IN THE SUPREME COURT OF FLORIDA

NO. SC06-1931

ARTHUR DENNIS RUTHERFORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DEATH WARRANT SIGNED, EXECUTION SET FOR OCTOBER 18, 2006 AT 6:00 P.M.

INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of an order summarily denying Mr. Rutherford=s successive Rule 3.850 motion and the appeal of an order dismissing Mr. Rutherford=s Motion to Correct an Illegal Sentences, pursuant to Florida Rule of Criminal Procedure 3.800(a). The following symbols will be used to designate references to the record in this appeal:

AR.@ **B** record on direct appeal to this Court;

ASupp-R.@ - supplemental record on direct appeal to this Court;

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

APC-R2.@ - record on appeal from the summary denial of postconviction relief.

AApp.@ - appendix to Mr. Rutherford=s 3.850 motion in the present proceedings.

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

REQUEST FOR ORAL ARGUMENT

Mr. Rutherford is presently under a death warrant with an execution scheduled for October 18, 2006, at 6:00 p.m. This Court has allowed oral argument in other cases arising from a successive motion to vacate. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003). A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Rutherford=s pending execution date. Mr. Rutherford, through counsel, urges that the Court permit oral argument.

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INTRODUCTION

At its core, Mr. Rutherford=s case presents this Court with the question: How much uncertainty over a defendant=s guilt or the reliability of his sentence of death is tolerable under the state and federal constitutions? It is clear that the Florida capital sentencing scheme is flawed. Is it too flawed? And what is too flawed? What is the standard?

But beyond the questions concerning an arbitrary capital sentencing scheme in general are the questions upon Mr. Rutherford=s conviction and sentence in particular. In order to convict, the State presented the testimony of four individuals who claimed that Mr. Rutherford made incriminating statements to them. The stories these individuals told were not consistent with each other and certainly were not consistent with Mary Heaton=s testimony, and the defense offered impeachment of each. Yet, the State presented these four individuals on the principle that there is strength in numbers - because there were four, it was more likely that Mr. Rutherford was guilty. Now, Mr. Rutherford has presented sworn statements from two individuals recounting how Mary Heaton confessed to committing this murder. The circuit court=s response to the affidavit from the second individual was that it was in essence irrelevant because it merely repeated what was in the first affidavit. If that is the governing law, then presumably it would not matter if Mr. Rutherford presented one hundred affidavits from one hundred individuals claiming that Mary Heaton confessed committing the murder herself. Surely, that cannot be the rule of law.

If the State is not limited to the number of individuals that it can present testifying that the defendant made incriminating statements, a different rule cannot be applied to a criminal defendant. There is a significant difference between the weight given to one person=s claim that an individual has confessed to a murder and the weight to be given when a second person reports a nearly identical confession. When a second affidavit is presented corroborating the first, a cumulative analysis must occur that factors in the enhanced reliability that the two affidavits afford to each other.

The time to hear the evidence and evaluate it is before the execution. The matter should not be left to ferment over time after Mr. Rutherford=s execution, so that a posthumous exoneration may result when other of Mary Heaton=s confidantes surface.

STATEMENT OF THE CASE

Mr. Rutherford was indicted by a Santa Rosa County grand jury for first degree murder and robbery on September 1, 1985. Mr. Rutherford entered a plea of not guilty in the 1st Judicial Circuit Court. On January 28, 1986, Mr. Rutherford=s trial commenced. On January 31, 1986, the jury found Mr. Rutherford guilty as charged, and the jury recommended the death penalty.

Pursuant to a defense motion for mistrial, the circuit court found that the State had committed a material, substantial, knowing and willful discovery violation at trial and ordered a re-trial on all issues.

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

Mr. Rutherford appealed his convictions and sentences, which were affirmed. Rutherford v. State, 545 So. 2d 853 (Fla.), cert. denied, 110 S.Ct. 353 (1989).

Mr. Rutherford timely filed a motion for postconviction relief. The circuit court entered an order denying relief on some claims and ordering an evidentiary hearing on Mr. Rutherford=s penalty phase ineffective assistance of counsel claim. Following the evidentiary hearing, the circuit court denied relief. This Court affirmed. Rutherford v. State, 727 So. 2d 216 (Fla. 1999).

Mr. Rutherford filed a petition for a writ of state habeas corpus on December 21, 1999. The petition was denied. Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000).

On March 30, 2001, Mr. Rutherford filed for habeas corpus relief in federal district

court. Habeas relief was denied. The Eleventh Circuit affirmed. Rutherford v. Crosby, 385 F. 3d 1300 (11th cir. 2004), cert. denied, 125 S.Ct. 1847 (2005).

In September of 2002, Mr. Rutherford filed a successive postconviction motion based on Ring v. Arizona, 122 S.Ct. 2428 (2002). Following the denial of relief, this Court affirmed. Rutherford v. State, Case No. SC03-243 (Fla. 2004).

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

On November 28, 2005, Mr. Rutherford filed a petition for a writ of state habeas corpus based on Deck v. Missouri, 125 S. Ct. 2007 (2005). This Court denied the petition. Rutherford v. Crosby, Case No. 05-2139 (Fla. 2006).

On November 29, 2005, Governor Bush signed a death warrant setting an execution for January 31, 2006 at 6:00 p.m. Mr. Rutherford filed a 3.850 motion on December 21, 2005. An amendment was filed with the lower court=s permission on December 24, 2005. After a Huff hearing on December 28, 2005, the lower court, on January 5, 2006, denied relief without the benefit of an evidentiary hearing. Thereafter, this Court affirmed the lower court=s summary denial of relief. Rutherford v. State, 926 So. 2d 1100 (Fla. 2006).

On January 31, 2006, the United States Supreme Court granted a stay of execution in connection with Mr. Rutherford=s federal court challenge to the method of execution. On June 19, 2006, the Supreme Court granted Mr. Rutherford=s petition for writ of certiorari and remanded his case to the circuit court of appeals.

On September 22, 2006, Governor Bush re-scheduled Mr. Rutherford=s execution for October 18, 2006, at 6:00 p.m. On September 27, 2006 Mr. Rutherford filed a successive 3.850 motion. In light of the State=s response to that motion, Mr. Rutherford subsequently filed a Motion to Correct an Illegal Sentence under Fla. R. Crim. Pro. 3.800(a). Mr. Rutherford also filed an amendment to his pending Rule 3.850 motion and a

reply to the State=s response to his Rule 3.850 motion. The State moved to strike Mr. Rutherford 3.800(a) motion.

On October 3, 2006, the circuit court held a Huff hearing as to the pending motions. The circuit court granted the State=s motion to strike Mr. Rutherford=s 3.800(a) motion, while taking all other matters under advisement.

On October 6, 2006, the lower court summarily denied the Rule 3.850 motion and its amendment. Mr. Rutherford filed his notice of appeal on October 6, 2006.

Pursuant to this Court=s briefing schedule, Mr. Rutherford herein timely files his Initial Brief regarding the circuit court=s adverse rulings.

STATEMENT OF THE FACTS

I. FACTS RELATED TO THE ARBITRARINESS OF MR. RUTHERFORD=S SENTENCE OF DEATH AND FLORIDA=S CAPITAL SENTENCING SCHEME.

On September 17, 2006, five days before the Governor Bush re-scheduled Mr. Rutherford=s execution, the American Bar Association=s Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida=s death penalty system. See American Bar Association, **Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report**, September 17, 2006 (hereinafter ABA Report on Florida). See Appendix B to Motion to Vacate. The information, analysis and ultimate conclusions contained in the ABA Report make clear: Florida=s death penalty system is seriously flawed and broken, and it does not meet the constitutional requisite of being fair, reliable or accurate. Id. at iii (AThe team has concluded, however, that the State of Florida fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial.@). The flaws and defects identified by the ABA Report demonstrate that Florida=s capital sentencing scheme does not deliver on the obligation arising under Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam). The identified flaws and defects inject arbitrariness into the

capital sentencing process. Who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process.[1]

[1]Who gets executed in Florida turns upon such factors as who represented the condemned; what objections he did or did not make; what investigation he did or did not undertake; whether counsel was diligent in finding evidence demonstrating that the condemned was innocence; at what point in time did this Court review the case; did the condemned get the benefit of new law identifying constitutional or statutory error in his case; did the State preserve the physical evidence containing DNA material that would prove innocence; what procedural bars were applied by the courts to preclude consideration of meritorious claims; etc.

In 2001, the ABA had created the Death Penalty Moratorium Implementation Project to, among other things, collect and monitor data on death penalty developments, as well as analyzing responses from government and courts to death penalty issues. Id. And, A[t]o assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions= death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process.@ Id. Florida was one such jurisdiction. Along with individuals from the ABA, a state assessment team was assembled. Id. at 2. Those comprising Florida=s assessment team were: the Chair, Professor Christopher Slobogin, Judge O.H. Eaton, Jr., Dr. Mark R. Fondacaro, Michael J. Minerva, Mark Schlackman, Justice Leander J. Shaw, Harry L. Shorstein, Sylvia Walbolt and students who assisted with research form the University of Florida College of Law. Id. at 3-6.[2]

The state assessment team in Florida was charged with Acollecting and analyzing various laws, rules, procedures, standards and guidelines relating to the administration of the death penalty.@ Id. The team concentrated on thirteen distinct areas: 1) death row demographics, 2) DNA testing and testing and preservation of biological evidence; 3) law enforcement tools and techniques; 4) crime laboratories and medical examiners; 5) prosecutorial professionalism; 6) defense services; 7) direct appeal process; 8) state

[2]Most of the assessment team members are easily recognizable as individuals with a vast experience in Florida=s death penalty system. See ABA Report on Florida at 3-6. However, it is equally clear that many of the members are in favor of the death penalty. Specifically, State Attorney of the Fourth Judicial Circuit, Harry Shorstein, made clear in a comment that he is Aa proponent of the Death Penalty.@ Id. at 5.

postconviction proceedings; 9) clemency; 10) jury instructions; 11) judicial independence, 12) racial and ethnic minorities; and 13) mental retardation and mental illness.

The team identified a number of the areas discussed in the report Ain which Florida=s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures@. ABA Report on Florida at iii. In the report, recommendations were made to assist Florida in fixing a broken system. But, the team cautioned that the apparent harms in the system Aare cumulative@ and must be considered in such a way; Aproblems in one area can undermine sound procedures in others.@ Id. at iii-iv. A review of the areas identified in the report as falling short makes apparent that in Florida=s death penalty scheme is deficient for the many of the same reasons the schemes at issue in Furman were found to be unconstitutional.[3]

In light of the ABA Report, Mr. Rutherford argued in circuit court that the Florida

[3]For example, the various opinions written in Furman noted the same evidence of arbitrary factors unrelated to the crime or the defendant=s character that were at work in the sentencing process that is set forth in the ABA Report on Florida. Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive, albeit arbitrary factor in whether a death sentence was imposed); Id. at 290 (the manner in which retroactivity rules operate injected arbitrariness); Id. at 293, 309-10, 313 (the number of executions in comparison to the number of murders suggested a lottery); Id. at 364-66 (evidence that racial prejudices and/or classism and/or sexism infected sentencing decisions); Id. at 366-67 (likelihood that an innocent may be executed suggested arbitrariness); Id. at 368 n. 158 (the failure to apply scientific developments in criminal cases fast enough to enhance reliability of outcome of process created arbitrary results).

death penalty statute now violates Furman. Mr. Rutherford argued that death sentences in Florida, like his, are a product of an arbitrary and capricious system. Not only is the process arbitrary at trial and on direct appeal, but another layer of arbitrariness arises from the postconviction process. Who is executed in Florida is determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

In denying Mr. Rutherford=s claim, the circuit court concluded that the ABA Report upon which Mr. Rutherford primarily relied to establish his claim did not constitute newly discovered evidence. (Oct. 6, 2006, Order at 5).[4] The lower court=s conclusion was based on a mistaken understanding, which was urged by the State, that the evidence upon which Mr. Rutherford relied to establish his constitutional violation must be admissible at trial.

II. FACTS RELATED TO THE EVIDENCE OF MR. RUTHERFORD=S INNOCENCE AND INNOCENCE OF THE DEATH PENALTY.

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

Heaton returned to the bank with a signed check for $2000.00 (R. 440). The bank record indicated that the check was processed at 2:02 p.m. (R. 440). Heaton received $2000.00

[4]When the State argued that the ABA Report was not evidence, but merely a compilation of existing facts about the manner in which the capital statute functions, Mr. Rutherford presented the claim in a Rule 3.800(a) motion. The circuit court denied the 3.800 motion because the ABA Report was not in the record, and thus could not be considered in passing upon the constitutionality of the death penalty statute.

(R. 441). As far as the teller could tell, Heaton Awas by herself@ (R. 441).

Later that day, Heaton purchased an automobile from Harvey Smith (R. 443). Before arriving at the auto dealership, Heaton called and told Smith Athat she had gotten her income tax check@ (R. 444). She paid $350.00 in cash for an automobile (R. 444).

By the time of Mr. Rutherford=s capital trial, Heaton had been committed to a mental institution (R. 411). However, Heaton testified on behalf of the State at Mr. Rutherford=s trial. During cross examination, she explained that she suffered from psychiatric problems and had a nervous breakdown, stroke and brain damage (R. 412). Due to her mental problems, Heaton admitted that she had difficulty Adistinguishing between what is fantasy and what is fact.@ (R. 412). She also admitted that she was having this trouble on August 22, 1985. Heaton testified that she could Aremember some things@ from that time period, but Asome things [she] couldn=t@ (R. 412).

According to Heaton=s trial testimony, Mr. Rutherford arrived at her home between 11:30 a.m and 12:00 p.m. on August 22, 1985, looking for her father in order to sell him some glass doors (R. 400). While there, he asked if she knew how to fill out a check (R. 400). She told him that she did not (R. 401). Mr. Rutherford requested that she ask her niece, Elizabeth Ward, to come out to his van and Heaton complied (R. 401). Ward soon returned to the house and told Heaton that Mr. Rutherford requested to see Heaton (R. 402). Heaton testified that she then accompanied Mr. Rutherford to the Santa Rosa State Bank where she tried to cash a check (R. 403). When Heaton was unable to cash the check, she and Mr. Rutherford left the bank and he drove into the woods (R. 405). Mr. Rutherford exited the van with a check stub, blue billfold, pen and credit card wrapped in a blue pull-over shirt and Athrowed@ it away (R. 406). They then returned to the bank where Mr. Rutherford produced a signed check (R. 408). Heaton then returned to the bank and cashed the check using her driver=s license (R. 408). Mr. Rutherford paid Heaton $500.00 and dropped her back at her home at 2:00 p.m. (R. 410).

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

Her trial testimony also conflicted with the testimony of Ward and other witnesses. For example, the time frames she provided conflicted with testimony heard from Ward and the bank teller. The circumstances of filling out the check conflicted with Ward=s account. Heaton=s trial testimony also conflicted with Mr. Rutherford=s testimony. During his testimony, Mr. Rutherford explained that he did not commit the crimes with which he was charged. He provided detailed testimony regarding his whereabouts on August 22, 1985 (R. 637-40).[5]

After Mr. Rutherford=s death warrant was signed on November 29, 2005, postconviction counsel learned of an individual, named Alan Gilkerson. In an affidavit, Gilkerson stated:

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

(Id.).

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

Based upon Gilkerson=s information, postconviction counsel sought to locate and interview others who knew Heaton. Indeed, in December, Eddie Bivin, Elizabeth Ward=s current husband, attested that a few years ago he overheard a conversation between several of Heaton=s family members (Att. L to Jan. 6, 2006, Motion for Rehearing). During the conversation, one of Heaton=s sister=s stated: AYou know, Mary Francis may have been the one that killed that lady and not the man they said did it.@ (Id.).

Also, postconviction counsel located Marie Pouncey, a woman who resided with Heaton in 1995 (Att. M to Jan. 6, 2006, Motion for Rehearing). Ms. Pouncey recalled how Heaton slapped her elderly father, spoke to Ms. Pouncey=s young son about a murder and told Pouncey that she knew Ahow to kill [her] and get away with it.@ (Id.).

In December, 2005, Investigator Rosa Greenbaum identified Brian Adkison as a person who would have had contact with Biven and Heaton during the 1990's. However, all attempts to locate Adkison were unsuccessful.

However, during the week of September 25, 2006, Investigator Greenbaum located Adkison. Ms. Greenbaum was advised by Adkison that he in fact had contact with Heaton and that Heaton had confessed to him that she had killed an old lady in Milton.

Adkison attested that he had previously lived in a trailer park near Bivin in the late 1990's. During this time period, Heaton occasionally stayed with her niece, Bivin, f.k.a., Elizabeth Watson. Adkison vividly recalled Heaton. She once told him ADon't mess with me because I've killed people before.@ (App. F). Specifically, Adkison recalled Heaton elaborating that she had killed a woman in Milton. In his affidavit regarding this conversation with Heaton, Adkison swore:

> . . . [Heaton] 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: AI beat her to death so she couldn't talk." You don=t forget when someone tells you something like that.

(Appendix F).

SUMMARY OF THE ARGUMENT

The lower court erred in failing to grant Mr. Rutherford an evidentiary hearing on his factual claims. Mr. Rutherford presented claims regarding newly discovered evidence of the constitutional infirmity of his death sentence. Evidence establishes that Florida=s death penalty scheme is arbitrary. Moreover, if the ABA Report on the data and information upon which it is based is not evidence, as the lower court suggests, then Mr. Rutherford 3.800 motion was properly brought and the lower court erred in dismissing it.

Also, Mr. Rutherford has produced more newly discovered evidence of his innocence of the crimes for which he was charged and convicted. The lower court erred in summarily denying Mr. Rutherford=s claims of innocence.

STANDARD OF REVIEW

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

Also, this Court must review the lower court=s determination that the ABA Report does not establish a newly discovered evidence claim *de novo* since that determination was a legal one.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. RUTHERFORD=S CLAIM THAT NEWLY DISCOVERED EMPIRICAL EVIDENCE DEMONSTRATES THAT HIS CONVICTION AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam).[6] At issue in Furman were three death sentences: two from Georgia and one from Texas. The Petitioners relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the

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[6]The previous year, the United States Supreme Court in McGautha v. California, 402 U.S. 183 (1971), had considered whether:

> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196. In the majority opinion written by Justice Harlan, the Court found no due process violation. In reaching this conclusion, the majority noted the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 204, 208. When Furman reached the Court the next year and the Petitioners presented an argument that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from McGautha and found that the death penalty statutes were indeed unconstitutional.

death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) (AWe cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.@); Id. at 293 (Brennan, J., concurring) (Ait smacks of little more than a lottery system@); Id. at 309 (Stewart, J., concurring) (A[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual@); Id. at 313 (White, J., concurring)(Athere is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not@); Id. at 365-66 (Marshall, J., concurring)(AIt also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.@)(footnote omitted). As a result, Furman stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: AThe Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed@ on a Acapriciously selected random handful" of individuals. Id. at 310.[7]

[7]It is important to recognize that the decision in Furman did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court looked at the systemic arbitrariness. Furman involved a macro analysis of a death penalty scheme and a

determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

In the wake of Furman, all death sentences were vacated. Proof of individual harm or the lack of such proof was irrelevant. Thereafter, the State of Florida (as well as others states) sought to adopt a death penalty scheme that would pass scrutiny under Furman. Florida=s newly adopted scheme was reviewed by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). In Gregg v. Georgia, 428 U.S. 153 (1976), a companion case to Proffitt, the United States Supreme Court explained: Athe concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.@ Gregg v. Georgia, 428 U.S. at 195 (plurality opinion).[8] Applying this principle to Florida=s newly-adopted capital sentencing scheme,

[8]The plurality in Gregg noted:

> In view of *Furman, McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

Gregg at 195 n. 47

the Supreme Court concluded:

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

Proffitt, 428 U.S. at 259-60. Subsequent Supreme Court decisions have explained that Furman required that a capital sentencing scheme produce constitutional reliability and Aa reasoned moral response to the defendant's background, character, and crime.@ Penry v. Lynaugh, 492 U.S. 302, 319, (quoting California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring) (emphasis deleted). See Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976)(plurality opinion). As a result, a capital sentencing scheme must: 1)Anarrow@ the capital sentencer=s discretion, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); and 2) permit the sentencer to consider A*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.@ Lockett v. Ohio, 438 U.S. 586, 604 (emphasis in original). See also Penry v. Lynaugh, 492 U.S. 302, 324 (1989).

However over time, various Justices of the United States Supreme Court have expressed concern whether the capital sentencing schemes approved in Gregg and Proffitt actually delivered the promised and requisite reliability. Justice Scalia observed an inherent inconsistency between the narrowing requirement and the broad discretion to consider mitigation requirement:

> My initial and my fundamental problem, as I have described it in detail above, is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them -- or, more precisely, how to apply both them and *Furman* -- if I wanted to. I cannot continue to say, in

> case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman. Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

Walton v. Arizona, 497 U.S. 639, 672-73 (1990).

Thereafter, Justice Blackmun soon concluded that the Furman promise could not be delivered, and accordingly the death penalty should be declared unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia, 408 U.S. 238 (1972),* and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia, supra,* can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. See *Lockett v. Ohio, 438 U.S. 586 (1978).*

Callins v. Collins, 510 U.S. 1141, 1143-44 (1994)(Blackmun, J., dissenting from the denial of cert.).

Most recently, Justice Souter wrote in an opinion joined by Justices Stevens, Ginsburg, and Breyer:

> Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "'a reasoned moral response to the defendant's background, character, and crime,"' *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (quoting *California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)* (O'Connor, J., concurring); emphasis deleted); cf. *Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)* (joint opinion of Stewart, Powell, and STEVENS, JJ.) (sanctioning sentencing procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"). The *Eighth Amendment*, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.

* * *

> That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972. See *408 U.S., at 309-310, 92 S. Ct. 2726, 33 L. Ed. 2d 346* (Stewart, J., concurring). Today, a new body of fact must be accounted for in deciding what, in practical terms, the *Eighth Amendment* guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."
>
> * * *
>
> We are thus in a period of new empirical argument about how "death is different," *Gregg, 428 U.S., at 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859* (joint opinion of Stewart, Powell, and STEVENS, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

Kansas v. Marsh, 126 S.Ct. 2516, 2542, 2544, 2545-46 (2006) (Souter, J., dissenting).

B. The ABA Report

The ABA Report issued on September 17, 2006, identified numerous defects and flaws in the Florida capital sentencing scheme that inject arbitrariness into the decision-making process. The ABA Report cited a number of the areas Ain which Florida=s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures@ ABA Report on Florida at iii. The team cautioned that the apparent harms in the system Aare cumulative@ and must be considered in such a way; Aproblems in one area can undermine sound procedures in others.@ Id. at iii-iv. A review of the areas identified in the report as falling short makes apparent that in Florida=s death penalty scheme is deficient for the many of the same reasons the schemes at issue in Furman were found to be unconstitutional. Death sentences, like Mr. Rutherford=s, are a product of an arbitrary and capricious system, including the postconviction process. Who is executed in Florida is

determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

C. Florida B An Arbitrary and Capricious Death Penalty System

1. The Number of Executions

The information and conclusions contained in the ABA Report make clear that Florida=s death penalty scheme has failed to satisfy the Furman mandate. Florida=s capital sentencing is still arbitrary and capricious. Since 1972, Florida has carried out a total of 61 executions; while between 1972 and 1999, there were 857 defendants sentenced to death (obviously since 1999, there have been more death sentences imposed). ABA Report on Florida at 7. Statistics of the number of individuals who committed murder during that time has not been recorded. Nevertheless, it is clear that few death sentences that are imposed are actually carried out. Undoubtedly, the percentage of murderers in Florida actually executed since 1972 is minuscule. Furman, 408 U.S. at 293 (Brennan, J., concurring) (Ait smacks of little more than a lottery system@); Id. at 309 (Stewart, J., concurring) (A[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual@); Id. at 313 (White, J., concurring) (Athere is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not@). The ABA Report on Florida demonstrates the same flaws and defects condemned in the Furman once again infect Florida=s capital sentencing scheme.

2. The Exonerated[9]

In Florida, since 1972, twenty-two (22) people have been exonerated and another individual has been exonerated posthumously, while sixty-one (61) people have been executed. ABA Report on Florida at iv, 8 (A[T]he proportion exonerated exceeds thirty percent of the number executed.@). ASince the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations.@ Id. at 45. As noted by Justice Souter in his dissenting opinion in Kansas v. Marsh, 126 S.Ct. at 2544-45, when Illinois had 13 exonerations between 1977 and 2000, a moratorium was imposed and investigation launched. During the investigation, 4 more individuals were determined to be innocent. As a result, the Illinois capital sentencing scheme was reformed and all death sentences imposed under the old scheme were vacated. Yet, as the ABA Report on Florida notes, Florida has had more capital exonerations than Illinois. The staggering rate of exonerations certainly suggest that Florida=s death penalty system is just as broken as Illinois= was B that politics, race, prosecutorial misconduct and deficient lawyering afflict the system. Yet in Florida, unlike in Illinois, there has been no moratorium. There has been no investigation. There has been no reform. There has been no effort to learn what defects and flaws have allowed innocent men to not just get convicted, not just have the convictions and sentences affirmed on direct appeal, but to have those convictions on at least one occasion (Juan Melendez) be all the way through a first round and second round of state postconviction proceedings before prevailing in a his third motion for postconviction relief and being released from death row after 17 years. Surely what happened to Mr. Melendez was Acruel and unusual in the same way that being struck by lightning is cruel and unusual@ Furman 408 U.S. at 309 (Stewart, J., concurring). The number of exonerations in the State of Florida alone demonstrates a broken system that violates the Furman promise. But equally symptomatic of a broken system is the lack of curiosity or concern that innocent men have been sent to death row. Not only did Mr. Melendez serve 17 years there, Rudolph Holton served 16 years before his release, and Frank Lee Smith served 15 years

before dying of cancer a few months before DNA evidence established his innocence.

a. The arbitrariness in the treatment of evidence of actual innocence.

While the State of Florida has recently passed legislation to allow capital defendants the opportunity to seek DNA testing,[10] most of the exonerated defendants= cases, had no connection to favorable post-verdict DNA results.[11] Yet, the State of Florida has not made any substantive or procedural improvements for those who have no DNA evidence in their case, but could show innocence through the use of other evidence.[12] Indeed, while the State of Florida has now removed the time limitation for bringing a motion seeking DNA testing, see Fla. Stat. ' 925.11 (1)(b) (2006); Fla. R. Crim. P. 3.853, capital postconviction defendants, like Mr. Rutherford, must prove due diligence in bringing their claims of innocence.

Indeed, this Court has held that it would not consider evidence of innocence presented in a successive collateral motion where the circuit court had found that the capital defendant=s attorney had not been diligent in uncovering and presenting the evidence that demonstrated innocence. Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).[13] In yet another case, this Court, while considering some of the newly discovered evidence presented in a successive collateral motion, excluded from its consideration certain other pieces of the newly discovered evidence. This Court deferred to the circuit court=s conclusion that Leo Jones[14] had failed to prove his diligence in uncovering certain pieces of newly discovered evidence, and excluded evidence of another man=s confession as inadmissible hearsay. Jones v. State, 709 so. 2d 512, 519-20, 525 (Fla. 1998).[15]

A system that precludes the presentation of evidence of innocence in a form other that the results of DNA testing injects arbitrariness and randomness into the process in violation of Furman.[16] It simply defies logic to require an innocence man to be executed because his attorney failed to prove diligence in discovering the evidence that proves his innocence.[17]

As was noted in Furman, any judicial system with procedural and substantive protections for an accused will result in errors; innocent individuals will be convicted. Furman, 408 U.S. at 366 (AOur >beyond a reasonable doubt= burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.@). Yet, not only does empirical evidence now demonstrate that Florida has the highest exoneration in capital cases of any state, nothing has been done to investigate, find out why, and attempt to remedy the matter. Having such knowledge and experiencing such a situation first-hand in Florida, the courts and government have ignored the arbitrariness that accompanies the determinations that one type of proof of innocence is less valuable than another; one type qualifies for less procedural restrictions than another; and one type imposes less hurdles to be cleared before consideration of the evidence on the merits.

While DNA is a powerful tool in proving innocence, the recantation of witness testimony, confession by another individual to a third-party and other scientific improvement may be equally revealing. See House v. Bell, 126 S.Ct. 2064 (2006). And, while there may be a more obvious issue of credibility attached to evidence of recantations, confessions and other scientific advances than may not be present with DNA, that does not mean that there will not be credibility issues raised as to the accuracy of DNA results. It is simply arbitrary to place a diligence requirement when dealing with a particular type of evidence of diligence, but not another. See Jones; Swafford.[18]

Florida=s decision to ignore the need for an actual innocence exception which allows an individual to defeat procedural bars and to demonstrate innocence has created a system that tolerates and accepts the risk of executing an innocent individual. Though it has made an exception for new evidence in the form of the results of DNA testing, Florida has refused to apply the rationale for such an exception to its procedural bars (*i.e.* innocent

people should not be locked up in prisons) across the board to all evidence of innocence. As a result, Florida=s capital sentencing scheme violates the principles enunciated in Furman.

b. DNA.

The State of Florida has now decided that DNA evidence will not be subjected to the procedural bars that apply to other evidence of innocence. However, those ignored by the State are those who cannot prove their innocence through DNA testing because the State destroyed the evidence before the testing could be conducted. In fact, these are the circumstances in Mr. Rutherford=s case.[19]

As the ABA Report on Florida makes clear: AMany who have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence.@ ABA Report at 43. Indeed, Athe State of Florida did not require the preservation of physical evidence in death penalty cases until October 1, 2001.@ Id. at 56. There is no protection for defendants who fall into this category. Thus, depending on whether an agency of the State of Florida had the space to store evidence, the weather[20], and other extraneous factors, evidence of innocence will be available to some, but not others. There are no ramifications for the State or protections for defendants who encounter such a situation. The distinction between the case where the evidence was retained and the testing demonstrates innocence and the case where the evidence would have established innocence, but was destroyed, can only be described as Awanton@ or Afreakish@. Furman, 408 U.S. at 310.

2. Representation

The Florida Death Penalty Assessment Team identified several problems concerning the representation of indigent capital defendants that leads to the arbitrary imposition of the death penalty and the problems effect all levels of representation. Indeed, the team considered defense counsel=s competence to be perhaps the most critical factor

determining whether a capital offender/defendant will receive the death penalty. ABA Report on Florida at 135. See Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive arbitrary factor in whether a death sentence was imposed).

a. Trial level representation.

The team found that there was inadequate compensation for trial counsel in death penalty proceedings. ABA Report on Florida at iv. In addition, the administration of the funding and timing of counsel=s ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. Of course, Florida is obligated to provide effective representation at the trial under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984).[21] As explained in Strickland, the purpose of this constitutional obligation is insure that the trial is an adequate adversarial testing that produces a reliable result. Recently, the Supreme Court not only recognized that the ABA had promulgated a set of guidelines devoted to setting forth the obligations of defense counsel in capital cases, but found that those guidelines served as a benchmark in further the goal of obtaining a constitutionally adequate adversarial testing. Rompilla v. Beard, 545 U.S. 374 (2005).[22] With those guidelines in mind, the team recommended that steps be taken to insure the appointment of Aqualified and properly compensated counsel.@ Id. at 174. The team also recommended that this guarantee include A[a]t least two attorneys@ with access to investigators and mitigation specialists. One member of the defense team should be trained in mental health screening. Id. at 175-76. These and the other recommendations made in the ABA Report reflect that Florida has not lived up to its obligation to minimize, if not remove, arbitrary factors from the capital sentencing process.

b. Postconviction representation

An even more substantive failure to deliver on the Furman promise arises in the context of Florida=s capital postconviction representation. The quality of Florida=s capital postconviction representation system has steadily declined over the past ten years when the federal funding for resource centers was eliminated.[23] The past ten years have demonstrated a consistent pattern of turmoil and chaos in the representation of capital postconviction defendants. The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases, absorbing those cases that the federally funded organization had represented, and a large number of cases in the mid-90s when death sentences spiked and rule changes caused initial motions to be filed much quicker than in previous years.[24] That the location of the agency was split into three regional offices but still managed under the auspices of a single agency. The agency was then officially separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. A few years later, the Florida Legislature eliminated one of the regional offices and sent Registry sixty-plus cases. Under the current system, at that part of the capital process at which errors are sought to be caught and corrected,[25] qualifications to be appointed to a capital postconviction case are minimal, oversight is non-existent, and funding is inadequate.[26] Id. at v. Compensation is capped. Though this Court has recognized that the cap may be breached in extraordinary circumstances, the fact that the determination of whether the cap was properly breached is made after the fact. Fla. Dept.of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006). Certainly, requiring attorneys who find that the requisite work exceeds the statutory cap to litigate their compensation after the fact has a chilling effect. Within the Registry system, statutorily funding is only available for 840 attorney hours for attorneys representing capital postconviction defendants on the registry when research suggests that 3,300 attorney hours are required to represent a capital postconviction defendant. ABA Report on Florida at v. This is not the only monetary limitation, funds for investigative, expert, travel and other

costs is limited. Moreover, there is no provision for compensation for successor proceedings.[27]

While Registry counsel are restricted in funding, the Capital Collateral Counsel (CCC) offices are not. Thus, CCC attorneys can exceed the 840 hours without the consequence of non-payment. CCC attorneys can hire experts, pay investigators and incur other costs associated with litigating a capital postconviction case without consequence of non-payment. There is no valid basis for distinction between death row defendants represented by Registry counsel and death row defendants represented by CCC attorneys.[28] Undoubtedly, this disparity in funding will impact the representation and arbitrarily effect the ultimate success of capital postconviction defendants in challenging their convictions and death sentences.

In 1988, this Court recognized that the creation of CCR extend to all Florida capital defendants the right to have effective representation in all collateral proceedings in both state and federal court. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988)(Aeach defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings.@). Having recognized the statutorily created right, this Court has generally found that no remedy exists for a breach of the statutorily created right to effective collateral counsel. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)(Aclaims of ineffective assistance of postconviction counsel do not present a valid basis for relief@).[29] This Court did recognize an exception to the Lambrix rule where state-provided collateral counsel due to neglect failed to file a timely notice of appeal. Porter v. State, 788 So. 2d 917 (Fla. 2001). Otherwise, state-provided collateral counsel=s failure to exercise diligence in investigating and timely presenting evidence of innocence or of a constitutional deprivation operates as a bar to a court=s

consideration of the resulting claims for relief. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).

Because, beyond the narrow circumstance identified in Porter v. State, a capital defendant has no remedy when state-provided counsel either through negligence or a lack of diligence fails to provide effective representation, Florida=s capital sentencing process fails to live up to the Furman promise. As noted in the ABA Report, the performance of Registry counsel has been openly criticized, even by members of this Court:

> This lack of appellate experience may account for the questionable performance of some registry attorneys. For example, a number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard. Specifically, registry attorneys in at least twelve separate cases filed their clients= state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.
>
> Performance like this has led two Florida Supreme Court Justices to publicly comment on the quality, or lack thereof, of registry attorneys. Justice Cantero stated that the representation provided by some registry attorneys is A[s]ome of the worst lawyering@ he has ever seen. Specifically, Asome of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven=t raised the right ones.@ Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that A[a]s for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimal levels of competence.@ The questionable performance of these attorneys, as well as the lack of requisite qualifications, is particularly troublesome in light of the fact that death-sentenced inmates do not have a state of federal constitutional right to assert a claim of ineffective assistance of post-conviction counsel.
>
> The performance of these attorneys has also led many legal experts as well as some Democratic and Republican Legislators to criticize the closure of CCRC-North Office in 2003. In fact, many legal experts, including Justice Cantero and the Executive Director of the Commission on Capital Cases, have cautioned against proposals to eliminate the two other CCRC Offices.

ABA Report on Florida at 183-84. Thus, it is well recognized by state officials in the legislative and judicial branches of government that a number of the post-conviction attorneys provided by the State are incompetent, *i.e.* some of the worst lawyering ever seen. Yet, the capital defendants provided some of the worst lawyering ever seen must accept the incompetent representation without recourse.

An amicus brief filed in the United States Supreme Court that is noted and relied upon in the ABA Report, catalogues instances where Registry counsel simply do not know or understand capital postconviction law, and thereby waive the capital defendants= rights and avenues to obtain relief without their consent or knowledge. See ACLU=s Amicus Brief in Lawrence v. Florida, Appendix C.

A system that knowingly provides capital defendants with Asome of the worst lawyers@ that a Justice of this Court has ever seen, and strips the capital defendant of the right to complain and seek redress, simply does not comport with the Furman promise that states with capital sentencing schemes must affirmatively take steps to eliminate the risk that an execution will be as random as a bolt of lightning. Undeniably with 22 exonerations, Florida=s trial system warrants Aa constitutional safety net.@ Jones v. State, 709 So. 2d. at 535-36 (Shaw, J., dissenting). Yet, it is well-recognized within the State of Florida, as the ABA Report documents, that the Asafety net@ has been stripped away.[30] Those capital postconviction defendants who receive Asome of the worst lawyering@ that a Florida Supreme Court justice has ever seen and who may have meritorious claims for relief and who in fact may be innocence, have been arbitrarily denied any real chance of obtaining relief by Florida=s knowing willingness to provide incompetent counsel. The situation Asmacks of little more than a lottery system.@ Furman, 408 U.S. at 293 (Brennan, J., concurring). The outcome of the post conviction process, directly linked to whether state-appointed counsel is incompetent, is a purely arbitrary.

3. Issues Related to the Jury=s Role in Sentencing

a. Jury Instructions.

The Florida Death Penalty Assessment Team based upon the evidence it gathered that capital jurors, i.e., those individuals largely involved in the decision of whether a defendant receives the death penalty, do not understand Atheir role or responsibilities when deciding whether to impose a death sentence.@ ABA Report on Florida at vi. Indeed, A[i]n

one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt.@ Id. The same study found that over thirty-six percent (36%) Abelieved that they were *required* to sentence the defendant to death if they found the defendant=s conduct to be >heinous, vile or depraved=@ beyond a reasonable doubt. Id. (emphasis in original). Over twenty-five percent (25%) considered future dangerousness, even though such a factor is not a legitimate sentencing factor under Florida law. Id. Based on these disturbing results, the state assessment team recommended that the State of Florida redraft its capital jury instructions in order to prevent common juror misconceptions, misconceptions that can only inject arbitrariness to the process. Id. at x. The presence of an identified arbitrary factor, *i.e.* juror confusion, warrants action. Had Florida launched an investigation into why there have been some many exonerations from death row, it may have learned that one factor contributing to the problem was juror confusing. But instead, as red flags are waved, as alarm bells go off, as identified arbitrary factors are identified, nothing is done. The system tolerates it. This violates the promise of Furman.

b. Unanimity.

AFlorida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote.@ State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005)(emphasis in original). The ABA Report on Florida cites a study which permitting capital sentencing recommendations by a majority vote reduces the jury=s deliberation time and may diminish the thoroughness of the deliberation. ABA Report on Florida at vi-vii. Of course, it is inherently obvious that the requirement of a unanimous verdict at the guilt phase is consistent with the presumption of innocence, the State=s burden to prove guilt beyond a reasonable doubt, and the general desire to ensure greater certainty of the reliability of a finding of guilt.[31] It should then follow that permitting a less

than unanimous verdict during the penalty phase reflects a choice that the guilt phase concerns warranting unanimity are not present in the penalty phase.[32] In the ABA Report on Florida, the state assessment team recommended that the State of Florida require a unanimous jury verdict.[33] Id. at x.

Of course, the question of the constitutionality of permitting a jury to recommend a death sentence on the basis of a majority vote has been upheld. Spaziano v. Florida, 468 U.S. 447 (1984). But here in Florida where death recommendations have been permitted on less than a unanimous vote, 22 exonerations of death sentenced individuals has occurred since 1972. Of course, the cause for the highest rate of capital exonerations in the nation has not been investigated. However, it is recognized that Florida has held that a sentencing jury is precluded from consideration of residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. ABA Report on Florida at 311 (Athe Florida Supreme Court has consistently rejected >residual= or >lingering doubt= as a non-statutory mitigating circumstance@).[34] It is certainly logical that an innocent man or woman may have less to argue in the way of mitigation than a guilty one. See Cheshire v. State, 568 So. 2d 908, 912 (1990)(AEvents that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court.@). Where the defendant is innocent, the reality is that there were no Aevents@ that led to a murder that he did not commit. There is only the mitigation inherent in any individual=s life story. Thus, the exclusion of lingering doubt as a basis for a sentence of less than death clearly increases the odds that an innocent defendant will receive a sentence of death.

The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt as a basis for a sentence of less than death certainly add to the risk that an innocent will be sentence to death. Given that Florida is the only state to have coupled these things together and given that Florida leads the nation in capital exoneration,

certainly provides a basis for arguing the synergistic effect of the choices made in structuring Florida=s capital scheme has produced a system that Asmacks of little more than a lottery system.@ Furman, 408 U.S. at 293 (Brennan, J., concurring). The decision by Florida officials to simply accept the high exoneration rate without seeking find the how and the why and then undertake corrective measures, breaches the Furman promise.

c. Judicial Overrides.

In Florida, the judge who presides over a capital sentencing proceedings has the ability to override a jury=s sentencing recommendation. ABA Report on Florida at 31. This Court adopted the standard to be employed when reviewing a judicial override in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, the Tedder standard has been the source of great debate over the years. Justice Shaw opined in 1988 that the Tedder standard had created Furman error:

> This presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not.

Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring)(footnote omitted). In 1989, a majority of this Court held that the vigorousness of the Tedder standard had waxed and waned over the years:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):
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> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .
> >
> > Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says,that the judge must concur with the jury's life

> recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910.

Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). Thus, this Court confessed that standard used to review overrides on appeal had varied over time. A clearer confession that arbitrariness had infected the decision making process is hard to imagine.

More recently, three dissenters argued that a majority of the Court once again failing to give meaning to the Tedder standard:

> In the final analysis, the majority's tenuous reliance on Garcia simply underscores its abandonment, with no compelling rationale, of our principled and well-reasoned caselaw in Tedder and its progeny.

Zakrzewski v. State, 717 So. 2d 488, 498 n. 6 (Fla. 1998) (Anstead, J., dissenting). In his opinion joined by Chief Justice Kogan and Justice Shaw, Justice Anstead explained:

> Hence, in addition to the unprecedented mitigation presented, the majority has itself identified another substantial basis for the jury's recommendation by pointing out that the jury could have reasonably concluded, because the evidence was in conflict, that Anna was not aware of her impending death. In that event, for example, the jury would also not have found the HAC aggravator for Anna's death since that aggravator requires a finding of consciousness of impending death. So, the majority opinion has demonstrated a number of reasonable bases for the life recommendation.
>
> As we approach the 21st century of our civilization, do we really want to take a law (the trial judge's sentencing discretion) that was intended to act as a rational check on a jury possibly voting for death based upon an emotional appeal, and twist that law so as to use it as a sword for the judiciary to emotionally trump a jury acting with reasoned mercy?

Id.

But not just members of this Court have been trouble by the jury override and this Court=s erratic treatment of the Tedder standard. In Parker v. Dugger, 498 U.S. 308 (1991), the United States Supreme Court reviewed this Court=s application of the Tedder standard and its resulting affirmance of a judicial override of a life recommendation. The United States Supreme Court found:

> What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge=s findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge=s findings.

Parker, 498 U.S. at 320. In reversing, the United States Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker=s sentence at all.

Parker, 498 U.S. at 321.

The sporadic use of the judicial override and the erratic application of the Tedder standard has again injected arbitrariness into Florida=s capital sentencing scheme. As noted by Justice Shaw, the use of the override and the use of the Tedder Apresent[ed] a serious Furman problem@ B this has simply been ignored. Combs v. State, 525 So. 2d at 859 (Shaw, J., specially concurring). The failure to address this problem reflects an abandonment of the Furman promise. Layer upon layer of arbitrary sentencing factors entirely divorced from the facts of the crime or the character of the defendant have accumulated and rendered the Florida sentencing scheme in violation of Furman.

4. Racial and Geographic Disparities

Racial and geographic disparities still plague Florida=s death penalty scheme as noted in the ABA Report.

a. Racial Disparities.

The ABA Report relied on three previous studies concerning race and the death penalty as well as an analysis of current statistical discrepancies concerning race and the death penalty. In 1991, this Court=s Racial and Ethnic Bias Commission found that Athe application of the death penalty is not colorblind.@ ABA Report on Florida at vii-viii. In 1991, a criminal defendant in a capital case was 3.4 times more likely to receive the death penalty if the victim is white that if the victim is African American.[35] Id. 7-8. This

statistic has not changed. A[A]s of December 10, 1999, of the 386 inmates on Florida=s death row, >only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.= Additionally, since Florida reinstated the death penalty there have been no executions of white defendants for killing African American victims.@ Id. at viii.

The statistics relied on in the ABA Report on Florida make clear that race is a factor in Florida=s death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. Furman, 408 U.S. at 364-66 (Eighth Amendment violated where racial prejudices and/or classism and/or sexism infected sentencing decisions). Even after Governor Bush commissioned a study of race and its impact on the justice system in 2000, and those involved recommended an additional study, no steps have been taken find a remedy for the injection of a improper factor into the sentencing process. ABA Report on Florida at xi. The State of Florida=s knowledge of the disparities of race on its death penalty scheme and disregard of the impacts of such a factor demonstrates an impermissible acceptance of a capital system that permits the death penalty Ato be . . . wantonly and . . . freakishly imposed@ on a Acapriciously selected random handful@ of individuals. Furman, 408 U.S. at 310.

b. Geographic Disparities.

Likewise, geographic disparities contribute to the arbitrariness of Florida=s death penalty scheme. In 2000, 20 percent of the death sentences imposed that year came from the panhandle, while in 2001, 30 percent of the death sentences imposed that year came from the panhandle. ABA Report on Florida at 9.[36] Thus, death sentences are significantly influenced by the county where a crime occurred.[37] Geographic disparities clearly show that a factor unrelated to the circumstances of the crime or the character of the defendant are at work in the decision to seek and impose

a death sentence. In a state such as Florida, where race, ethnicity, religious affiliation, cultural background, age and political philosophies differ so drastically from county to county, the geographic disparity breaches the Furman promise that death sentences not be premised upon arbitrary factors.

5. Prosecutorial Misconduct

AThe prosecutor plays a critical role in the criminal justice system.@ ABA Report on Florida at 107. And, even more so in a capital case, where the prosecutor had Aenormous discretion@ in determining whether to seek the death penalty. Id. Yet, this Court regularly orders new trials in capital cases because of prosecutorial misconduct. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State,894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); State v. Gunsby, 670 so. 2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988); Arango v. State, 497 So. 2d 1161 (Fla. 1986).[38] On occasion, this Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty phase relief. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993).[39] And on a number of occasions, this Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to warrant relief from either the conviction or the death sentence. Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006); Smith v. State, 931 So. 2d 790 (Fla. 2006); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).[40]

Despite the numerous instances of prosecutorial misconduct in Florida capital cases, no investigation has been launched nor program instituted to stamp out such

misconduct.[41] Despite the frequency of prosecutorial misconduct, whether warranting or new trial, coupled with the fact that Florida leads the nation in the number death row exonerations, no alarms have gone off, no bells have rung, nothing has been done to investigate the causes for the pattern of prosecutorial misconduct and frequency of exonerations. The State of Florida by its conduct has demonstrated that the situation is acceptable, and that the risks that an innocence man or woman will be convicted, or that guilty man or woman will receive an undeserved death sentence are okay.

However, the ABA=s assessment team stated that to stop prosecutorial abuses, Athere must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.@ ABA Report on Florida at 108. In fact, the United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Thus, there should be a higher ethical obligation because the prosecutor carries with him power derived from his position which must be held in check, just as each branch of government is subject to checks and balances. Florida=s willingness to tolerate prosecutorial misconduct violates the promise of Furman.[42]

The ABA Report further recommends that each prosecutor=s office have written polices governing the exercise of prosecutorial discretion. Id at 125. This is necessary given Florida=s history to try to eradicate arbitrary factors from not just the trial, but in the exercise of prosecutorial discretion to seek death in the first instances. Without such policies or guidelines, Florida=s death penalty scheme Asmacks of little more than a lottery system.@ Furman, 408 U.S. at 293 (Brennan, J., concurring).[43]

Time and time again, prosecutors violate the rules B the rules of discovery, the rules of evidence, the rules of due process. This Court often identifies capital cases where the prosecutor went to far, or was guilty of a discovery violation, yet, the Court refuses to grant relief because the defense failed to object and/or the error was Aharmless@ or insufficiently prejudicial. The failure to do anything about the numerous instances of prosecutors not following the rules, or in essence excusing the misconduct because of an apparent Ano harm no foul@ rule, actually encourages prosecutors to convert the Berger limiting principle into a perversion of itself, to make it into a self-righteous justification that because winning is justice, winning is everything, and therefore, the ends justify the means. The acceptance of prosecutorial misconduct as merely a kind of error, like a deficient jury instruction, certainly offers a ready explanation for Florida:s leadership of death row exonerations. It also constitutes a violation of Furman that turns the capital process, not into a search for truth or for justice or for the objectively right result, but into a game of relativity, where all that matters is winning, and the rules of law become akin to the rules found inside a board game - merely a means to winning a conviction and a sentence of death.

6. The Direct Appeal Process

This Court reviews all of the cases where the death sentence is imposed and has the obligation to determine whether death is a proportionate penalty. However, because this Court only reviews cases Awhere the death penalty was not imposed in cases involving multiple co-defendants@, the proportionality is skewed. ABA Report on Florida at xxii. ABecause of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment system will function in an arbitrary and discriminatory manner.@ Id. at xxii, 208. The limited scope of the proportionality review, only looking at other

cases in which death has been imposed, skews the review in favor of death and undercuts its Ameaningfulness@.[44] But in addition to this, the ABA assessment team noted a disturbing trend in this Court=s proportionality review: ASpecifically, the study found that the Florida Supreme Court=s average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period.@ ABA Report on Florida at 212. The ABA Report noted Athat this drop-off resulted from the Florida Supreme Court=s failure to undertake comparative proportionality review in the >meaningful and vigorous manner= it did between 1989 and 1999.@ ABA Report at 213. The ABA Report also noted Athat, since 1999, the Florida Supreme Court is no longer holding true to its own rule that proportionality review should be a >qualitative review . . . of the underlying basis for each aggravator and mitigator= and not simply a comparison between the number of aggravating and mitigating circumstances.@ ABA Report on Florida at 213.[45]

The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends upon what year the appellate review was or is conducted. This variable has nothing to do with the facts of the crime or the character of the defendant. Accordingly, it could only be describe as arbitrary. It is not a Ameaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not@. Furman, 408 U.S. at 313 (White, J., concurring).

As noted previously, the shift in this Court=s proportionality review commencing since the year 2000, reflects a reoccurring pattern in the appellate process. This Court=s review of judicial overrides of life recommendations has shifted repeatedly. Even though the majority of the Court always cites Tedder v. State as establishing the standard, dissenting justices who were previously in other cases in the majority repeatedly assert that the manner in which the Tedder is applied has shifted. See

Combs v. State; Cochran v. State; Zakrzewski v. State. Moreover, the affirmance rate of judicial overrides also waxes and wanes in a fashion supporting dissenting justices claim that the manner in which the standard was applied has altered.

Even the United States Supreme Court has noted deficiencies in this Court=s appellate review. See Parker v. Dugger, 498 U.S. 308, 320 (1991)(AWhat the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge=s findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge=s findings.@). In Parker, this Court=s failure to accurately read the record was itself a violation of the Eighth Amendment. In granting Mr. Parker relief, the United States Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker=s sentence at all.

Parker, 498 U.S. at 321.

7. Retroactivity

Problems with the appellate review process show in other ways, some previously noted. For example, the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v.Smith, and Williams v. Taylor, were all dictated by its decision in Strickland and therefore each of those decisions, while issuing between 2000 and 2005, actually date back to Strickland, and reflect what the decision in Strickland the very day it was issued in 1984. Between 1984 and 2000, this Court addressed ineffective assistance of counsel claims under Strickland in virtually every capital post conviction case that it heard. It is clear from analyzing those opinions that this Court did not read Strickland the way it was read and applied in Rompilla, Wiggins, and Taylor.[46] Yet, this Court has refused to re-examine its decisions predicated upon its understanding of the meaning of

Strickland which was at least arguably in error under Rompilla, Wiggins, or Williams. Thus, individuals on Florida=s death row who have meritorious claims under any one of these three decisions and who presented those claims to this Court before the issuance of these three opinions since the year 2000, will not get the benefit of those three decisions. In essence, this Court has stripped those death row inmates of their Sixth Amendment rights as defined by the United States Supreme Court.[47] Since the very purpose of Strickland (and of Rompilla, and of Wiggins, and of Williams) was to insure that a constitutionally adequate adversarial testing occurred and that it produced a constitutionally reliable result, this Court=s action defeats that purpose. It again injects arbitrariness into Florida=s death penalty system.

Another example of arbitrariness injected into the capital process by this Court=s erratic action in applying decisions retroactively can be seen in the manner in which it has handled the fallout from its decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000). There, Mr. Delgado had been convicted of first degree murder on the basis that the homicide occurred in the course of a burglary in 1990. On appeal, the issue concerned whether Mr. Delgado, who had entered the victims= home with consent, committed a burglary by Aremaining in@ the residence. This Court concluded that the Aremaining in@ language only applied where the Aremaining in@ was done surreptitiously. In reaching this conclusion, this Court overturned a number of prior decisions, including Jimenez v. State, 703 So. 2d 437, 441 (Fla. 1997)(AJimenez argues that the burglary was not proven because there was no proof of forced entry, or that Minas refused entry, or that she demanded that he leave the apartment.@). The alleged burglary in Mr. Jimenez=s case happened in 1992 and involving the same criminal statute at issue in Delgado. Yet, this Court refused to apply its construction of legislative intent as to the meaning of a criminal statute that it applied to a 1990 crime, to a criminal case occurring in 1992 involving the same statute. Subsequently, this Court gave the benefit

of the Delgado construction to a defendant who was charged with a 1980 burglary in which a homicide occurred. Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003), and give the benefit of the Delgado construction to a defendant who was charged with a 1994 burglary in which a homicide occurred. Raleigh v. State, 932 So. 2d 1054 (Fla. 2006).

Because of the manner in which this Court used retroactivity rules to preclude consideration of meritorious claims, the ABA assessment team recommended in its report that the Florida state courts Ashould give full retroactive effect to United States Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.@ ABA Report on Florida at 241. Certainly, the manner in which the retroactivity rules operate currently has as at least as much to do with who gets executed and who does not, than the facts of the crime and the character of the defendant does. The manner in which this Court applies its retroactivity rules is arbitrary and violates Furman.

8. Procedural Default

Further, this Court frequently relies upon procedural defaults to create procedural bars that preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 so. 2d 512, 519-20, 525 (Fla. 1998). Certainly, the refusal to consider issues that go towards the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases a Ameaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not@. Furman, at 313 (White, J., concurring). The ABA assessment team recommended in its report that AState courts should permit second and successive post-conviction proceedings in capital cases where counsels= omissions or intervening court decisions resulted in possibly meritorious claims not

previously being raised, factually or legally developed, or accepted as legally valid.@ ABA Report on Florida at 241. As it is, the Florida death penalty scheme violates Furman.

9. Clemency

Clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors that the legal system does not correct can be considered. See Herrera v. Collins, 506 U.S. 390, 412 (1993). However, the assessment team found Florida=s clemency process to be severely lacking: AGiven the ambiguities and confidentiality surrounding Florida=s clemency decision-making process and that fact that clemency has not been granted to a death-sentenced inmate since 1983, it is difficult to conclude that Florida=s clemency process is adequate.@ ABA Report on Florida at vii. See Furman, 408 U.S. at 253 (Douglas, J., concurring)(AUnder these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.@).

The clemency process is entirely arbitrary because there are no rules or guidelines Adelineating the factors that the Board should consider, but not to be limited to@ for consideration of clemency. For all practical purposes, the clemency process seems to be dead. It does not appear that any serious consideration is given. It certainly does not function in the manner that is suggested it should in Herrera. The clemency process is part and parcel of Florida=s death penalty scheme. All it provides is more arbitrariness.

10. Politics

Undoubtedly politics is a factor that causes arbitrariness in Florida=s death penalty scheme. In fact, the state assessment team noted that judicial elections and appointments are influenced by consideration of judicial nominees= or candidates views on the death penalty. ABA Report at xxxi. The team also cited this Court=s recent quantitative approach to proportionality review, which has been caused by political pressures and the change of composition of the Court. Id at 213.

Certainly, nothing could be clearer in Mr. Rutherford=s case, where the timing of his death warrant was controlled by a gubernatorial candidate, who is currently the Attorney General of Florida, Charles Crist. Under Florida law when a stay of execution is issued incident to an appeal, Aupon certification by the Attorney General that the stay has been lifted or dissolved, within 10 days after such certification, the Governor must set the new date for execution of the death sentence.@ Sec. 922.06, Fla. Stat (2005). In the recent case of Clarence Hill, Attorney General Charlie Crist waited until August 24, 2006, to notify the Governor that the United States Supreme Court=s stay of Mr. Hill=s execution had dissolved. This was a little less than two weeks before the contested primary election in which Mr. Crist was seeking the Republican nomination for governor however, and nearly two months after the stay had actually dissolved. Attorney General Crist and his representatives claimed that because Mr. Hill had nothing pending in court the statute was invoked; yet, his case was in fact pending in the Eleventh Circuit awaiting action by that court following the remand from the United States Supreme Court.

Now, only weeks away from the general election, Attorney General Crist has notified Governor Bush that Mr. Rutherford=s stay has likewise dissolved. And, Mr. Rutherford=s execution has been scheduled for just weeks before the election. Contrary to Attorney General Crist=s contention that Mr. Hill had nothing pending, thus, he invoked

the statute, Mr. Rutherford does have briefs pending before the Eleventh Circuit Court of Appeals.

Florida=s death penalty scheme is infected by politics and decisions made for political gain rather than fairness.

11. Mental Disabilities

The ABA assessment team concluded: AThe State of Florida has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.@ ABA Report on Florida at ix. And, while Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended its logic to those suffering from severe mental disabilities. Id. at xi. The ABA assessment team recommends that the logic regarding those with mental retardation be extended to those with severe mental disabilities, noting that mental illness can effect every stage of a capital trial. Id at xxxviii. Certainly, the distinction between the mental impairment of the mental retarded and the mental impairment of the mental ill and corresponding culpability of those inflicted with each condition appears to be arbitrary.

Furthermore, even in the case of the mentally retarded, Florida has created a procedure that will produce arbitrary results, as ABA assessment team acknowledges. The legislation and rule governing mental retardation procedures makes a distinction between those individuals whose cases are final and those who are not. See Fla. Stat. ' 921.137; Fla. R. Crim. P. 3.203. Those whose cases are final receive none of the protections as those whose cases are not final, including, but not limited to a jury=s consideration of the issue and the sixth amendment guarantee to effective assistance of counsel. These distinction depending on where a defendant is in his criminal process are arbitrary.

The ABA assessment team also criticized the burden of proof imposed on capital defendants and recommended that the State be required to disprove a defendant=s substantial showing that he is mentally retarded. ABA Report on Florida at xxxviii. The imposition of the burden of proof on the defendant will undoubtedly cause the decision as to who is mental retarded and does not get executed and who is not retarded and gets executed to turn on arbitrary factors, such as whether records demonstrating onset before the age of 18 exist, are family members still alive who can advise mental health experts as to the defendant=s adaptive skills, etc.

12. Crime Laboratories and Medical Examiner=s Offices

The ABA Report on Florida also describes many of the problems in the crime laboratories and medical examiner=s offices in the State of Florida. The team found that: AThe deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures and the failures to follow such procedures, and inadequate funding.@ Id at 83. The result of these problems is errors B errors that go unchallenged and uncorrected before the jury. Thus, yet another factor, unrelated to the circumstances of the crime or the character of the defendant, that injects arbitrariness into Florida=s death penalty scheme in violation of Furman.

D. The Circuit Court=s Ruling Denying the Claim.

In denying Mr. Rutherford=s claim the circuit court stated:

> 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. *Hoffman 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 Aconsider all newly discovered

which would be admissible@ at trial).

* * *

> Here Defendant fails to establish how the information gathered by the ABA assessment team regarding death penalty procedure falls within the consideration of Anewly 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.

However, this ruling was erroneous and premised upon a misreading of the multitude of cases which establish the standard for proving through new evidence that a constitutional violation occurred.[48]

This Court, as well as the United States Supreme Court has recognized that new evidence can support a claim of a constitutional violation, and even relief in some cases, i.e., judicial bias, juror misconduct, destruction of evidence, exclusion of evidence, or the constitutionality of a particular method of execution. See Miller-El v. Drehtke, 545 U.S. 231 (2005)(holding that evidence of racial bias by the prosecutors in selecting a jury in a capital case entitled defendant to relief); Rutherford v. State, 926 So. 2d 1100 (Fla. 2006)(analyzing claim of newly discovered evidence of unconstitutionality of lethal injection); Kokal v. State, 901 So. 2d 766, 779 (2005)(reviewing claim of constitutional violation of newly discovered destruction of evidence); Roberts v. State, 840 So. 2d 962 (Fla. 2002)(relief granted in a third successive 3.850 motion because of new evidence that the judge through *ex parte* communication had the prosecutor drafting findings in support of death sentence); Provenzano v. State, 739 So. 2d 1150, 1153 (Fla. 1999)(reviewing newly discovered evidence claim of constitutional violation of method of execution); Davis v. State, 742 So. 2d 233, 235-6 (Fla. 1999)(same); Card v. State, 652 So. 344 (Fla. 1995)(granting an evidentiary hearing to defendant to show through newly discovered evidence a constitutional violation in sentencing the defendant to death because there was no independent weighing); Porter v. State, 723 So. 2d 191, 196-7 (Fla. 1998)(granting sentencing relief to defendant who proved, through newly discovered evidence,

unconstitutional judicial bias).

Obviously, there are two type of newly discovered evidence claims: those that concern innocence and therefore require admissibility and those that concern constitutional violations. For example, in the case of Raleigh Porter, hours before his execution was to occur, newly discovered evidence surfaced as to comments that had been made by the trial judge who had imposed death. Porter, 723 So. 2d 191 (Fla. 1998). These comments made by the trial judge were inadmissible in a re-trial or new penalty phase, yet, relief was granted because the new evidence established judicial bias, a violation of the constitution.[49] Likewise, Mr. Rutherford has presented evidence which he argues now establishes that his sentence of death was and is unconstitutional. The lower court=s order construing newly discovered evidence only as evidence of innocence was wrong and ignored this Court=s precedent.

Mr. Rutherford has established a constitutional violation that entitles him to relief. See p. 23-65, *supra*. Indeed, this Court need only to review of the United States Supreme Court=s decision in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), and its aftermath here in Florida, with the evidence submitted by Mr. Rutherford to determine: 1) that the evidence is nearly identical in proving that the death penalty system in question is arbitrary and unconstitutional; 2) that death sentenced petitioner=s need not connect the factors which evidence the arbitrariness of the death penalty system to his/her case; and 3) that no procedural default rules or bars apply when making a Furman challenge.

In Furman, the Supreme Court reviewed three deaths sentences: two from Georgia and one from Texas. The Petitioners in Furman relied on compilations of problematic aspects of the death penalty statutes at issue, like those outlined in the ABA Report upon which Mr. Rutherford relies.

The evidence presented to establish that the death penalty systems in Georgia and Texas were administered in an arbitrary or discriminatory manner were exactly the type of evidence contained in the ABA Report B information regarding the number of murders in a given time frame, versus the number of death sentences handed down,[50] versus the number of executions;[51] the number of new trial and the results of those proceedings; exonerations;[52] the racial statistics of those receiving the death penalty;[53] the information that supported the conclusion that class and socio-economic status of a capital defendant have an impact on who is sentenced to death;[54] the information revealed that the variation of the representation of a capital defendant effects the outcome of the punishment.[55]

Mr. Rutherford=s claim that Florida=s death penalty scheme is arbitrarily applied is based on similar evidence and information that was relied upon by the Furman majority. The defects outline in the ABA Report demonstrate that Florida=s death penalty system is nothing more than a lottery.

In addition, the petitioners in Furman were not required to connect themselves to each factor showing that the death penalty systems in which they were sentenced was arbitrary or discriminatory. While Mr. Rutherford has pointed to several factors in Florida=s capital scheme that are arbitrary, under Furman it in not a question of whether he can demonstrate that any of those factors actually caused his sentence of death. If the death penalty statute is unconstitutional, the resulting death sentences are illegal and must be vacated, as this Court held in the wake of Furman. In Anderson v. State, 267 So. 2d 8 (Fla. 1972),[56] none of the forty defendants at issue there were required to demonstrate how the factors relied upon in Furman effected or prejudiced his case. None of the death sentenced individuals in Anderson were required to connect the problems in the Florida death penalty system to his case. All that was necessary was simply the demonstration that the system under which one was sentenced to death

allowed factors to be considered that were not relevant or proper in the sentencing scheme, i.e., that the system was administered in an arbitrary and discriminatory manner.

In In re Baker, this Court addressed a petitioner=s original writ requesting that his death sentence be voided. 267 So. 2d 331 (Fla. 1972). In Baker, this Court granted the motion and ordered that it was the Court=s Apurpose . . . to conclude the resentencing of all other persons in the class.@ Id at 335. Thus, Baker and those other individuals in his class, i.e., under a sentence of death, were likewise not required to demonstrate how the factors relied upon in Furman effected or prejudiced their cases.

As to the State=s contention that the issues contained in the report have been known for years B the same could be said for the information relied upon by the Furman majority. The Supreme Court relied on statistics, treatises, studies and first-hand information that had existed for years. Yet, no time bar was applied by this Court or any other court. To adopt one now would require this Court to overrule Anderson and Baker, and to arbitrary apply a time bar to a Furman challenge that the manner in which the Florida=s capital sentencing statute functions as whole violates the eighth amendment by permitting the process to be permeated with arbitrary factors that determine who is executed and who is not.

The ABA=s Report on Florida is new. It is a detailed compilation of all aspects of Florida=s capital sentencing scheme cataloguing its flaws and defects. It explains how through the synergistic effect the flaws and defects in the system rendered the outcome in individual cases dependent upon a myriad of arbitrary factors totally unrelated to the circumstances of the crime or the character of the defendant. No previous report, prepared since 1976 when Proffitt v. Florida, 428 U.S. 242 (1976), approved Florida=s new death penalty statute, has ever identified and documented the flaws in Florida=s death penalty system showing that it is functioning in the same arbitrary manner as

those schemes found unconstitutional in Furman. Now, in 2006, the data and information is extensive and clearly demonstrates that the flaws and arbitrariness of Florida=s death penalty system.

Florida=s death penalty system is infected with factors that lead to arbitrary results. The imposition of death sentences is premised upon facts unrelated to the circumstances of the crime or the character of the defendant. These arbitrary factors are virtually identical to the ones identified in Furman, and have caused Florida=s death penalty system to operate as nothing more than a lottery. The ABA Report identifying many of the factors which demonstrate the arbitrariness of the system is newly discovered evidence of a constitutional violation that requires relief.

ARGUMENT II

THE LOWER COURT ERRED IN DISMISSING MR. RUTHERFORD=S MOTION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a).

If the ABA Report on Florida is not evidence, but a compilation of well-recognized facts regarding the operation of the Florida=s death penalty, as the State argues, for purposes of being raised pursuant to Rule 3.850, then those facts compiled in the Report is properly raised as a Rule 3.800(a) motion. Rule 3.800(a) provides that AA court may at any time correct an illegal sentence imposed by it@. After Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam), the Florida Attorney General filed a motion in this Court asking this Court to vacate 40 death sentences because in light of Furman the death sentences were illegal. As this Court said, AThe Attorney General relies upon Rule 3.800, *F. R. Cr. P., 33* F.S.S., which authorizes the Court at any time to correct an illegal sentence imposed by it.@ Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972). This Court noted that though it Aha[d] never declared the death penalty to be unconstitutional, we nevertheless recognized and follow the consensus determination of the several opinions rendered by the United States Supreme Court in Furman v. Georgia, supra.@ Accordingly, this Court applied Furman, which involved three petitioners (two from Georgia and one from Texas) challenging the death sentences imposed upon them, to the Florida statutory scheme and concluded that it was unconstitutional in light of opinions rendered in Furman. This Court ultimately concluded Ait is our opinion that we should correct the illegal sentences previously imposed without returning the prisoners to the trial court.@ Id. at 10.

This Court=s opinion in Anderson reflects that the mere fact that the petitioners had been sentenced to death and the information contained in the Furman opinion was sufficient to establish Rule 3.800(a) relief. In addition, this Court=s opinion reflects that there was absolutely no analysis of whether the forty individuals sentenced to death had timely objected to Florida=s death penalty nor of whether the error was either harmless or prejudicial. It was simply accepted that if the statute was unconstitutional, the resulting death sentences were illegal within the meaning of Rule 3.800.

Indeed, this Court has stated: AA sentence that patently fails to comport with statutory or constitutional limitations is by definition >illegal=.@ State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998). Accordingly, Rule 3.800 is available to a criminal defendant whose sentence is Aillegal@. See Hopping v. State, 708 So. 2d 263 (Fla. 1998)(Awhere it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800.@). As this Court has explained: AA rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination.@ State v. Callaway, 658 So. 2d 983, 988 (Fla. 1995).[57]

Mr. Rutherford, like Petitioner Anderson, filed his 3.800(a) motion relying on the recent ABA Report which discussed Florida=s death penalty system and how the system has worked over the past thirty years. Mr. Rutherford=s motion relied on the jurisprudence by this Court as well as the documented facts regarding the system=s functioning that was contained in the ABA Report on Florida to establish his claim that Florida=s current death penalty system violates the dictates of Furman.

In dismissing Mr. Rutherford=s motion, the lower court determined that the ABA Report on Florida was Anot a part of the record before [the] court@. (Oct. 4, 2006, Order at 3). Alternatively, the Court determined that Mr. Rutherford=s challenge was not an issue for a 3.800(a) motion because this Court and the United States Supreme Court had upheld Florida=s death sentencing statute. (Id.). The lower court=s order is in error.

First, the ABA Report need not be Ain the record@ as the lower court defined it. As in Anderson, the evidence relied upon in Furman, was not Ain the record@ of any of the forty petitioners before the court, yet, this Court granted relief pursuant to Rule 3.800, and as the Court pointed out, the State stipulated that the use of Rule 3.800 was

proper. Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972).

In Anderson, the only record evidence that the petitioners were required to produce was his or her sentence of death. However, in this case, while Mr. Rutherford certainly established that the record in his case showed that he had been sentenced to death,[58] the lower court stated that it was not persuaded by such an argument. (Oct. 4, 2006, Order, at 3). The lower court=s order does not comport with this Court=s precedent in Anderson. In fact, neither the lower court, nor the State has attempted to explain how Mr. Rutherford=s case is any different from the petitioners in Anderson.

Likewise, during the Huff hearing, in arguing that Mr. Rutherford=s 3.800 motion should be dismissed, the State argued that Mr. Rutherford=s motion was based on this Court jurisprudence and the information contained in those opinions in arguing that Mr. Rutherford=s claim was untimely:

> Part of what, the thing called the ABA Report, something that needs to be considered is that **the ABA Report is nothing but a compilation of opinions written by the courts, written by the Florida Supreme Court, and an examination of those by a number of individuals on the panel**. And from that standpoint it expresses the opinions of those persons regarding the sentencing scheme and talks about specific problems since the level of prosecutorial misconduct, racial issues, overrides. Again, none of which is present in the Rutherford thing.
>
> **But the bottom line is this is not new**. These are opinions that have been written in black letter law for a number of years. **This is just simply something that has been available**. **The Florida Supreme Court, the United States Supreme Court, and has been available for them for whatever analysis they want to look at this**. And that is the basis of the ABA Report in many ways. And an analysis of those, and their opinions of that. All of which have been present for the Court's consideration of a Furman-type of claim.

(Oct. 3, 2006, Hearing, at 52-3)(emphasis added). So, according to the State=s own argument it was entirely proper for Mr. Rutherford to bring his claim in a Rule 3.800(a) motion, which, of course has no time limitation. According to the State, the ABA Report was merely a compilation of the jurisprudence from this Court and the United States Supreme Court B similar to the jurisprudence used by this Court in Anderson to grant 3.800 relief. Furman like the ABA Report was a compilation of information showing the

arbitrariness of the death penalty in a particular system due to the extraneous and impermissible factors which infected the sentencing determination. And the information contained in the ABA Report is nearly identical to the type of information set forth in Furman and relied upon by this Court in Anderson. Moreover, in response to Mr. Rutherford=s claim that the ABA Report constituted newly discovered evidence that Mr. Rutherford=s death sentence violated Furman, which was contained in his successive Rule 3.850 motion, the State asserted: ANo evidentiary hearing should be granted because none of the claims require further evidentiary development.@ (Sept. 29, 2006, Response, at 1). In that pleading, again the State maintained that the ABA Report Ais not evidence at all.@ (Id. at 9). According to the State, the report merely set forth legal matters that have been decided by this Court and Ahave been known for years.@ (Id. at 11).

But, the State cannot have it both ways B the report is either new evidence establishing a constitutional violation, in which case the evidence is properly raised in a Rule 3.850 motion, or it is evidence that has existed, but was merely compiled by the ABA, and established a constitutional violation, in which case the information is properly raised in a Rule 3.800(a) motion, like in Anderson.

Furthermore, the lower court rejected Mr. Rutherford=s claim because this Court and the United States Supreme Court have upheld Florida=s sentencing statute. But of course, the year before, Furman, the United States Supreme Court upheld the death penalty scheme in California in McGautha v. California, 402 U.S. 183 (1971). What Furman makes clear is that over time as information emerges, as case law develops and as lessons regarding the process and its functioning are learned, the death penalty experiment which began thirty years ago in Florida proves more and more that death sentences in Florida are based on arbitrary factors B factors unrelated to the circumstances of the crime or the character of the defendant. These arbitrary factors

have so infected the process as to render it in violation of Furman. The facts detailed in the ABA Report show that Florida=s death penalty experiment has failed. Mr. Rutherford is entitled to relief.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. RUTHERFORD AN EVIDENTIARY HEARING ON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE OF INNOCENCE, *i.e.* JONES V. STATE, BECAUSE THE FILES AND RECORDS DO NOT SHOW THAT HE WAS CONCLUSIVELY ENTITLED TO NO RELIEF.

Mr. Rutherford recently learned of additional information which demonstrates that Mary Heaton committed the crime for which he is convicted and sentenced to death. The information presented to the lower court is yet another confession by Heaton to another individual, Brian Adkison, acknowledging that she committed the murder. Heaton told Adkison, that she killed an older woman who lived in Milton by beating her to death with a tool, and that she had planned to rob the victim of money and medication. (Appendix F).

The lower court has denied Mr. Rutherford an evidentiary hearing so that he can present the evidence of Heaton=s confessions. This is so despite this Court=s determination that a postconviction defendant is Aentitled to an evidentiary hearing unless >the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.=@ Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. Similarly situated capital postconviction defendants have received evidentiary hearings based on newly discovered evidence.[59] State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(noting that lower court held an evidentiary hearing on allegations that co-defendant had made inculpatory statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999) (remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant=s allegations that another individual had confessed to committing the crimes

with which defendant was charged and convicted); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce and acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to Ademonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]@); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

The lower court denied Mr. Rutherford an evidentiary hearing, and the substance of his claim because he Apresented this Court with nothing new.@ The lower court relied on this Court=s previous opinion affirming the summary denial of Mr. Rutherford=s claim of newly discovered evidence of innocence. See Rutherford v. State, 926 So. 2d 1100 (2006). Thus, the lower court ignored the significance as to a confession to yet another individual, independent of her confessions to Gilkerson and Pouncey.[60] Not only does Adkison add one more witness to Heaton=s guilt, but also all of the information obtained by Mr. Rutherford corroborates the other information and the information from trial that Heaton cashed the victim=s check, obtained $2000.00 and then proceeded to start spending a large quantity of the money.

The circuit court also ignored cases from this Court where capital defendants present evidence concerning a particular fact repeatedly which warrants them evidentiary hearings and even relief. In the circuit court=s view, those defendants should

have been denied hearings and relief because they had not presented anything new. Yet, that was not what this Court held. For example, in State v. Mills, (Mills II), this Court affirmed the lower court=s determination to grant Mills penalty phase relief based on information that the co-defendant was the actual shooter in the crime for which Mills was convicted and sentenced to death. 788 So. 2d 249, 250 (Fla. 2001). However, just weeks prior to granting Mills relief, the lower court had denied Mills relief, though he had held and evidentiary hearing, when he heard evidence as to the same issue **B** who was the shooter.[61] Mills v. State, 786 So. 2d 547, 550 (Fla. 2001)(Mills I).

While Mills finally obtained relief after raising evidence that was not anything new, others at a minimum, have been entitled to an evidentiary hearing to prove their claims, though not raising anything new.[62] See Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(granting evidentiary hearing regarding allegations about the veracity of testimony from two jail house snitches) and Lightbourne v. State 549 So. 2d 1364, 1365 (Fla. 1989)(granting evidentiary hearing regarding allegations about the veracity of testimony from two jailhouse snitches); Jones v. State, 709 So. 2d 512 (Fla. 1998)(denying relief, after defendant was granted an evidentiary hearing to present evidence of other suspects confessions) and Jones v. State, 678 So. 2d 309 (Fla. 1996) and Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)(remanding case for evidentiary hearing on evidence of another=s guilt of crime); Swafford v. State, 828 So. 2d 966 (Fla. 2002)(indicating evidentiary hearing held on evidence of other suspect) and Swafford v. State, 679 SO. 2d 736 (Fla. 1996)(remanding for an evidentiary hearing regarding confession by other suspect).

The circuit court=s conclusion that Adkison=s information is nothing new and therefore not significant enough to hold an evidentiary hearing is in error. The circuit court erroneously focused on this Court=s analysis of the Gilkerson information to determine that Mr. Rutherford=s current allegations would be Ainsufficient to create a

probability of acquittal.@ The circuit court at the State=s urging did not conducted the requisite cumulative analysis of the evidence now presented and the new evidence previously presented. The court failed to realize the significance of the Adkison information, and that now three independent witness have heard Heaton confess to murder. Certainly, the shear number of individuals who have heard Heaton=s confession is significant in analyzing Mr. Rutherford=s claim.[63] It was significant enough to this Court to grant evidentiary hearings in other cases. See State v. Mills, 788 So. 2d 249 (Fla. 2001); Mills v. State, 786 So. 2d 547, (Fla. 2001); Lightbourne v. State, 742 SO. 2d 238 (Fla. 1999); Lightbourne v. State 549 So. 2d 1364 (Fla. 1989); Jones v. State, 709 So. 2d 512 (Fla. 1998); Jones v. State, 678 So. 2d 309 (Fla. 1996); Jones v. State, 591 So. 2d 911 (Fla. 1991); Swafford v. State, 828 So. 2d 966 (Fla. 2002); Swafford v. State, 679 SO. 2d 736 (Fla. 1996).[64] In addition, the witnesses that Mr. Rutherford seeks to present corroborate one another.

Both the circuit court and the State reference Heaton=s alleged mental problems as supporting the notion that her confessions are unreliable. (Oct. 6, 2006, Order at 12; Oct. 3, 2006, Hearing at 44, 82). However, such a determination cannot and should not be made without providing Mr. Rutherford the benefit of an evidentiary hearing.[65] The confessions can certainly be used to argue that Heaton=s Amental problems@ are a ruse that she uses to hide her guilt behind. When questioning gets tough, she has mental problems. When she becomes afraid that the truth may come out, she has mental problems. Certainly, an evidentiary hearing is warranted to explore the various possibilities. However, until an evidentiary hearing occurs, the affidavits are required by law to be taken as true. Yet, neither the State nor the circuit court have accepted the affidavits as true.

Likewise, the circuit court=s reference to the other evidence presented at Mr. Rutherford=s trial shows a flaw in the court=s analysis. (Oct. 6, 2006, Order at 12). The

circuit court is taking the evidence at trial in the light most favorable to the State and is ignoring the substantive and impeachment evidence presented by Mr. Rutherford.

And, the lower court never mentions the evidence presented at trial which inculpated Heaton. For example, Heaton was the only person proven to possess an unusually large amount of money following the crimes. Harvey Smith testified that Heaton contacted him on August 22, 1985, told him that she had just received her income tax refund and wanted to purchase an automobile (R. 444). In fact, later that day Heaton purchased an automobile from Smith (R. 444). So, Heaton lied to Smith about where she obtained the funds to purchase the car and was proven to possess an unusually large quantity of money, facts which corroborate the evidence that has surfaced over the past year regarding Heaton=s confessions. Likewise, the victim=s check was made payable to AMary Francis Heaton@ and was endorsed with the signature AMary Francis Heaton@. Heaton was identified as cashing the check at approximately 2:02 p.m. on August 22, 1985. The bank teller did not see any other individuals present with Heaton. The victim was found deceased later that day, at approximately 7:30 p.m. Heaton=s fingerprints were never compared to the unidentified fingerprints found at the crime scene. Heaton=s hair was never compared to the unidentified hair found on the victim=s body. And, the handwriting exemplars submitted by Heaton were insufficient to exclude her as having written or signed the check. Additional samples were not submitted, though requested by law enforcement personnel.

Having the information from Adkison, Gilkerson, Pouncey and Eddie Bivin, Mr. Rutherford could have made a compelling case that Heaton committed the murder and made it look like Mr. Rutherford did it.

Furthermore, the lower court failed to analyze the Adkison information as to how it would have impacted the jury=s recommendation at the penalty phase, especially

considering that the jury recommended the death sentence by the narrowest of margins B 7 to 5. The evidence of Heaton=s confession would have affected the jury=s consideration of mitigation, aggravation and provided lingering doubt. Therefore, the files and records do not rebut the affidavit and the factual allegations and conclusively show that Mr. Rutherford is entitled to no relief. Mr. Rutherford is entitled to an evidentiary hearing.

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

The affidavits of Brian Adkison, Alan Gilkerson, Marie Pouncey, and Eddie Bivin present compelling evidence of Mr. Rutherford=s actual innocence. This new information, alone, and when combined with the evidence of Mary Heaton=s involvement, and the lack of physical evidence support the conclusion that Mr. Rutherford is innocent of the crime for which he stands convicted.

This summer, the United States Supreme Court issues its opinion in House v. Bell, 126 S.Ct. 2064 (2006). In House, the Supreme Court again considered the significance of actual innocence claims brought by capital postconviction defendants. The Supreme Court reviewed Mr. House=s evidence of innocence[66] in the federal habeas context and found that he had shown that in light of the evidence presented Aany reasonable juror would have [had] reasonable doubt@. Id at 2077. In the federal habeas context, meeting the actual innocence burden of proof provided Mr. House with the opportunity to pursue Ahabeas corpus relief based on constitutional claims that are procedurally barred under state law.@ Id. at 2068.

Additionally, the House Court examined evidence of innocence similar to the evidence of innocence previously pleaded by Mr. Rutherford.[67] In House, the Supreme Court reviewed Atroubling evidence@ of another suspect. Id. at 2083. As in Mr.

Rutherford=s case A[t]he confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused.@ Id. at 2085.[68] Heaton=s confessions, especially in light of her possession of the victim=s check shortly after the crime was committed would have Areinforced Aother doubts as to [Mr. Rutherford=s guilt.@ Id.

In considering the affidavits, this Court must not substitute its own judgement for the Aindependent judgement as to whether reasonable doubt exists@. Schlup, 513 U.S. at 329. While Mr. Rutherford must meet the high standard of the Ano reasonable juror test@, he need not entirely dismantle the pillars of the prosecution=s case or affirmatively demonstrate innocence. See Schlup, 513 U.S. at 329, 331. Certainly, the evidence provides reasonable doubt as to Mr. Rutherford=s conviction and meets the Ano reasonable juror test@.

Further, this Court must consider that the prosecution=s case against Mr. Rutherford was entirely circumstantial. The case consisted of a palm print matched to Mr. Rutherford in the victim=s bathroom, where she was found, Heaton=s testimony that Mr. Rutherford possessed the victim=s wallet and checkbook and disposed of the wallet in the woods, Ward=s testimony that Mr. Rutherford requested that she fill out the check, and finally, various statements made to individuals that Mr. Rutherford planned to rob the victim and did rob and kill the victim.

However, there is no question that Mr. Rutherford had been in the victim=s home the day before the crime working - he admitted that fact. Mr. Rutherford explained that he entered the victim=s bathroom to work on the sliding doors. Furthermore, Heaton=s admission that she killed the victim to Mr. Adkison and Mr. Gilkerson demonstrates not just that her testimony was false, but explains why she testified falsely. It also give her motive to influence Ward=s testimony. Heaton=s confessions that she committed the

murder supports the impeachment already presented of the individuals who claimed that Mr. Rutherford made incriminating statements.[69]

Mr. Rutherford has presented a colorable claim of actual innocence. The lower court erred in denying his claim based on what the court characterized as "overwhelming evidence of guilt" that was presented at trial. Mr. Rutherford's conviction and sentence are unconstitutional. Relief is proper.

ARGUMENT V
FLORIDA'S CLEMENCY PROCESS IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Rutherford has a continuing interest in his life until his death sentence is carried out, as guaranteed by the Due Process clause of the Fourteenth Amendment to the United States Constitution. See Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272, 288 (1998)(Justices O'Connor, Souter, Ginsburg and Breyer concurring)("A prisoner under a death sentence remains a living person and consequently has an interest in his life"). This constitutionally-protected interest remains with him throughout the appellate processes, including during clemency proceedings:

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, **or in a case where the State arbitrarily denied a prisoner any access to its clemency process**.

Woodard, 523 U.S. at 289 (emphasis added). The denial of Mr. Rutherford's clemency petition was arbitrary and the process he received was not due.

The lower court denied Mr. Rutherford's claim that the clemency process in Florida is arbitrary based only on the fact that clemency is "within the sound discretion of the executive branch." (Oct. 6, 2006, Order at 8). But, of course, the lower court's order ignores Ohio Adult Parole Authority, et al. v. Woodard, in which the Supreme Court held that judicial intervention was warranted in a case where a clemency system was arbitrary. Mr. Rutherford can show that Florida's clemency system is arbitrary.

In fact, Mr. Rutherford relied on the ABA Report and the Florida Death Penalty Assessment Team=s information regarding Florida=s clemency process in support of his claim. See Appendix B. The report made clear that clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors that the legal system does not correct can be considered. The state assessment team issuing the report found that the State of Florida=s clemency process was severely lacking: AGiven the ambiguities and confidentiality surrounding Florida=s clemency decision-making process and that fact that clemency has not been granted to a death-sentenced inmate since 1983, it is difficult to conclude that Florida=s clemency process is adequate.@ ABA Report on Florida at vii.

Florida=s clemency process is entirely arbitrary because there are no rules or guidelines Adelineating the factors that the Board should consider, but not to be limited to@ for consideration of clemency. Given the opportunity, Mr. Rutherford can prove that Florida=s clemency process is arbitrary.

Indeed, Mr. Rutherford did in fact raise a specific due process claim to the clemency process with which he was provided. The lower court simply denied Mr. Rutherford=s claim because it was his second request for clemency, suggesting that no due process is required in such a circumstance. However, this conclusion conflicts with United States Supreme Court case law. It is clear that Mr. Rutherford was provided a process for a second clemency proceeding, thus, contrary to the lower court=s conclusion, he was also entitled to due process. See Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272, 288 (1998)(Justices O=Connor, Souter, Ginsburg and Breyer concurring); Evitts v. Lucey, 469 U.S. 387, 401-2 (1984)(holding that if a state provides a process to a defendant, that process must be due).

The process Mr. Rutherford received in his recent request for executive

clemency was not due. The facts surrounding Mr. Rutherford=s request for executive clemency are as follows: On November 29, 2005, Governor Bush signed Mr. Rutherford=s warrant and scheduled his execution for January 31, 2006, at 6:00 p.m. On January 25, 2006, 2006, Regina Grayson, the oldest daughter of Mr. Rutherford personally delivered a petition for executive clemency to Governor Bush=s office. (Appendix D). Through the petition Ms. Grayson asked for mercy for her father and pointed to several reasons upon which to grant clemency. (See Appendix E). Those reasons included her fathers heroic service as a United States Marine during the Viet Nam conflict and the impact his service had on his mental and emotional stability; Mr. Rutherford=s dedication to his family, particularly his children; the jury=s narrow 7 - 5 recommendation for the death penalty; the State=s destruction of evidence; and the doubt about her father=s guilt. Id. Many of the reasons presented were never considered by the jury that narrowly recommended that Mr. Rutherford be sentenced to death and the quantity and quality of the information was never presented during Mr. Rutherford=s initial clemency process.[70]

Mr. Rutherford was deprived of due process in the clemency process and the decision to deny him clemency was the equivalent of flipping a coin. The same day that Ms. Grayson delivered the clemency petition to the Governor Bush=s office, ABush spokesman Russell Schweiss said the governor=s clemency lawyer Aha[d] not yet reviewed the petition but that such cases normally must be filed by convicts themselves or their lawyers, not relatives. He said the issues appear more appropriate for a court of appeal.@ Bill Kaczor, Associated Press, *Rutherford=s Daughter Asks Clemency from Bush, Cabinet*, January 25, 2006.

After much prodding of the governor=s office personnel, Ms. Grayson was told that she could speak to the governor=s Assistant General Counsel, Victoria Brennan, concerning the petition. Like, the governor=s spokesperson, Ms. Brennan, believed that

it was Anot [Ms. Grayson=s] place@ to ask for clemency for her father. (Appendix D). And, Ms. Brennan also felt that the issues Ms. Grayson spoke to her about Mr. Rutherford Adid not matter@ in the clemency process. (Id.). Mr. Rutherford=s petition was apparently given little, if any, consideration.

Ms. Grayson=s experience in attempting to persuade the governor and his cabinet to grant clemency proves that the process is arbitrary. No rules have been set forth about who is the proper party to request clemency, what factors Amatter@ in the clemency process and there is apparently a fundamental misunderstanding in Governor Bush=s office as to the purpose of the clemency process.

The misunderstanding of the clemency process is demonstrated by Governor Bush=s General Counsel, Raquel A. Rodriguez, who was asked to comment on the clemency section contained in the ABA Report on Florida. Ms. Rodriguez did not agree that having specific rules and considerations for the clemency process were appropriate as the report recommends. ABA Report on Florida Appendix 1. Ms. Rodriguez set forth her belief that Athe clemency process should not be designed to re-litigate the question of guilt@ and or to review what courts had determined to be Aharmless errors@ Id. Likewise, Ms. Rodriguez dismissed factors such as a petitioner=s mental health issues, age of a defendant and racial disparity as being relevant factors in the clemency process, in part because they are Amatters currently required by law to be addressed at various stages of a murder prosecution.@ Id. However, the factors Ms. Rodriguez dismisses are exactly the types of factors that should be considered and have been considered in granting clemency in the State of Florida. See ABA Report on Florida at 255-6 (outlining the factors considered in granting clemency in the six (6) death-sentenced petitioner=s who received clemency since 1972 B lingering doubt; mental capacity; the disproportionality of the petitioner=s sentence); see also Herrera v. Collins, 506 U.S. 390, 411-12 (1993)(AClemency is deeply rooted in our Anglo-

American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.@)(footnotes omitted). In fact, in Herrera, the United States Supreme Court made clear: AExecutive clemency has provided the "fail safe" in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.@ Id at 415.

The Florida Death Penalty Assessment Team has indicated that A[t]he clemency process can only fulfill its critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.@ Furthermore, A[t]he clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies.@ The arbitrariness of Florida=s clemency process is demonstrated by the lack of any specific factors to be considered and in Mr. Rutherford=s case, Ms. Brennan=s opinion that the issues raised on his behalf did not Amatter@, i.e., that the decision-maker did not take into account all factors@. Id. at 254.

Mr. Rutherford did not receive due process in his recent clemency proceeding because the process was completely undefined and the information he presented (see Appendix E), was simply dismissed. The denial of clemency for Mr. Rutherford was the equivalent of flipping a coin. Relief is proper.

CONCLUSION

Mr. Rutherford submits that this case should be remanded for an evidentiary hearing on each of his issues. Based on his claims for relief, Mr. Rutherford is entitled to a new trial and/or sentencing proceeding. Terminally, Mr. Rutherford=s sentence of death violates the dictates of Furman v. Georgia.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, FL 32399, this 9th day of October 2006.

CERTIFICATE OF FONT

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

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