IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC06-1931

ANSWER BRIEF OF APPELLEE

WARRANT SIGNED
EXECUTION SET

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

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 record relating to the second successive motion will be referred to as (SM 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 postconviction 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.
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> 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.
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> 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 which was ultimately granted. 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 prosecution rebutted Rutherford’s explanation by proving 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.

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 Florida Supreme Court affirmed the

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[1] The seven issues were: (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

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 postconviction relief raising fifteen issues.[2] The trial court denied relief after conducting

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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.

[2] The fifteen issues were: (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)

an evidentiary hearing. On appeal, Rutherford raised six issues.[3] The Florida Supreme Court affirmed the trial court's

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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).

[3] The six issues were: (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

denial of postconviction 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.[4] The Eleventh Circuit affirmed the denial of habeas relief. *Rutherford v. Crosby*, 385 F.3d 1300 (11th Cir.

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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).

[4] The three issues were: (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.

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. *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. *Rutherford v. Crosby*, 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), which was denied by the Florida Supreme Court on January 5, 2006. *Rutherford v. Crosby*, No. SC05-2139.

On November 29, 2005, Governor Jeb Bush signed a death warrant. On December 21, 2005, Rutherford filed a successive 3.851 motion raising five claims: (1) the trial court improperly limited his public records requests; (2) lethal injection is

cruel and unusual 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.[5] On December 27, 2005, the State filed a response to the amended successive 3.851 motion. The trial court summarily denied the successive motion for postconviction relief on January 5, 2006. The Florida Supreme Court affirmed the trial court's summary denial. *Rutherford v. State*, 926 So.2d 1100 (Fla. 2006).

On January 27, 2006, Rutherford filed a § 1983 action in the Northern District of Florida raising the constitutionality of Florida's lethal injection protocols. The Northern District dismissed the petition for lack of jurisdiction but held, in the alternative, that, assuming Petitioner has a cognizable claim under 42 U.S.C. § 1983, he was not entitled to relief due to his unnecessary delay in bringing his claim. *Rutherford v. Crosby*,

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[5] *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).

2006 WL 228883, *1 (N.D.Fla. January 28, 2006). The Eleventh Circuit affirmed. *Rutherford v. Crosby*, 438 F.3d 1087 (11th Cir. 2006). Rutherford filed a petition for writ of certiorari in the United States Supreme Court. The United States Supreme Court granted a stay pending disposition of the petition for writ of certiorari but noted that "[i]n the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court." *Rutherford v. Crosby*, - U.S. -, 126 S.Ct. 1191, 163 L.Ed.2d 1144 (2006). On June 19, 2006, the United States Supreme Court vacated the judgment and remanded the case to the Eleventh Circuit for further consideration in light of *Hill v. McDonough*, - U.S. -, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006). *Rutherford v. McDonough*, - U.S. -, 126 S.Ct. 2915, 165 L.Ed.2d 914 (2006). Judgment was returned to the Eleventh Circuit on July 21, 2006, which lifted the previously entered stay. On October 5, 2006, Rutherford's § 1983 action regarding lethal injection was dismissed as dilatory by the Eleventh Circuit. *Rutherford v. McDonough*, 2006 WL 2830968 (11th Cir. October 5, 2006)(dismissing § 1983 because of Rutherford's "unnecessarily delay" and noting he "deliberately waited until the last few days before his execution to file what he could have filed many months, if not years, earlier.").

On September 26, 2006, Rutherford filed a second successive 3.851 motion in the trial court, raising three claims: (1) relying on an American Bar Association report, entitled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report", he asserted that the ABA report is newly discovered evidence that Florida's death penalty scheme violates the Eighth and Fourteenth Amendments; (2) Florida's clemency process violates the Eighth and Fourteenth Amendments; and (3) the failure of Florida Court to recognize a freestanding claim of actual innocence violates the Eighth Amendment. The State filed a response on September 29, 2006. Rutherford filed a reply on October 2, 2006. On October 2, 2006, Rutherford also filed a 3.800(a) motion to correct illegal sentence turning his claim regarding the ABA report into the basis for this motion. On October 2, 2006, Rutherford also filed an amendment to his second successive 3.851 motion, raising two additional claims: (4) newly discovered evidence based on the affidavit of inmate Brian Adkison and (5) his actual innocence based on the affidavit. On October 2, 2006, the State filed a motion to strike Rutherford's 3.800(a) as an unauthorized pleading. On October 3, 2006, the State filed a response to the amended 3.851

motion which raised the two additional claims. The trial court held a case management conference on October 3, 2006. The trial court granted the State's motion to strike Rutherford's 3.800(a) motion. On October 6, 2006, the trial court summarily denied Rutherford's second successive 3.851 motion, determining that no evidentiary hearing was warranted on any of the claims.

The Governor has signed a death warrant with the execution scheduled for Wednesday, October 18, 2006, at 6:00 P.M.

SUMMARY OF ARGUMENT

ISSUE I

Rutherford, relying on an American Bar Association report entitled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report", asserts that the ABA report is newly discovered evidence that Florida's death penalty scheme violates the Eighth and Fourteenth Amendments. This claim is procedurally barred. Constitutional challenges to Florida's death penalty statute should be raised on direct appeal, not in postconviction litigation, much less after a warrant is signed. Furthermore, Rutherford has no standing to raise many of his constitutional challenges. Rutherford cannot meet either prong of the test for newly discovered evidence. An ABA report is not evidence. The opinions of the ABA committee members would not be admissible at any retrial or new penalty phase. New evidence must be admissible to warrant a new trial or new penalty phase. On the merits of the ABA report, the State simply cannot improve on Justice Scalia's devastating criticism of such reports in *Kansas v. Marsh*, 548 U.S. -, 126 S.Ct. 2516, 2531-2539, 165 L.Ed.2d 429 (2006)(Scalia, J., concurring). The trial court properly summarily denied the newly discovered evidence claim.

ISSUE II

Rutherford asserts Florida's clemency process violates the Eighth and Fourteenth Amendments. First, the Eighth Amendment does not apply to clemency proceedings. It is the Due Process Clause that governs clemency proceedings and it requires only minimal due process. Rutherford was afforded all the process he was due, and more, in his first clemency proceeding. He was given an opportunity to be heard which minimal due process requires. And he was represented by counsel which minimal due process does not require. Rutherford's complaints relate to his second clemency petition. Rutherford has no due process rights regarding a second clemency petition. The trial court properly summarily denied the due process claim.

ISSUE III

Rutherford asserts Florida's failure to recognize freestanding claims of actual innocence violates the Eighth Amendment citing *House v. Bell*, - U.S. -, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). This issue is procedurally barred. Moreover, there is no Eighth Amendment requirement regarding actual innocence claims. Furthermore, Florida has the equivalent of an

actual innocence claim. Florida uses the newly discovered evidence analysis. Thus, the trial court properly summarily denied this claim.

ISSUE IV

Rutherford, relying on a last minute affidavit of jail inmate Adkison, asserts there is newly discovered evidence of his innocence and therefore, he is entitled to a new trial. Rutherford's claim should be denied as procedurally barred because the substance of his newly discovered evidence claim has already been addressed by the trial court and this Court and rejected by both. The substance of Adkison's affidavit is the same as the prior affidavit, the Gilkerson affidavit. Moreover, all the reasons given by this Court in its opinion rejecting the earlier newly discovered evidence claim are equally applicable to this newly discovered evidence claim. This affidavit would not produce an acquittal on retrial, anymore than the earlier affidavit would, as this Court previously concluded. The trial court properly summarily denied the newly discovered evidence claim.

ISSUE V

Rutherford, based on the affidavits of Adkison and Gilkerson, contends that he is actually innocent, citing *House v. Bell*, - U.S. -, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). To present a viable claim of actual innocence, Rutherford must present reliable evidence of innocence such as scientific evidence, or a trustworthy eyewitness account, or evidence. An affidavit from a convicted felon, reporting what a mentally ill person, who was always “taking pills” and “rocking”, told him, nearly a decade ago, is simply unreliable. It is not scientific evidence, or a trustworthy eyewitness account, or physical evidence. Rutherford presents no reliable evidence of actual innocence. Morever, as this Court previously observed, discussing the prior affidavit, Adkison’s impeachment testimony “would not have contradicted or provided an innocent explanation for any of the other evidence presented at trial indicating that Rutherford was the perpetrator.” Nor would Adkison’s testimony have “affected Ward's uncontradicted testimony placing Rutherford in possession of the victim's check.” Rutherford’s actual innocence claim totally ignores his fingerprints in the bathroom; his rebutted explanation of those fingerprints; and the four prosecution witnesses’ testimony that he confessed to them either before or after the crime. The trial court properly

summarily denied the claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE NEWLY DISCOVERED EVIDENCE CLAIM?

Rutherford, relying on an American Bar Association report entitled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report", asserts that the ABA report is newly discovered evidence that Florida's death penalty scheme violates the Eighth and Fourteenth Amendments.[6] This claim is procedurally barred. Constitutional challenges to Florida's death penalty statute should be raised on direct appeal, not in postconviction litigation, much less after a warrant is signed. Furthermore, Rutherford has no standing to raise many of his constitutional challenges. Rutherford cannot meet either prong of the test for newly discovered evidence. An ABA report is not evidence. The opinions of the ABA committee members would not be admissible at

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[6] The ABA report is a series of studies by the Death Penalty Moratorium Implementation Project of the ABA. The ABA section released reports on Alabama, Arizona and Georgia, as well as Florida. (ABA report at 1). The reports on the other three state are available on the internet.

any retrial or new penalty phase. New evidence must be admissible to warrant a new trial or new penalty phase. On the merits of the ABA report, the State simply cannot improve on Justice Scalia's devastating criticism of such reports in *Kansas v. Marsh*, 548 U.S. -, 126 S.Ct. 2516, 2531-2539, 165 L.Ed.2d 429 (2006)(Scalia, J., concurring). The trial court properly summarily denied the newly discovered evidence claim.

The trial court's ruling

The trial court ruled:

> Defendant claims that newly discovered empirical evidence demonstrates that Mr. Rutherford's conviction and sentence of death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (Motion to Vacate p. 5). Defendant asserts this newly discovered evidence claim based upon a recent report released on September 17, 2006, Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report (hereafter ABA Report), which contains a compilation of information, analysis, and opinions, makes clear that Florida's death penalty process violates the decision rendered by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 310 (1972). (Motion to Vacate p. 5-40).
>
> Defendant argues "*Furman* imposes an obligation on the States to create a system that is designed to ensure reliability." (Huff Hrg. Tr. 17:2-4). Defendant points out that the ABA Report outlines similar factors that were considered in *Furman* which held the Georgia and Texas' death penalty statutes to be unconstitutional. (Huff Hrg. Tr. 18:14-19). In sum, Defendant contends the ABA Report should be

considered as evidence and requests the Court to conduct an evidentiary hearing to establish the facts relied upon within the ABA Report. (Huff Hrg. Tr. 51:19).

In addition to Defendant's argument that the ABA Report constitutes newly discovered evidence, Defendant asserts his right to present evidence in the 2.850 proceeding to establish the unconstitutionality of (Florida's death penalty) statute. (Huff Hrg. Tr. 82:19-22) and have this Court declare the statute unconstitutional. (Huff Hrg. Tr. 33:1-3). However, the Florida Supreme Court has held Florida's Death Penalty Statute to be constitutional. *Proffitt v. Florida*, 315 So.2d 461 (Fla. 1975), and that sentencing scheme was reviewed and upheld by the United States Supreme Court. *Proffitt v. Florida*, 428 U.S. 242 (1976). Trial courts are always bound to follow binding precedent. *Bozeman v. Higginbotham*, 923 So.2d 535, 536 (Fla. 1st DCA 2006). This Court initially notes that opinions, reports or recommendations are not binding law.

The State argues that "personal opinions of Florida's death penalty scheme do not tend to prove or disprove Rutherford's guilt or innocence or his appropriate sentence. . . .personal opinions would not be admissible at trial or a penalty phase." (State's Response to Second Successive Motion p. 9).

Clearly, the ABA Report does not constitute newly discovered evidence. The information, analysis and conclusions that are contained within the ABA Report are based on the opinions of individuals who were selected by the ABA to form an assessment team. This assessment team reviewed and identified problems that they perceived undermine the death penalty procedures in this state.

A newly discovered evidence claim may be raised pursuant to Rule 3.851(e)(2)(c). However, to consider this newly discovered evidence in light of granting a new trial, the evidence must be determined to be admissible. *Huffman v. State*, 909 So.2d 922, 923 (Fla. 2d DCA 2005) (noting that the newly discovered evidence must be admissible); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (noting the trial court is to "consider all newly discovered evidence which would

be admissible" at trial).

> 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.
>
> Here Defendant fails to establish how the information gathered by the ABA assessment team regarding death penalty procedures falls within the consideration of "newly discovered evidence" as contemplated by Rule 3.851 or *Jones*. See also *Trepal v. State*, 846 so.2d 405, 424 (Fla. 2003), receded from on different grounds, *Guzman v. State*, 868 So.2d 498 (Fla. 2003) (holding an OIG report to be inadmissible hearsay). Thus, this claim is denied.

(Order at 4-7).

Standard of review

The standard of review for a newly discovered evidence claim is abuse of discretion. *Consalvo v. State*, 2006 WL 1375091, *6 (Fla. May 18, 2006)(noting that "absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence including a witness's newly recanted testimony will not be overturned on appeal" citing *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001)); *Clark v. State*, 379 So.2d 97, 101 (Fla. 1979)(stating that a motion for a new trial based on newly discovered evidence is addressed to sound discretion of trial court); *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).

Procedural bar

Rutherford’s facial constitutional challenge to Florida’s death penalty statute is procedurally barred. Constitutional challenges to the death penalty statute should be raised on direct appeal. *Elledge v. State*, 911 So.2d 57, 78 (Fla. 2005)(finding contention that Florida's capital sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty and violates the due process guarantees against cruel and unusual punishment to be procedurally barred because it was not raised on direct appeal). Rutherford’s facial challenge is procedurally barred.

Standing

Rutherford lacks standing to raise many of his facial constitutional challenges to Florida's death penalty statute. The United States Supreme Court recently explained that facial challenges to criminal statutes on overbreadth grounds are discouraged. *Sabri v. United States*, 541 U.S. 600, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004). The *Sabri* Court noted that "facial challenges are best when infrequent." *Sabri*, 541 U.S. at 608. And in particular, overbreadth challenges "are especially to be discouraged." *Sabri*, 541 U.S. at 609. Not only do facial constitutional challenges invite judgments on fact-poor records, but they entail relaxing the familiar requirements of standing to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand. *Sabri*, 541 U.S. at 609; *see also Burch v. Louisiana*, 441 U.S. 130, 132, n.4, 99 S.Ct. 1623, 1624, n.4, 60 L.Ed.2d 96 (1979)(noting that because one of the defendants was convicted by a unanimous jury, it lacks standing to challenge the constitutionality of the provisions of Louisiana law allowing conviction by a nonunanimous jury).

Rutherford is raising a generalized, systematic challenge to Florida's death penalty system, highlighting alleged problems,

many of which did not occur in his case. He is limited to challenges or problems that occurred in his particular case. For example, the ABA report and Rutherford's brief discuss judicial overrides. Rutherford's case is not an override case; his jury recommended death. The ABA report and Rutherford's brief also discuss racial disparity. Rutherford is a white male. The victim, Stella Salamon, was also white. It is one thing to permit third-party standing to white defendants to assert the rights of racial minorities as jurors, as the court did in *Powers* and *Campbell*, but it is quite another to permit a white defendant standing to argue unconstitutionality based on racial disparities, that did not, and could not have, affected his particular case.[7] It is simply perverse to allow a

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[7] *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)(holding white defendant had third party standing to raise the discriminatory use of peremptory challenges in jury selection); *Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998)(holding white defendant had third party standing to raise the exclusion of blacks from foreperson service in grand juries). Rutherford is not raising such a challenge in his successive postconviction motion and therefore,

perpetrator third party standing to raise the right of victims, African-American or otherwise. The ABA report and Rutherford's brief also discuss mental disabilities. Rutherford, however, makes no argument that he suffers from mental retardation or serious mental illness. Rutherford simply does not have standing to raise these types of issues. Rutherford lacks standing.

Merits

In *Jones v. State*, 709 So.2d 512 (Fla. 1998), this Court established 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

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he has no third party standing.

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).

ABA reports are not newly discovered evidence. Cf. *E.I. DuPont De Nemours and Co. v. Native Hammock Nursery, Inc.*, 698 So.2d 267 (Fla. 3d DCA 1997)(concluding that results of soil studies of other nurseries was not "newly-discovered evidence" that would warrant a new trial because test results from other growers were not sufficiently linked to instant facts to form basis for granting new trial); *Coppola v. State*, 2006 WL

1699436, *1 (Fla. 2006)(holding that the decision in *Heggs v. State*, 759 So.2d 620 (Fla. 2000), does not constitute "newly discovered evidence" for purposes of Florida Rule of Criminal Procedure 3.850(b)(2) "because the rule contemplates a fact in the sense of evidence which is anything which tends to prove or disprove a material fact."). Indeed, the report is not evidence at all. Basically, it is the personal opinion of eight persons. Personal opinions are not facts as envisioned by the concept of "newly discovered evidence" because they are not a fact because they do not tend to prove or disprove a material fact. Personal opinions of Florida's death penalty scheme do not tend to prove or disprove Rutherford's guilt or innocence or his appropriate sentence.

Moreover, these personal opinions would not be admissible at trial or a penalty phase.[8] Newly discovered evidence must be

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[8] *Thompson v. State*, 619 So.2d 261, 266 (Fla. 1993)(finding no abuse of discretion in trial court's refusal to allow defense witnesses to express their personal opinions concerning the appropriateness of the death penalty citing *Floyd v. State*, 569 So.2d 1225, 1230 (Fla. 1990)(finding no abuse of discretion in the trial court refusal to allow the victim's

admissible to warrant granting a new trial or penalty phase and the ABA report is not. *Huffman v. State*, 909 So.2d 922, 923 (Fla. 2d DCA 2005)(noting that the newly discovered evidence must be admissible); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)(noting the trial court is to "consider all newly discovered evidence which would be admissible" at trial). The ABA report would be inadmissible hearsay. *Trepal v. State*, 846 So.2d 405, 424 (Fla. 2003)(noting that an OIG report would be inadmissible hearsay).

In *Glock v. Moore*, 776 So.2d 243 (Fla. 2001), the Florida Supreme Court rejected a newly discovered evidence claim based on an interim report by the New Jersey Attorney General's Office concerning racial profiling in New Jersey. Glock had been stopped on the New Jersey turnpike in the murder victim's stolen car. *Glock*, 776 So.2d at 249. The *Glock* Court analyzed the

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daughter from expressing her opinion regarding the death penalty); *Martin v. Wainwright*, 770 F.2d 918, 936-37 (11th Cir. 1985)(barring the admissibility of testimony concerning whether the death penalty has a deterrent effect because such evidence is designed to persuade the sentencer that the legislature erred when it enacted a death penalty statute).

claim under the *Jones* standard for newly discovered evidence. This Court explained that 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 use of diligence." The trial court had denied the claim, reasoning that the concept of profiling has been well known for several years and yet Glock waited some fourteen years and only on the eve of execution on a second death warrant presented the claim. *Glock*, 776 So.2d at 250. The trial court noted that Glock offered nothing that would challenge, in any way, the trooper's testimony that he validly stopped the vehicle for an improper display of the license tag. The trial court also found the claim untimely because it was an "eleventh hour exercise in speculation." The Florida Supreme Court affirmed the trial court's conclusions regarding the denial of the newly discovered evidence claim on both prongs of *Jones*. The Court noted that the claim that minorities were subject to a disproportionate number of traffic stops on the New Jersey Turnpike was a claim that has been known for a number of years, as indicated by reported cases addressing that issue and therefore, they found the claim procedurally barred. The Court also concluded that

the motion was insufficiently pled because it did not present evidence that would probably produce an acquittal or result in a successful motion to suppress. This Court also found nothing that Glock asserted in his successive motion contradicted the "established fact" that the trooper stopped the victim's car because the license plate was improperly displayed. The Court also noted that Glock was white. *Glock*, 776 So.2d at 252. The Court concluded that, even assuming that an official policy of racial profiling existed in New Jersey in 1983, it is mere speculation that the stop was connected to such a policy.

Here, as in *Glock*, Rutherford cannot meet either prong of *Jones*. Like *Glock*, many of the matters discussed in the ABA report, and raised by Rutherford in his second successive 3.851 motion, have been known for years. For example, the ABA report discusses jury unanimity in death recommendations.[9] But allowing

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[9] Actually, Rutherford's successive motion discussed lingering doubt more than jury unanimity. The United States Supreme Court recently reaffirmed that the Eighth Amendment does not require that a defendant be allowed to present lingering doubt as mitigation. *Oregon v. Guzek*, - U.S. -, 126 S.Ct. 1226, 1227, 163 L.Ed.2d 1112 (2006)(observing that "[t]his Court's

a jury to recommend death by a majority vote has been authorized by statute since 1972 and has been discussed in numerous Florida cases.[10] Rutherford's claim is procedurally barred for the same

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cases have not interpreted the Eighth Amendment as providing such a defendant the right to introduce at sentencing, evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction."). Lingering or residual doubt is not a mitigating circumstance in Florida. *King v. State*, 514 So. 2d 354, 357-358 (Fla. 1987); *Darling v. State*, 808 So.2d 145, 162 (Fla. 2002). 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 requires lingering doubt be considered in mitigation. Basically, the ABA panel and opposing counsel disagree with the United States Supreme Court and this Court about the appropriate standard of proof in a penalty phase.

[10] *Butler v. State*, 842 So.2d 817, 834 (Fla. 2003)(Wells,

reasons as the claim in *Glock* was procedurally barred. Rutherford's motion is also insufficiently pled, just as Glock's was, because it does not present evidence that would probably produce an acquittal in any retrial. Rutherford presents no evidence in this claim of his innocence of the crime or the death penalty. Rutherford's claim, like Glock's, is also an "eleventh hour exercise in speculation."

Regarding the ABA report, the State simply cannot improve on Justice Scalia's devastating criticism of reports, such as the ABA report, that refer to "exonerations". *Kansas v. Marsh*, 548 U.S. -, 126 S.Ct. 2516, 2531-2539, 165 L.Ed.2d 429 (2006)(Scalia, J., concurring). Justice Scalia pointed out that there is not a single case - not one - in which it is clear that

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J., concurring)(noting that a nonunanimous jury is that this is what has been mandated by Florida statute since 1972 . . . and "has been applied for twenty-eight years."); *Parker v. State*, 904 So.2d 370, 383 (Fla. 2005) (observing: "[t]his Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote."); *Alvord v. State*, 322 So.2d 533, 536 (Fla.1975)(rejecting a contention that a jury recommendation by nonunanimous vote violates the Sixth Amendment right to a jury trial).

a person was executed for a crime he did not commit. There is "not a single verifiable case" of a mistaken modern execution but "it is easy as pie to identify plainly guilty murderers who have been set free." He noted that these exonerations came about, not through the operation of some outside force, but rather *as a consequence of the functioning of our legal system*. *Marsh*, 126 S.Ct. at 2535-2536 (Scalia, J., concurring)(emphasis in original). Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, "demonstrates not the failure of the system but its success."

The State can also point to numerous recent studies showing that the death penalty has a deterrent effect. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703 (2005)(taking the position that, because the death penalty is a significant deterrent to murder, as recent studies establish, including one leading study finding that each execution deters some eighteen murders, the state is morally obliged to use it as a form of punishment and a serious commitment to the sanctity of human life compels it as a form of punishment); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's*

Differing Impacts Among States, 104 Mich. L. Rev. 203 (2005)(stating that recent empirical studies by economists have shown, without exception, that capital punishment deters crime but noting that there must be a threshold number of executions for the deterrence effect to exist). These studies use a new type of information called "panel data." H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453, 474 (2003)(using panel data on all death sentences handed out in the United States between 1977 and 1997 and finding that "[e]ach additional execution decreases homicides by about five, and each additional commutation increases homicides by the same amount, while one additional removal from death row generates one additional homicide). A leading study used county panel data from over 3,000 counties between 1977 and 1996. Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003). The authors found that the murder rate is significantly reduced by both death sentences and executions and that, on average, each execution results in eighteen fewer murders. Another study concluded that the murders of both African-American and white victims decrease after executions,

suggesting that capital punishment benefits people of all races. Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283, 318 (2004)(concluding that each execution results in, on average, three fewer murders and the death penalty's deterrence effect extends to crimes of passion and murders by intimates). The trial court properly summarily denied the newly discovered evidence claim.

MOTIONS TO CORRECT ILLEGAL SENTENCES IN CAPITAL CASES

Rutherford filed a 3.800(a) motion to correct illegal sentence, arguing that the death sentence in his case was an illegal sentence based on the ABA report. Rule 3.800(a) does not apply to capital cases. Rule 3.851 is the exclusive rule governing all motions in capital cases. The trial court properly granted the State's motion to strike.

The scope provision of the rule of criminal procedure governing capital cases, Rule 3.851(a), provides:

> This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after

> October 1, 2001. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.

This rule is the exclusive rule for seeking any type of relief in capital cases.

The rule of criminal procedure governing Correction, Reduction, and Modification of Sentences, in non-capital sentences, rule 3.800, provides:

> (a) Correction. A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal.

Rule 3.800(a) does not apply to capital cases. *Cf. Lynch v. State*, 841 So.2d 362, 375 (Fla. 2003)(noting that Florida Rule of Criminal Procedure 3.800(b), a motion to correct a sentencing error, does not apply in capital cases); *Wuornos v. State*, 644 So.2d 1012, 1020, 1020 n.5 (Fla. 1994)(rejecting a claim that 3.800(b) violates the constitution); *Fotopoulos v. State*, 608 So.2d 784, 794, 794 n.7 (Fla. 1992).

Even if 3.800(a) applied to capital cases, Rutherford cannot meet the requirements to file such a motion. Rutherford's

sentence is not an illegal sentence as the term is defined by this Court. An illegal sentence is "one that no judge under the entire body of sentencing laws could possibly impose." *Wright v. State*, 911 So.2d 81, 83 (Fla. 2005)(citing *Carter v. State*, 786 So.2d 1173, 1178 (Fla. 2001), and noting that there are few claims that come within the illegality contemplated by the rule). The Florida Supreme Court and the United States Supreme Court have repeatedly upheld the constitutionality of Florida's death penalty statute. *Lugo v. State*, 845 So.2d 74, 119 (Fla. 2003)(reiterating that this Court has "rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty"); *State v. Dixon*, 283 So.2d 1 (Fla. 1973)(upholding Florida's revised statute, requiring the finding of aggravating and mitigating factors, against an Eighth Amendment challenge); *Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)(upholding constitutionality of Florida's death penalty statute against multiple challenges). A death sentence is not an illegal sentence.

Additionally, Rutherford's particular death sentence is not an "illegal sentence". Not only has this Court upheld the constitutionality of Florida's death penalty in general in

numerous cases, but this Court has already upheld Rutherford's own death sentence in the direct appeal. *Rutherford v. State*, 545 So.2d 853, 855-857 (Fla. 1989)(addressing arguments that the trial court improperly considered Rutherford's lack of remorse in making the finding of heinous, atrocious, and cruel; heightened premeditation required for CCP; the trial court did not consider mitigating evidence; improperly counted the aggravating and mitigating circumstances rather than weighing them and the trial court's use of testimony that the victim was afraid of the defendant to support its CCP finding). Indeed, the Florida Supreme Court even addressed Rutherford's thirty-year sentence imposed for the armed robbery conviction. *Rutherford*, 545 So.2d at 857. Rutherford's sentence is legal and has been held to be so by this Court.

Furthermore, the ABA report did not declare Florida's death penalty statute unconstitutional. The ABA is a professional organization, not a court. It has no power to declare any statute unconstitutional. The ABA report merely made recommendations that would, in their opinion, improve the system. Rutherford's death sentence is not an illegal sentence. Moreover, the error complained of is not apparent from the face of the record as required to file a 3.800(a) motion. *Bover v.*

State, 797 So.2d 1246, 1251 (Fla. 2001)(concluding that the issue of sentencing a defendant as a habitual offender when the requisite sequential felonies do not exist "may be corrected as an illegal sentence pursuant to rule 3.800(a) so long as the error is apparent from the face of the record."). Indeed, the "evidence" relied on to support the "illegal sentence" claim is not in the record at all, it depends entirely on an ABA report released in 2006.

Counsel argues that there must be some means of presenting his constitutional challenges to the statute after a warrant is signed. No, there does not. That is the entire point of procedural bars. Procedural bars are a statement that it is too late to raise a particular claim. Basically, counsel is seeking to end run the procedural bar against raising constitutional challenges in postconviction litigation, much less after a warrant has been signed, by using a 3.800(a) motion.

Counsel also argues that non-capital defendants are being treated preferentially because, under rule 3.800(a), non-capital defendants may raise a challenge to their sentences at any time, but capital defendants may not. This is simply not true. Non-capital defendants may not use 3.800(a) to raise Eighth

Amendment challenges to their sentences either.[11]

Counsel also argues, based on *Steele v. Kehoe*, 747 So.2d 931 (Fla. 1999), that non-capital defendants get preferential treatment regarding attorney negligence. This is not accurate. Both capital defendants and non-capital defendants are now

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[11] *State v. Spriggs*, 754 So.2d 84, 84 (Fla. 4th DCA 2000)(concluding that a "rule 3.800(a) motion to correct an illegal sentence is not the proper vehicle for challenging a sentence on the basis that it violates the constitutional prohibition against cruel and unusual punishment."). Even when courts find merit to the claim, they do not permit non-capital defendants to raise such challenges in a 3.800(a) motions. *Lykins v. State*, 894 So.2d 302, 303 (Fla. 3d DCA 2005)(agreeing, while sympathizing with the defendant's argument that the sentence imposed was disproportionate to the crime for which he was convicted, with the Fourth District's decision in *State v. Spriggs*, 754 So.2d 84, 84 (Fla. 4th DCA 2000), that "[a] rule 3.800(a) motion to correct an illegal sentence is not the proper vehicle for challenging a sentence on the basis that it violates the constitutional prohibition against cruel and unusual punishment.").

protected by their respective rules.[12] Both capital and non-

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[12] The rule governing capital defendants, Rule 3.851(d)(2)(c) states:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that
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> . . . .
>
> (C) postconviction counsel, through neglect, failed to file the motion.

The rule governing non-capital defendants, Rule 3.850(b)(3) states:

> (b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case

capital defendants may seek belated postconviction relief if they establish attorney negligence. While neither capital or non-capital defendants will receive a second round of review in federal habeas court, both will receive a first round of state collateral review regardless of their attorney's negligence. Both are treated equally.

Rutherford's reliance on *Anderson v. State*, 267 So.2d 8, 9 (Fla. 1972), is misplaced. *Anderson* was decided prior to the enactment of rule 3.851 which governs capital case. *Anderson* was decided in 1972. Rule 3.851 was first enacted in 1987 and, by its terms, applies to all motions filed "on or after October 1, 2001". If this Court or the United States Supreme Court ever holds that Florida's death penalty statute is unconstitutional, as the Supreme Court did in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the proper vehicle for a capital defendant to raise the issue would be a Rule

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> in which a death sentence has been imposed unless it alleges that
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> ....
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> (3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.

3.851(d)(2)(B) motion.[13] The trial court properly struck the 3.800(a) motion as an unauthorized pleading. For all of these reasons, Rutherford is not entitled to any relief on his first claim.

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13 Rule 3.851(d)(2)(B) states:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that
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> > (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT FLORIDA'S CLEMENCY PROCESS VIOLATES THE EIGHTH AMENDMENT?

Rutherford asserts Florida's clemency process violates the Eighth and Fourteenth Amendments. First, the Eighth Amendment does not apply to clemency proceedings. It is the Due Process Clause that governs clemency proceedings and it requires only minimal due process. Rutherford was afforded all the process he was due, and more, in his first clemency proceeding. He was given an opportunity to be heard which minimal due process requires. And he was represented by counsel which minimal due process does not require. Rutherford's complaints relate to his second clemency petition. Rutherford has no due process rights regarding a second clemency petition. The trial court properly summarily denied the due process claim.

The trial court's ruling

The trial court ruled:

> Defendant claims Florida's clemency process is arbitrary and capricious and violates the Eighth and Fourteenth Amendments to the United States Constitution. Defendant states the ABA Report demonstrates the arbitrariness and capriciousness of the clemency process as it pertains to death row inmates. (Motion to Vacate p. 41-43). Defendant asserts the clemency process fails to fulfill its

critical function of "providing a safety net." (Huff Hrg. Tr. 30:2-3). Defendant points out that there are "no rules or guidelines "delineating the factors that the Board should consider. . ."" (Motion to Vacate p. 41). Given the lack of guidelines, Defendant argues his second clemency petition was dismissed based on the lack of understanding as to "who is the proper party to request clemency" and "what factors "matter" in a clemency process. (Motion to Vacate p. 42).

This Court recognizes Defendant is asserting two claims, the first of which is a broad due process violation claim with regards to the denial of clemency as it applies to death row inmates based upon the ABA Report findings and recommendations. However, Article IV, Section 8(a) of the Florida Constitution vests the power of executive clemency in the Governor. *Parole Commission v. Lockett*, 620 So.2d 153 (Fla. 1993)(finding the clemency process is strictly an executive branch function and defining the nature of the Governor's clemency power and explaining the clemency process in capital cases).

Therefore, this Court will not analyze matters that are within the sound discretion of the executive branch of our government. *Glock v. State*, 776 So.2d 243 (Fla. 2001) (citing *In re Advisory Opinion of the Governor*, 334 So.2d 561, 562-63 (Fla. 1976), "[t]his Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government.").

The Supreme Court of Florida has held that Florida's clemency process does not violate the Due Process and Equal Protection Clauses of the United States and Florida Constitutions. *King v. State*, 808 So.2d 1237, 1246 (Fla. 2002); *Glock v. State*, 776 So.2d 243, 252-53 (Fla. 2001); *Provenzano v. State*, 739 So.2d 1150, 1155 (Fla. 1999).

As to Defendant's remaining claim regarding the dismissal of Defendant's second clemency petition, he fails to establish a due process violation. The substitute procedural safeguards Defendant claims he was denied upon the dismissal of his second petition were afforded to him when he was given opportunity to be heard and was represented by counsel at his first clemency hearing. Defendant fails to establish an

> entitlement to a second clemency proceeding.
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> Accordingly, this Court finds no due process violation and no merit to Defendant's clemency claim, and therefore, Claim II is denied.

(Order at 7-9).

Standard of review

The standard of review for a minimal due process claim is unclear; however, it is probably *de novo*. *Cf. Trotter v. State*, 825 So.2d 362, 365 (Fla. 2002)(stating that a sentencing claim raising a due process issues is reviewed *de novo*); *Linton v. Walker*, 26 Fed.Appx. 381, *383, 2001 WL 1298910, **2 (6th Cir. 2001)(unpublished)(noting that Parole Commission's compliance with due process is a question of law, which is reviewed *de novo*, citing *Hutchings v. United States Parole Comm'n*, 201 F.3d 1006, 1009 (8th Cir. 2000).

Merits

Florida's constitutional provision governing clemency provides:

> Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute

> punishment, and remit fines and forfeitures for offenses.

Art. IV, § 8(a), Fla Const. See *King v. State*, 808 So.2d 1237, 1246 (Fla. 2002)(denying a challenge to Florida's clemency process as "meritless" citing *Provenzano v. State*, 739 So.2d 1150, 1155 (Fla. 1999)). The United States Supreme Court requires only "*minimal* procedural safeguards" in clemency proceedings in capital cases, "to prevent them from becoming so capricious as to involve a state official flipping a coin to determine whether to grant clemency." *I.N.S. v. St. Cyr*, 533 U.S. 289, 345, 121 S.Ct. 2271, 2303, 150 L.Ed.2d 347 (2001)(emphasis in original)(citing *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (O'Connor, J., concurring in part and concurring in judgment)). Justice O'Connor, in *Woodard*, gave examples of flipping a coin or an arbitrary denial of any clemency process as situations that would violate minimal due process. *Woodard*, 523 U.S. at 289-90, 118 S.Ct. at 1253, 140 L.Ed.2d at 401-02 (O'Connor, J., concurring). Justice Stevens gave examples such as bribery, personal or political animosity, or the deliberate fabrication of false evidence. *Woodard*, 523 U.S. at 290-91, 118 S.Ct. 1244 (Stevens, J., concurring and dissenting). Rutherford makes no allegation of coin tossing, bribery, personal or

political animosity, or the fabrication of false evidence regarding the Governor's denial of his second clemency petition.

Rutherford had an opportunity to be heard and was represented by counsel at his first clemency proceeding. Rutherford had an opportunity to be heard on two occasions during his first clemency process. Rutherford was given a personal opportunity to be heard on January 12, 1990, in front of Commissioner Crockett of the Florida Parole and Probation Commission, at Florida State Prison. He was represented by counsel, Ted A. Stokes, at this hearing. Rutherford also had a clemency hearing on June 19, 1990, at which he was represented by counsel Stokes. Rutherford's first clemency proceeding was more than sufficient to meet the "*minimal* procedural safeguards" required by due process in clemency proceedings in capital cases.[14]

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[14] *Bacon v. Lee*, 549 S.E.2d 840, 850 (N.C. 2001)(noting that state clemency procedures generally comport with due process when a prisoner is afforded notice and the opportunity to participate in clemency procedures). Informal and nonadversarial procedures comport with due process and may be even more informal in the context of clemency which only requires minimal due process. *Cf. Wilkinson v. Austin*, 545 U.S.

Rutherford contends that Florida's clemency process is not adequate because clemency has not been granted to a death row inmate since 1983. Complaints about the frequency with which the Governor grants clemency do not establish a due process violation. *Sepulvado v. Louisiana Bd. of Pardons and Parole,* 171 Fed.Appx. 470, 473, 2006 WL 707024, **2 (5th Cir. 2006)(dismissing a § 1983 action claiming that Louisiana's clemency process violates due process where the death row inmate had full access to the clemency process and concluding that complaints that the Louisiana Governor rarely grants clemency to violent offenders does not state a claim for a due process violation).

209, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)(determining what process is due an inmate under the framework established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and holding state's informal, nonadversary procedures before placement of inmate in supermax prison were adequate); *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 15, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)(concluding the level of process due for inmates being considered for release on parole includes opportunity to be heard and notice of any adverse decision).

The argument that there are no rules delineating the factors to be considered in clemency misses the point of equity-like proceedings. The point is to let the decision maker consider anything and everything he considers relevant without rules or set procedures in an effort to provide justice without technical requirements. *Herrera v. Collins*, 506 U.S. 390, 412, 113 S.Ct. 853, 867, 122 L.Ed.2d 203 (1993)(discussing the history of clemency and describing the clemency powers of the Executive as "holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment" quoting 4 W. Blackstone, Commentaries and noting the "looseness" of clemency). Neither the ABA, nor the courts, have the authority to tell the Governor what to consider substantively. Courts simply are not authorized to review the substantive merits of a clemency proceeding. *Workman v. Summers*, 111 Fed.Appx. 369, 2004 WL 2030051 (6th Cir. 2004)(unpublished opinion)(dismissing a § 1983 action for failure to state a claim and observing that courts are "not authorized to review the substantive merits of the state clemency proceeding or the quality of the evidence considered during those proceedings."). Clemency is an act of grace, not a mandate.

Rutherford complains of matters related to the second clemency petition, not his first clemency proceeding. *Glock v. Moore*, 776 So.2d 243, 252-253 (Fla. 2001)(rejecting a due process claim regarding being denied an attorney during his second clemency proceeding); *Provenzano v. State*, 739 So.2d 1150, 1155 (Fla. 1999)). While Rutherford was entitled to a minimum level of due process at his first clemency proceeding, he is entitled to none regarding his second clemency petition. The trial court properly summarily denied this claim.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT FLORIDA'S STANDARD FOR NEWLY DISCOVERED EVIDENCE VIOLATES THE EIGHTH AMENDMENT?

Rutherford asserts Florida's failure to recognize freestanding claims of actual innocence violates the Eighth Amendment citing *House v. Bell*, - U.S. -, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). This issue is procedurally barred. Moreover, there is no Eighth Amendment requirement regarding actual innocence claims. Furthermore, Florida has the equivalent of an actual innocence claim. Florida uses the newly discovered evidence analysis. Thus, the trial court properly summarily denied this claim.

The trial court's ruling

The trial court ruled:

> Defendant claims the State of Florida's failure to review freestanding claim of actual innocence violates the Eighth Amendment. Defendant asserts that this Court must establish an actual innocence exception which would allow individuals the opportunity to defeat procedural bars. (Motion to Vacate p. 45 and Reply to State's Response p. 9).
>
> As noted by both counsel, the Supreme Court allows a freestanding innocence claim by capital petitioners to be brought in a federal habeas petition. Currently state courts are not constitutionally required to recognize such claims. See e.g. *Hill v. Crosby*, 2005 WL 3372888, *4 (M.D. Fla., December 12, 2005); *Jennings v. Crosby*, 2006 WL 2425522 (M.D. Fla., August 21, 2006).
>
> However, Florida does allow a defendant to raise

> a claim of actual innocence under the standard announced in *Jones v. State*, 591 So.2d 911 (Fla. 1991). This claim is denied.

(Order at 9-10).[15]

Standard of review

Eighth Amendment claims are reviewed *de novo*. *United States v. Jones*, 143 Fed.Appx. 230, *232, 2005 WL 1943191, **2 (11th Cir. 2005)(unpublished opinion)(reviewing argument that sentence violates the Eighth Amendment *de novo* citing *Thompson v. Nagle*, 118 F.3d 1442, 1447 (11th Cir. 1997)).

Procedural bar

This issue is procedurally barred. Rutherford is arguing what that Eighth Amendment requires which is normally a direct appeal issue. Even if he could not raise the matter until he had an actual innocence claim in postconviction, Rutherford should have

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[15] The trial court's order states, "[a]s noted by both counsel, the Supreme Court allows a freestanding innocence claim by capital petitioners to be brought in a federal habeas petition." The State does not agree. The Supreme Court has never reached the issue.

raised this issue the prior successive 3.851 motion litigation at the latest. This issue is procedurally barred.

Merits

First, in *House*, the United States Supreme Court refused to address whether the constitution requires that a capital defendant be allowed to present a freestanding claim of actual innocence. Because there is a dispute regarding the holding in *House*, the State feels compelled to quote the Court's exact language in *House*:

> In addition to his gateway claim under *Schlup*, House argues that he has shown freestanding innocence and that as a result his imprisonment and planned execution are unconstitutional. In *Herrera*, decided three years before *Schlup*, the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S., at 417, 113 S.Ct. 853; see also id., at 419, 113 S.Ct. 853 (O'Connor, J., concurring)("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"). "[T]he threshold showing for such an assumed right would necessarily be extraordinarily high," the Court explained, and petitioner's evidence there fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, arguendo, to exist." Id., at 417, 418-419, 113 S.Ct. 853; see also id., at 427, 113 S.Ct. 853 (O'Connor, J., concurring)(noting that because "[p]etitioner has failed to make a persuasive showing of actual innocence," "the Court has no reason

> to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence"). House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.
> We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt-doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." 506 U.S., at 417, 113 S.Ct. 853. The sequence of the Court's decisions in *Herrera* and *Schlup* - first leaving unresolved the status of freestanding claims and then establishing the gateway standard-implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

House, 126 S.Ct. at 2086-2087 (emphasis added). Contrary to opposing counsel's argument, the *House* Court did not merely decline to decide the standard of proof for an actual innocence exception; they refused to decide whether an actual innocence exception exists. See also *Foster v. Quarterman*, 2006 WL 2806686, *7 (5th Cir. October 2, 2006)(holding that actual innocence is not an independently cognizable claim in federal habeas and following prior Fifth Circuit precedent because the Supreme Court's decision in *House* which "declined to resolve

whether *Herrera* left open the possibility of stand-alone actual-innocence claims", "did not change the law" so "this panel may not entertain Foster's stand-alone claim."); *Davis v. Terry*, 2006 WL 2729606, n.1 (11th Cir. September 26, 2006)(noting that the viability of an actual innocence claim "remains an open question" because the *Herrera* Court "did not reach it."). The Eighth Amendment does not currently have an actual innocence exception. So, the federal constitution does not currently require state courts to recognize an actual innocence claim.

But Florida courts do allow claims of actual innocence. Rutherford cites no Florida case holding, or even implying, that claims of newly discovered evidence of innocence may not be brought in Florida and there is Florida Supreme Court precedent directly to the contrary, including Rutherford's own prior case. *Rutherford v. State*, 926 So.2d 1100, 1107-1112 (Fla. 2006)(analyzing Rutherford's claim of actual innocence under the *Jones* standard). In Florida, a claim of actual innocence is raised as a claim of newly discovered evidence under the standard announced in *Jones v. State*, 591 So.2d 911 (Fla. 1991). Indeed, the standard in Florida for raising an actual innocence claim is more liberal than federal courts. Florida has no

equivalent concept to the exhaustion concept in federal habeas.[16] Additionally, Florida's rules of criminal procedure specifically provide for an exemption to the time limitations for newly discovered evidence in both capital and non-capital cases.[17] A

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[16] The concept of "freestanding" has a unique meaning in federal habeas cases. It is a means of overcoming a procedural bar for failure to exhaust a claim in state court before raising the claim in federal court. *Davis v. Terry*, - F.3d -, 2006 WL 2729606, *2 (11th Cir. September 26, 2006)(asserting an actual innocence claim as a gateway to reach the other claims that petitioner failed to exhaust in state court).

[17] Rule 3.851(d)(2)(a), Fla.R.Crim.Pro (providing for an exemption to the one year time limitation based on "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence"); Rule3.850(b)(1), Fla.R.Crim.Pro,(providing for an exemption to the two year time limitation based on "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence"); *Dunbar v. State*, 916 So.2d 925, 925 (Fla. 1st DCA

defendant may raise a claim of actual innocence at any time in Florida provided he does so within a year of discovering the new evidence. Whether and when a claim of actual innocence requires more judicial proceedings may remain "a contentious subject" in federal habeas courts, but it is not a contentious subject in Florida courts. *Hernandez v. Sheahan*, 455 F.3d 772, 778 (7th Cir. 2006)(observing that "[w]hether and when a claim of actual innocence (despite a formal conviction) requires more judicial proceedings remains a contentious subject.").

Counsel argues that Florida needs to recognize an actual innocence claim to lift procedural bars. Counsel misunderstands the concept of freestanding versus gateway claims of actual innocence. *Davis v. Terry*, - F.3d -, 2006 WL 2729606, *2 (11th Cir. September 26, 2006)(explaining the difference between a freestanding claim of actual innocence and a gateway claim of actual innocence). An actual innocence claim is a claim that the execution of an innocent person violates the Eighth Amendment even if a conviction was the product of a fair trial;

2005)(explaining that ordinarily, a 3.850 motion must be brought within two years but a defendant may file a 3.850 motion later if the claim is based upon newly discovered evidence).

whereas, a gateway claim of innocence is a claim that the conviction of an innocent person is constitutionally impermissible when the conviction was the product of an unfair trial. If a court recognizes a freestanding claim of innocence, then a gateway claim is not needed. Such a defendant does not need to end run any procedural bars. In other words, if Rutherford met the *Jones* standard (which he does not), he would be granted a new trial and all the other issues related to his first trial, procedurally barred or not, would be rendered moot by the new trial.

Furthermore, Rutherford was allowed to present this actual innocence claim. Rutherford asserted a claim of actual innocence in his first successive 3.851 motion as Claim V. The State did not argue that no such claim exists in Florida in its response to the earlier successive motion - far from it. The State cited *House v. Bell,* which was then pending in the Supreme Court in its response. The trial court, in rejecting Rutherford's actual innocence claim in the prior litigation, 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).

This Court addressed the actual innocence claim in a footnote:

> Based upon our conclusion that Heaton's statements do not establish either that she committed the murder or that Rutherford is innocent, we conclude that the circuit court did not err in denying an evidentiary hearing on Rutherford's claim that his conviction and sentence of death are unconstitutional because he has presented evidence demonstrating his actual innocence.

Rutherford v. State, 926 So.2d 1100, 1111, n.5 (Fla. 2006).

Neither the State, nor the trial court, nor this Court refused to address his claim. Neither court hinted, in any manner, that such a claim was not cognizable in Florida courts. His claim that Florida courts do not allow claims of actual innocence is clearly refuted by the fact that his claim of actual innocence was decided on the merits by both the trial court and this Court. The trial court properly summarily denied the claim that Eighth Amendment has an actual innocence exception.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE NEWLY DISCOVERED EVIDENCE OF INNOCENCE CLAIM BASED ON THE AFFIDAVIT OF JAIL INMATE ADKISON? (Restated)

Rutherford, relying on a last minute affidavit of jail inmate Adkison, asserts there is newly discovered evidence of his innocence and therefore, he is entitled to a new trial. Rutherford's claim should be denied as procedurally barred because the substance of his newly discovered evidence claim has already been addressed by the trial court and this Court and rejected by both. The substance of the Adkison's affidavit is the same as the prior affidavit, the Gilkerson affidavit. Moreover, all the reasons given by this Court in its opinion rejecting the earlier newly discovered evidence claim are equally applicable to this newly discovered evidence claim. This affidavit would not produce an acquittal on retrial, anymore than the earlier affidavit would, as this Court previously concluded. The trial court properly summarily denied the newly discovered evidence claim.

Standard of review

The standard of review for a newly discovered evidence claim is abuse of discretion. *Consalvo v. State*, 2006 WL 1375091, *6

(Fla. May 18, 2006)(noting that "absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence, including a witness's newly recanted testimony, will not be overturned on appeal" citing *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001)); *Clark v. State*, 379 So.2d 97, 101 (Fla. 1979)(stating that a motion for a new trial based on newly discovered evidence is addressed to the sound discretion of trial court); *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).

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 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 $5.00 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

Rutherford attached the following affidavit to his amended motion:

1. My name is Brian Adkison. I currently reside at the Walton County Jail in DeFuniak Springs, Florida. I have known Elizabeth Bivin for years, and we were neighbors in a trailer park in Crestview, Florida in the late 1990s.

2. During the time that Elizabeth Bivin was my neighbor, I visited her home on many occasions. I remember her aunt Mary staying with her from time to time. Mary was always taking pills, rocking, and talking. She often said, "Don't mess with me because I've killed people before." She mentioned killing a lady in Milton by beating her to death, with some sort of tool.

3. When Mary would start talking about this, Liz would tell her to shut up and quit running her mouth, Liz did not want her talking about this to me. But, one time when Liz wasn't around to stop her, Mary told me some details about the lady she'd beaten to death and how it happened. She told me that she beat the old lady to death when trying to rob the lady of money and medication. Mary said something about how she had been at the old lady's house before, so

she knew what she had. There had been a plan to get the stuff. But when it went down, I guess it went wrong. I remember very clearly Mary saying to me: "I beat her to death so she couldn't talk." You don't forget when someone tells you something like that.[18]

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[18] In Gilkerson's affidavit, submitted in connection with the prior claim of newly discovered evidence, litigated earlier this year, Gilkerson stated 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."

In the affidavit supporting the previous *Brady* claim, 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 trial court's ruling

The trial court ruled:

> Defendant claims that newly discovered evidence demonstrates that Mr. Rutherford's capital conviction and death sentence are constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> Defendant claims that a newly discovered witness gives corroborating evidence that when considered cumulatively "would probably produce an acquittal if a re-trial were granted, but would certainly result in a sentence of less than death." (Motion to Vacate p. 7).
>
> Defendant avers that Brian Adkison's corroborating information is newly discovered evidence.[19] Adkison recites the following in his affidavit:
>
> > and we were neighbors in a trailer park in Crestview, Florida in the late 1990s.
> >
> > to time. Mary was always taking pills, rocking, and talking. She often said, "Don't mess with me because I've killed people before." She mentioned killing a lady in Milton by beating her to death, with some sort of tool.
> >
> > me. But, one time when Liz wasn't around to stop her, Mary told me some details about the lady she'd beaten to death and how it happened. She told me that she beat the old lady to death when trying to rob the lady of money and medication. Mary said something

[19] A review of the amended postconviction motion shows Defendant has failed to allege availability as required pursuant to Florida Rule of Criminal Procedure 3.851(e)(2)(c)(ii).

> about how she had been at the old lady's house before, so she knew what she had. There had been a plan to get the stuff. But when it went down, I guess it went wrong. I remember very clearly Mary saying to me: "I beat her to death so she couldn't talk." You don't forget when someone tells you something like that.

(Adkison Affidavit).

Absent an evidentiary hearing, this Court is required to accept the allegations contained in the motions and affidavits as true. *McLin v. State*, 827 So.2d 948, 956 (Fla. 2002). However, Defendant's claim fails because he has not made a showing of any new facts not previously considered under the standard announced in *Jones*.

Here, Defendant has presented this Court with nothing new. Defendant asserted his actual innocence in his previous successive postconviction motion based on similar facts that are now asserted in this newest affidavit. Two things stand out in this Court's review of this newly submitted affidavit. Initially the Court notes that the facts asserted are less explicit than the previously considered facts in Gilkerson's Affidavit. A review of Gilkerson's affidavit shows that he claimed Heaton told him she killed a lady with a hammer and framed the Defendant.

Adkison states similar facts as Gilkerson with the exception that he refers to Mary Heaton using a tool and no mention is made of Heaton framing the Defendant. Secondly, taking these facts as asserted as true and considering them with his previously submitted witness' affidavit, this Court finds Defendant has failed to present any new facts or information that have not been previously considered and rejected both by this Court and on appeal. *Rutherford v. State*, 926 So.2d 1100, 1107, 1112 (Fla. 2006).

This Court further determines under *Jones* that the comparative weighing of this alleged newly discovered evidence, affidavit(s) taken independently or cumulatively with the knowledge that Heaton admittedly suffers from a mental disorder, and the state's evidence introduced at trial including

> Defendant's fingerprints, along with his self-incriminating statements made to four witnesses, "three of whom he told that he was going to kill the victim, and the fourth one whom he told after he killed the victim that he had killed the victim, are insufficient to create a probability of acquittal. (Huff Hrg. Tr. 35:10-13).
>
> As pointed out by the State at the hearing, neither Mary Heaton nor her niece has come forward to recant their trial testimony. (Huff Hrg. Tr. 70:4-5). As recognized by the Rutherford Court, Heaton suffered from mental difficulties that impaired her ability to differentiate fact from fantasy and, therefore, "a reasonable juror's determination of Rutherford's guilt would not be shaken by these affidavits." *Rutherford v. State*, 926 So.2d 1100, 1112 (Fla. 2006). Clearly this newest affidavit which in itself points out "Mary was always taking pills, rocking, and talking" further lends to the determination that the affidavit(s) either taken independently or cumulatively is insufficient to create a probability of an acquittal on re-trial. Thus, this claim is denied.

(Order at 10-13)(footnote included but renumbered).

Procedural Bar

This claim is barred by the law of the case doctrine. *State v. McBride*, 848 So.2d 287 (Fla. 2003)(explaining that questions of law which have been decided on appeal become the law of the case, precluding relitigation of the issue). Rutherford's claim should be denied as procedurally barred because the substance of his newly discovered evidence claim has already been rejected by this Court. This Court rejected Rutherford's claim because "a reasonable juror's determination of Rutherford's guilt would not

be shaken by these affidavits" and concluding there would be "no probability of an acquittal or sentence less than death" because "Heaton's presence at the crime scene does nothing to reduce Rutherford's culpability for the murder, and is irrelevant to any aggravating or mitigating factor." *Rutherford v. State*, 926 So.2d 1100, 1107-1112 (Fla. 2006). A capital defendant may not just get another person to sign a new affidavit, the substance of which is the same as the prior affidavit, and then relitigate the same issue. The reasoning of this Court, in rejecting the prior claim, did not depend on the particular person who signed the affidavit. Indeed, Adkison's affidavit is less explicit than Gilkerson's. Gilkerson stated that Heaton told him she killed a lady with a hammer and framed Rutherford. These details are not in Adkison's affidavit which merely refers to a tool. This claim is procedurally barred.

Evidentiary hearing

No evidentiary hearing was required. As this Court noted in its earlier opinion:

> This Court has never adopted a per se rule requiring an evidentiary hearing in a successive postconviction motion simply because an admission by another person comes to light at virtually the last minute. Although an evidentiary hearing is required on an initial postconviction motion in a capital case on claims

> requiring a factual determination, see Fla. R.Crim. P. 3.851(f)(5)(A)(i), a successive postconviction motion may be denied without an evidentiary hearing if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R.Crim. P. 3.851(f)(5)(B).

Rutherford, 926 So.2d at 1112.

This Court noted that conducting an evidentiary hearing "would be a futile exercise." *Rutherford*, 926 So.2d at 1111-1112. An evidentiary hearing regarding this latest affidavit would be an equally futile exercise. All that the latest affidavit establishes is that Mary Heaton made additional contradictory statements. Mary Heaton's mental problems were established at trial when she admitted to the jury that she had been Baker Acted and that she had had problems telling fact from fiction. Indeed, the affidavit itself reflects "Mary was always taking pills, rocking, and talking." No evidentiary hearing was warranted. The trial court properly denied this claim without conducting an evidentiary hearing.

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 the 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).[20]

Rutherford does not meet either prong of *Jones*. Rutherford has not established his diligence in locating Brian W. Adkison. The lack of funds is not due diligence. *Remeta v. State*, 710 So.2d 543, 546 (Fla. 1998)(rejecting a claim that due diligence was excused by the lack of funding available to fully investigate

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[20] The affidavits should not be considered cumulatively. The Florida Supreme Court has already rejected the claim that the evidence in Gilkerson's affidavit would produce an acquittal. Of course, the Court normally considers the newly discovered evidence cumulatively, but not when the Court has already addressed the evidence and rejected the claim. Gilkerson's affidavit is not properly part of the analysis of this claim. *Jones v. State*, 709 So.2d 512, 522, n.7 (Fla. 1998)(rejecting the argument that the Court must consider all testimony previously heard at the 1986 and 1992 evidentiary hearings, even if the testimony had previously been found to be barred or not to qualify as newly discovered evidence and concluding "[w]e consider only that evidence found to be newly discovered.").

and prepare his postconviction pleading.).[21]

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[21] The State did not concede due diligence regarding the Gilkerson affidavit and is not conceding diligence regarding this affidavit either. The State, in its earlier answer brief to the Florida Supreme Court, stated:

> 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.

Rutherford v. State, Case No. SC06-18, AB at 27 (briefs available on Florida Supreme Court website). If an evidentiary hearing is granted, the State will contest due diligence. But the critical prong of *Jones* is the second prong, which requires

Assuming Rutherford could establish his diligence, he cannot meet the second critical prong of *Jones*. Adkison's hearsay testimony, even if admissible as a statement against penal interest, would not produce an acquittal at retrial. It is not likely to produce an acquittal for three reasons. First, Heaton's trial testimony was corroborated by her niece's testimony. Mary Heaton's trial testimony, that Rutherford came over to her house and asked her, and then her niece to fill out the victim's check, was corroborated her niece. Her niece, Elizabeth Ward, has not recanted her trial testimony. Neither Mary Heaton nor Elizabeth Ward have recanted.[22] Secondly, it is

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Rutherford establish that Adkison's affidavit is likely to result in an acquittal in a retrial. The State will choose to focus on that prong in its pleadings. This Court often does likewise when dealing with a two prong test. *Evans v. State*, 2006 WL 2827647 (Fla. October 5, 2006)(declining to address the deficient performance prong of two prong *Strickland* test and addressing only the prejudice prong citing *Whitfield v. State*, 923 So.2d 375, 384 (Fla. 2005).

[22] There is a dispute about the definition of recanted. Black's Law Dictionary 1267 (6th ed.1990)(defining to "recant" as

"[t]o withdraw or renounce formally and publicly."). The witness has to retract their prior trial testimony personally and formally to be a true recantation. The danger of opposing counsel's "treacherous hyperbole" of referring to the Adkison's affidavit as a recantation, as noted in *Jackson v. State*, 884 A.2d 694, 701 (Md. App. 2005),

> is that once the user gets into the habit of referring to such a confidence as a "recantation" two or three times, he has successfully scaled a linguistic plateau and the presumptuous usage becomes a deceptively familiar commonplace. At that point, the user can nonchalantly invoke caselaw dealing with actual recantations and it will seem, to the lazy ear at least, as if those recantation cases are apposite to the case at hand. The only place to stop such semantic slippage is before it gets started. We are not in this case dealing with anything that can fairly be termed a "recantation." One might readily ask, "If a witness renounces her trial testimony, what difference does it make whether the renunciation takes place in the courtroom or on a school playground?" It makes a great

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. 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. Lastly, it is also contradicted by the physical evidence of Rutherford's fingerprints and palm print in the bathroom. The evidence of Rutherford's guilt includes three sets of fingerprints in the bathroom where the victim was beaten and

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deal of difference.

Mary Heaton has not recanted. Rutherford has never obtained an affidavit from Heaton herself stating that her trial testimony was false.

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. As this Court noted, in both the postconviction opinion and the opinion earlier this year, there "was overwhelming evidence of Rutherford's guilt." *Rutherford*, 727 So.2d at 220; *Rutherford v. State*, 926 So.2d 1100, 1110 (Fla. 2006)(observing: "[i]n this case, there was overwhelming evidence of Rutherford's guilt.").

All the reasons given by this Court in its opinion rejecting the earlier newly discovered evidence claim are equally applicable to this newly discovered evidence claim. This Court, rejecting Rutherford's claim of newly discovered evidence based on the prior affidavit, reasoned:

> At trial, Heaton testified that between 11:30 a.m. and 12:00 p.m. on August 22, 1985, Rutherford came to her home with a blank check from the victim. Heaton testified that Rutherford asked her to fill out the check and that when she told him that she did not know how to fill out a check, he asked her niece Elizabeth Ward to do it for him.[23] According to Heaton's testimony, she and Rutherford then went to the Santa

[23] Heaton testified that she did not know how to fill out a check because she could not read or write.

Rosa Bank to cash the check. Heaton acknowledged that she went inside the bank alone and cashed the check. The check was made out to Heaton in the amount of $2,000. Heaton denied endorsing the check and testified that Rutherford signed her name on the back of the check. Heaton also testified that Rutherford signed Mrs. Salamon's name on the check but that he did not sign the check in her presence. Heaton stated that she received $500 from the cashed check. On cross-examination, the defense established that at the time of trial Heaton was residing in a mental institution against her will, and that at the time of the murder she had trouble distinguishing fact from fantasy.

Ward testified that Rutherford came to the home she shared with Heaton and asked Ward to fill out the blank check on the victim's account. Ward testified that she filled out the check but refused to sign either Heaton's name or Mrs. Salamon's name. Ward testified that she witnessed Rutherford endorse the check, and that Heaton later gave her $5 for filling out the check.

Other evidence against Rutherford included his self-incriminating statements made to numerous individuals about his involvement in the murder, evidence of his fingerprints and palm prints in the bathroom where the victim was found, and evidence impeaching Rutherford's explanation why his prints were found in the bathroom. One witness testified that Rutherford said he planned to kill a woman and place her body in a bathtub. Another witness testified that Rutherford said that he would force a woman to write him a check and then put her in a bathtub, and a third witness testified that Rutherford said that he could get easy money by knocking a woman he worked for in the head. A fourth witness testified that Rutherford told him on the day of the murder that he had killed “the old lady” by hitting her in the head with a hammer, and then had put her in the bathtub. Law enforcement officers testified that Rutherford's fingerprints and palm prints were found in the bathroom where the victim's body was found. In response to this testimony, Rutherford explained that his prints were found in the bathroom because, he

claimed, Mrs. Salamon had asked him to realign the shower door because her nieces and nephews had knocked the door off of the track. The State impeached this testimony by proving that Mrs. Salamon did not have any nieces or nephews, and that no young children had visited Mrs. Salamon's home in the weeks prior to her murder.

Rutherford, 926 So.2d at 1108-1109 (footnote included).

Rutherford is not entitled to relief because the alleged newly discovered evidence does not satisfy the second prong of Jones in that Heaton's contradictory statements are not such that, if presented to the jury, would probably produce an acquittal on retrial.

Heaton's statements to Gilkerson and Glantz concerning whether she committed the murder are contradictory on their face. In her statement to Gilkerson, Heaton confessed to killing Mrs. Salamon. However, this confession is contradicted by her subsequent statement to Glantz, in which she stated that it was Rutherford who struck the fatal blow, killing Mrs. Salamon. When viewed against the impeachment evidence presented at trial concerning Heaton's mental problems and difficulty distinguishing fact from fantasy, Heaton's inconsistent statements to Gilkerson and Glantz would only serve to impeach Heaton's credibility further. Clearly, this evidence does not establish that Heaton committed the crime or that Rutherford is innocent.

At most, these conflicting versions of events suggest that Heaton's involvement in the crime may have been greater than was presented at trial. Even assuming that Heaton played a more significant role in the crime than was presented at trial, this evidence fails to satisfy the second prong of Jones when considered cumulatively with the evidence presented at trial. First, there is no probability that this evidence would produce an acquittal on retrial. Although Heaton's statements could be used to impeach her credibility and her testimony at trial concerning her involvement in the crime, <u>these statements would not have contradicted or provided an innocent explanation for any of the other evidence presented at</u>

> trial indicating that Rutherford was the perpetrator. Nor would these statements have affected Ward's uncontradicted testimony placing Rutherford in possession of the victim's check.
>
> Further, there is no probability that this evidence would result in imposition of a sentence less than death on retrial. In this case, there was overwhelming evidence of Rutherford's guilt. Although the affidavits suggest that Heaton may have had greater involvement in the murder than she acknowledged at trial, her statements to Gilkerson and Glantz do not warrant a reasonable belief that Rutherford is less than wholly culpable for the murder. Despite the fact that Heaton stated that she was present at the time of the murder and when the victim's belongings were buried, Heaton does not state that she did anything to assist Rutherford in committing the murder or in disposing of the victim's belongings. In addition, Heaton's statements do not affect the aggravating factors found by the trial court in this case.

Rutherford, 926 So.2d at 1109-1110. "To conclude that this evidence is such that it could probably result in an acquittal or a life sentence, we would have to consider the contents of each affidavit in isolation from the other affidavit and also from the evidence at trial. We decline to examine the alleged newly discovered evidence through such a narrow lens." *Rutherford*, 926 So.2d at 1112. "Based on the overwhelming evidence of guilt presented at trial, the contradictions in the Gilkerson and Glantz affidavits, and the evidence in the record that Heaton has suffered from mental difficulties that have impaired her ability to differentiate fact from fantasy, a

reasonable juror's determination of Rutherford's guilt would not be shaken by these affidavits." *Rutherford*, 926 So.2d at 1112.

All these reasons given by this Court in the opinion rejecting the earlier newly discovered evidence claim apply equally to this newly discovered evidence claim. Rutherford totally ignores this Court's reasoning on this claim. This affidavit would not produce an acquittal on retrial anymore than the earlier affidavit would, as both the trial court and this Court found. The trial court properly summarily denied the newly discovered evidence claim.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE ACTUAL INNOCENCE CLAIM? (Restated)

Rutherford, based on the affidavits of Adkison and Gilkerson, contends that he is actually innocent, citing *House v. Bell*, - U.S. -, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). To present a viable claim of actual innocence, Rutherford must present reliable evidence of innocence such as scientific evidence, or a trustworthy eyewitness account, or evidence. An affidavit from a convicted felon, reporting what a mentally ill person, who was always "taking pills" and "rocking", told him, nearly a decade ago, is simply unreliable. It is not scientific evidence, or a trustworthy eyewitness account, or physical evidence. Rutherford presents no reliable evidence of actual innocence. Morever, as this Court previously observed, discussing the prior affidavit, Adkison's impeachment testimony "would not have contradicted or provided an innocent explanation for any of the other evidence presented at trial indicating that Rutherford was the perpetrator." Nor would Adkison's testimony have "affected Ward's uncontradicted testimony placing Rutherford in possession of the victim's check." Rutherford's actual innocence claim totally ignores his fingerprints in the bathroom; his rebutted

explanation of those fingerprints; and the four prosecution witnesses' testimony that he confessed to them either before or after the crime. The trial court properly summarily denied the claim.

The trial court's ruling

The trial court ruled:

> Defendant claims his conviction and sentence of death violate the Eighth and Fourteenth Amendments to the United States Constitution. Defendant argues that taken cumulatively Gilkerson and Adkison's affidavits present this Court with compelling evidence of Defendant's actual innocence.
>
> Given the rationale as laid out in Claims III and IV, this Court finds the affidavits do not give rise to a colorable claim of innocence. See *Herrera v. Collins*, 506 U.S. 390, 423-424, 113 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); *Kokal v. State*, 901 So.2d 766, 775 (Fla. 2005) (affirming the denial of a newly discovered evidence claim that another person confessed to committing the murder because this inadmissible hearsay evidence contradicted the overwhelming evidence of the defendant's guilt presented at trial); *Sims v. State*, 754 So.2d 657 (Fla. 2000) (affirming the denial of a newly discovered evidence claim consisting of hearsay statements that a person other than the defendant committed the murder, because the evidence was admissible solely for impeachment purposes, did not place this person at the scene of the crime, and did not affect the testimony of eyewitnesses who identified the defendant as the perpetrator).
>
> Based on the overwhelming evidence of guilt presented at trial, the self-incriminating statements made by Defendant, the contradictions in the Gilkerson, Glantz, and Adkison affidavits, and the evidence in the record that Heaton suffered from a

> mental disorder, the Court has determined that the claims raised can be summarily denied.

(Order at 13-14).

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

Even if a constitutionally mandated actual innocence claim existed, which is somehow different from Florida's newly

discovered evidence standard, Rutherford has not established his innocence. 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). 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.

Adkison's affidavit is not reliable evidence of actual innocence. It is not scientific evidence, a trustworthy eyewitness account, or critical physical evidence. Rather, it is a hearsay statement regarding a person that the affidavit itself

notes has mental problems. The affidavit states: “Mary was always taking pills, rocking, and talking.” Mary Heaton’s mental problems were established at trial when she admitted to the jury that she had been Baker Acted and that she had problems telling fact from fiction. An affidavit, from a convicted felon, reporting what a mentally ill person, who was always “taking pills” and “rocking”, said to him, is simply unreliable. And Adkison’s affidavit is contradicted by Glantz’s affidavit. In one affidavit, Heaton is the actual murderer, but in the other affidavit, Heaton is an eyewitness to Rutherford committing the murder. Adkison’s affidavit is not reliable evidence of actual innocence.

Furthermore, courts do not allow prisoners to start with clean slates after their convictions and argue “actual innocence” as if the trial had not occurred. ***Escamilla v. Jungwirth***, 426 F.3d 868, 871 (7th Cir. 2005). This is exactly what Rutherford is attempting to do. Worse, he is attempting to do it for the second time. Basically, Rutherford ignores all the evidence established at the trial. He ignores his fingerprints in the bathroom; his rebutted explanation of those

fingerprints;[24] and the four prosecution witnesses' testimony that he confessed to them either before or after the crime. Instead, he focuses solely on the affidavits. Rutherford must account for the evidence that remains after Heaton's trial testimony is excluded. Even totally excluding both Heaton and Ward's testimony, neither of which has recanted their testimony, Rutherford does not account for the four prosecution witnesses that testified Rutherford either confessed or told them prior to the murder that he intended to kill the victim. Nor does he account for the physical evidence of his fingerprints and palm prints. Rutherford is not innocent. The trial court properly denied the claim of actual innocence.

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[24] 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).

CONCLUSION

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

Respectfully submitted,

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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 9th day of October, 2006.

_____

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CERTIFICATE OF FONT AND TYPE SIZE

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