evidentiary hearing held in circuit court. The State does not seem to understand that those cases arising after an evidentiary hearing was held involve a different standard of review.

[18]At Mr. Melendez= first evidentiary hearing on the allegations that another individual had confessed, the circuit court found that some of the witnesses were not credible. Yet, when those same witnesses testified and were considered with all of the evidence at the second evidentiary hearing, the circuit court came to a different conclusion and found the witnesses credible.

In opposing Mr. Rutherford=s request for further discovery, the State relies on Officer Joel Lowery who testified about his search for the evidence. However, Officer Lowery=s testimony raised more questions than it answered. Mr. Rutherford must be entitled to discovery concerning this issue.

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

The State argues that Mr. Rutherford has not met his burden to obtain Heaton=s psychological records. (Answer at 45). But, the State ignores the fact that Heaton admitted that she spoke to counselors in the past about her presence at the scene of the crime. Thus, Mr. Rutherford=s request is not a Afishing expedition@ or Adesperate grasping at a straw@. Instead, Mr. Rutherford informed the lower court that Heaton admitted that she had given inconsistent statements to her mental health counselors in the past. Based on this information, Mr. Rutherford should be entitled to Heaton=s records as it constitutes impeachment evidence and corroborates Gilkerson.

ARGUMENT II:

A. Lethal Injection[19]

[19]While conceding that the standard of review for this issue is *de novo*, the State then proceeds to argue that statutes are presumed to be constitutional. (Answer at 48).

In its Answer, the State attempts to reinvent Mr. Rutherford=s argument by asserting that A[t]here is no constitutional right to an entirely pain free execution and there certainly is no constitutional right to be unconscious during execution.@ (Answer at 47). As the State is well aware, this statement in no way relates to Mr. Rutherford=s actual claim.

What Mr. Rutherford actually asserted in his Initial Brief was that the LANCET study Aconfirmed, 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.@ (Initial Brief at 61)(emphasis added). As Mr. Rutherford argued, and as the State concedes in its Answer, A[t]he Eighth Amendment prohibits the infliction of >cruel and unusual punishments.= U.S. Const., amend. VIII. It >forbids the infliction of <u>unnecessary</u> pain in the execution of the death sentence.= *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 67 S.Ct. 374, 376, 91 L.Ed. 422

In doing so, the State ignores Mr. Rutherford=s very clear statement that, AHere, 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.@ (Initial Brief at 59)(emphasis added).

(1947)(plurality opinion).@ (Answer at 49)(emphasis in original).

Thus, the State=s argument that A[t]here is no constitutional right to an entirely pain free execution@ is of no consequence to these proceedings.[20] Similarly, the State=s reliance on a recent case from Indiana, Bieghler v. State, 2005 Ind. LEXIS 1156 (Ind. December 28, 2005), is also misplaced. See Bieghler, 2005 Ind. LEXIS at *9 (ABieghler cites no authority for the proposition that he is entitled to a Apain free@ execution, and we have found none.@).[21] Unlike in Bieghler, Mr. Rutherford=s claim involves the infliction of unnecessary and wanton pain.[22]

Turning to Mr. Rutherford=s actual claim, the State relies on this Court=s opinion in Sims where it Arejected the parade of horribles argument regarding what could happen if lethal injection is not administered properly.@ (Answer at 50). However, the State fails to address or even acknowledge Mr.

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[20]Additionally, the State=s assertion that Athere is no constitutional right to be unconscious during execution@ (Answer at 47), is a gross mischaracterization of Mr. Rutherford=s argument.

[21]Beighler asserted that only an anethesiologist has the proper training to administer sodium penthotal, and since Indiana=s protocol does not include the assistance of an anethesiologist, Indiana=s method of execution lacks the assurance of a Apain free@ execution. Id. at *7-8.

[22]Moreover, as the State concedes, (Answer at 55), the procedure for proceeding on a successive post-conviction claim in Indiana is different than that in Florida. See Bieghler, 2005 Ind. LEXIS at *6.

Rutherford=s argument in his Initial Brief that unlike Sims, this claim is no longer about the Aifs@ of what could go wrong, but rather what actually is going wrong during executions by lethal injection. Unlike Sims, there is now empirical evidence establishing that the infliction of cruel and unusual punishment and the wanton infliction of pain is no longer speculative.[23] Again, without addressing the fact that the LANCET study constitutes new, empirical scientific evidence, the State string-cites several cases subsequent to Sims for the proposition that A[t]his Court has repeatedly rejected such challenges in the wake of ***Sims*** and repeatedly affirmed summary denials of such challenges.@ (Answer at 51).[24] The State makes this assertion without ever acknowledging that, as pointed out in Mr. Rutherford=s Initial Brief, in none of these cases did the appellants rely on the scientific evidence presented by Mr. Rutherford. Therefore, these rulings have no bearing on Mr. Rutherford=s entitlement to an evidentiary hearing.

Subsequently, the State proceeds to conduct its own

[23]As the State fails to acknowledge, this Court did not have the benefit of this study when finding that the protocols used in 2000 were constitutional.

[24]The State cites to Suggs v. State, 2005 WL 3071927 (Fla. November 17, 2005); Johnson v. State, 904 So.2d 400, 412 (Fla. 2005); Parker v. State, 904 So.2d 370, 380 (Fla. 2005); Sochor v. State, 883 So.2d 766, 769 (Fla. 2004); and Cole v. State, 841 So.2d 409, 430 (Fla. 2003). (Answer at 51-2).

critique of the LANCET study (Answer at 52) and opines that the study=s conclusion is an Aodd@ one for a true scientific article (Answer at 53, fn 10). Of course, what the State is actually doing is making arguments and raising questions that could and should have been fleshed out at an evidentiary hearing, where one of the authors of the LANCET study, Dr. Lubarski, was available to testify.[25]

Interestingly, with regard to Dr. Lubarski, the State altogether ignores his affidavit which Mr. Rutherford presented in the lower court proceedings. Hence, the State has failed to rebut his conclusion that because Florida=s practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicological analysis, 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.[26]

Rather than concede to a necessary evidentiary hearing, the State instead attempts to convince this Court that it should adhere to the decisions of other jurisdictions, notwithstanding the fact that such decisions involve different legal standards, evidence, facts and procedural postures.

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[25]However, the State adamantly opposed an evidentiary hearing.

[26]Dr. Lubarski=s findings were made to a reasonable degree of scientific certainty. (App. C).

The first case which the State would have this Court rely on in upholding the summary denial of an evidentiary hearing is Reid v. Johnson, 333 F.Supp.2d 543 (E.D.Va. 2004)(Answer at 53). However, this case is both factually and procedurally distinguishable from Mr. Rutherford=s case. Factually, despite the State=s misrepresentation that this case was decided Ain the wake of the Lancet article@, (Answer at 53), the Reid opinion was actually issued in 2004, well before the LANCET study was published.[27] Further, the State is seemingly unaware of the fact that in Reid, there was an evidentiary hearing, during which the State presented an expert in rebuttal, and the defense expert deferred to the expertise of the State=s witness. 333 F.Supp.2d at 546-7.

Unlike in Reid, there was no evidentiary hearing 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 has presented no expert to rebut Mr. Rutherford=s proffer of evidence.

Procedurally, the petitioner in Reid was attempting to proceed under a 1983 action in federal court. 333 F.Supp.2d at 549. He was seeking a preliminary injunction to prevent the State from executing him. Id. The district court addressed the granting of a preliminary injunction under a more

[27]As such, Mr. Rutherford is at a loss as to how this case addressed lethal injection Ain the wake of the Lancet article.@

stringent legal standard. The standard to be applied for determining whether an evidentiary hearing should be granted in a postconviction case in Florida is much less onerous. 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 Ano relief.@). Here, the State=s reliance on Reid is misplaced.[28]

[28]Moreover, in relying on the evidence in the Virginia proceedings, the State has injected facts not in the record into its argument, thereby conceding an evidentiary hearing. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993).

Finally, the State claims that the Eighth Circuit (Missouri) recently summarily denied a motion for a stay of execution based on the LANCET study, thus an evidentiary hearing here is unnecessary. Again, the State=s reference to proceedings in Missouri is of no relevance to these proceedings, unless the State wishes to concede an evidentiary hearing wherein it could attempt to use evidence from another State to rebut Mr. Rutherford=s case. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993). Further, unlike here, the Petitioner in Missouri was attempting to proceed under a 1983 action in federal court, and the Eighth Circuit denied relief in a brief order without addressing any facts.[29] Mr. Rutherford was not a party to the proceedings in Missouri and has never had the opportunity to examine any witnesses there.

Here, in Florida, 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 Ano relief.@ See Lemon v. State, 498 So. 2d 923 (Fla. 1986); Fl.

[29]Despite the tenuous procedural posture of that case, four Justices on the United States Supreme Court were in favor of granting certiorari.

R. Crim. P. 3.851(f)(5)(B). Contrary to the State=s argument, an evidentiary hearing is required.

B. Motion for Independent Testing

In its Answer, the State never addresses the merits of Mr. Rutherford=s claim. Rather, the State simply states that Sims controls and the trial court properly denied the motion. (Answer at 57). As the State has failed to address any of Mr. Rutherford=s argument, he relies on the unrebutted argument in his Initial Brief and reiterates his request 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

The State argues that Mr. Rutherford has abandoned his Motion for Discovery because it was not ruled on until after the Notice of Appeal was filed. (Answer at 57). The State=s argument is unavailling and ignores the circumstances of litigation conducted under a death warrant.

As explained in his Initial Brief, counsel first learned of the circumstances leading to the Motion for Discovery on Thursday, January 5, 2006.[30] Counsel filed the Motion for Discovery the following day, Friday, January 6th. On that same day, the lower court ordered a response from the Department of Corrections to be filed on Monday, January 9th. However, as ordered by this Court, Mr. Rutherford=s Initial Brief was to be

[30]Also on January 5, 2006, the lower court issued its order denying relief.

filed on Tuesday, January 10th. Thus, on January 9th, Mr. Rutherford necessarily filed his Notice of Appeal.

Subsequent to the Notice of Appeal being filed, the Department of Corrections filed its response, and the lower court denied Mr. Rutherford=s motion. (Order, Jan. 9, 2006). At no time did the lower court, or the State, determine or argue that Mr. Rutherford abandoned the issue.[31]

The State=s argument would seemingly have required Mr. Rutherford to ignore this Court=s briefing schedule and simply wait until the lower court ruled. In reality, this was not a viable option. Instead, Mr. Rutherford acted as expeditiously as possible, and he should not be penalized for following the times constraints imposed upon him. Following the State=s logic, the present appellate proceedings should not be going forward as no record on appeal has been compiled. Not surprisingly, however, the State has not issued a complaint about this defect in the appellate process.

Turning to the merits, the State asserts that Athis medical examination is part of the standard protocol.@ (Answer at 58). However, if this was in fact a Athorough physical examination@ in accordance with protocol, Mr. Rutherford does not understand why the State is being so secretive about it. In response to Mr. Rutherford=s motion, the Department of Corrections (DOC) stated that A[t]here is no documentation

[31]Rather, it is likely that the lower court understood the time constraints imposed and acted accordingly.

connected with the aforementioned examination.@[32] Yet, from what counsel understands, inmates under warrant are closely monitored, and virtually every observation of them, from eating to sleeping, is reduced to writing. However, for some unknown reason, any report of this Athorough physical examination@ has only been committed to memory.

Counsel for Mr. Rutherford is clearly entitled to his medical records. The State claims the occurrence referenced in the Motion for Discovery was a medical examination. If the State continues to Ahide the ball@ and maintain that there are no records, then Mr. Rutherford should be allowed to depose those individuals involved with his Aexamination@. The lower court=s order denying the requested relief is erroneous.

ARGUMENT III: FIRST AMENDMENT CLAIM. [33]

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[32]Further, DOC also objected to Mr. Rutherford deposing the individuals because they are Apart of the execution team whose identities remain secret@.

[33]With regard to the standard of review, the State once again proceeds to assert that statutes are presumed to be constitutional (Answer at 60). Here, as in Argument II, the State fails to direct this Court=s attention as to what basis it has determined that Mr. Rutherford is challenging a statute.

In his Initial Brief, 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.

In its Answer, the State relies on the Ninth Circuit=s decision in Beardslee v. Woodford, 395 F.3d 1064, 1076 (9th Cir. 2005), as a basis to summarily deny Mr. Rutherford=s claim. (Answer at 60). However, the State never actually addresses Mr. Rutherford=s argument in his Initial Brief, where he demonstrates that, A[a]side from the fact that Florida is not bound by rulings of federal courts from other circuits, Beardslee is distinguishable both procedurally and factually.@ (Initial Brief at 73-77).

As Mr. Rutherford argued in his Initial Brief, 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 legal standard utilized for the granting of a preliminary injunction is far more stringent than for granting an evidentiary hearing. (Compare Id. at 1067, with Lemon v. State, 498 So. 2d 923 (Fla. 1986)).

Factually, the opinion in Beardslee preceded the published study upon which Mr. Rutherford relies. Further, 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.[34] Thus, the State=s reliance on Beardslee is misplaced.

Next, the State asserts that there is a legitimate penological interest in having an inmate unconscious and immobile during the execution. (Answer at 61). Contrary to the State=s distorted version of his argument, Mr. Rutherford is not complaining that he will be unconscious or immobile during his execution. Rather, he is saying that in the likely event that he will not be rendered unconscious by the anesthesia, he wants to be able to communicate this as well as the fact that he is experiencing excruciating pain. However, the administration of pancuronium bromide will paralyze Mr. Rutherford=s voluntary muscles, resulting in his inability to speak or move.

Like the lower court, the State also fails to cite any Alegitimate penological interest@ in utilizing the paralyzing agent. The State=s reliance on Thornbough v. Abbott, 490 U.S. 401 (1989), (Answer at 61), also does nothing to identify the penological interest here. Unlike in Thornbough, Mr. Rutherford is not complaining about the Federal Bureau of Prisons= regulation of publications being sent into the prison.

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

490 U.S. at 403.

Here, the State has failed to rebut the fact that the lower court erred in denying Mr. Rutherford an evidentiary hearing on this issue.

ARGUMENT IV: PUBLIC RECORDS

In its Answer, the State confuses Mr. Rutherford=s requests for records and his motion for access.

A. Request for public records

During the warrant proceedings, Mr. Rutherford sought public
records pursuant to Fla. Stat. Ch. 119 and Fla. R. Crim. P. 3.852 (h)(3), from a total of six agencies.[35] Contrary to the State=s assertion (Answer at 71), Mr. Rutherford has in fact identified, on at least several occasions, whether he previously made requests to these agencies.

From what Mr. Rutherford can discern, the State is complaining that Mr. Rutherford is not entitled to records relating to lethal injection, because this Ais a fishing expedition unrelated to a colorable claim for postconviction relief.@ (Answer at 72)(emphasis in original).[36]

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[35]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.

[36]The State does nothing to rebut Mr. Rutherford=s

Of course, the State=s argument is incorrect. Mr. Rutherford=s claim that the current method of lethal injection, in light of recent empirical evidence, constitutes cruel and unusual punishment, is a colorable claim for relief. As is clear from Mr. Rutherfords=s pleadings, he 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, based upon recent scientific evidence, that he believes the Department of Corrections uses to carry out executions.[37]

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contention that his requests for public records were in fact narrowly tailored and fall squarely within the confines of Rule 3.852 (h)(3).

[37]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.

Despite the fact that Mr. Rutherford followed the dictates of Rule 3.852 (h)(3), the State now wants to unilaterally create an additional hurdle, requiring Mr. Rutherford to prove that he will prevail on his constitutional claim in order to receive public records. The State=s ad-hoc addendums to Rule 3.852 (h)(3) are improper and contrary to the law. The State also attempts to fit Mr. Rutherford=s six narrowly tailored requests into a group of cases where overbroad requests were made.(Answer at 71). However, unlike those cases, Mr. Rutherford did not make over twenty records requests to agencies that were not the recipients of previous requests.[38]

Additionally, the State misleadingly relies on the fact that, AHere, as in *Bryan*, the public record requests should be

[38]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, AIt 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).

denied. Rutherford may not relitigate a constitutional challenge in the trial court that has been conclusively rejected by the Florida Supreme Court.@ (Answer at 78). In actuality, however, such public records were disclosed in Bryan: AIn 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.@ Bryan v. State, 753 So. 2d 1244, 1251 (Fla. 2000).

Finally, the State argues that Mr. Rutherford is only entitled to updates of prior requests, but that he didn=t previously request lethal injection protocols from DOC. (Answer at 72). However, the State=s position is simply untenable, as it would require Mr. Rutherford to have known in 1991 when he requested records from DOC, that lethal injection would be adopted as the method of execution in Florida in 2000. Nowhere in Rule 3.852 (h)(3) does it contemplate that Mr. Rutherford should be faulted for not requesting records that did not exist about a method of execution that did not exist. Clearly, any request about the method of execution in 1991 would no longer be germane to whether or not the current method of execution in Florida is constitutional because, not only has the method changed, but information about recent executions, the protocol and related matters are constantly

changing.

Mr. Rutherford asks this Court to remand the case to the lower court for full public records disclosure and to permit amendment of this motion based upon future records received.

B. Motion for Access to Records

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.

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. Mr. Rutherford informed the court that after the abolishment of CCRC - N, the transition was Achaotic@ and counsel was unsure of the completeness of Mr. Rutherford=s files.

Mr. Rutherford was not asking the State to waste any resources to make copies of their files. Rather, Mr. Rutherford requested that a representative of his defense team be permitted to look at the files at the offices of each of these agencies.[39]

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[39]The State falsely asserts that ACollateral counsel, in her >MOTION TO COMPEL ACCESS TO PUBLIC RECORDS,= requested that the Office of the State Attorney, the Santa Rosa County Sheriff=s office, Florida Department of Law Enforcement (FDLE) and First District Medical Examiner, provide a second copy of

The State claims that counsel had a duty not to lose the records and that she could have deposited them in the repository. (Answer at 68). In making this statement, perhaps the State is unaware of the fact that when CCRC-N was abolished, a third party was appointed by the Governor=s Office to oversee the transition. Former CCRC-N employees were not at liberty to just walk in and take anything they wanted.[40]

With regard to the actual merits of this issue, the State never addresses Mr. Rutherford=s argument that he is being denied equal protection, as other death sentenced individuals whose public records were delivered to the records repository have the ability to access their records at any time. The State has failed to rebut Mr. Rutherford=s assertion that he should not be deprived of this same right. Relief is warranted.

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public records previously provided by these agencies.@ (Answer at 61).

[40]Moreover, counsel never stated that she Alost the records.@ She simply wanted to verify the completeness of Mr. Rutherford=s files.

ARGUMENT V: ACTUAL INNOCENCE

The State argues that Mr. Rutherford=s newly discovered evidence does not establish his innocence because the affidavits contradict each other. (Answer at 83). Also, the State argues that the evidence is not the type to warrant relief because it is not scientific, physical or eyewitness evidence. (Id.). However, there is no authority for the State=s argument.

Gilkerson=s affidavit must be taken as true, thus, contrary to the State=s assertion, it is reliable evidence of innocence. Gilkerson=s information undermines all of the evidence presented by that State at Mr. Rutherford=s capital trial. Likewise, Heaton=s change in story is also reliable evidence of her guilt. Mr. Rutherford has presented a colorable claim of actual innocence. Relief is proper.

CONCLUSION

Based on the foregoing argument, Mr. Rutherford is entitled to an evidentiary hearing and thereafter to the relief that he has requested.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, FL 32399, this 17th 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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