IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC06-18

ANSWER BRIEF OF APPELLEE

WARRANT SIGNED
EXECUTION SET

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PRELIMINARY STATEMENT

Appellant, ARTHUR DENNIS RUTHERFORD, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The trial transcript will be referred to as (T. Vol. pg). The postconviction record on appeal will be referred to as (PC Vol. pg). The evidentiary hearing transcript will be referred to as (EH Vol. pg). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court's denial of a successive motion for post-conviction relief in a capital case with an active warrant. The facts of the crime, as stated in the Eleventh Circuit's opinion, are:

> During the summer of 1985, Rutherford told his friend Harold Attaway that he planned to kill a woman and place her body in her bathtub to make her death look like an accident. Rutherford also told a long-time business associate, Sherman Pittman, that he was going to get money by forcing a woman to write him a check and then putting her in the bathtub. If the woman initially refused to make out the check, Rutherford explained that he would "get her by that arm and she would sign." It was then that Rutherford bragged that he would do the crime but not the time. About a week after making those statements, Rutherford again told Attaway about his homicidal plan. Rutherford also told his uncle that they could get easy money by knocking a woman Rutherford worked for in the head. Unfortunately, none of these three men took Rutherford seriously enough to report his plans to the authorities. If any of them had, Rutherford's murder of Stella Salamon a week later could have been prevented.
>
> Mrs. Salamon, a 63-year-old widow originally from Australia, lived alone in Santa Rosa County, Florida with her two Pekingese dogs since her husband had died unexpectedly from a heart attack two years earlier. Other than a sister-in-law in Massachusetts, she had no family in this country.
>
> Rutherford, who hired out to do odd jobs, installed sliding glass doors in the doorway leading from Mrs. Salamon's patio to her kitchen. Before long, Mrs. Salamon had those sliding glass doors replaced because they did not close and lock properly. She told her long-time friend and next-door neighbor Beverly Elkins that the unlocked doors made her nervous and that she wondered if Rutherford had intentionally made the doors so that she could not lock them. Mrs. Salamon also said that Rutherford kept coming to her house and acted as though he was "casing the joint."

It is unclear whether Mrs. Salamon notified Rutherford about the problems with the doors, but on the morning of August 21, 1985, Rutherford asked Attaway to come along with him when he went to repair the doors he had installed for Mrs. Salamon. When they got to her house, she told them she had those doors replaced. Attaway left to get money to give Mrs. Salamon as a refund on the doors. Rutherford stayed behind at Mrs. Salamon's house.

Around noon that day, Mrs. Salamon received a call from her friend Lois LaVaugh. Mrs. Salamon told Ms. LaVaugh that she was nervous because Rutherford had been at her house for “quite awhile.” Ms. LaVaugh drove over there and found Rutherford sitting shirtless on Mrs. Salamon's porch. Rutherford left after Ms. LaVaugh arrived, and Mrs. Salamon told her that Rutherford “really has made me nervous” and had been sitting around on her couch. Apparently, Mrs. Salamon never got the refund that Attaway was supposed to bring, and Rutherford left the old glass doors in her garage.

At 7:00 the next morning, August 22, Rutherford and Attaway went to retrieve the old doors from Mrs. Salamon's garage. When they reached the house, Rutherford told Attaway that he had a gun in his van and said, “If I reach for that gun, you'll know I mean business.” Attaway testified that this was the first time he really believed that Rutherford might actually hurt someone, yet he still did nothing about it. While they were loading the doors, Attaway overheard Mrs. Salamon say to Rutherford, “You can just forget about the money.”

Later that morning, between 9:30 and 10:30 a.m., the manager of a local Sears store saw Mrs. Salamon when she came by to pick up a package. She also stopped at the Consolidated Package Store and made a purchase at 10:29 a.m., according to computer sales records. After that, Rutherford was the only other person known to have seen Mrs. Salamon alive, and she was not alive long, as Rutherford's actions on that day evidence.

Around noon, Rutherford went to see Mary Frances Heaton, a woman who sometimes baby-sat for his children and with whom he had once lived for a few months. He showed her one of Mrs. Salamon's checks and asked her to fill it out. Heaton cannot read or write other than to sign her name, so she called for her thirteen-year-old niece, Elizabeth. Rutherford promised Elizabeth money if she would fill out

the check as instructed. Elizabeth filled out the check the way Rutherford told her to, making it payable to Heaton, but she did not sign anyone's name on it.

Rutherford told Heaton that he owed her money for work she had done for him and asked her to accompany him. He took Heaton to the Santa Rosa State Bank, gave her the check, and sent her into the bank to cash it. Because of the blank signature line, the teller refused to cash the check; Heaton returned to Rutherford's van and told him.

Rutherford responded by driving them to the nearby woods, where he took out a wallet, checkbook, and credit cards wrapped in a shirt, and threw the bundle into the trees. He also signed Mrs. Salamon's name onto the check, and then they went back to the bank. Outside the bank, Heaton watched as Rutherford endorsed Heaton's name on the check. In doing so Rutherford misspelled Heaton's name, scratched it out, and corrected it. Heaton re-entered the bank, and this time she successfully cashed the check and left with $2,000 in one hundred dollar bills. Rutherford gave Heaton $500 of those funds, and she in turn gave Elizabeth $5 for filling out the check.

Around 3:00 that afternoon, Rutherford visited his friend Johnny Perritt. He told Perritt that he had “bumped the old lady off” and showed him $1500 in cash. He wanted Perritt to hold $1400 of that amount for him. Rutherford said that he had hit the “old lady” in the head with a hammer, stripped her, and put her in the bathtub. Perritt refused to take the cash, and his mother later notified the police of Rutherford's claim to have committed a murder.

Earlier that day Mrs. Salamon had made plans to go walking that evening with Beverly Elkins and another neighbor. At 6:30 p.m. Ms. Elkins tried to contact Mrs. Salamon by phone but got no answer. She went to Mrs. Salamon's house, saw her car outside, and realized that she must still be at home. Ms. Elkins rang the front doorbell. After receiving no answer, she went around back and through the sliding glass doors saw that the television was on and that the normally calm dogs were jumping around excitedly. Ms. Elkins retrieved a spare key to the house, met up with the other neighbor who was to have gone walking with them that night, and the two women let themselves into Mrs. Salamon's home.

When the two women entered the kitchen through the carport door, they heard water running. They followed the

sound to a little-used guest bathroom. There they were horrified to find Mrs. Salamon's naked body floating in the water that filled the tub to overflowing. Realizing that their friend was dead, the stunned women went to call for help. When walking through the house, Ms. Elkins noticed that Mrs. Salamon's eyeglasses were on the kitchen floor underneath the counter. The makings of a tomato sandwich were out on the counter. Mrs. Salamon had liked to eat tomato sandwiches for lunch.

When crime scene investigators arrived they found three fingerprints on the handle of the sliding door to the bathtub, one fingerprint on the tile wall of the tub, and a palm print on the window sill inside the tub with the fingers up and over the sill as though the person had grabbed it. All of those prints were later identified as Rutherford's. Blood was spattered on the bathroom walls and floor. According to an expert, the spatter pattern indicated that the blows occurred while Mrs. Salamon was sitting or kneeling on the bathroom floor.

Mrs. Salamon's naked body floated face-up in the water. She had been viciously beaten. There were bruises on her nose, chin, and mouth and a cut on the inside of her lip consistent with a hand being held forcefully over her face. Her lungs showed signs of manual asphyxiation, apparently from someone covering her nose and mouth. Her arms and knees were bruised and scraped, and her left arm was broken at the elbow. Of the three large wounds on her head, two were consistent with being struck with a blunt object or having her head slammed down. The other wound, a puncture that went all the way to the bone, appeared to be from a blow with a claw hammer or screwdriver. Her skull was fractured from one side to the other.

Severe as those injuries were, none of them were the actual cause of Mrs. Salamon's death. Although Rutherford had beaten and smothered her, she had water in the lungs. That shows the 63-year-old widow was still alive when Rutherford stripped off her clothes and placed her in the bathtub to drown.

Rutherford v. Crosby, 385 F.3d 1300, 1302-1305 (11th Cir. 2004).

Rutherford was tried for the first degree murder and armed robbery of Mrs. Salamon. During the trial, Rutherford moved for

a mistrial based on a discovery violation by the prosecution, but the court reserved ruling and the proceedings continued. The Santa Rosa County jury found Rutherford guilty and, by an eight-to-four vote, recommended a sentence of death. Rutherford then renewed his motion for a mistrial and the trial court granted it.

After a change of venue to Walton County, Rutherford was retried. He was represented by two public defenders, William Treacy and John Gontarek. During the guilt stage of the trial, Rutherford took the stand and tried to explain his prints in the bathroom by claiming that Mrs. Salamon had asked him to realign the shower door when he was at her house on August 21 (the day before she was killed) because her nieces and nephews had knocked the door off its track. The state thereafter proved that Mrs. Salamon did not have any nieces or nephews, and according to Beverly Elkins, her close friend, no young children had visited Mrs. Salamon's house in the weeks prior to her death. Rutherford denied the testimony of the three witnesses that he had confided to them his plans to murder a woman. According to Rutherford, he never would have said such things “because I've got a good mother.” He insisted that every one of the witnesses against him was lying.

On October 2, 1986, the jury found Rutherford guilty. During the penalty phase, the defense presented character evidence and testimony about Rutherford's childhood, his family, his service as a Marine during the Vietnam War, and his nervousness, nightmares, and night sweats since returning from Vietnam. The jury recommended death, this time by a seven-to-five vote. The trial court imposed a death sentence based on three aggravating circumstances: the murder was especially heinous, atrocious, and cruel; it was cold, calculated, and premeditated; and it was committed in the course of a felony (robbery) and for pecuniary gain. *Rutherford*, 385 F.3d at 1305.

Rutherford appealed to the Florida Supreme Court raising seven issues: (1) the retrial violated double jeopardy; (2) the trial court improperly considered Rutherford's lack of remorse in making the finding of heinous, atrocious, and cruel; (3) the evidence does not establish the heightened premeditation necessary to support a finding that the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (4) the trial court did not consider mitigating evidence that Rutherford had served in the armed forces in Vietnam and also improperly counted the aggravating and mitigating circumstances rather than weighing

them; (5) the trial court impermissibly relied on the death recommendation at a first trial; (6) being placed in restraints before closing arguments in the penalty phase because of his threatening conduct and (7) testimony from three witnesses at the penalty phase that the victim was afraid of the defendant. The Florida Supreme Court affirmed the convictions and death sentence. *Rutherford v. State*, 545 So.2d 853 (Fla. 1989), *cert. denied*, *Rutherford v. Florida*, 493 U.S. 945, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989).

Rutherford filed a motion for post-conviction relief raising fifteen issues: (1) ineffective assistance of counsel (IAC) at the guilt phase for failing to investigate, prepare, and perform sufficiently; (2) IAC at the penalty phase for failing to investigate, develop, and present substantial mitigation; (3) IAC at the penalty phase for failing to object to hearsay testimony regarding the victim's fear of Rutherford; (4) improper penalty-phase jury instructions that shifted the burden of proof to Rutherford; (5) improper penalty-phase jury instructions regarding aggravating circumstances; (6) inapplicability of CCP; (7) improper penalty-phase jury instruction on HAC; (8) untimely imposition of written death sentence; (9) trial court's refusal to find mitigators

established by the record; (10) IAC at penalty phase for conflict of interest in revealing confidences and secrets to the trial court; (11) admission of inflammatory photographs; (12) improper introduction of nonstatutory aggravators at the penalty phase; (13) IAC at the penalty phase for failing to obtain mental-health expert; (14) improper robbery sentence without benefit of scoresheet; and (15) double jeopardy bar to retrial. *Rutherford v. State*, 727 So.2d 216, 218 n.1 (Fla. 1998). The trial court denied relief after conducting an evidentiary hearing.

On appeal, Rutherford raised six issues: (1) ineffectiveness during the penalty phase for failing to object to the hearsay testimony regarding the victim's fear of Rutherford; (2) ineffectiveness for failing to obtain a mental health expert to offer mitigation evidence during the penalty phase; (3) ineffectiveness for failing to develop mitigating evidence; (4) the trial court erred in summarily denying Rutherford's double jeopardy claim as procedurally barred; (5) trial counsel was ineffective during the guilt phase for failing to investigate, prepare, and perform; (6) the trial court erred in summarily denying several of Rutherford's claims. *Rutherford v. State*, 727 So.2d 216, 218 (Fla. 1998). The Florida Supreme Court affirmed

the trial court's denial of post-conviction relief. *Rutherford v. State*, 727 So.2d 216 (Fla. 1998).

Rutherford filed a petition for writ of habeas corpus in the Florida Supreme Court raising eleven claims of ineffectiveness of appellate counsel which the Florida Supreme Court denied. *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000).

On April 2, 2001, Rutherford filed a petition for writ of habeas corpus in federal district court. The district court denied relief. Rutherford appealed to the Eleventh Circuit raising three issues: (1) whether his second trial violated the Double Jeopardy Clause of the Fifth Amendment; (2) whether relief should have been granted on his penalty phase ineffective assistance of counsel claim; and (3) whether his trial counsel had a conflict of interest that rendered their representation of him ineffective. *Rutherford*, 385 F.3d at 1306. The Eleventh Circuit affirmed the denial of habeas relief. *Rutherford v. Crosby*, 385 F.3d 1300 (11th Cir. 2004), *cert. denied*, *Rutherford v. Crosby*, - U.S. -, 125 S.Ct. 1847, 161 L.Ed.2d 738 (2005).

On September 12, 2002, Rutherford filed a successive 3.851 motion raising a *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim. Following a hearing, the trial court denied the claim and the Florida Supreme Court affirmed.

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Rutherford v. State, 880 So.2d 1212 (Fla. 2004), *cert. denied*, *Rutherford v. Florida*, - U.S. -, 125 S.Ct. 1342, 161 L.Ed.2d 142 (2005).

Rutherford raised a *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) claim in a successive habeas petition which the Florida Supreme Court denied on August 18, 2005. FSC Case No. SC05-376.

Rutherford filed a third successive habeas petition raising a shackling claim based on *Deck v. Missouri*, 544 U.S. -, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). The Florida Supreme Court denied the successive habeas petition on January 5, 2006 by order. FSC Case No. SC05-2139.

On December 21, 2005, Rutherford a successive 3.851 motion raising five claims: (1) the trial court improperly limited his public records requests; (2) lethal injection is cruel and usual punishment; (3) lethal injection violates free speech; (4) newly discovered evidence based on an inmate's affidavit; and (5) actual innocence. On December 23, 2005, the State filed a response to the successive 3.851 motion. On December 24, 2005, Rutherford filed an amended successive 3.851 motion raising both

a *Brady* claim and a *Giglio* claim[1]. On December 27, 2005, the State filed a response to amended successive 3.851 motion. On December 28, 2005, the trial court conducted a *Huff* hearing regarding the successive 3.851 motion. The trial court summarily denied the successive motion for postconviction relief on January 5, 2006. Rutherford filed a motion for rehearing on January 6, 2006. The trial court denied the motion for rehearing on January 6, 2006. Rutherford filed a notice of appeal on January 9, 2006. This appeal follows.

The Governor has signed a death warrant with the execution set for Tuesday, January 31, 2006, at 6:00 P.M.

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[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

SUMMARY OF ARGUMENT

ISSUE I -

Rutherford asserts, based on the newly discovered evidence of the last minute affidavit of inmate Alan Gilkerson, that Mary Frances Heaton confessed to him that she committed the crime and framed Rutherford, that he is entitled to a new trial. IB at 14. In the affidavit, Gilkerson states that "[i]n 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', . . . She told me that she once killed an old lady with a hammer and made it look like A.D. Rutherford committed the crime." This evidence does not meet the standard for newly discovered evidence. It is not likely to produce an acquittal for three reasons. First, Heaton's trial testimony was corroborated by her niece's testimony. Secondly, it is contradicted by the trial testimony of three other witnesses that Rutherford told them of his plan to commit this crime and a fourth witness that Rutherford admitted to killing the victim with a hammer after the murder. It is also contradicted by the physical evidence of Rutherford's fingerprints and palm print in the bathroom. The trial court properly summarily denied the newly discovered evidence claim.

Brady

Rutherford contends that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose Mary Heaton's statement that she saw Rutherford strike the fatal blow. Collateral counsel asserts that Heaton told an unidentified law enforcement officer that she was present at the victim's house and saw Rutherford kill the victim but the State failed to disclose this statement to trial counsel. There is no *Brady* violation because the statement is not exculpatory. Far from it. Heaton's statement that she saw Rutherford strike the fatal blow is inculpatory. Nor is it significant impeachment. Mary Heaton, a prosecution witness presented during the guilt phase, tied Rutherford to the victim's check. Her testimony, however, was corroborated by her niece. Both put the victim's check in Rutherford's hands. The new statement is not truly impeaching of the State's case because it does not affect the testimony of the niece. Furthermore, Heaton was impeached at trial with the fact that she had been involuntarily committed to a mental hospital recently and the admission that she could not tell fact from fiction. Additionally, there is no *Brady* violation because there is no prejudice. Heaton's

testimony was not critical to the State's case against Rutherford. The prosecution had three witnesses that Rutherford told he was going to kill a woman before the murder. The prosecution had a fourth witness to whom Rutherford admitted killing the victim with a hammer after the murder. The physical evidence of Rutherford's fingerprints and palm print in the bathroom was also a crucial part of the State's case. It was these witnesses and physical evidence that were essential to the State's case. Heaton's statements cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. The trial court properly summarily denied the *Brady* claim.

ISSUE II -

Rutherford asserts that Florida's three drug protocol used in lethal injection is cruel and unusual punishment in violation of the Eighth Amendment based on a research letter. IB at 58; L.G. Koniaris, M.D., et.al., *Inadequate anaesthesia in lethal injection for execution*, 365 THE LANCET 1412 (April 16, 2005). There is no constitutional right to an entirely pain free execution and there certainly is no constitutional right to be unconscious during execution. This Court has repeatedly

rejected cruel and unusual punishment challenges to lethal injection. Another state supreme court and a federal circuit court have summarily rejected a challenge based on the Lancet article. The trial court properly summarily denied the claim.

ISSUE III -

Rutherford asserts that the second drug in the series, pancuronium bromide, will render him unable to speak, violating his right to free speech. IB at 72. Florida's lethal injection drug protocols do not violate the First Amendment. The State has a legitimate penological interest in having an inmate unconscious and immobile during the execution. The trial court properly summarily denied this claim.

ISSUE IV -

Rutherford asserts that the trial court erred in denying his public records requests. IB at 77. The rule governing public records requests envisions updates of prior requests only. The public record requests to four agencies were not updates of prior requests; rather, they were duplicate requests. Collateral counsel asserted that she may have lost the prior public records produced by these four agencies. Such duplicate

requests are not authorized by the rule. The public record requests to two agencies were not updates of prior requests; rather, they were entirely new requests. New requests are not authorized by the rule. The trial court properly denied the public records requests.

ISSUE V -

Rutherford asserts that he is actually innocent of the murder. IB at 84. Relying on Gilkerson's affidavit, Rutherford asserts that Mary Heaton murdered the victim and framed him. Rutherford has not presented a colorable claim of actual innocence. The two affidavits submitted by Rutherford contradict each other. In one affidavit, Heaton is the actual murderer, who frames Rutherford, but in the other affidavit, Heaton is an eyewitness to Rutherford committing the murder. Three prosecution witnesses testified that Rutherford was planning a murder and a fourth prosecution witness testified that Rutherford confessed to murdering the victim with a hammer. Additionally, three sets of Rutherford's fingerprints were located in the victim's bathroom where the body was discovered. Moreover, Heaton's trial testimony was corroborated in large part by her niece's

trial testimony. The trial court properly summarily denied the actual innocence claim.

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ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE NEWLY DISCOVERED EVIDENCE AND *BRADY V. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) CLAIMS? (Restated)

Rutherford asserts, based on the newly discovered evidence of the last minute affidavit of inmate Alan Gilkerson, that Mary Frances Heaton confessed to him that she committed the crime and framed Rutherford, that he is entitled to a new trial. IB at 14. In the affidavit, Gilkerson states that "[i]n 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', . . . She told me that she once killed an old lady with a hammer and made it look like A.D. Rutherford committed the crime." This evidence does not meet the standard for newly discovered evidence. It is not likely to produce an acquittal for three reasons. First, Heaton's trial testimony was corroborated by her niece's testimony. Secondly, it is contradicted by the trial testimony of three other witnesses that Rutherford told them of his plan to commit this crime and a fourth witness that Rutherford admitted to killing the victim with a hammer after the murder. It is also contradicted by the physical evidence of Rutherford's fingerprints and palm print in

the bathroom. The trial court properly summarily denied the newly discovered evidence claim.

Affidavits

In the affidavit supporting the newly discovered evidence claim, claim IV of the original 3.851 motion, inmate Alan Gilkerson, DOC #112536, stated that Mary Frances Heaton confessed to him that she committed the crime and framed Rutherford. Motion at 15 and Appendix I. In the affidavit, Gilkerson states that "[i]n 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', . . . She told me that she once killed an old lady with a hammer and made it look like A.D. Rutherford committed the crime." Appendix I paragraph 6.

In the affidavit supporting the *Brady* evidence claim, claim VI of the amended 3.851 motion, Investigator Michael Glantz stated that Mary Frances Heaton, when confronted with Alan Gilkerson’s statements, “told me that she was present at the victim’s house on the day of the crimes and she claimed to have witnessed Mr.

Rutherford striking the fatal blow." Declaration of Michael Glantz Appendix K paragraph 9. The investigator further stated that Ms. Heaton told him that "she told law enforcement that she was present at the victim's house when the victim was murdered . . ." Declaration of Michael Glantz Appendix K paragraph 10.

Collateral counsel argues that the newly discovered evidence claim must be considered cumulatively with the *Brady* claim. IB at 33,49. This is impossible because the two claims are contradictory. The facts contained in the affidavit supporting the newly discovered evidence claim contradict the facts contained in the affidavit supporting the *Brady* claim. Basically, Rutherford's two claims are factually inconsistent. Rutherford is asserting, on the one hand, that Heaton is the actual killer and then, on other hand, that Heaton saw Rutherford murdering the victim. Obviously, both cannot be true.

The trial court's ruling

The trial court ruled:

> Defendant alleges that he has consistently maintained his innocence. Furthermore, Defendant points out that during closing arguments trial counsel argued that "Mary Heaton was the only person directly linked to the victim's

property." (Trial Tr. vol. V, 744:6-21).[2] Therefore, Defendant argues that the recent hearsay statements regarding Heaton's involvement in the murder of Stella Salamon, as stated in two affidavits attached to his motion and amended motion, constitute newly discovered evidence. Additionally, Defendant argues that this newly discovered evidence impacts "culpability, disparate sentencing, proportionality or statutory mitigation" and would have probably resulted in a life sentence assuming conviction was obtainable.[3] This Court disagrees.

In *Jones v. State*, 709 So.2d 512 (Fla. 1998), the Florida Supreme Court addressed the two-prong test for determining whether a conviction should be set aside on the basis of newly discovered evidence: 1) to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have know [of it] by the use of diligence, and; 2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

During a hearing held on December 23, 2005, the Assistant Attorney General represented that they would not contest the diligence requirement. Thus, this Court will turn to the second prong of *Jones*.

Absent an evidentiary hearing, a court is required to accept the allegations contained in the motions and affidavits as true. However, the Court notes there are factual inconsistencies on the face of the affidavits.

In the first affidavit submitted in support of Defendant's newly discovered evidence claim, Alan Gilkerson states that "[i]n the early 1990's, the three of us lived together in a trailer. One evening, Mary [Heaton] and I were alone at the trailer and I asked why she seemed so 'crazy', . . . She told me that she once killed an old lady with a manner and made it look like A.D. Rutherford

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[2] Excerpts cited from the trial transcript are contained in Exhibit "E".

[3] Motion to Vacate pg. 17:11 Amendment to Motion pg. 9:31.

committed the crime . . . Mary Heaton told me her motive for murdering the old lady was to get her money."[4]

The trial testimony of Heaton reflects the following (Trial Tr. vol. II-III, 397-424): Heaton testified Defendant was alone when he drove to her house in a van around 11:30 or 12:00 on August 22, 1985. (Trial Tr. vol. III, 399:18-21). Defendant wanted to know if Heaton's father wanted two glass sliding doors. (Trial Tr. vol. II, 400:6-8). Defendant asked her to fill out a check but she refused stating she didn't know how. (Trial Tr. vol. II, 401:8). Defendant then asked Heaton to see if she could find her niece which she did. (Trial. Tr. vol. II, 401:12-15). Heaton testified her niece went out to the van to talk to Defendant and she went back into the house. (Trial. Tr. vol II, 401:15-16). The niece returned to the house and told Heaton the Defendant wanted to see her and she went out to the van. (Trial Tr. vol. III, 401:23-24). Subsequently, Heaton accompanied Defendant to the Santa Rosa State Bank in Pace. (Trial Tr. vol. III, 402:4-5). Heaton testified that Defendant signed her name on the back of check. (Trial Tr. vol. III, 403:18-20). Heaton stated she attempted to cash this check but it was not signed. (Trial Tr. vol. III, 404:9-11). Defendant and Heaton then left and drove about a mile to a mile and a half to Center Field Road. (Trial Tr. vol. III, 405;5-14). Heaton testified she refused to sign the check at the bottom. (Trial Tr. vol. III, 405-14, 21). Heaton stated that Defendant signed the bottom of the check but did not sign it in her presence. (Trial Tr. vol. III, 408:5-6). Defendant and Heaton returned to the bank and Heaton cashed the check. (Trial Tr. vol. III, 409:15-19). Defendant gave her five hundred dollars and then drove her home. (Trial Tr. vol. III, 410:6-10).

In corroborating Heaton's testimony, the State called Elizabeth Ward to testify. (Trial Tr. vol. III, 425). Ward testified that she was fourteen years old and in the seventh grade. (Trial Tr. vol. III, 425:15-19). Ward stated Defendant promised to pay her five hundred dollars for filling out the check. (Trial Tr. vol. III, 429:5-6). Ward testified that Defendant handed her the check and she wrote it out to Mary Frances Heaton for the amount of two

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[4] Motion to Vacate pg. 17:8, App. I.

thousand and no cents. (Trial Tr. vol. III, 429:10-16). She stated she did not sign the signature line or the back of the check. (Trial Tr. vol. III, 429:18-25, 430:1-9). Ward testified that she saw Defendant and her aunt leave. (Trial Tr. vol. III, 430:19-20). Ward stated that Defendant dropped Heaton off about thirty minutes to an hour later. (Trial Tr. vol. III, 431:13-14).

The Court finds Ward's testimony corroborates Heaton's trial testimony which places the victim's property (a check) in the possession of Defendant. Moreover, Heaton testified that Defendant only gave her five hundred dollars leaving Defendant with fifteen hundred dollars from the cashed check.

In the second affidavit submitted in support of Defendant's newly discovered claim, Investigator Glantz declares he confronted Heaton with Gilkerson's statement.[5] Glantz states Heaton denied having told Gilkerson she killed the victim but admitted to having been present during the murder. According to Glantz's declaration, Heaton stated she saw the defendant delivering the "fatal blow" to the victim. Thus, Heaton's recent statement to Glantz in and of itself refutes her alleged confession to Gilkerson.

Furthermore, Heaton's statement, on its face that she saw Defendant strike the fatal blow is inculpatory thereby strengthening the State's case against the Defendant. As such, this newly discovered evidence probably would not have produced a different result if the case was to be retried.

In affirming this Court's denial of Defendant's previous postconviction motion, the Florida Supreme Court noted there "was overwhelming evidence of Rutherford's guilt." *See Rutherford v. State*, 727 So.2d 216, 220 (Fla. 1998). At the trial, the State introduced evidence of three sets of Defendant's fingerprints found at the victim's house on the handle of the sliding door to the bathtub, on the tile wall of the bathtub, and a palm print that was found on the window sill inside the tub where the deceased victim was found. The victim was found naked floating in the bathtub and had been viciously beaten. Bruises were noted on her face, arms and knees. Her left arm had been broken at the

[5] Amendment to Motion pgs. 3-4, App. K.

elbow. There were three large wounds found on her head and her skull was fractured from one side to the other. Actual cause of death was determined to be water in the lungs demonstrating that the victim was alive following the infliction of these severe injuries and prior to the defendant placing her in the bathtub.

The Court notes that in an attempt to explain his fingerprints being found in the victim's bathroom, Defendant took the stand and testified that on August 21 (the day before the victim was killed) he had been asked by the victim to realign the shower door because her nieces and nephews had knocked it off its tracks. (Trial Tr. vol. IV, 607:18-21). The State rebutted Defendant's testimony by calling Heaton's close friend, Beverly Elkin, to testify that the victim did not have any nieces or nephews and that no young children had visited the victim's house in the twelve years that Elkin knew the victim. (Trial Tr. vol. IV, 683:8-23).

More compelling is the following trial testimony from three witnesses who testified that Defendant told them of his plan to commit the murder and of a fourth witness to whom Defendant admitted being the murderer:

John Kenneth Cook, Defendant's uncle, testified that a week prior to the murder Defendant told him he was going to knock an old lady in the head. (Trial Tr. vol. III, 477:5, 20).

Harold Attaway testified that about two weeks prior to the murder, Defendant told him how he planned to kill a woman and place her body in her bathtub to make her death look like an accident. (Trial Tr. vol. II, 375:2-3). Moreover, Attaway's testimony placed Defendant at the victim's house on the morning of August 22, 1985 when he and the Defendant went to retrieve two glass sliding doors from the victim. (Trial Tr. vol. II, 376:9-13). Attaway testified Defendant then dropped him off at Attaway's house at a quarter til eight. (Trial Tr. vol. II, 377:4-12).

Sherman Pittman testified Defendant told him that "he needed some money." (Trial Tr. vol. III, 483:14). Pittman stated Defendant further informed him that he was going to "make this old lady write him out a check." (Trial Tr. vol. III, 483:15-16). Pittman testified that Defendant stated that if she wouldn't sign the check he would "get her by that arm and she would sign that check and he would put her in the bathtub." (Trial Tr. vol. III, 483:19-22).

Most importantly, Johnny Perritt, Jr. testified that between one and three o'clock on the afternoon of August 22, 1985, the Defendant told him he "had bumped the old lady off." (Trial Tr. vol. III, 449:13-15). Perritt further testified Defendant stated he had "slapped her aside the head with a hammer stripped her off and put her in the bathtub." (Trial Tr. vol. III, 449:13-15). At the time Defendant made these statements, he told Perritt that he had $1500.00 in cash and asked Perritt to hold $1400.00 for him. (Trial Tr. vol. III, 449:16-19). Perritt testified that from what he could observe of the money in the possession of the Defendant there were some hundred dollar bills. (Trial Tr. vol. III, 456:19-21).

In summary, the Court finds that the foregoing witnesses' sworn trial testimony wherein Defendant directly implicates himself in the murder of Stella Salamon, the fingerprint evidence placing Defendant at the scene of the crime, Heaton's trial testimony as corroborated by her niece Elizabeth Ward that Defendant was in possession of the victim's check for two thousand dollars of which five hundred went to Heaton, Johnny Perritt's testimony of having observed one hundred dollar bills in Defendant's possession and that the Defendant told him that he had fifteen hundred dollars on him (*see also* Jamie Peleggi's testimony that she cashed a two thousand dollar check for Heaton paying it out in one hundred dollar bills (Trial Tr. vol. III, 440:18-19)) along with the rebuttal testimony of Beverly Elkins refuting Defendant's explanation of how the victim's glass sliding doors were displaced greatly outweigh and rebut the inconsistent statements made by Heaton to Gilkerson and Glantz.

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 the observed Defendant with the money and by her subsequent statement to Glantz that she observed Defendant strike the fatal blow. Furthermore, Heaton's statement to Glantz only strengthens the state's case against the defendant. The Court finds Heaton's inconsistent statements would probably not have produced an acquittal on retrial and would not have resulted in a different jury recommendation following the penalty phase, and, as such, does not qualify as newly discovered evidence. Thus, this claim is denied.

(Order at 9-17)(footnotes included but renumbered).

Standard of review

The 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. *United States v. Jernigan*, 341 F.3d 1273, 1287 (11th Cir. 2003)(stating: "[w]e review the denial of a motion for a new trial based on newly discovered evidence for abuse of discretion.); *United States v. Holmes*, 229 F.3d 782, 789 (9th Cir. 2000)(holding denial of a motion for a new trial based on newly-discovered evidence is reviewed for abuse of discretion). Where 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).

Merits

In *Jones v. State*, 709 So.2d 512 (Fla.1998), the Florida Supreme Court addressed the two-prong test for determining whether a conviction should be set aside on the basis of newly discovered evidence: (1) to be considered newly discovered, the

evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Jones*, 709 So.2d at 521.

In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. *Lightbourne v. State*, 841 So.2d 431, 440 (Fla. 2003).

Rutherford does not meet the requirements for a new trial based on newly discovered evidence established in *Jones* and *Lightbourne*. This hearsay alleged "confession" would not produce an acquittal at retrial. Mary Heaton's trial testimony was corroborated by her niece, Elizabeth Ward. Both testified that Rutherford had the victim's wallet and checkbook. Both testified that Rutherford had Elizabeth Ward fill out the check. Elizabeth Ward has not recanted her trial testimony.

Moreover, Gilkerson, who is a convicted felon, has not explained his delay in coming forward with this evidence. Gilkerson claims that Mary Heaton made this statement to him in the early 1990s, yet Gilkerson waited approximately 15 years to come forward. *Herrera v. Collins*, 506 U.S. 390, 423-424, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993)(observing, in a capital case, where the inmates affidavits exonerating the defendant were given over eight years after petitioner's trial, that "[n]o satisfactory explanation has been given as to why the affiants waited until the 11th hour--and, indeed, until after the alleged perpetrator of the murders himself was dead--to make their statements.). As Justice O'Connor noted:

> Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch

> for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism. These affidavits are no exception. They are suspect, produced as they were at the 11th hour with no reasonable explanation for the nearly decade-long delay.

Herrera v. Collins, 506 U.S. 390, 423-424, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring). She also noted that the defendant had delayed presenting his new evidence until eight years after conviction – without offering a "semblance of a reasonable excuse for the inordinate delay." The trial court may consider both the length of the delay and the reason the witness failed to come forward sooner. *Lightbourne v. State*, 841 So.2d 431, 438-440 (Fla. 2003).

The evidence of Rutherford's guilt includes three sets of fingerprints in the bathroom where the victim was beaten and drowned. Rutherford's three fingerprints were found on the handle of the sliding door to the bathtub, another one of Rutherford's fingerprints was found on the tile wall of the bathtub, and his palm print was found on the window sill inside the tub. Rutherford's statements to Harold Attaway that he planned to kill a woman and place her body in her bathtub to make her death look like an accident and to Sherman Pittman that he was going to get money by forcing a woman to write him a check and then putting her in the bathtub and also to his uncle,

Kenneth Cook, a week prior to the murder, that he was going to knock an old lady in the head, are not affected, in any way, by the affidavit. Nor is Johnny Perritt, Jr.'s testimony that Rutherford told him he killed her with a hammer and asked him to hold $1400.00, affected in any manner. As the Florida Supreme Court noted in his postconviction opinion, there "was overwhelming evidence of Rutherford's guilt." *Rutherford*, 727 So.2d at 220.

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. Heaton's statements concern who the perpetrator of the crime is, which a guilt, not sentencing, issue. It does not relate to the penalty phase.

Rutherford's reliance on other newly discovered evidence cases where an evidentiary hearing was held is misplaced. IB at 19,29. None of those cases involved contradictory affidavits from the same witness, as this case does.

Rutherford's reliance on *Oregon v. Guzek*, 86 P.3d 1106 (Or. 2004), *cert. granted*, - U.S. -, 125 S.Ct. 1929, 161 L.Ed.2d 772 (2005), is also misplaced. Lingering or residual doubt is not a mitigating circumstance in Florida. *King v. State*, 514 So. 2d

354, 357-358 (Fla. 1987). Lingering doubt actually is not mitigation; it is a standard of proof. Traditional mitigation concerns the defendant's background and character. Lingering doubt, by contrast, increases the State's burden of proof in the penalty phase from beyond a reasonable doubt to absolute certainty and there is no Eighth Amendment justification for doing so. Neither the federal constitution nor Florida law require lingering doubt be considered in mitigation.

The Florida Supreme Court has repeatedly denied newly discovered evidence claims. *Kokal v. State*, 901 So.2d 766, 775-776 (Fla. 2005)(denying a newly discovered evidence claim based on an affidavit of an inmate who shared a cell with the another inmate who allegedly told this inmate that he, not the defendant, was the actual shooter); *Melendez v. State*, 718 So.2d 746, 747-48 (Fla.1998)(denying a newly discovered evidence claim where the defendant claimed that another man was the killer and presented five other witnesses at the evidentiary hearing who testified the killer had made incriminating statements to them about the murder but the trial court found these witnesses not credible). The evidence is not likely to produce an acquittal on retrial and therefore, the trial court properly summarily denied the newly discovered evidence claim.

The State did NOT concede due diligence. In its pleadings and at the public records hearing, held on December 13, 2005, the State declined to dispute the due diligence prong, so that the due diligence witnesses would not be necessary. The focus of the State's response to the newly discovered evidence claim was that the new evidence would be unlikely to produce an acquittal on retrial. If an evidentiary hearing is granted, the State will contest due diligence.

Contrary to collateral counsel's argument that it is a "well understood principle" that a witness who is telling the truth about an event will tell the same story every time because the witness is speaking from memory, this is not true of a witness with a history of mental illness. IB at 16 n.9. Heaton was impeached at trial with the fact that she had been involuntarily committed to a mental hospital recently and the admission that she could not tell fact from fiction. Heaton's mental illness and brain damage, no doubt, affect her memory. The inconsistencies in Heaton's versions of events could be from her illness rather than lying. The trial court properly summarily denied this claim.

Brady

Rutherford contends that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose Mary Heaton's statement that she saw Rutherford strike the fatal blow. Collateral counsel asserts that Heaton told an unidentified law enforcement officer that she was present at the victim's house and saw Rutherford kill the victim but the State failed to disclose this statement to trial counsel. There is no *Brady* violation because the statement is not exculpatory. Far from it. Heaton's statement that she saw Rutherford strike the fatal blow is inculpatory. Nor is it significant impeachment. Mary Heaton, a prosecution witness presented during the guilt phase, tied Rutherford to the victim's check. Her testimony, however, was corroborated by her niece. Both put the victim's check in Rutherford's hands. The new statement is not truly impeaching of the State's case because it does not affect the testimony of the niece. Furthermore, Heaton was impeached at trial with the fact that she had been involuntarily committed to a mental hospital recently and the admission that she could not tell fact from fiction. Additionally, there is no *Brady* violation because there is no prejudice. Heaton's testimony was not critical to the State's case against

Rutherford. The prosecution had three witnesses that Rutherford told he was going to kill a woman before the murder. The prosecution had a fourth witness to whom Rutherford admitted killing the victim with a hammer after the murder. The physical evidence of Rutherford's fingerprints and palm print in the bathroom was also a crucial part of the State's case. It was these witnesses and physical evidence that were essential to the State's case. Heaton's statement cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. The trial court properly summarily denied the *Brady* claim.

Trial

Mary Heaton testified at trial for the State during the guilt phase. (T. Vol. II 397- Vol. III 424). Mary Heaton lived in Milton. (T. Vol. II 398). She testified that Rutherford came over to her house about 11:30 or 12:00 on August 22, 1985. (T. Vol. II 399). Rutherford was driving a black van and was by himself. (T. Vol. II 399). Rutherford had two sliding glass doors with him. (T. Vol. II 399). She, her father, her sister and her sister's two children lived at the house. (T. Vol. II 400). Rutherford asked her father if he wanted the two sliding

glass doors. (T. Vol. II 400). Rutherford asked her to fill out a check but she could not because she could not read or write. (T. Vol. II 400). She refused to fill out the check because she did not know how to. (T. Vol. III 401). Heaton testified that Rutherford then asked if her niece, Elizabeth Ward, was at home. (T. Vol. III 401). Rutherford asked Ms. Heaton to go find her niece which she did. (T. Vol. III 401). Her niece was in a van and Rutherford went out to speak with the niece while Ms. Heaton returned to the house (T. Vol. III 401). Rutherford told Ms. Heaton that he wanted to pay her the money he owed her. (T. Vol. III 402). Rutherford and Heaton went to the Santa Rosa State Bank in Pace. (T. Vol. III 402). Rutherford gave her the check and she attempted to cash the check but it was not signed. (T. Vol. III 402). Heaton identified State's Exhibit #9 as the check she had attempted to cash. (T. Vol. III 402). The Santa Rosa State Bank was in Pea Ridge near East Spencer Field Road. (T. Vol. III 403). The bank, however, would not cash the check because it was not signed at the bottom. (T. Vol. III 404,405). Heaton identified State's Exhibit #10 as her driver's license. (T. Vol. III 404). She had presented her license to the teller. (T. Vol. III 404). She left the bank and returned to Rutherford's van and informed him that the bank refused to cash

the check. (T. Vol. III 405). They drove to Center Field Road where Rutherford told her to sign the check. (T. Vol. III 405). She refused. (T. Vol. III 405). Rutherford had the check stub, the blue billfold, and the credit card which he carried into the woods. (T. Vol. III 405). She testified that Rutherford signed her name. (T. Vol. III 403).

On cross, she testified that it was the bottom of the check that was not signed. (T. Vol. III 407). Rutherford signed the check but not in her presence. (T. Vol. III 408). They returned to the bank in Pace. (T. Vol. III 408). She did not know the bank teller. (T. Vol. III 409). This time, the bank cashed the check and gave her the money in hundred dollar bills. (T. Vol. III 409). She did not count the money. (T. Vol. III 409). She returned to the van and Rutherford gave her five hundred dollars. (T. Vol. III 410). Rutherford then drove her back home. (T. Vol. III 410). She bought a green ‘74 Mustang that day. (T. Vol. III 410). She went to Mr. Smith’s car lot and paid $350.00 down on the car. (T. Vol. III 411). She purchased car insurance and some clothes with the remainder of the money. (T. Vol. III 411). It was about two o’clock when she returned to her home. (T. Vol. III 410). She did not see Rutherford anymore that day. (T. Vol. III 410). She had never cashed a

check before. (T. Vol. III 410). She testified that she had been in a mental institution for five months. (T. Vol. III 411). She was put in the Santa Rosa Hospital against her will. (T. Vol. III 412). She testified that she had a nervous breakdown and a stroke and brain damage. (T. Vol. III 412). It caused her to have difficulty distinguishing between fact and fantasy. (T. Vol. III 412). She was having trouble distinguishing between fact and fantasy on August 22. (T. Vol. III 412). She could remember some things and some things she could not but she was sure what happened on August 22, 1985. (T. Vol. III 412). She admitted that it would be difficult for her to distinguish between one check and another because she cannot read. (T. Vol. III 414). She did not have a checking account and was not familiar with how checks worked. (T. Vol. III 414). She admitted telling Deputy Jesse Cobb that she had signed the check in her deposition and that she was lying when she said that. (T. Vol. III 419-420). Rutherford had misspelled her name when he signed it on the back of the check. (T. Vol. III 420-421). She had originally told Deputy Cobb on August 23, that Rutherford signed the check. (T. Vol. III 422).

Elizabeth Ann Ward, Ms. Heaton's niece, testified. (T. Vol. III 424-425). She was fourteen years old and in 7th grade. (T.

Vol. III 425). She had known Rutherford for about a year or a year and a half. (T. Vol. III 426). She identified the check. (T. Vol. III 426). She testified that she wrote part of the check. (T. Vol. III 426). She was cleaning her grandfather's bus when her aunt told her that Rutherford wanted to talk to her. (T. Vol. III 427). It was between one o'clock and two o'clock but she was not certain. (T. Vol. III 427). Her aunt went in the house. (T. Vol. III 428). Rutherford handed her a checkbook in a wallet. (T. Vol. III 428). Rutherford asked her if she knew how to fill out a check and she responded no, but if you show me, I could. (T. Vol. III 428). She wrote out the check but refused to sign it. (T. Vol. III 428). She wrote out the date as August 21 because she thought that that was the correct date. (T. Vol. III 428). She wrote out Mary Frances Heaton. (T. Vol. III 428). She wrote $2,000 and wrote out two thousand and no cents and wrote personal loan. (T. Vol. III 429). Rutherford told her that he would give her $500.00 if she wrote out the check. (T. Vol. III 429). She did not sign the bottom of the check or the back of the check. (T. Vol. III 429). Rutherford signed the back of the check. (T. Vol. III 430). Rutherford and her aunt then left to go take care of some business. (T. Vol. III 430). She did not see Rutherford again

that day. (T. Vol. III 431). She saw her aunt get out of Rutherford's van about thirty minutes or an hour later. (T. Vol. III 431). Rutherford then left. (T. Vol. III 431). She testified that her aunt gave her $500.00 that she owed her. (T. Vol. III 432).

Ms. Jamie Peleggi, the teller at the bank, testified. (T. Vol. III 435). She was employed as a bank teller at the Pace branch of the Santa Rosa State Bank on August 22, 1985. (T. Vol. III 436). She did not know Mary Heaton. (T. Vol. III 436). She testified that Mary Heaton was a customer of the bank on August 22, 1985. (T. Vol. III 437). Mary Heaton came to the bank twice on that day - first at approximately 1:15 or 1:30 and again at approximately two o'clock. (T. Vol. III 437,438). She testified that Mary Heaton presented a $2000 dollar check to be cashed. (T. Vol. III 437). Ms. Peleggi identified State's Exhibit #9 as the check. (T. Vol. III 437). Ms. Peleggi testified that she noticed that Stella Salamon's signature was missing. (T. Vol. III 437). She refused to cash the check. (T. Vol. III 438). The bottom signature line of the check was missing. (T. Vol. III 438). Ms. Peleggi testified that Heaton left the bank and then returned. (T. Vol. III 439). She cashed the check at exactly 2:02 according to her list of transactions. (T. Vol. III

439). She had written Heaton's driver's license information on the check. (T. Vol. III 439). The check was on Stella Salamon's account and it was for $2000.00 dollars (T. Vol. III 440). She did not verify the signature on the check as the victim's by comparing it against the signature card on file because the signature cards are located in the main branch in Milton. (T. Vol. III 440). The teller testified that she had to go to the vault to get the large bills to cash the check. (T. Vol. III 440). She gave Heaton the two thousand dollars in one hundred dollar bills. (T. Vol. III 440). So, she gave Heaton twenty one hundred dollar bills. (T. Vol. III 440). She did not know the victim, Stella Salamon. (T. Vol. III 441). The bank teller testified that she did not see anyone with Ms. Heaton. (T. Vol. III 441).

On cross, the teller testified that she did not see who signed the check. (T. Vol. III 441). She did not see Rutherford sign the check. (T. Vol. III 442).

Affidavit

In the affidavit supporting the *Brady* evidence claim, claim VI of the amended 3.851 motion, Investigator Michael Glantz stated that Mary Frances Heaton, when confronted with Alan Gilkerson's

statements, “told me that she was present at the victim’s house on the day of the crimes and she claimed to have witnessed Mr. Rutherford striking the fatal blow.” Declaration of Michael Glantz Appendix K paragraph 9. The investigator further stated that Ms. Heaton told him that “she told law enforcement that she was present at the victim’s house when the victim was murdered . . .” Declaration of Michael Glantz Appendix K paragraph 10.

Collateral counsel argues that the newly discovered evidence claim must be considered cumulatively with the *Brady* claim. This is impossible because the two claims are contradictory. The facts contained in the affidavit supporting the newly discovered evidence claim contradict the facts contained in the affidavit supporting the *Brady* claim. Basically, Rutherford’s two claims are factually inconsistent. Rutherford is asserting, on the one hand, that Heaton is the actual killer and then, on other hand, that Heaton saw Rutherford murdering the victim. Obviously, both cannot be true.

<u>The trial court’s ruling</u>

> In the amended 3.851 motion, Defendant claims the newly discovered evidence obtained from Heaton has raised both a *Brady* claim and a *Giglio* claim. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Specifically, Defendant states that Heaton on

December 22, 2005 told investigator Glantz she had previously informed law enforcement of her presence when the crime was committed.[6] Defendant contends the State violated *Brady* by failing to disclose Heaton's statement to law enforcement.

To establish a *Brady* violation the defendant must show: 1) the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; 2) the evidence was suppressed by the State, either willfully or inadvertently; and 3) the suppression resulted in prejudice. *See Floyd v. State*, 902 So.2d 775, 778 (Fla. 2005)(citing *Rogers v. State*, 782 So.2d 373, 378 (Fla. 2001)(citing *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

In order to establish a *Giglio* violation, the Defendant must show that false testimony was presented at his trial, that the State knew the testimony was false, and that the statement was material. *See Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104; *see also Ventura v. State*, 794 So.2d 553 (Fla. 2001).

In the Amended Response and at the *Huff* hearing held on December 28, 2005, 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 the Defendant has failed to establish either a *Brady* or *Giglio* claim. *See Rodriguez v. State*, 2005 WL 1243475, *10 (Fla. 2005)(rejecting a *Giglio* claim where the defendant failed to show the testimony presented was actually false or that the prosecutor had any knowledge of allegedly false testimony in a case where the disputed testimony was consistent with other witnesses who testified at trial about the defendant's role in the crime.) As such, this claim is denied.

(Order at 17-19)(footnotes included but renumbered).

Standard of review

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[6] Amendment to Motion pg. 8, App. K.

This Court reviews *de novo* the postconviction court's determination that the suppressed evidence was not material under *Brady*. *Guzman v. State*, 868 So.2d 498, 508 (Fla. 2003)(citing *Way v. State*, 760 So.2d 903, 913 (Fla. 2000)).

Merits

Brady requires the State to disclose material information within the State's possession or control that tends to negate the guilt of the defendant. *Snelgrove v. State*, 2005 WL 3005531, *5 (Fla. 2005)(citing *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. Establishing a *Brady* violation requires the defendant to show: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. *Snelgrove v. State*, 2005 WL 3005531, *5 (Fla. 2005)(citing *Rogers v. State*, 782 So.2d 373, 378 (Fla.2001) (citing *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). Knowledge is imputed to the prosecutor who tried the case. *Guzman v. State,* 868 So.2d 498, 505 (Fla. 2003)(citing *Gorham v. State*, 597 So.2d 782, 784 (Fla.1992)(holding that the prosecutor is charged with

constructive knowledge of evidence withheld by other state agents, such as law enforcement officers)). A *Brady* claim may not be premised on information already known to the defendant. See *Snelgrove v. State*, 2005 WL 3005531, *5 (Fla. 2005)(finding that the State's failure to disclose a letter does not warrant relief under *Brady* because, while the letter provided favorable evidence to the defense and the State erred in failing to disclose it, the defendant has failed to establish that this suppression prejudiced him because the letter contained evidence already known to the defendant); *Maharaj v. Secretary for Dept. of Corrections,* 2005 WL 3435506, *19 (11th Cir. 2005)(explaining that there is no *Brady* violation if the defendant has the information.) Prejudice under the *Brady* analysis is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Elledge v. State*, 911 So.2d 57, 63 (Fla. 2005)(quoting *Strickler v. Greene*, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). There is never a real *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *Strickler*, 527 U.S. at 281.

First, this statement is not favorable to Rutherford. It does not tend to negate the guilt of the defendant. If Mary Heaton saw Rutherford kill the victim, her statement is inculpatory, not exculpatory. Heaton, under the latest alleged statement, is now an eyewitness to the murder. While impeaching of her trial testimony, it is also more incriminating of Rutherford's guilt than her trial testimony. Heaton's trial testimony was corroborated by her niece. While Heaton placed the victim's property in Rutherford's hands, so did the niece's testimony. The new statement is not truly impeaching of the State's case because it does not affect the testimony of the niece. Even nondisclosure does not warrant a new trial under *Brady* where the questioned testimony was substantially corroborated by other witnesses. *Strickler*, 527 U.S. at 293-94, 119 S.Ct. 1936 (failure to disclose impeachment evidence does not contravene *Brady* where other witnesses provide corroborating evidence in support of conviction). Furthermore, Heaton was impeached with her history of mental illness and her inability to distinguish fact from fiction. (T. Vol. III 412).

Nor did the State suppress the statement. Collateral counsel fails to identify the law enforcement officer that the statement was given to. There are no details as to when or where Heaton

gave the statement to identify which officer Heaton spoke to. None of the public records support this claim. The State did not and does not have the statement. *Maharaj v. State*, 778 So.2d 944, 954 (Fla. 2000)(explaining that there "can be no *Brady* violation when the allegedly suppressed evidence is not in the possession of the State.").

Nor is there any prejudice. Heaton's testimony was not essential to the conviction. Regardless of Heaton's testimony, the prosecution had three witnesses that Rutherford told he was going to kill a woman before the murder. The prosecution had a fourth witness to whom Rutherford admitted killing the victim with a hammer after the murder. Furthermore, Rutherford's prints were found in the victim's bathroom where her body was discovered. It was these witnesses and physical evidence that were essential to the State's case. Heaton's most recent statements certainly cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Elledge*, 911 So.2d at 66-67 (finding no *Brady* violation regarding EEG results which were normal).

Contrary to collateral counsel's argument that trial counsel could have used Heaton's statement that she saw Rutherford strike the fatal blow "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," Heaton's statement does nothing of the sort. Nor is the statement "consistent with the defense theory that there was reasonable doubt as to Mr. Rutherford's guilt and that someone other than Mr. Rutherford could have committed the crime." Heaton's statement that she saw Mr. Rutherford kill the victim, does not decrease the State's case against Rutherford one iota. It establishes Rutherford's guilt and his being the actual killer by eyewitness testimony. It certainly does not provide a basis for reasonable doubt or a basis for an argument that someone else committed the murder.

The statement does not impact "culpability, disparate sentencing, proportionality or statutory mitigation." Mary Heaton's culpability does not matter to Rutherford's culpability. Relative culpability is not an issue when death is imposed on the actual killer. Cf. *Lugo v. State*, 845 So.2d 74, 117 (Fla. 2003)(rejecting a relative culpability argument where the witness for the State received a plea deal for his testimony and whose involvement in the murders was "more of an accessory after the fact"); *Shere v. Moore*, 830 So.2d 56, 61 (Fla. 2002)(explaining that the Court "cannot conduct a true relative

culpability analysis because the codefendant was convicted of second-degree murder" and "We cannot make a true comparison of a first-degree murder conviction and a second-degree murder conviction" because where the co-perpetrator is convicted of second-degree murder, his relative culpability has already been determined to be less than the defendant's culpability.); *Larzelere v. State*, 676 So.2d 394, 407 (Fla. 1996)(noting that disparate treatment of a codefendant, including the imposition of the death penalty, is warranted when that codefendant is a more culpable participant in the criminal activity and finding death sentence where codefendant was acquitted of the murder); *Jennings v. State*, 718 So.2d 144, 153 (Fla. 1998)(observing that "[w]hile the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable."). As the Florida Supreme Court has explained, equally culpable connotes the same degree of blame or fault. *Shere v. Moore*, 830 So.2d 56, 61 (Fla. 2002). An eyewitness to a murder does connote the same degree of blame or fault as the actual killer. Heaton's statement that she saw Rutherford kill the victim could mean that she was merely an eyewitness or an

accessory after the fact. But whatever her culpability, her culpability does not negate Rutherford's culpability. Heaton's statement that she saw Rutherford kill the victim does not effect Rutherford's culpability in any manner. Rutherford's death sentence is still proportionate as the actual killer. *Jennings v. State*, 718 So.2d 144, 153 (Fla. 1998)(affirming death sentence and rejecting a relative culpability argument where the accomplice received life imprisonment where "Jennings was the actual killer and thus more culpable than Graves" because "disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.").

Rutherford's reliance on *Oregon v. Guzek*, 86 P.3d 1106 (Or. 2004), *cert. granted*, - U.S. -, 125 S.Ct. 1929, 161 L.Ed.2d 772 (2005), is misplaced. Lingering or residual doubt is not a mitigating circumstance in Florida. *King v. State*, 514 So. 2d 354, 357-358 (Fla. 1987). Lingering doubt actually is not mitigation; it is a standard of proof. Traditional mitigation concerns the defendant's background and character. Lingering doubt, by contrast, increases the State's burden of proof in the penalty phase from beyond a reasonable doubt to absolute certainty and there is no Eighth Amendment justification for

doing so. Neither the federal constitution nor Florida law require lingering doubt be considered in mitigation.

The *Brady* claim was properly summarily denied. *Rodriguez v. State*, 2005 WL 1243475, *10 (Fla. 2005)(concluding that the summary denial of Rodriguez's *Brady/Giglio* claim was proper); *Gorby v. State*, 819 So.2d 664, 676 (Fla.2002)(rejecting *Brady* and *Giglio* claims as insufficiently pled or wholly conclusory).

Motion to get the facts

Rutherford filed a motion to get the facts which sought a determination of whether the evidence was destroyed. IB at 49. Rutherford sought “scientific testing” of the existing evidence, if any. The trial court held a hearing on the motion on December 28, 2005. As established at the hearing on the motion, the evidence is this case was destroyed or lost. Joel Lowery of the Santa Rosa County Sheriff Office testified that he searched the bins of the evidence warehouse and could not find the evidence in this case. The trial court denied the motion, noting that Mr. Lowery had conducted “an exhaustive search” and found that “there is no physical evidence regarding this cause in the possession of the Sheriff”. The trial court also ordered the clerk’s office to conduct a search to determine if the

clerk's office had any additional physical evidence and advise the court and parties in writing of the results. The Clerk filed a response and explaining that attached exhibit list contained the evidence introduced at trial, which is stored in her evidence vault. and that she had "no other physical evidence pertaining to the case". *King v. State*, 808 So.2d 1237, 1242-1243 (Fla. 2002)(finding no bad faith where the medical examiner destroyed the washings and swab of the victim, pursuant to their normal custom, the prior to advent of DNA testing, and noting it is apparent that Mr. King cannot be given any relief relying on *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). The trial court properly denied the motion.

Motion for Heaton's psychological medical records

Rutherford filed a motion to obtain Heaton's psychological records from numerous treatment facilities and hospitals. IB at 56. Rutherford has not even attempted to meet the standard for such a request. §90.503,Fla.Stat.(2005)(the Psychotherapist-patient privilege statute); *State v. Roberson*, 884 So.2d 976, 978 (Fla. 5th DCA 2004)(explaining that the clinical records associated with Baker Act commitments are required to be confidential, except under very limited circumstances); *Katlein*

v. State, 731 So.2d 87 (Fla. 4th DCA 1999)(requiring a threshold showing that the privileged records are likely to contain relevant evidence and prohibiting “desperate grasping at a straw” and “fishing expeditions.”); *State v. Famiglietti*, 817 So.2d 901 (Fla. 3d DCA 2002)(en banc)(concluding that neither the Evidence Code, nor any applicable constitutional principle allows the invasion of a victim's privileged communications with her psychotherapist); *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996)(holding statements police officer made to social worker during therapy were protected from disclosure). The trial court properly denied this motion.

ISSUE II

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE CRUEL AND UNUSUAL PUNISHMENT CHALLENGE TO LETHAL INJECTION? (Restated)

Rutherford asserts that Florida's three drug protocol used in lethal injection is cruel and unusual punishment in violation of the Eighth Amendment based on a research letter. IB at 58; L.G. Koniaris, M.D., et.al., *Inadequate anaesthesia in lethal injection for execution*, 365 THE LANCET 1412 (April 16, 2005). There is no constitutional right to an entirely pain free execution and there certainly is no constitutional right to be unconscious during execution. This Court has repeatedly rejected cruel and unusual punishment challenges to lethal injection. Another state supreme court and a federal circuit court have summarily rejected a challenge based on the Lancet article. The trial court properly summarily denied the claim.

The trial court's ruling

The trial court ruled:

> In claim II, Defendant asserts the lethal injection procedure used in Florida violates his constitutional right to be free from cruel and unusual punishment. Defendant argues there is new scientific evidence recently published in *The Lancet* which establishes through research the effects of the chemicals used in the lethal injection procedures "creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to

contemporary standards of decency."[7] Defendant notes in the motion to vacate that the lethal injection jurisdictions which disclosed their information for use in the Lancet study were "substantially similar" in their practices to that of Florida.[8] Defendant asserts these facts as presented in *The Lancet* were not known at the time the Florida Supreme Court decided *Sims v. State*, 754 So.2d 657 (Fla. 2000). As such, Defendant alleges entitlement to relief based on new scientific evidence.[9]

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 constitutionality 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 is 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

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[7] Motion to Vacate pg. 13:14.

[8] Motion to Vacate pg. 12:12.

[9] Motion to Vacate pg. 9:2.

> the lethal injection has been fully litigated and is procedurally barred. This claim is denied.

(Order at 6-8)(footnotes included but renumbered).

Standard of review

The standard of review for a constitutional challenge to a statute is *de novo*. However, statutes are presumed to be constitutional. *Florida Dept. of Revenue v. City of Gainesville*, 2005 WL 3310297, *4 (Fla. 2005)(noting that the determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo but explaining that "we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible.").

Merits

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const., amend. VIII. It "forbids the infliction of unnecessary 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 (1947)(plurality opinion). *Resweber* involved Louisiana's second attempt at executing an

inmate where the first attempt had failed. The *Resweber* Court, rejecting a claim that the second attempt was cruel and unusual punishment, observed that the "cruelty against which the constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Resweber*, 329 U.S. at 464, 67 S.Ct. 374. There is no constitutional right to an entirely pain free execution. And there certainly is no constitutional right to be unconscious during execution. Lethal injection, however, is the most humane form of execution. *Bryan v. State*, 753 So.2d 1244, 1253 (Fla. 2000)(stating that lethal injection is "generally viewed as a more humane method of execution"); *Abdur'Rahman v. Bredesen*, 2005 WL 2615801, *9-*12 (Tenn. Oct. 17, 2005)(noting that lethal injection is "commonly thought to be the most humane form of execution").

The Florida Supreme Court has held Florida's drug protocol to be constitutional. *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000)(holding that execution by lethal injection is not cruel and unusual punishment). The Florida Supreme Court rejected the parade of horribles argument regarding what could happen if lethal injection is not administered properly. *Sims*, 754 So.2d at 667. At the evidentiary hearing held in *Sims*, defense

expert, Dr. Lipman, a neuropharmacologist, provided examples of what could happen if the drugs are not administered properly or if the personnel are not adequately trained to administer the lethal substances. ***Sims***, 754 So.2d at n.19. The defense experts opined that if too low a dose of sodium pentothal is administered, the inmate could feel pain because low dosages of such drug have the opposite effect-it makes the pain more acute. In addition, if the drugs are not injected in the proper order, the inmate could suffer pain because he would not be properly anesthetized. Dr. Lipman further noted that if the drugs are not administered in a timely manner, the sodium pentothal could wear off, causing the inmate to regain consciousness. ***Sims***, 754 So.2d at n.19. The Florida Supreme Court observed that Dr. Lipman admitted that lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." He also admitted that at the high dosages of the lethal substances intended be used by the Department of Corrections, death would certainly result quickly and without sensation. The Florida Supreme Court concluded that this 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. *Sims*, 754 So.2d at 668.

This Court has repeatedly rejected such challenges in the wake of *Sims* and repeatedly affirmed summarily denials of such challenges. *Suggs v. State*, 2005 WL 3071927, *17 (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"); *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005)(rejecting a claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions as being "without merit"); *Parker v. State*, 904 So.2d 370, 380 (Fla. 2005)(stating: "this Court has repeatedly held that neither form of execution is cruel and unusual punishment."); *Sochor v. State*, 883 So.2d 766, 789 (Fla. 2004)(rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Cole v. State*, 841 So.2d 409, 430 (Fla. 2003)(summarily rejecting a claim that lethal injection is cruel

or unusual or both because “we previously have found similar arguments to be without merit.”).

The Lancet article involved the autopsy reports of 49 executed inmates from four states: Arizona, Georgia, North Carolina, and South Carolina. L.G. Koniaris, M.D., et.al., *Inadequate anaesthesia in lethal injection for execution*, 365 THE LANCET 1412 (April 16, 2005). Using toxicology reports from the autopsies, the article revealed that post-mortem concentrations of thiopental in the blood of 43 of the 49 inmates (88%) were below typical surgery levels, and in 21 of the 49 inmates (43%) the concentrations of thiopental in the blood was consistent with awareness. The blood samples were taken from the subclavian artery. The article noted that anaesthesia is assumed because of the “relatively large quantity of thiopental”, usually 2 grams compared to the typical surgical dose of 3-5 milligrams. The article stated that this finding suggests substantial variations in either the autopsy or the anaesthesia methods but concluded that the variation was probably due to difference in drug administration in individual executions based on the expertise of the state medical examiners compared with the unskilled executioners. The article stated that they could not conclude that these inmates were unconscious and insensate. The

article admitted that "[e]xtrapolation of antemortem depth of anaesthesia from post-mortem blood thiopental concentrations is admittedly problematic." The article "postulated that anaesthesia methods in lethal injection might be inadequate." The article concluded that cessation and public review of lethal injection was warranted.[10]

Rutherford argues that he may be conscious during the execution and therefore, he may feel pain. However, there is no constitutional right to an entirely pain free execution. And there certainly is no constitutional right to be unconscious during execution. Consciousness does not directly equate to the ability to feel pain. One does not automatically follow from the other. Local anaesthesia is an example of the lack of direct correlation. Other courts have addressed lethal injection in the wake of the Lancet article and have rejected the claim. The same issue was litigated in Virginia and rejected. *Reid v. Johnson*, 333 F.Supp.2d 543 (E.D.Va. 2004), *preliminary injunction denied*, 542 U.S. 963, 125 S.Ct. 25, 159 L.Ed.2d 854 (2004). Reid asserted, through his expert, Dr. Mark

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[10] This seems like an odd conclusion for a true scientific article. The more natural conclusion would seem to be a recommendation to increase the amount of thiopental used in

Heath, that the toxicology reports demonstrated that inadequate amounts of sodium thiopental had reached the inmate's body and thus, there was a possibility that the inmate may have been conscious during his execution. *Reid*, 333 F.Supp.2d at 548. Reid presented the post-mortem blood toxicology reports of condemned inmates from other states. *Reid*, 333 F.Supp.2d at 548. Virginia's drug protocol is: 2 grams of sodium thiopental, followed by 50 milligrams of pancuronium bromide, followed by at least 120 milliequivalents of potassium chloride. *Reid*, 333 F.Supp.2d at 546. The total duration of the execution, from the introduction of the first drug to death is five to ten minutes. The district court explained: the first drug, sodium thiopental is a barbiturate sedative. Two grams of sodium thiopental is approximately five to eight times the dosage that would be used to render a 176 pound individual unconscious for general surgery. Within moments after the injection of the sodium thiopental, the inmate will be rendered unconscious. The condemned inmate will slip into unconsciousness in the same manner as that experienced by a general surgery patient. The probability of the inmate regaining consciousness within the ensuing ten minutes is 3/1000 of one percent. The probability

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lethal injections as a means of addressing these concerns, not

of the inmate regaining consciousness by minute fifteen is 6/1000 of one percent. *Reid*, 333 F.Supp.2d at 546-547. The description of the effects of sodium thiopental was taken from the testimony of Dr. Mark Dershwitz, a board certified anesthesiologist, associated with the University of Massachusetts. *Reid*, 333 F.Supp.2d at n.7. The district court found: Dr. Dershwitz's clinical and academic experience with the administration of sodium thiopental and pancorium made him a convincing witness. *Reid*, 333 F.Supp.2d at n.7. The defense expert deferred to Dr. Dershwitz expertise. *Reid*, 333 F.Supp.2d at n.7. The district court concluded that the lack of pertinent information regarding when and how the blood was gathered renders these reports "of little value" as a basis for rendering an opinion based on reasonable medical certainty as to the amount of sodium thiopental that had actually reached the inmate's system. *Reid*, 333 F.Supp.2d at 548. The United States Supreme Court denied an application for a preliminary injunction. *Reid v. Johnson*, 542 U.S. 963, 125 S.Ct. 25, 159 L.Ed.2d 854 (2004).

In *Bieghler v. State*, - N.E.2d -, 2005 WL 3549175, 2005 Ind. LEXIS 1156 (Ind. December 28, 2005), the Indiana Supreme Court

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the cessation of all lethal injections.

held that Indiana's method of execution by lethal injection was not cruel and unusual punishment. The Indiana Supreme Court denied a request to file a successive postconviction motion based on the Lancet article. In Indiana, a petitioner must obtain authorization from the appellate courts to litigate a successive post-conviction claim which requires that he establish “a reasonable possibility that the petitioner is entitled to post-conviction relief.” See Ind. Post-Conviction Rule § 12(b). The Indiana Supreme Court described Indiana’s lethal injection drug protocol: “[t]hree drugs are injected in sequence: sodium pentothal, a fast-acting anesthetic intended to render the prisoner unconscious; pancuronium bromide, which stops a person's breathing; and potassium chloride, which stops a person's heart.” Bieghler’s claim related to the first drug.[11] He argued that a person's age, gender, body weight, level of anxiety, or history of substance abuse may, in some circumstances, affect the amount of the sodium pentothal needed to produce a continued state of anesthesia and submitted the Lancet article in support. He asserted that Indiana's method of execution "inflicts unnecessary pain and agony" because it lacks

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[11] It is not clear whether Indiana uses 2 or 5 grams of the first drug, sodium pentothal.

the assurance that his execution will be "pain free." The Court noted that Bieghler cited no authority for the proposition that he is entitled to a "pain free" execution, and “we have found none.” The Indiana Supreme Court observed that judicial intervention in the details of execution methods is by its nature highly restrained. No evidentiary hearing was conducted in *Bieghler*. The Indiana Supreme Court concluded that Bieghler had not shown the protocol “presents any unacceptable risk of a lingering death or the wanton infliction of pain.”

The Eighth Circuit denied a motion for stay of execution based on the Lancet article without an evidentiary hearing. *Brown v. Crawford*, 408 F.3d 1027 (8th Cir. 2005)(noting, in the dissent, that the inmate had relied on L.G. Koniaris, M.D., Inadequate anaesthesia in lethal injection for execution, 365 The Lancet 1412 (Apr. 16, 2005)), *cert. denied*, - U.S. -, 125 S.Ct. 2927, 162 L.Ed.2d 310 (2005).

Here, as in *Reid* and *Bieghler*, Florida’s drug protocol does not present any unacceptable risk of a lingering death or the wanton infliction of pain. Two grams of sodium thiopental is four or five times the dosage that would be used to render a person unconscious for general surgery according to both *Reid* and the Lancet article. Here, as in *Bieghler* and *Brown*, no

evidentiary hearing was necessary. The trial court properly summarily denied this claim.

Motion for Independent testing

Rutherford made a motion for serological samples and independent testing of the thiopental levels in the blood of Clarence Hill following his execution. IB at 68. *Sims* controls this claim as well. The trial court properly denied the motion.

Motion for discovery

Rutherford filed a motion for discovery requesting the public records associated with Rutherford's pre-execution medical examination. IB at 69. Rutherford also sought to depose the medical personnel who performed the examination. The trial court ordered the State to respond by noon on January 9, 2006. Rutherford filed a notice of appeal in the morning of January 9, 2006. The Department of Corrections responded to the motion explaining that the medical examination was standard protocol; that there are no documents generated during the medical examination and therefore no public records to disclose; and objecting to any disclosure of the identity of the medical

personnel. The trial court denied the motion in the afternoon of January 9, 2006.

Rutherford has abandoned this motion. Rutherford's notice of appeal was filed before the trial court had an opportunity to rule on the motion. Indeed, the notice of appeal was filed prior to the DOC's response to the motion being filed. By filing his notice of appeal before the trial court disposed of the motion, Rutherford abandoned his motion. *Forfeiture of $104,591 in U.S. Currency*, 589 So.2d 283, 285 (Fla. 1991)(explaining that a party abandons previously filed post-final judgment motions when he files a notice of appeal).

Rutherford seems to be claiming that this is a change in the lethal injection protocol. It is not. This medical examination is part of the standard protocol in Florida, as this Court has previously noted. *Bryan v. State*, 753 So.2d 1244, 1252 (Fla. 2000)(explaining that "[t]he procedure for execution by lethal injection is as follows: The defendant is given a thorough physical examination sometime prior to the date of the execution, including a medical history."). The page of questions posed by collateral counsel are exactly the type of questions rejected by this Court in *Sims* and *Bryan*. IB at 71. Rutherford knows how his execution will be conducted from the

detailed explanation in *Bryan*. The trial court properly denied the motion for discovery.

ISSUE III

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE FIRST AMENDMENT CHALLENGE TO LETHAL INJECTION? (Restated)

Rutherford asserts that the second drug in the series, pancuronium bromide, will render him unable to speak, violating his right to free speech. IB at 72. Florida's lethal injection drug protocols do not violate the First Amendment. The State has a legitimate penological interest in having an inmate unconscious and immobile during the execution. The trial court properly summarily denied this claim.

The trial court's ruling

The trial court ruled:

> In this claim, Defendant asserts the administration of the paralyzing drug, pancuronium bromide, violates his First Amendment right to freedom of speech and serves no penological purpose. Specifically, Defendant claims the administration of pancuronium bromide will render him incapable of communicating to others his experience during the lethal injection procedure, thereby, violating his right to free speech.
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> 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 tha the 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 8-9).

Standard of review

The standard of review for a constitutional challenge to a statute is *de novo*. However, statutes are presumed to be constitutional. *Florida Dept. of Revenue v. City of Gainesville*, 2005 WL 3310297, *4 (Fla. 2005)(noting that the determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo but explaining that "we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible.").

Merits

The Ninth Circuit has rejected this exact claim. In *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), the Ninth Circuit rejected a free speech challenge to California's lethal injection drug protocols which includes sodium pentothal (also

known as sodium thiopental) followed by pancuronium bromide and then potassium chloride. *Beardslee*, 395 F.3d at 1071. Beardslee contended that the use of pancuronium bromide will prevent him from audibly and consciously expressing his pain, thereby denying him his right to free speech under the First Amendment. *Beardslee*, 395 F.3d at 1076. The Ninth Circuit concluded that Beardslee would not be conscious when the final two drugs are administered and rejected the First Amendment claim. The Ninth Circuit denied a stay of execution because the inmate failed to establish a likelihood that he would be conscious during administration of lethal drugs.

Here, as in *Beardslee*, Rutherford will be unconscious and therefore, unable to speak. There is a legitimate penological interest in having an inmate unconscious during the execution. Contrary to collateral counsel's argument, there is also a legitimate penological interest in having an inmate immobile during the execution. *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).

Even if the second drug was not administered, Rutherford would be unconscious from the first drug and therefore, unable to speak. It is the first drug, sodium pentothal, not the second drug, the pancuronium bromide, that renders the inmate unconscious and therefore unable to speak. The trial court properly summarily denied this claim.

ISSUE IV

DID THE TRIAL COURT PROPERLY DENY THE PUBLIC RECORDS REQUESTS? (Restated)

Rutherford asserts that the trial court erred in denying his public records requests. IB at 77. The rule governing public records requests envisions updates of prior requests only. The public record requests to four agencies were not updates of prior requests; rather, they were duplicate requests. Collateral counsel asserted that she may have lost the prior public records produced by these four agencies. Such duplicate requests are not authorized by the rule. The public record requests to two agencies were not updates of prior requests; rather, they were entirely new requests. New requests are not authorized by the rule. The trial court properly denied the public records requests.

Facts

On December 7, 2005, Defendant made requests of six agencies for records not previously received. Collateral 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 public

records previously provided by these agencies. Collateral counsel also requested from the Medical Examiner of the Eighth Judicial Circuit the autopsy reports of the prior 16 executions conducted in Florida by lethal injection. Collateral counsel also requested from the Department of Corrections (DOC) 49 items relating to the lethal injection protocols. The State filed an objection to all these requests entitled "GLOBAL OBJECTION TO PUBLIC RECORDS REQUESTS". The global objection explained that duplicate requests were not unauthorized under the rule. The global objection also objected to the new requests made of DOC and to the requests made of the Eighth Judicial Circuit Medical Examiner because Rutherford had made no prior requests of this medical examiner. DOC also filed an objection. The trial court held a hearing on the public record requests on December 13, 2005. A representative from DOC, a representative from the Eighth Judicial Medical Examiner Office's and a representative from FDLE, as well as the parties, attended the public records hearing. DOC objected to the requests relating to lethal injection as a fishing expedition. DOC agreed to provide updated public records relating to Rutherford's inmate file because there was a prior request regarding this information. FDLE stated that they did not have any updates. All their

records were already delivered to collateral counsel. The prosecutor noted that the State Attorney's file was damaged in a hurricane. The representative from the Eighth Judicial Medical Examiner Office's stated that their office had never received prior requests. The trial court denied the requests.

The trial court's ruling

The trial court denied the public records requests, following a hearing, by written order:

> This cause is before the Court upon Defendant's Motion to Compel Access to Public Records; Defendant's Motion for Production of Additional Public Records, the State of Florida's Global Objection to Public Records Request and the Department of Corrections Objection to Defendant's Demand for Additional Records after Signing of Death Warrant.
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> Pursuant to this Court's Scheduling Order entered December 9, 2005, a telephone hearing was conducted on December 13, 2005 upon any objections to Defendant's Demand for Public Records. Present at that hearing via telephone were James Martin, Esquire, Assistant General Counsel for Department of Corrections (DOC); Charmaine Millsaps, Esquire, Assistant Attorney General; Linda McDermott, Esquire, counsel for Defendant and Mr. Larry Bedore, Administrator for the Office of the Medical Examiner, Eighth District of Florida. John Molchan, Esquire, Assistant State Attorney, First Judicial Circuit, appeared in person.
>
> In addition to the objections filed to Defendant's Demand for Production of Public Records, counsel for the Defendant requested that Defendant's Motion to Compel Access to Public records also be addressed. Since DOC's Objection addresses documents produced or possessed by DOC concerning execution by lethal injection, the Court also addresses Defendant's Motion for Production of Additional

Public Records from the Office of the Medical Examiner; Eight District of Florida.

On December 9, 2005, Defendant filed a Motion to Compel Access to Public Records directed to the Office of the State Attorney for the First Judicial Circuit, the Santa Rosa County Sheriff's Office, FDLE, and the Medical Examiner's Office, First District of Florida. Counsel for the Defendant alleges that at the time Defendant's post conviction proceedings began in 1989, Defendant was then represented by the Capital Collateral Representative (CCR). A Motion for Post Conviction Relief pursuant to Fla.R.Crim.P. 3.850 was filed on August 1, 1991 and later amended on October 16, 1992. Counsel further alleges that Defendant received the vast majority of his public records documents at that time and later in 1996 just prior to Defendant's evidentiary hearing. Subsequently, in 2003, the Office of the Capital Collateral Regional Counsel - North (CCRC-N) was abolished but Defendant's CCRC counsel was appointed by this Court as registry counsel for the Defendant. Counsel further alleges that she attempted to obtain all the relevant documents in Defendant's case but she now ***fears*** that she no longer has a complete file of Defendant's records. (Emphasis added). Defendant's counsel specifically requests that this Court compel the State to provide Defendant with access to files in the possession of the State Attorney, Santa Rosa Sheriff's Office, FDLE and the Medical Examiner's Office, First District of Florida.

On November 29, 2005, the Governor of the State of Florida signed a Death Warrant for the execution of the Defendant and accordingly post production requests for public documents is controlled by Fla.R.Crim.P. 3.852(h)(3); (i). Rule 3.852(h)(3) sets forth the specific procedure for obtaining public records from persons or agencies from which Collateral counsel had previously requested public records and does not provide for additional access to agency records, when those documents have already been provided to Defendant or his counsel. Furthermore, counsel's allegation that she "fears" that she no longer has a complete file of Defendant's records falls well short of the allegations and proof required to obtain additional records pursuant to Rule 3.852(i). Accordingly, Defendant's Motion to Compel Access to Public Records should be denied.

Defendant also requests production of additional records of the Medical Examiner's Office, Eighth District of Florida pursuant to Fla.R.Crim.P. 3.852(h)(3). Specifically, counsel requests copies of any and all documents concerning post execution photographs of condemned inmates and postmortem examinations performed on individuals executed by lethal injection by the State of Florida including but not limited to autopsy narrative reports, notes, diagrams, photos, and toxicology studies for the executed prisoners set forth in Defendant's motion beginning with Terry M. Sims, executed on February 23, 2000 and concluding with Glen J. Ocha, executed April 5, 2005. Defendant also seeks any and all writings or documents relating to the Medical Examiner's autopsy protocols that were in effect at the time the prisoners listed above were executed. Both DOC and the State through its Attorney General object to the granting of said motion. Both DOC and the Attorney General argue that the request is not an update as provided for in Fla.R.Crim.P. 3.852(h) but is an attempt to initiate a new records production request subsequent to the exhaustion of all collateral appeals. The record in this cause does not reflect any prior requests of the Medical Examiner of the Eighth Circuit and counsel for the Defendant did not point to same.

Furthermore, it is clear on 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. 2001). Specifically, the request for all documents concerning post execution photographs of the condemned inmate, postmortem examinations performed on individuals executed by lethal injection to this state including the autopsy narrative reports, notes, diagrams, photos and toxicology studies for executed prisoners and all writings and documents relating to the Medical Examiners's autopsy protocols in effect at the time of the execution of said prisoners directed to the Medical Examiner's Office, Eighth District of Florida and more particularly Defendant's Demand for Production of Additional Public Records directed at DOC requesting all

> information that in any way relates to lethal injection[12] could only be requested for one purpose, that being an attempt to show that execution by lethal injection is a cruel and unusual punishment. However, the Supreme Court of Florida has rejected such challenges. *See Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005); *citing Provenzano v. State*, 761 So.2d 1097, 1099 (Fla. 2000); *Sims v. State*, 754 so.2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment). Accordingly, Defendant's Demand for Production of Additional Public Records made upon the Department of Corrections as it relates to lethal injections and the requested documents directed to the Medical Examiner's Office, Eighth District of Florida, and Defendant's Motion for Production of Additional Public Records is not relevant as it does not relate to a colorable claim for post conviction relief.

Collateral counsel then reasserted the requests in the successive 3.851 motion and the trial court again denied the requests, ruling:

> 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)(emphases added). Regarding the records request to the Department of Corrections and the Medical Examiner's Office, Eighth District of Florida, the Court stated:

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[12] Defendant's Demand for Production of Additional Public Records served on James Lee Crosby, Jr., Secretary, Department of Corrections, sets forth forty-nine (49) paragraphs of requested documents, procedures for execution by lethal injection, monitoring of the Defendant, minimum qualifications and expertise required of those persons delegated with the responsibility of overseeing the execution process and other information set forth in Defendant's Demand.

> "It is clear on the fact 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 postconviction relief contrary to the prior rulings of the court. *Mills v. State*, 786 So.2d 547, 552 (Fla. 2001)."[13]
>
> 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 5-6)(footnotes included but renumbered).

Standard of review

The standard of review for public records requests is abuse of discretion. *State v. Coney*, 845 So.2d 120, 137 (Fla. 2003)(explaining that a circuit court's ruling on a public records request filed pursuant to a rule 3.850 motion will be sustained on review absent an abuse of discretion and discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion

[13] Order Denying Motion to Compel Access to Public Records, Defendant's Motion for Production of Additional Public Records and Order Sustaining Department of Corrections' Objection for Additional Records dated December 14, 2005.

is abused only where no reasonable person would take the view adopted by the trial court).

Merits

Collateral counsel requested public records, pursuant to rule 3.852 (h)(3)(b) and 3.852 (h)(3)(c), which provides:

> Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not previously the subject of an objection;
>
> (B) that was received or produced since the previous request; or
> (C) that was, for any reason, not produced previously.
>
> The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been produced previously. A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.

Collateral 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, FDLE and First District Medical Examiner, provide a second copy of public records previously provided by these agencies which may have been lost

during the “chaotic transition” caused by the abolishment of CCRC-North. Collateral counsel, who is now registry counsel, had been counsel of record handling Rutherford’s case when she was working for CCRC-North. She had a duty not to lose the prior public records. Moreover, while this is a pre-repository case, collateral counsel could have deposited the prior public records produced by these agencies in the repository prior to the transition to make it less chaotic. The rule simply does not provide for “I lost the prior public record” requests. None of these agencies should be required to do a second time what they have already done. The rule only provides for additional records generated since the last requests were made or prior requests that were not produced previously. Any requests to these four agencies for duplicates should be denied as unauthorized by the rule.

In *Mills v. State*, 786 So.2d 547, 551 (Fla. 2001), the Florida Supreme Court, in a death warrant case, held that the trial court properly denied the public records requests because the requests were overly broad, of questionable relevance, and unlikely to lead to discoverable evidence Mills requested public records from the following agencies: (1) Florida Department of Law Enforcement; (2) Florida Department of

Corrections; (3) Orlando Police Department; (4) Office of the State Attorney, Eighteenth Judicial Circuit; (5) Office of Executive Clemency; (6) Florida Parole Commission; (7) Florida Department of State, Division of Elections; (7) Seminole County Sheriff's Office; (8) City of Sanford Police Department; (9) Seminole County Medical Examiner's Office; (10) Florida Attorney General's Office; (11) Seminole County Jail; (12) Florida Department of Children and Families; (13) Lancaster Youth Development Center; (14) Arthur G. Dozier School for Boys; and (15) Florida Department of Juvenile Justice. Mills requested public records from fifteen different agencies, and in most of his demands, requested "[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files generated or received by any and all members of your agency which are related to Gregory Mills." Mills argued that the denial of access to public records violated his right to due process and equal protection as well as the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The *Mills* Court noted that it had recently addressed similar public records claims in *Glock v. Moore*, 776 So.2d 243 (Fla.2001), and *Sims v. State*, 753 So.2d 66 (Fla.2000). In both cases, the

defendant made broad public records requests after the death warrant was signed. Likewise, in both cases, this Court affirmed the trial court's denial of the defendant's motion to compel. The *Mills* Court quoted *Sims*:

> The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant. However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief. To prevent such a fishing expedition, the statute and the rule provide for the production of public records from persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey. The use of the past tense and such words and phrases as “requested,” “previously,” “received,” “produced,” “previous request,” and “produced previously” are not happenstance.
>
> This language was intended to and does convey to the reader the fact that a public records request under this rule is intended as an update of information previously received or requested. To hold otherwise would foster a procedure in which defendants make only a partial public records request during the initial postconviction proceedings and hold in abeyance other requests until such time as a warrant is signed. Such is neither the spirit nor intent of the public records law. Rule 3.852 is not intended for use by defendants as, in the words of the trial court, “nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry.”

Sims, 753 So.2d at 70 (affirming denial of public record requests where public records requests of twenty-three agencies or persons most of whom had not been the recipients of prior requests for public records). The Florida Supreme Court

concluded that the record supported the trial court's finding that the demands filed in this case are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. Mills requested public records from fifteen different agencies, and in most of his demands, requested “[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files generated or received by any and all members of your agency which are related to Gregory Mills” which is overly broad. The Florida Supreme Court concluded that Mills did not make the requisite showing for the additional records. See also *Bryan v. State*, 748 So.2d 1003, 1006 (Fla. 1999)(affirming denial of public records, in a non-warrant capital case, where the trial court, who was Justice Bell, found Bryan's requests to be “at best a ‘fishing expedition’ and at worst a dilatory tactic” where the defendant had simply filed a "plethora of demands … to nearly every public agency that had any contact" with him, and that he failed to identify specific concerns or issues to the trial court that would warrant relief.) Here, as in *Mills*, *Glock* and *Sims*, the public records requests are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. The rule is intended as an update of information previously received

or requested. Rutherford does not identify if he has previously made requests of these agencies and specifically what the prior requests were. Rutherford is ONLY entitled to updates of prior requests, he may not make new requests. *Glock v. Moore*, 776 So.2d 243, 254 (Fla.2001)(affirming trial court denial of public records requests, in a death warrant case, because most of the records were not simply an update of information previously requested, which are proper, but entirely new requests, which are not proper and observing that Glock had not made a showing as to how any of the records he has requested and has not received relate to a colorable claim for postconviction relief and concluding that Glock did not show good cause as to why he did not make these public records requests until after the death warrant was signed.). Rutherford did not make ANY prior requests of the Medical Examiner of the Eighth Judicial Circuit. Nor did Rutherford make prior requests to DOC regarding the 49 items relating to the lethal injection protocols.

Moreover, this is a fishing expedition unrelated to a colorable claim for postconviction relief. Rutherford made these public records to attempt to raise a cruel and unusual punishment challenge to lethal injection, specifically the drug protocols. The Florida Supreme Court, however, has repeatedly

rejected such challenges. *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005)(rejecting a claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions as being "without merit"); *Sochor v. State*, 883 So.2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Cole v. State*, 841 So.2d 409, 430 (Fla. 2003)(summarily rejecting a claim that lethal injection is cruel or unusual or both because "we previously have found similar arguments to be without merit."); *Bryan v. State*, 753 So.2d 1244, 1253 (Fla. 2000) (stating that lethal injection is "generally viewed as a more humane method of execution"); *Provenzano v. State*, 761 So.2d 1097, 1099 (Fla.2000) (execution by lethal injection does not constitute cruel or unusual punishment); *Sims v. State*, 754 So.2d 657 (Fla. 2000)(holding lethal injection is constitutional). The drugs used in Florida's lethal injection method do not violate the Eighth Amendment. *Sims v. State*, 754 So.2d 657, 666-669 (Fla. 2000)(finding Florida Department of Corrections procedures for the application of lethal injection does not constitute cruel and unusual punishment).

In *Sims*, the Florida Supreme Court rejected a claim regarding the adequacy and sufficiency of the DOC's written protocol, about the execution procedures, the chemicals to be administered and the roles of the persons who will be carrying out the execution. Sims contended that lethal injection constitutes cruel and unusual punishment under the Eighth Amendment. Sims asserted that: (1) lethal injection can be cruel and unusual punishment based on the number of reported problems in correctly administering such executions around the country; (2) the lack of written guidelines for carrying out lethal injection constitutes cruel and unusual punishment because the participants may not know what to do if a problem occurs; (3) the participants to the execution do not know what their function is; (4) under the protocols, the DOC intends to give the inmate his last meal an hour before the execution which contradicts standard anesthesia protocols on the consumption of food and fluids prior to administering sodium pentothal; (5) the testimony at the hearing conflicts with the written protocol on the procedure to be followed if the inmate does not die after the initial series of injections; (6) the written protocols conflict with state law concerning the witnesses to the execution; (7) the lack of specific protocols subjects Sims to a

risk of pain, torture and degradation in violation of the Eighth Amendment. *Sims*, 754 So.2d at n.18.

The Florida Supreme Court, relied on and quoted a district court in Arizona where a similar challenge was raised and rejected. *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz.1995), aff'd,133 F.3d 1253 (9th Cir.1998). The Arizona district court had found that the written procedures are not constitutionally infirm simply because they fail to specify in explicit detail the execution protocol. The district court concluded that the challenge to the procedural safeguards was "based entirely on speculation." The district court also found that the condemned lose consciousness within seconds, and death occurs with minimal pain within one to two minutes that concluded that the risk of being subjected to a cruel and wanton infliction of pain was negligible.

Sims raised a similar challenge to the sufficiency of the DOC's written protocol, relying on testimony by Professor Michael Radelet and Dr. Joseph Lipman, both of whom provided examples of what could happen if the lethal injection is not administered properly. Dr. Lipman admitted that lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the

proper sequence at the appropriate time, they will “bring about the desired effect.” He also admitted that at high dosages of the lethal substances intended be used by the DOC, death would certainly result quickly and without sensation. After considering the testimony presented by the witnesses from DOC and the defense's experts on lethal injection, the trial court ruled that “the manner and method of execution to be carried out by lethal injection in Florida is neither cruel nor unusual and that the Department of Corrections is both capable and prepared to carry out executions in a manner consistent with evolving standards of decency.” The Florida Supreme Court found no error in the trial court's analysis and conclusion. The Court explained that Sims’ “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. The Court concluded that Sims had not shown that the DOC procedures will subject him to pain or degradation if carried out as planned and that Sims' argument centers solely on what may happen if something goes wrong. The *Sims* Court concluded that the procedures for administering the lethal injection does

not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

In *Bryan v. State*, 753 So.2d 1244, 1251-1253 (Fla. 2000), the Florida Supreme Court addressed a public records claim regarding lethal injection. Bryan claimed that the State violated public records disclosure requirements by improperly withholding records pertaining to lethal injection under chapter 119, Florida Statutes (1999). Bryan requested "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. Based on the evidence developed in that case, the trial court in Sims described lethal injection thusly:

> Mr. [James V.] Crosby is the Warden at Florida State Prison where the execution is to take place. Mr. Crosby had considerable knowledge about the procedures to be used and provided the following information:
> The requirements to be an executioner using lethal injection are simply that he or she must be over the age of twenty-one, a citizen of the State of Florida, and able to inject fluids using a syringe.
> The person who will be the executioner in this case has observed two lethal injections in Virginia.
> The procedure for execution by lethal injection is as follows:
> The defendant is given a thorough physical examination sometime prior to the date of the execution, including a medical history.

On the date of the execution the defendant is fed his last meal. Utensils authorized are a plate and a spoon.
A physician consults with the defendant and explains the execution procedure. The defendant is offered Valium.
The defendant is escorted to the preparation area near the death chamber and is laid down on a gurney. The gurney has straps which are used to secure the defendant.
Two [IVs] are started by qualified medical personnel. One IV is placed in each arm. A saline solution is started in each IV.
Meanwhile, a pharmacist prepares eight syringes, numbered one through eight.
Syringes numbered one and two contain Sodium Pentathol. The dosage itself is lethal. This drug is used in surgical settings as an anaesthetic. It will take effect in a matter of seconds.
Syringe number three contains a saline solution which is used as a flushing agent.
Syringes four and five contain a lethal dosage of Pancuronium Bromide which causes paralysis.
Syringe six contains a saline solution which is used as a flushing agent.
Syringes seven and eight contain a lethal dosage of Potassium Chloride which will stop the heart from beating.
The syringes are inserted, in numerical order, into a port in the IV tube and are administered one after the other in the order stated.
Six persons are present in the death chamber besides the defendant. In addition to the executioner, there is a medical doctor, a physician's assistant, and three others, presumably security personnel. The medical doctor is present in the event there is some unusual event that needs medical attention and the physician's assistant is present both as an observer and to check for a pulse after the drugs have been administered.
Mr. Crosby testified that the procedure is designed to be dignified.
Several “walk throughs” have been performed by the execution team and the court is satisfied that the procedure is well rehearsed and the team is competent to perform its function. While defense counsel has made much of the fact that there are no written protocols to direct the team in the event there is a mishap, the medical doctor

> is there to give direction if that occurs and that is satisfactory.

Id. slip op. at 13-15 (footnotes omitted). The *Bryan* Court noted that it had recently affirmed the trial court's order in Sims that established the sufficiency of the DOC's lethal injection protocol and procedures. See *Sims v. State*, 754 So.2d 657, 667-68 (Fla.2000). The *Bryan* Court concluded that the State provided "a thorough account of how Bryan's execution by lethal injection will be administered by the State of Florida, thereby evidencing the State's compliance with public disclosure requirements as to lethal injection as applicable to Bryan." The State claimed exemptions regarding protocols from other states, written notes describing these protocols, DOC records regarding the development of lethal injection, the names of people on the execution team, and the travel records of persons sent to observe lethal injections in other states. Bryan claimed that the trial court erred in allowing the State to exempt the above information. The Florida Supreme Court concluded that Bryan's claim failed to show that any undisclosed information would provide a basis for relief. Given the detailed disclosure of the chemicals and procedures that will be used during Bryan's scheduled execution, the above exempted

material could not provide a basis upon which relief would likely be granted.

Here, as in *Bryan*, the public record requests should be denied. Rutherford may not relitigate a constitutional challenge in the trial court that has been conclusively rejected by the Florida Supreme Court.

Given the controlling precedent against such a claim, this is not a colorable claim for postconviction relief. Rutherford cannot present a colorable claim because the Florida Supreme Court has repeatedly held that lethal injection is constitutional. *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005)(rejecting a claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions as being "without merit"); *Cole v. State*, 841 So.2d 409, 430 (Fla. 2003)(summarily rejecting a claim that lethal injection is cruel or unusual or both because "we previously have found similar arguments to be without merit."); *Sims v. State*, 754 So.2d 657, 668 (Fla.2000)(holding that execution by lethal injection is not cruel and unusual punishment). The trial court properly denied the public records requests relating to the drug protocols.

Rutherford argues that in other cases an evidentiary hearing was held on the lethal injection claim relying on *Bryan v. State*, 753 So.2d 1244 (Fla. 2000). In *Bryan*, the State submitted, into the record, the evidence that had been developed in *State v. Sims*, No. E78-363-CFA (Fla. 18th Cir.Ct. Feb. 12, 2000), *affirmed in*, *Sims v. State*, 754 So.2d 657 (Fla. 2000). Since that time, however, the Florida Supreme Court has repeatedly affirmed summary denials of lethal injection claims. Indeed, the Florida Supreme Court, as recently as November, affirmed a summary denial in a case raising a lethal injection claim where no evidentiary hearing was held on the claim. *Suggs v. State*, 2005 WL 3071927, *17 (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 is not cruel and unusual punishment)).

Collateral counsel asserts that she merely wants to view the agencies files to make sure that she has all the records and it would not involve any effort on the agencies' part. However,

she also requested 49 items from DOC, relating to the lethal injection protocols, never previously requested and she also made a first public records request of the Eighth District Medical Examiner Office. *Glock v. Moore*, 776 So.2d 243, 254 (Fla.2001)(affirming trial court denial of public records requests, in a death warrant case, because most of the records were not simply an update of information previously requested, which are proper, but entirely new requests, which are not proper and observing that Glock had not made a showing as to how any of the records he has requested and has not received relate to a colorable claim for postconviction relief and concluding that Glock did not show good cause as to why he did not make these public records requests until after the death warrant was signed.). The trial court properly denied the public records requests.

ISSUE V

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE ACTUAL INNOCENCE CLAIM? (Restated)

Rutherford asserts that he is actually innocent of the murder. IB at 84. Relying on the Gilkerson affidavit, Rutherford asserts that Mary Heaton murdered the victim and framed him. Rutherford has not presented a colorable claim of actual innocence. The two affidavits submitted by Rutherford contradict each other. In one affidavit, Heaton is the actual murderer, who frames Rutherford, but in the other affidavit, Heaton is an eyewitness to Rutherford committing the murder. Three prosecution witnesses testified that Rutherford was planning a murder and a fourth prosecution witness testified that Rutherford confessed to murdering the victim with a hammer. Additionally, three sets of Rutherford's fingerprints were located in the victim's bathroom where the body was discovered. Moreover, Heaton's trial testimony was corroborated in large part by her niece's trial testimony. The trial court properly summarily denied the actual innocence claim.

The trial court's ruling

The trial court ruled:

> In his final claim, Defendant asserts Heaton's confession to Gilkerson supports his claim of actual innocence. For the reasons set forth in claim IV above, this claim must also fail. Defendant has failed to demonstrate that the proffered newly discovered evidence of inconsistent statements is of such a nature to give rise to a colorable claim of innocence and a possibility of an acquittal. *See Herrera v. Collins*, 506 U.S. 390, 423-424, 114 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993)(upholding the denial of actual innocence claims based on such last minute affidavits in capital case).

(Order at 19).

Standard of review

The standard of review for an actual innocence claim is *de novo*.

Doe v. Menefee, 391 F.3d 147, 163 (2nd Cir. 2004)(explaining that because the determination as to whether no reasonable juror would find a petitioner guilty beyond a reasonable doubt is a mixed question of law and fact, we review the district court's ultimate finding of actual innocence *de novo*); *United States ex rel. Bell v. Pierson*, 267 F.3d 544, 551-552 (7th Cir. 2001)(noting that district court must make factual findings with respect to new evidence, but concluding that district court is no better placed than appellate court to make probabilistic determination as to what reasonable juror would find and concluding that review is therefore *de novo*);

Stewart v. Angelone, 1998 WL 276291, *3 (4th Cir 1998)(unpublished opinion)(reviewing *de novo* a claim of actual innocence).

Merits

To demonstrate actual innocence in a collateral proceeding, a petitioner must present "new reliable evidence that was not presented at trial" and "show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 299, 327-28, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); see also *House v. Bell*, 386 F.3d 668, 677 (6th Cir. 2004)(en banc), *cert. granted*, 125 S.Ct. 2991 (2005)(raising the issue of the standard for a freestanding claim of actual innocence). The *Schlup* Court observed that "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare" and "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial. *Schlup*, 513 U.S. at 324, 115 S.Ct. at 865. The Court

also noted that “in virtually every case, the allegation of actual innocence has been summarily rejected. *Schlup*, 513 U.S. at 324, 115 S.Ct. at 866.

Gilkerson’s affidavit is not reliable evidence of actual innocence. It is not scientific evidence, a trustworthy eyewitness account, or critical physical evidence. Moreover, it is hearsay. *Herrera*, 506 U.S. at 417, 113 S.Ct. at 869 (observing that “[p]etitioner's affidavits are particularly suspect in this regard because, with the exception of Raul Herrera, Jr.'s affidavit, they consist of hearsay). Most importantly, Gilkerson’s affidavit is contradicted by Glantz’s affidavit. In one affidavit, Heaton is the actual murderer, who frames Rutherford, but in the other affidavit, Heaton is an eyewitness to Rutherford committing the murder.

Collateral counsel asserts that Heaton’s hearsay confession undermines the statements Rutherford made prior to the murder that he intended to kill the victim. No, it does not. Rutherford’s statements to Harold Attaway that he planned to kill a woman and place her body in her bathtub to make her death look like an accident and to Sherman Pittman that he was going to get money by forcing a woman to write him a check and then putting her in the bathtub and also to his uncle, Kenneth Cook,

a week prior to the murder, that he was going to knock an old lady in the head, are not affected, in any way, by the affidavit. Nor is Johhny Perritt, Jr.'s testimony that Rutherford told him he killed her with a hammer and asked him to hold $1400.00, affected in any manner. The affidavit does not undermine the trial testimony from these numerous individuals in any manner.

Contrary to collateral counsel's characterization, the State's case was not entirely circumstantial. IB at 86. Rutherford's confessions to these witnesses before and after the murder were direct evidence.

Furthermore, Rutherford's explanation for his fingerprints in the bathroom was directly refuted by the State. IB at 87. Rutherford testified that his fingerprints were in the bathroom of the victim's home because he was fixing the bathtub sliding doors that the victim's nieces and nephews had "bumped the sliding part of it off the track.". (T Vol. IV 607). However, the State presented the testimony of Beverly Elkins, the victim's next door neighbor and close friend, who saw the victim nearly every day, on rebuttal, who testified that the victim had no nieces or nephews. (T. Vol. IV 683).

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The United States Supreme Court has denied actual innocence claims based on such last minute affidavits in capital case. *Herrera v. Collins*, 506 U.S. 390, 423-424, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993). The trial court properly summarily denied this claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court summary denial of the successive postconviction motion.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by electronic mail Linda McDermott, Esq. at lindammcdermott@msn.com with a follow up hard copy by U.S. mail to Linda McDermott, 141 N.E. 30th Street, Wilton Manors, FL 32334 13th day of January, 2006.

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Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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