IN THE SUPREME COURT OF FLORIDA

LEO ALEXANDER JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 81,346
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, will be referred to in this brief as the state. Appellant, Leo Alexander Jones, will be referred to by his name. The state accepts Jones' preliminary statement concerning symbols used to refer to the record, and will use the same symbolism in its brief. (The state notes however, that, at pages 31 through 33 of his initial brief, Jones has inadvertently used the symbol PC-R rather PC-R2 to refer to the record in the instant 3.850 appeal.)

REQUEST FOR ORAL ARGUMENT

The State concurs in Jones' request for oral argument.

STATEMENT OF THE CASE AND FACTS

In 1981, Leo Alexander Jones was convicted of murder and sentenced to death. Both conviction and sentence have survived numerous challenges, on direct and collateral appeal. Jones v. Dugger, 928 F.2d 1020 (11th Cir.), cert. denied, 112 S.Ct. 216 (1991); Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Jones v. State, 528 So.2d 1171 (Fla. 1988); Jones v. Wainwright, 473 So.2d 1244 (Fla. 1985); Jones v. State, 440 So.2d 570 (Fla. 1983).

Now, Jones seeks postconviction relief based on a claim of newly discovered evidence. The circuit court initially denied relief on this claim without a hearing, applying the standard of Hallman v. State, 371 So.2d 482, (Fla. 1979), to Jones' alleged newly-discovered evidence. This Court, adopting a new standard for reviewing claims of newly-discovered evidence, reversed and remanded the case to the circuit court for an evidentiary hearing. Jones v. State, 591 So.2d 911 (Fla. 1991).

After an evidentiary hearing, the circuit court denied relief. Thereafter, Jones' motion for rehearing was denied. This appeal follows.

The application of the appropriate standard necessitates an evaluation of the "weight of both the newly-discovered evidence and the evidence which was introduced at the trial." Ibid. Jones' Statement of the Case and Facts not only contains numerous factual assertions with which the state cannot agree (e.g. "No one witnessed the actual shooting," Brief of Appellant, p.2; Hammond and Jones gave statements only "after hours of interrogation, beatings and coercion," Brief of Appellant, pp. 2

and 3; "Ms. Reed's testimony basically mirrored that of Mr. Cole," Brief of Appellant, p.20; etc.), but indiscriminately mixes together references to trial evidence, evidence which could have been introduced at trial but was not, and exhibits which have never been admitted in evidence. Therefore, the state offers the following:

A. The Evidence At Trial

At 1:00 a.m. on May 23, 1981, three police officers, in separate cars, left the scene of a hostage situation and proceeded east on 6th street in Jacksonville toward Davis street (TR 708-09). Officer Dyal, in the second car (TR 709), testified that as he turned left on Davis Street, he heard a "large bang, a rifle shot or a gunshot" (TR 710). He looked to his right rear at an apartment building just southeast of the intersection of Davis and 6th streets, and observed flashes from two more "real loud" gunshots "coming from this ... brick apartment house" (TR 710).

Officer Szafranski, in the third car, was shot in the head (TR 737). His car came to a stop in the intersection (TR 737). The first officer to him testified that he was in convulsions and his foot was jammed on the brake so hard he could not be pulled out of his car (TR 738).

Other officers quickly arrived. Patrons of a bar across the vacant lot just north of the apartment building stated that the shots had come from the apartment building (TR 743, 766). Officer Wilmouth entered the lower left apartment and found one young man and some women and children (TR 744-45). While there, he heard "footsteps running back and forth, not just walking but

running back and forth to the apartment that was directly overhead on the top left" (TR 745). Meanwhile, Officer Mundy entered the downstairs right-hand apartment. It was unoccupied and empty except for some junk in the back and a table against the front window on which lay a pack of matches and a still-cold bottle of orange juice (TR 769, 775). There was a piece of newspaper in the window "set up" in a way that would have been "good camouflage" (TR 811-12), as well as a fresh "recoil" mark on the window frame (TR 814, 820).

Officer Mundy, along with Officer Roberts, proceeded up the stairwell. No one responded when they knocked on the door to the upper left-hand apartment, but an elderly man answered from the upper right-hand apartment (TR 778). He let them search his apartment. While there, they heard footsteps coming from the upper left-hand apartment (TR 779). The two upper apartments shared a porch, so the officers proceeded out the front door of the upper right-hand apartment across the porch to the front door of the opposite apartment (TR 779-80). It was open (TR 780). Officer Mundy, now joined by not only Officer Roberts but also Officer Torrible, shouted into the darkness, "Police. Is there anyone home. . . If so, come forward." No one did (TR 782). Officer Mundy entered, with his flashlight. He thought he saw someone on a couch at the end of the hall (TR 783). Finding a light switch, he turned it on. He observed Bobby Lee Hammond pretending to be asleep but jerking uncontrollably (TR 787). Hammond lept to his feet when Officer Mundy "racked" his shotgun and told him to wake up (TR 788). Mundy asked Hammond if anyone else was in the house and whether any guns were in the house.

Hammond answered no to both questions (TR 788). However, after Mundy ordered anyone else in the apartment to came out or be shot, Leo Jones spoke up from a bedroom (TR 719). Officer Torrible attempted to take him into custody (TR 791). As officer Torrible conducted a "pat down" for weapons, Jones dropped a live .380 caliber bullet (TR 975, 979). Both he and Hammond began fighting the officers (TR 972, 980). With difficulty, they were subdued and taken away (TR 798).

It should be noted here that both Hammond and Jones were fully dressed when discovered by the police, even though Hammond was pretending to be asleep and Jones was hiding in a darkened bedroom (TR 831).

There were many guns in the apartment. Under the bed in Jones' bedroom were two 30-30 caliber lever-action Marlin rifles (each of which had one fired shell casing in the barrel) and a fully loaded M-14 Ruger semi-automatic rifle (TR 994-95). A legible fingerprint lifted from one of the two Marlin rifles was identified as Jones' (TR 995). In the living room were two more guns: a .30 caliber carbine with a fold-up paratrooper stock and a .22 caliber rifle (TR 995).

A firearms examiner testified that the bullet which killed Officer Szafranski, although fragmented, could be conclusively identified as having been fired from a 30-30 Marlin lever action rifle, and was consistent (although not conclusively so) with having been fired from the 30-30 Marlin lever action rifle that had Jones' fingerprint on it (TR 1013, 1040, 1048-49).

Hammond testified that he was Leo Jones' cousin (TR 912), and had been at Jones' apartment since 11:30 that evening; he had

planned to spend the night (TR 914). Glen Schofield (later identified as Jones' roommate) was there when Hammond arrived, but left the apartment about an hour before the murder, carrying a pistol (TR 915, 928, 964). Jones, Hammond testified, left 10-15 minutes before the murder carrying a rifle (TR 915, 920, 937). Hammond heard a shot, and Jones returned to the apartment almost immediately, still carrying the rifle (TR 918, 919). Jones told him to "lay back down." Soon afterwards, the police arrived (TR 919).

Detective Eason testified that he talked briefly to Jones at 4:00 a.m. Jones was "cocky" and "hostile" (TR 1095). Because of injuries described by Eason as "slight" and by the examining doctor (Dr. Pack) as "minor", Eason sent Jones and Hammond to the hospital for examination and, afterwards, to breakfast (TR 1095, 1300). Eason did not talk to Jones again until noon (TR 1096). Jones was still "cocky" and told Eason repeatedly that he understood his rights (TR 1096). Then they talked, having a "pretty far range of conversation" during which Eason developed a "fairly good rapport" with Jones -- to the point they even had an "arm wrestling match" (TR 1118). Jones eventually signed a written statement admitting that he had taken a rifle from his apartment, walked downstairs to the empty apartment, shot the policeman from behind the window, returned to the apartment, hid the rifle under the bed, and waited until the police came (TR 1100). After signing the statement, he explained orally why he had shot the policeman:

> I'm tired of being fucked with. I go to the store and I'm fucked with. I go down the street and I'm fucked with. My friends are

> fucked with, my family is fucked with, and I'm tired of policemen fucking with me, and I decided I'd kill a policeman and that's why I did it. (TR 1101)

This explanation was consistent with a threat Jones had made only a week before, when after being arrested on several charges, including possession of a firearm by a convicted felon (TR 1144, 1272-73), Jones stated "he was tired of police hassling him, that the police weren't the only ones that had guns and that he was going to shoot a mother-fucking pig" (TR 1142).

After the state rested, Jones presented the testimony of three witnesses and also testified himself. Nathaniel Hamilton (resident of the upper right-hand apartment) testified he heard two shots spaced 2 to 3 seconds apart, which he thought came from the vacant lot north of the apartment building (TR 1160-61). He admitted on cross-examination that the first shot, which woke him up, was very, very loud and he really did not know where it came from (TR 1165). He also testified the police treated him "all right" (TR 1166).

Two additional witnesses, one living in the next building to the north of Jones' apartment building, and one in the next building to the south, testified that they thought from the sound of the shots that they had come from the vacant lot next to Jones' apartment building and not from the building itself (TR 1173, 1193).

Jones testified that he shared his apartment with Glen Schofield and that the guns were Schofield's (TR 1216). Schofield had been there earlier that evening, but left after Jones' cousin Bobby Hammond arrived (TR 1216). Jones did not see

whether or not Schofield was carrying a pistol when he left (TR 1216, 1287). Afterwards, Jones and Hammond watched television for 40 to 45 minutes and then went to bed (TR 1219). Hammond lay on the sofa, while Jones went to the bedroom and undressed (TR 1219-20). Twenty minutes or so later, Jones "heard a gun -- heard two gunshots" (TR 1221). The shots came from the vacant lot next door (TR 1225). Jones put his clothes back on (TR TR 1226). When the police knocked on the door, Jones ordered Hammond not to open it (TR 1226). After the police entered by the front door to the porch, both Jones and Hammond were beaten with a flashlight (TR 1232). Later, on the way to jail, Jones was beaten and kicked for "ten minutes or so" (TR 1235). He was kicked and beaten with "flapjacks" upon his arrival at the station (TR 1235-36). Then he was taken upstairs to a room where he was kneed in the side, jumped on, hit with a pipe in his "privates" and threatened (TR 1237-38). After all this he was so "whipped up" he could not say anything (TR 1238). He was then taken to the hospital (TR 1242). The whole top of his head was swollen and bleeding (TR 1242). After his return, he was interviewed by Detective Eason, who presented him with a theory of the case, wrote it up, and made Jones sign it (TR 1246-47). Jones signed it because he was "whipped all up" (TR 1247). He denied threatening to kill a police officer a week before the crime (TR 1248-49).

On cross-examination, Jones denied owning a gun (TR 1252) (even though he had bragged about how many guns he owned only a week before shooting Officer Szafranski (TR 1142)). He denied knowing that there were guns under the bed he was "sleeping" in

(TR 1253) (even though one of them had his fingerprint on it, TR 1013)).

Jones denied sleeping in the same bed Schofield slept in (TR 1253). However, when the prosecutor asked Jones if the bed with the guns under it was Jones' "regular" bed, Jones -- recognizing the implications of this question -- admitted only that he slept there "at times" (TR 1254). He could not explain why he had gotten fully dressed, including shirt and shoes, after having earlier undressed and gone to bed, when he had no intention of allowing the police into the apartment (TR 1256).

Asked why he had not told the doctor what had happened to him or what was wrong with him when he was taken to the hospital for examination, Jones answered: "I couldn't tell him. I was all whipped up, how could I tell him?" (TR 1264).

He admitted that although he did not like guns, he had at least one in his possession not too many days before the murder of Officer Szafranski (TR 1273). He denied knowing any weapons were in his apartment the night of the murder (TR 1273) (even though his fingerprint was on one of them (TR 1013)).

He admitted he had earlier told a psychiatrist that he did not remember making a statement to Detective Eason at all (TR 1282), even though he now remembered talking to Eason (TR 1284), and signing the statement (TR 1246-47). He denied arm-wrestling Detective Eason; he "wasn't in no shape" to do so (TR 1284). He admitted that between the time he was taken to the hospital until he signed the confession over 6 hours later, no one "laid a hand" on him (TR 1283).

Finally, he conceded that the police cars coming down Sixth Street "probably would" have shined their lights directly into the field from where he contended the shots had been fired (TR 1290).

In rebuttal, Dr. Pack testified that he had examined Jones the morning of May 23, 1981, and had observed only minor injuries and no evidence of any neurological injuries (TR 1300). Contrary to Jones' testimony, Dr. Pack did not find that the top of Jones' head was swollen or bleeding (TR 1300). Also in rebuttal, Detective Japour testified that he gave Jones his Miranda warnings that morning (TR 1306-07). According to Japour, Jones, rather than being "all whipped up," was smug and belligerent (TR 1307). Jones stated he knew his rights (TR 1308). When asked to sign a waiver, Jones told Japour: "I've already told you one time I know what my fucking rights are and I ain't signing a fucking thing to prove anything to you" (TR 1308).

B. Jones' Alleged Newly-Discovered Evidence

Attached to Jones' November 1991 motion for postconviction relief were several affidavits from alleged newly-discovered witnesses (App. 1-11). In addition, contending his investigation was "ongoing," Jones included in his brief on appeal from the first denial of this postconviction motion, copies of additional affidavits and reports not attached to the motion. Initial Brief of Appellant, case no. 78,907 at pp 73-74 and 82-84. These affidavits and reports are summarized in this Court's opinion. 591 So.2d at 914.

The motion was originally denied by the trial court based on the legal insufficiency of the motion under the then-prevailing

legal standard. On appeal, this Court adopted a new legal standard for addressing claims for relief based on newly-discovered evidence, and remanded the case to the trial court for an evidentiary hearing. 591 So.2d at 916. At the subsequent hearing, there was no stipulation concerning the admissibility of any affidavits, and none were admitted in evidence. See cf., T 9-26 and 40-41 (discussion of the possible expense of bringing Bobby Hammond from California to testify); T 27-34 (discussion of the necessity for orders for transporting the inmate witnesses to the evidentiary hearing) and T 48 (implicit acknowledgment of both parties that case would be decided on basis of "evidence submitted by the defendant at this hearing").

The following witnesses testified at the evidentiary hearing:

Daniel Cole and Sharon Denise Reed were boyfriend and girlfriend at the time of the shooting (T 66, 126). They were walking home from the Blodgett homes area sometime after midnight (T 67-8, 126-27). Cole testified that just before reaching the intersection of 4th and Madison, he heard a shot. They paused for a few minutes and saw someone running down Madison towards them (T 100-101). (Madison is one block east of Davis; 4th is two blocks south of 6th (T 128-29)). According to Cole, they proceeded down 4th Street one-half block before the man reached the intersection of 4th and Madison (T 103). Cole recognized the running man as Glenn Schofield and saw he was carrying a rifle or a shotgun (T 74). Reed testified somewhat differently. According to her, she and Cole were at the intersection of 4th and Madison when they heard the shot (T 150). A few seconds

later, Schofield ran by in front of them as they were still crossing intersection (T 153-56, 158). Both Reed and Cole claimed they told no one except Reed's mother about this for some 10 years because they were afraid of Schofield (even though he was incarcerated shortly after the murder) (T 142, 108-09). Reed admitted she was a friend of Leo Jones and that she spoke up after 10 years of silence because she read that Jones was about to be executed (T 144). Cole denied knowing Jones (T 89), but admitted having five felony convictions (T 92).

Reed's mother Martha Bell testified that Reed telephoned her after the murder and told her about having seen Schofield running down the street carrying a gun (T 180-81). Bell acknowledged that she was close friends with the Jones family and talked to them on a daily basis but said nothing to them about this (T 192-194).

Patricia Owens testified that she was Schofield's girlfriend in 1981 (T 210). She saw Schofield briefly early Sunday morning after the murder (T 210). The next morning, she saw him again and he told her that if anyone asked, he had been with her (T 215). His response to her inquiry about the police officer was, "do I think he was going to say anything to go to prison for the rest of his life" (T 216). Later, when he got out of prison in 1989, Schofield

> would talk about the killing of the police officer, that - what he did and who he will do it to, you know. He talked about it a lot. (T 219).

Asked if Schofield mentioned Leo Jones, Owens said yes and that Schofield had said

> that he wasn't going to make anytime for it, that he wasn't and that nobody was going to bother him you know. (T 220).

When asked if Schofield told her how the police officer had been killed, Owens stated:

> He would talk about it and say that he was shot through his window or windshield or something of this sort and he just went on and on. (T 220).

On cross-examination, Owens confirmed that Schofield had left certain depositions with her that contained information about the shooting, including allegations about Schofield's possible involvement (T 235-36). She admitted that she only mentioned any of this information after she and Schofield had broken up (T 239). She claimed she had not came forward sooner because she was afraid of Schofield (T 241), but admitted she had not been afraid to claim for herself some $40,000 that Schofield contended was his (T 243).

Jones presented the testimony of five prison inmates who claimed to have knowledge that Schofield confessed to killing Officer Szafranski: Frank Pittro, Franklin Delano Prince, Michael Richardson, Andrea Hicks Jackson, and Donald Perry.

Andrea Jackson did not claim to hear any confession herself. She did state that she met Glenn Schofield's sister Barbara in prison (T 252). In the fall of 1991, Andrea Jackson, Barbara Schofield and several others were playing cards and watching television (T 253). When they heard the news that Leo Jones' death warrant had been signed and that he was close to being executed, Barbara commented that "they were executing the wrong man", because her brother had told her he did it (T 254). Andrea

Jackson admitted on cross-examination that she was on Death Row herself for killing a police officer (T 259).

Michael Richardson testified that, contrary to prior statements to a state prosecutor, Schofield had never told him he had killed a cop (T 315). Richardson had made his earlier statements in an attempt to further his own plea negotiations and because Leo Jones was his friend (T 315, 320, 333-34). His prior statements were a "hoax" and Glenn Schofield "had never confessed murder" (T 327-28). Richardson admitted that he had been convicted of "several" felonies, but he could not recall "right off" how many there were (T 336).

Frank Pittro testified that he talked to Glenn Schofield while they both worked in the kitchen together at UCI in 1985 (T 271). According to Pittro, Schofield said he had shot a police officer with high-powered rifle from inside a house and left out the back way (T 272-73). Schofield did not say whether Leo Jones was also involved (T 273), but did state that Jones was on Death Row for the crime (T 272). Schofield did not tell Pittro what he had done with the weapon. Pittro testified that he did not tell anyone about this for 6 years because he did not think anyone would believe him (T 296-97). He admitted that he had nine prior felony convictions (T 275), including one for forgery resulting from his filing a forged document in a federal habeas corpus proceeding (T 287-289, 291).

Donald Perry was another inmate who testified. In 1992, Perry testified, he saw Schofield in a holding cage at the Department of Corrections Regional Medical Center at Lake Butler (T 381, 383). Perry asked him why he didn't tell the truth about

Leo Jones, and Schofield answered "I done it. . . . I killed the cop" (T 385). According to Perry, Schofield was afraid he would be prosecuted if he told the prosecutor the truth. (T 385). Schofield provided no details of any kind about the murder other than he supposedly used a "30-30" (T 395).

Perry admitted he has "about two" felony convictions, including one for first-degree murder, and is serving a life sentence with a mandatory 25-year minimum (T 387, 391). He denied knowing Leo Jones or giving Jones a "high sign" when he entered the courtroom (T 387), even though he is "on confinement . . . right close to Death Row", and has talked to at least one death-row inmate about the case (T 393).

Finally, prison inmate Franklin Delano Prince also testified. Sometime, probably in 1986, Prince was in a conversation with a group that included "a couple" of correctional officers about the Leo Jones case, which had recently been discussed in the newspaper (T 399-400, 408). Schofield walked up (T 400), and "told the fellow that he didn't know what he was talking about, that he had did the crime" (T 408). Schofield provided no details about how this occured (T 424). Prince denied being a friend of Leo Jones until he was reminded that he had told Detective Housend that he was (T 418-19). Then he admitted having a "relationship" with Jones since 1974 (T 421). In addition, he had gone to school with Leo Jones' brother "Jitt" (T 422). Prince also denied telling Detective Housend that he could not talk about the case until CCR told him what to say (T 419). (Detective Housend testified to the contrary in rebuttal, i.e. that Prince refused to talk until CCR

told him what to say (T 521)). Prince admitted having eight felony convictions, including first-degree murder (T 417-18), and confirmed that he is presently serving a total sentence of 390 years (T 426). Prince explained why he had waited six years to report Shofield's statement:

> Because normally in the institution when the guys be talking, I let it go. . . [G]uys that boosting themselves up, that type things do happen. . . I think it gives them some type of self-esteem, Judge. I really do. Some kind of false self of themselves. . . .
>
> [B]ut [w]hat really made me come forward, I read it in the paper. . . I believe that motivated me to just go forward with it. (T 431).

Jones also called Judith Dougherty, an attorney for CCR (T 374 et seq), and Donna Harris, an investigator for CCR (T 436 et seq). Dougherty travelled to Jacksonville in 1988 to investigate this case, but was unable to develop any specific leads (T 375-76). Harris testified that she began investigating the case in 1991 and discovered witnesses Pittro, Perry, Prince, Jackson, Richardson, Willie, Owens, Reed, Cole, Dixon and Brown (T 439-54). Harris could not recall whether Prince had told her that correctional officers had been present when Schofield made the admissions that Prince allegedly heard (T 458). She could not recall making any efforts to locate these correctional officers (T 459-60). Harris agreed with Jones' assertion in his November 10, 1991 petition that trial counsel could and should have located Schofield's girlfriend Patricia Owens (nee Ferrell), Katherine Dixon (girlfriend of Schofield's close friend Tony Brown), and Artie Hammonds (Bobby Hammonds' brother)(T 474-476). (The "s" on the end apparently is optional.)

It is notable that Jones originally planned to call Stanley Thomas as a witness; however he, like Michael Richardson, recanted his earlier story. As recounted by counsel for the defense, Thomas had told defense counsel that Schofield had bragged about having done "it" and "put it off on somebody;" that Schofield, not Jones had committed the crime (T 481). However, Thomas also had told defense counsel that he had not talked to the state attorney, and defense counsel had just learned from the state that that was not true (T 482). Counsel for the state explained that he had talked numerous times to Thomas, who had initially stated that Schofield had told him that although Schofield had "got the gun" for Jones, Jones had done the shooting (T 484). Thomas also told the state attorney that Jones' mother and sister were paying Schofield to make statements in prison "to take the rap for this." The State attorney reported that Thomas had said that the state could record telephone conversations between himself and the Jones family; the state did so and learned that "Thomas was trying to set us up and have other people ... talk on the phone as if they were the Jones family" (T 485). The state decided not to use the witness; based on this report, counsel for Jones decided not to either (T 485).

Jones also did not call Schofield himself as a witness, notwithstanding that Schofield was "sitting back there ... ready to testify" (T 478, 499). The Court addressed this issue, noting that under Florida rules of evidence, admissions against penal interest were admissible only if the declarant is unavailable, and the defense had offered nothing to show that Schofield was unavailable (T 505-507). Counsel for the defense responded that

he did not know whether Schofield "would testify here at this hearing or not" (T 507). But, counsel contended, "we all know what Mr. Schofield will say if he takes the stand. He's going to say, it's a lie, I never said it, I never did it. We all know that." (T 508). Therefore, counsel for the defense was not going to call Schofield (T 508). The State, noting once again that "Mr. Schofield is sitting right back there," argued that it was defendant's burden to satisfy the evidence code and that the defense was making, presumably, "a strategic decision" not to call Schofield (T 511-512).

Jones also presented additional exhibits that were excluded by the court either on hearsay grounds or because they clearly were not newly-discovered or both (T 362-63, 488-97).[1]

In rebuttal, the State presented the testimony of Detective Housend, who testified that Franklin Delano Prince had told him that Leo Jones was a personal friend of his (TR 520) and that

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[1] These included: (1) An affidavit by Stanley Willie who stated that Schofield told Willie that Leo Jones was not the killer. Since Schofield did not claim to Willie that he (Schofield) was the killer, Schofield's statement to Willie was clearly not against his penal interest and fits within no other exception to the hearsay rule; (3) Police incident reports and case activity summaries that were known and available at the time of the trial and are therefore not newly-discovered (and also are hearsay); (3) A statement from a witness whose name was on the original discovery list at trial to the effect that he heard footsteps after the shooting between Jones' apartment and the next door. This was known at trial and therefore is not newly-discovered; (4) Other trial documents showing that Schofield was on the witness list for both the defense and the state and that he had been subpoenaed to testify before Jones' grand jury; and (5) A transcript of a police disciplinary hearing and a copy of a reported appellate opinion which reflect on Officer Mundy's credibility in unrelated cases at a much later time.

Prince could not talk to Housend until "CCR told him what to say" (TR 521).

C. The Lower Court's Rulings

In a 61-page order, the trial court reviewed the evidence presented to determine first, how much of the proffered evidence qualified as newly-discovered; second, how much of the newly-discovered evidence would be admissible; and finally, whether the newly-discovered and admissible evidence would probably have resulted in an acquittal of Leo Jones if it had been introduced at trial (PC-R2 206-269).

The trial court determined that any statements by Katherine Dixon, Paul Marr, Linda Atwater, and so much of Patricia Owens' testimony as related to statements Schofield made to her soon after the murder did not qualify as newly-discovered evidence because it all could have been discovered earlier through the use of due diligence (PC-R2, 224-25). The court determined that the testimony of Daniel Cole, Sharon Denise Reed, Andrea Hicks Jackson, Frank Pittro, Michael Richardson, Franklin Delano Prince, Donald Perry, and so much of Patricia Owens' testimony as referred to statements made by Schofield after his release from prison in 1989 qualified as newly-discovered (PCR2, 228).[2]

The court determined that none of Schofield's alleged out-of-court "confessions" were admissible under §90.804(2)(c), Fla. Stat. (1991) as admissions against penal interest because

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[2] The court also found the testimony of Sharon Denise Reed's mother, Martha Bell, to be newly-discovered, but admissible only to rebut an inference of recent fabrication. Matha Bell had no personal knowledge of Schofield's possible involvement.

Schofield was available to testify (PC-R1 233). In addition, the statements lacked corroboration (PC-R2 266).

The court ruled that the enforcement of the requirements of §90.804(2)(c) does not violate due process or unconstitutionally impair Jones' right to present a defense (PC-R2 234-251).

The court concluded that the admissible newly-discovered evidence was not of such quality that, had it been introduced at Jones' trial, it probably would have resulted in his acquittal (PC-R2 284-85). Moreover, the court concluded that even if Schofield's out-of-court confessions were admissible, they would not have probably resulted in an acquittal had they been introduced at trial, because the "confessions" were "fraught" with credibility problems, were lacking in corroboration, and did not create any reasonable doubt about the validity of Jones' confession to police and other evidence connecting him to the crime (PC-R2 285-87).

D. Related Background Matters

The foregoing is presented as an accurate summary of the evidence presented at trial and offered at the instant 3.850 hearing on the newly-discovered-evidence claim, along with the trial court's ruling on the claim. However, because Jones has devoted a considerable portion of his Statement of Facts discussing the validity of Jones' confession (Initial Brief of Appellant at pp. 3-13), as well as police reports and other matters--including affidavits--not admitted in evidence indicating that Schofield was and is a suspect (Initial Brief of Appellant at pp. 16-18, 19-20, 28), some additional discussion of the background of this case is in order.

It is little wonder that Jones attempts to cast doubt on the validity of his confession, since nothing he offers by way of newly-discovered evidence of his alleged innocence in any way negates his own confession. This voluntariness issue, in fact, has been hashed and rehashed, and has always been resolved adversely to Jones' claim that the confession was coerced or was otherwise inadmissible. Hammond testified at the pre-trial hearing on the motion to suppress about the alleged physical abuse of Jones by police, while Jones himself testified at trial about the alleged abuse. This Court held on direct appeal that Jones' confession was properly found to have been freely and voluntarily given, and that Jones' "assertions that he was physically abused prior to giving his statement cannot be substantiated." Jones v. State, supra, 440 So.2d at 574.

Jones next raised the confession issue via an ineffective assistance of counsel claim in his initial 3.850 motion. Jones contended that his trial attorney was ineffective for introducing Hammond's physical-abuse testimony only at the hearing on the motion to suppress and not at trial. This Court agreed that trial counsel's decision "not to call the unpredictable Bobby Hammond as a witness" was a reasonable tactical decision. Jones v. State, supra, 528 So.2d at 1174.

Jones next raised several issues concerning his confession in his federal habeas corpus petition. The Eleventh Circuit affirmed the denial of habeas relief, holding: (1) Jones' cross-examination of Hammond was not unconstitutionally limited because his trial attorney could have called Hammond as a defense witness to elicit testimony about the alleged physical abuse by police,

Jones v. Dugger, supra, 928 F.2d at 1025; (2) trial counsel's tactical decision not to call Hammond as a defense witness indicates that further examination would not have been helpful, id. at 1026; (3) Jones' confession was not obtained in violation of his right to counsel, id. at 1026-27; and (4) Jones had offered nothing new to contradict the state court finding that his confession was voluntary or to support his "allegations of police coercion and brutality." Since the Court would not grant relief "based on mere naked allegations of such police wrongdoing," it concluded "that Jones' confession was not involuntarily made." Id. at 1027.

Jones quotes extensively from the pre-trial deposition testimony of Bobby Hammond and cites "similar" pre-trial testimony of Bobby Hammond at the hearing on the motion to suppress. Brief of Appellant at pp 3-10. Obviously, he offers nothing newly-discovered here, as the trial court recognized when it refused to continue the proceeding until Hammond's testimony could be obtained, and declined to consider the post-hearing proffer of Hammond's videotaped deposition (T 361) (PC-TR2 278).

As for Arty Hammonds, Jones' own witness testified that he was not a newly-discovered witness (T 476), and Jones did not present his testimony at the hearing below, nor obtain a stipulation to the admissibility of the affidavit attached to his newly-discovered-evidence motion. The same goes for the affidavits of Jones' mother and attorney William White, which he quotes at pp 12 and 13 of his Brief. Neither of these two affiants testified at the hearing, nor were their affidavits admitted in evidence.

In fact, Jones has offered no newly-discovered evidence pertaining to the voluntariness of his confession, and this entire discussion in his brief is an irrelevant digression. See Routly v. State, 590 So.2d 397, 401 (fn. 5) (Fla. 1991) ("Absent stipulation or some other legal basis, we cannot see how the affidavits can be argued as substantive evidence.")

The trial court's rulings on Jones' proffer of defense exhibits have been discussed previously. See footnote 1. That Schofield might have been a possible suspect is not newly discovered. In fact, Jones has previously contended that his trial attorney was ineffective for failing to investigate and present evidence that Schofield was the person who murdered officer Szafranski. 528 So.2d at 1174, 1175; 928 F.2d at 1027. It is notable that Jones' trial attorney testified in 1986 that: "Almost everybody in that section of Jacksonville was aware of this case, was aware of on the street as to -- that Leo Jones was in trouble. This Schofield story had circulated. That's the reason I went to St. Augustine to see Schofield, because I knew where he was. And certainly, if any of these people had any knowledge that they're now testifying to, they could have gotten hold of anyone of those members of that family, I would have come to them or they could have called me. That's why I don't believe any of that existed." Transcript of Jones' original 3.850 motion hearing, p. 478.

Although some theory or other concerning Schofield's possible involvement has been brought up before this hearing, the alleged manner of Schofield's involvement has varied over the years and from one proffered witness to the next.

In 1986 Homer Lee Spivey testified that he and Phillip Anderson were drinking heavily in their car parked in an alley between the bar and Jones' apartment building. As they were cleaning up beer that Spivey had spilled in the car, a shot rang out from between the two buildings. Spivey saw "all these cops going down the street," and hid in the car. Transcript, original 3.850 hearing at pp 123-140. Anderson testified that he heard the shot between the two buildings also, and soon thereafter saw a man come from this area and run to a car "right in front of the phone booth," where he stayed until after all the police left, when the car drove away, with a woman driving. Transcript, original 3.850 hearing at pp 172-200.

Marion Manning testified at the 1986 hearing that she was Schofield's girlfriend in 1981, and that on the night of the murder, she and Schofield were supposed to go to a club. She found him at 4th and Davis, but he was talking to "some guys" and was not ready to go. He instructed her to go up Davis Street to look for his brother. When she returned from that errand, Schofield was not there, and "all the police" were at 6th and Davis. She circled the block for five or six minutes, until Schofield came from Lee Street (which is one block west of Davis), and jumped in the car, stating that Leo Jones had shot somebody at 6th and Davis. Transcript, original 3.850 hearing at pp 111-123.

Prison inmate Paul Alan Marr testified at the 1986 hearing that Schofield had told him that he had killed the police officer; according to Marr, Schofield said that he had gone upstairs in an apartment building, retrieved a rifle from a gun

case which contained three firearms, gone downstairs, shot the officer from downstairs in the apartment, gone back up the stairs, wiped the gun down, placed it back in the gun case, and fled the area. Transcript, original 3.850 hearing at pp 359-60.

Linda Atwater stated in an affidavit attached to the latest 3.850 motion that she was at Jones' apartment sometime after midnight borrowing money from Jones, who was her boyfriend. As she was leaving, going down the stairs, Schofield passed her, running upstairs, carrying a rifle or shotgun. She asked him why he was running, and he answered, "Them crackers are after me." App. 2.

Katherine Dixon stated in an affidavit attached to the instant 3.850 motion that Schofield failed to meet her and her boyfriend in the Davis Street area as planned the night of the murder, but that when whe woke up the next morning, she saw a rifle in her closet which her boyfriend identified as a 30-30. App. 3.

So, depending on which theory is being advanced by the defense at any given moment, Schofield left Jones' apartment either unarmed, or with a pistol, or with a rifle; he shot officer Szafranski either from the apartment building or from the vacant lot next door; he either disposed of the rifle by returning to the apartment and replacing the rifle under Jones' bed (presumably, while Jones was not looking), or he carried it with him as he ran down Madison; he either ran to a car parked right in front of the murder scene and hid there with an unidentified woman until the police left, or he ran down Madison carrying his rifle, or he was over on Lee Street without the

rifle claiming that Leo Jones had shot someone, or he left the rifle at Catherine Dixon's apartment on North Liberty.

SUMMARY OF ARGUMENT

Jones has not offered newly-discovered admissible evidence that "probably" would have caused an acquittal if it had been introduced at trial. What he mostly has offered is inadmissible and unreliable hearsay testimony from multi-convicted felons serving lengthy sentences, some of whom recanted their "Schofield confessed" stories even before they could be presented at the newly-discovered-evidence hearing. All were friends of Leo Jones, but not one of them bothered to report their information for years after supposedly learning it.

The testimony and reports of Schofield's alleged confessions to prison inmates is inadmissible hearsay, not coming within the declarations-against-penal-interest to the hearsay rule because Jones has not shown that Schofield himself was unavailable to testify; in fact, the record shows the contrary. Moreover, no sufficient corroboration of this hearsay testimony has been presented, and the witnesses simply are not credible.

A defendant's right to present a defense does not mean that a defendant may ignore valid state evidentiary rules, or present unreliable hearsay testimony. Chambers v. Mississippi supports the exclusion of the proffered inmate testimony. The problem addressed in Chambers was that the State of Mississippi had excluded reliable hearsay because Mississippi did not have an exception to the hearsay rule for declarations against penal interest, and the declarant was unavailable to the defendant through the operation of another Mississippi evidentiary rule, so

that by the "mechanistic" application of the two Mississippi evidentiary rules, Chambers was precluded from presenting evidence whose reliability was not in question. By contrast, nothing in Florida's declaration-against-penal-interest rule (which is identical to the federal rule) violates due process.

Jones' cannot attempt to corroborate his hearsay evidence with procedurally-barred evidence that is not newly discovered and could have been presented at trial; nor can he relitigate an issue of ineffectiveness of counsel that has already been decided against him. In any event, however, the non-newly discovered evidence excluded by the court below does not corroborate Jones' newly discovered evidence.

The trial court considered all the newly-discovered admissible evidence and determined that it would not probably produce an acquittal on retrial. In addition, the trial court determined that even if Jones' inadmissible hearsay evidence were considered and weighed, Jones still has not met the probably-produce-an-acquittal standard. The trial court performed the task assigned to it by this Court, and its conclusions are presumptively correct.

Finally, this Court should reconsider its standard for reviewing newly-discovered-evidence-of-innocence claims. The standard adopted is not the federal standard, is too lax, invites routine and repetitive claims of innocence based upon dubious and non-credible inmate affidavits, and will cause unecessary delays, to the detriment of the State's interest in finality.

ARGUMENT

JONES HAS NOT OFFERED NEWLY DISCOVERED ADMISSIBLE EVIDENCE OF SUCH NATURE THAT HE SHOULD BE GRANTED A NEW TRIAL

Jones is a confessed cop killer who has been fairly tried and proven guilty beyond a reasonable doubt of the crime of murder. The presumption of innocence which originally cloaked him has long since disappeared, and he stands before this Court presumptively guilty. What he offered below does not overcome that presumption of guilt. The State will address the issues along the same general outline as they are addressed in Jones' brief, and therefore will address the admissibility of Schofield's alleged confessions in Section A, the consideration of non-newly discovered evidence in Section B, and the trial court's application of this Court's newly adopted probably-produce-an-acquittal standard to Jones' evidence in Section C. In addition, in Section D, the State would ask this Court to reconsider its formulation of the "federal" standard for claims of innocence based on newly discovered evidence, in light of Herrera v. Collins, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), which has been decided since this case last appeared in this Court.

A. JONES HAS NOT OFFERED ANY ADMISSIBLE EVIDENCE THAT SCHOFIELD HAS CONFESSED TO THIS MURDER

This Court directed the trial court to conduct "an evidentiary hearing" at which the trial court "should consider all newly discovered evidence which would be admissible." 591 So.2d at 916. The trial court ruled that the testimony about Schofield's alleged confessions was inadmissible hearsay because

the testimony did not satisfy the requirements of §90.804(2)(c), Fla. Stat. (1990), and that the consideration of this testimony was not constitutionally required as a matter of due process. Jones implicitly concedes that this testimony is inadmissible under Florida law. He does not even argue that the trial court misconstrued the Florida hearsay rule concerning declarations against penal interest; his argument is limited to his alleged "constitutional right to present a defense." Brief of Appellant at 40. Nevertheless, an analysis of the scope and application of the relevant Florida evidentiary rule is certainly a relevant predicate to any constitutional analysis of the rule.

There are a number of exceptions to the hearsay rule. Many apply whether or not the declarant is available as a witness. These exceptions are set forth in §90.803. By contrast, the exceptions enumerated in §90.804, including the exception for declarations against interest, are applicable only when the declarant is "unavailable," as defined in §90.804 (1). In addition, a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement." §90.804 (2)(c). (Emphasis supplied.)

Section 90.804 is virtually identical to Federal Rule of Evidence 804. Like the Florida rule, the federal rule requires that the declarant be unavailable and that any declaration against penal interest offered to exculpate the accused be corroborated.

Moore explains why the 804 exceptions include an unavailability requirement:

> [The unavailability] requirement insures that the Rule 804 exceptions will not be utilized in the absence of necessity and it is based on the judgment that all of the Rule 804 exceptions, save that of former testimony, have fewer circumstantial guarantees of reliability than the exceptions in Rule 803. Therefore, the live in-court testimony of the declarant is preferred. If that testimony is unavailable, then the hearsay testimony as to what the declarant said is admissible on the theory that it is better to have the hearsay evidence than no evidence at all. [11 Moore's Federal Practice, Art. VIII, §804.02, p. 239] [Emphasis supplied.]

It should be noted that declarations against penal interest were not admissible at common law. Moore explains the traditional distrust of such declarations, and the corroboration requirement that was included when when the federal rule was adopted:

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicion of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.... The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication. [Id. at §804.01, pp. 234-35.] [Emphasis supplied.]

Florida has long allowed declarations against penal interest to be admitted as an exception to the hearsay rule, so long as the "person confessing is unavailable to testify himself." Baker v. State, 336 So.2d 364 (Fla. 1976). As in the federal system, the burden of showing the unavailability of the

declarant is on the party offering the out-of-court statements. Magna v. State, 350 So.2d 1088 (Fla. 4th DCA 1977); United States v. Fernandez-Rogue, 703 F.2d 808, 812 (5th Cir. 1983).

The trial court correctly held that the testimony about Schofield's alleged confessions would be admissible, if at all, only if Jones satisfied the statutory requirements for the admission of declarations against penal interest (PC-R2 230-31). The record shows that Schofield was available and ready to testify, but defense counsel chose not to call him. As the trial court found (PC-R2 233-34), Jones has failed to show that Schofield is unavailable to testify, and therefore his "confessions" are inadmissible for that reason alone.

The trial court also questioned whether Schofield's alleged confessions were actually declarations against his penal interests, given the context in which they were made. See United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992) ("a statement by one criminal to another ... is more apt to be jailhouse braggadocio than a statement against his criminal interest').

In addition, the trial court concluded that the witnesses offered to prove that Schofield had confessed were not credible. In Maugeri v. State, 460 So.2d 975, 979 (Fla. 3rd DCA 1984), it was held that with respect to inculpatory declarations against interest (offered by the state against the defendant), it was not necessary to evaluate the credibility of the in-court witness prior to admitting the testimony by the in-court witness concerning the statements by the out-of-court declarant. However, this Court has upheld the exclusion of exculpatory

declarations against penal interest based upon the lack of credibility of the in-court witness. Hardwick v. State, 521 So.2d 1071, 1073-74 (Fla. 1988). And the Eleventh Circuit has held that it is proper to consider the credibility of the in-court witness. United States v. Hendrieth, 922 F.2d 748, 750 (11th Cir. 1991).

The witnesses offered by Jones to prove that Schofield confessed are nearly as non-credible as witnesses can be. All but Owens are long-term inmates with nothing to lose by perjuring themselves. Two of Jones' potential inmate witnesses (Richardson and Thomas) recanted their "Schofield confessed" story even before Jones could present their testimony. Another (Jackson) did not not hear Schofield confess, but only reported what his sister had said. That only leaves three inmates who actually testified that they have heard Schofield confess. Of these three, Pittro has nine felony convictions, including one for filing a forged document in a federal habeas proceeding; Perry has at least two felony convictions, including one for murder; and Prince has eight felony convictions, including murder. Pittro and Prince waited for six years before they bothered to tell anyone about Schofield's alleged confession. Prince has been a friend of Jones since 1974, and went to school with his brother. Perry is confined near death row, and has talked to at least one death-row inmate about this case. Perry and Pittro know each other, and Pittro also knows Prince and Paul Marr (who testified in 1986 about an alleged Schofield confession). No testimony has been presented from anyone else who might have been present when Schofield allegedly made any of

the reported "confessions," and who could corroborate the testimony of these witnesses, even though one of these alleged "confessions" was reportedly made in the presence of prison guards. The trial court concluded that these witnesses were not credible (PC-R2 59).

Owens, like the inmate witnesses, waited several years to report her information about Schofield, allegedly because of her fear of Schofield, which apparently evaporated after he left her and tried to claim $40,000 that she thought was hers. The trial court found Owens' testimony not to be credible because of her former relationship with Schofield (PC-R 287).

The trial court's conclusions about the non-credibility of the witnesses who claim that Schofield confessed provides further support for the exclusion of their testimony as hearsay not falling within any exeption to the hearsay rule. See Echols v. State, 484 So.2d 568, 576-77 (Fla. 1985) ("the well-established rule [is] that all evidence and matters appearing in the record should be considered which support the trial court's decision").

Finally, declarations against penal interest offered to exculpate the accused are not admissible unless "corroborating circumstances show the trustworthiness of the statement." §90.804 (2)(c) The proffered testimony is lacking in corroboration. These witnesses provided no information that they could not readily have obtained from a source other than Schofield. Prince provided no details whatever. Although Owens reported that Schofield "talked about it a lot," and "just went on and on," the only detail she provided was that the victim

"was shot through his window or windshield or something of this sort." Perry reported only that Schofield had used a "30-30." Pittro reported the most detail, but he could report only that Schofield had shot the officer with a high-powered rifle from inside a house and left out the back way.

The requirement of corroboration was added to the federal rule concerning the admissions of declarations against penal interest because of the "special dangers of a trumped-up confession by a professional criminal or some person with a strong motive to lie." Weinstein's Evidence, Vol 4, p. 804-153. Moreover, it has been noted that "when a prisoner's life is at stake, he often can find someone new to vouch for him." Herrara v. Collins, supra, 122 L.Ed.2d at 231 (O'Connor, J., concurring). Such "11th-hour" witnesses are inherently suspect. Cf. Taylor v. Illinois, 484 U.S. 400, 414, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Except for Owens, the "11th hour" witnesses in this case can fairly be described as "professional criminals" with a motive to lie (saving Jones' life). Owens had her own motive to lie (getting even). The possible corroboration of the testimony of these witnesses is minimal; combined, there are only the facts that: (1) Schofield (2) using a 30-30 or other high-powered rifle (3) shot the victim through "his window or windshield" (4) from inside a house. While the latter three facts are consistent with the evidence presented by the prosecution at trial, they are hardly such corroborating circumstances as would "show the trustworthiness of the statement[s]." §90.804 (2)(c). They are instead "facts" familiar to anyone the least bit familiar with the case.

Significantly, however, these "facts," especially the allegation of Schofield's involvment, are inconsistent with the trial evidence presented by the defense at trial, including Jones' own testimony. Jones offered testimony of himself and others at trial (and has contended since) that the shots came from the vacant lot next to his apartment, not from his apartment house. Moreover, neither Jones nor Hammond has ever testified that Schofield left the apartment with a 30-30 rifle, or with a high-powered rifle or with any kind of rifle at all. At most, Schofield was armed with a pistol when he left the apartment. Even though Jones testified on his own behalf at his trial, he did not testify, and never has testified, "Schofield left our apartment carrying a rifle;" nor has he ever testified, "We had another 30-30 Marlin lever action rifle that is now missing;" nor has he ever testified, "Schofield returned to our apartment after the shooting to return a 30-30 lever action rifle to its hiding place under my bed." Instead, both Jones and Hammond testified that Schofield left the apartment that he shared with Jones, without a rifle, over an hour before the murder, and he never returned.

The testimony about Schofield's "confessions" is all hearsay, and not admissible absent corroborating circumstances indicating trustworthiness. There are no corroborating circumstances in this case sufficient to show the trustworthiness of the statements. The trial court properly ruled that this testimony was inadmissible hearsay. See, e.g., Pittman v. State, 646 So.2d 167, 171-72 (Fla. 1994) (trial judge correctly exluded Hodges' testimony about his stepson's

confession where stepson was available to testify and statement lacked corroboration and trustworthiness). See also, Cammarano v. State, 602 So.2d 1369 (Fla. 5th DCA 1992) (jailhouse confession to fellow prisoner is "fraught with credibility problems"); Denny v. State, 617 So.2d 323 (Fla. 4th DCA 1993); Woodard v. State, 579 So.2d 875 (Fla. 1st DCA 1991); Ards v. State, 458 So.2d 379 (Fla. 5th DCA 1984).

Jones, however, contends that he has a "constitutional right to present a defense" which cannot be defeated by the application of a state hearsay rule. Brief of appellant, p. 40. Citing Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), Jones contends "that due process requirements supersede the application of state hearsay rules." Brief of Appellant, p. 40.

It is true, of course, that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S. at 485..." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). But that principle has never meant that a state evidentiary rule must be invalidated whenever it prevents a criminal defendant from admitting any evidence, no matter how dubious. The U.S. Supreme Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted." Ibid. The limitations upon hearsay declarations against penal interest under Florida law serve the interests of fairness and reliability. Moreover,

these limitations are not unique to Florida; the federal rule has identical limitations, and a number of states have similar rules limiting the admission of declarations against penal interest. See, e.g., Killam v. State, 626 A.2d 401 (N.H. 1993) (refusal to admit statements by fellow inmate that third party had confessed to crime upheld where no showing that declarant unavailable and no corroborating circumstances indicating trustworthiness); State v. Brown, 493 SE2d 589 (N.C. 1994) (same). Thus, this is not a case like Crane v. Kentucky, supra, in which the "reasoning of the Kentucky Supreme Court ... conflicts with the decisions of every other state court to have confronted the issue," Id. at 687, or Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), in which Arkansas apparantly was the only one of a number of states addressing the reliability of hypnotically enhanced testimony to have a per se rule exluding the testimony of the defendant, or Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), in which Georgia was the only state in the country not to allow the defendant to testify (he could only give an unsworn statement).

Jones cites no cases in which a hearsay rule comparable to Florida's concerning declarations against penal interest has been found to violate a criminal defendant's right to present a defense. Jones bases his argument most heavily on Chambers v. Mississippi, supra. Mississippi, however, did not recognize declarations against penal interest as an exception to the hearsay rule. Florida law does. As the trial court recognized, Chambers argued, in effect, that, in his case, Mississippi was "constitutionally compelled to adopt the declaration against

penal interest exception to the rule against hearsay" (PC-R2 236). Jones, on the other hand, contends that Florida "must suspend the operation of the declaration against penal interest exception to the rule against hearsay." Id. at 236-37. Jones' argument is the inverse of Chambers' argument, and Chambers is readily distinguishable. Hill v. State, 549 So.2d 179, 182 (Fla. 1989); Saavedra v. State, 576 So.2d 953, 961-62 (Fla. 1st DCA 1991); Kyser v. State, 576 So.2d 888 (Fla. 1st DCA 1991).

Moreover, although the declarant in Chambers was available to the state, he was in a real sense unavailable to Chambers, due to the operation of Mississippi's "voucher rule," which prevented Chambers from cross-examining the alleged confessor about his prior confessions. 410 U.S. at 294. It was the combined operation of the state voucher rule and the state hearsay rule which violated Chambers' right to present a defense, not the hearsay rule alone. Chambers would be closer on point if Jones had called Schofield as a witness, and had been prevented from cross-examing him about his alleged prior confessions and from introducing testimony from other witnesses about those alleged prior confessions. However, none of that happened; instead, Jones refused to call Schofield as a witness or to show that he was unavailable to testify on his behalf.

What further distinguishes Chambers, however, is that Chambers dealt with the exclusion of reliable and trustworthy evidence. Here, the state hearsay rule has been applied to exclude unreliable and untrustworthy evidence offered by a defendant who has not attempted to comply with the state rule. The hearsay declarant in Chambers had confessed to close

acquaintances "shortly after the murder had occurred," and these close acquaintances reported their information prior to trial. 410 U.S. at 300. None of the acquaintances were prison inmates serving lengthy sentences. In addition, the declarant himself gave a sworn confession to Chambers' attorneys. 410 U.S. at 287. By contrast, in this case, the alleged hearsay confessions did not occur until years after the trial, and were not reported for several more years, by witnesses lacking any credibility. Nor has Schofield ever confessed under oath.

"[T]he statements in Chambers bore indicia of reliability, were made spontaneously, were corroborated by other evidence, and were unquestionably against interest. [Cit.] As the evidence in the instant case does not meet the Chambers hearsay criteria, Chambers does not control in this case." Lightbourne v. State, 644 So.2d 54, 57 (Fla. 1994) (footnote omitted).

The trial court concluded that the State's interest "in preserving the established rules of evidence which assure fairness and reliability in criminal proceedings outweighs the defendant's interest in presenting unreliable hearsay statements Schofield may have made to others" (PC-R2 250). This conclusion does not, as Jones contends, turn "logic and due process on their heads." Brief of Appellant at 53.

The trial court found that statements allegedly made by Schofield were probative only in the sense that probative evidence is that "which tends to prove an issue." As Jones concedes, the trial court's discussion of the defendant's interest "devoted most of its attention to the reliability of the purported confessions." Brief of Appellant at 49. For

reasons discussed previously, the proffered evidence was, as the trial court found, "unreliable." (PC-R 245). The fact that without the hearsay evidence "the defendant has little evidence concerning Schofield's possible involvement in the murder of Officer Szafranski" (PC-R 247) is hardly a reason to suspend the rules of evidence to allow the admission of unreliable hearsay evidence.

Jones also argues that the trial court found that the admission of testimony about Schofield's alleged confessions would not "impair" the hearsay rule. Brief of Appellant at 53. In fact, the trial court only said that such testimony could be admitted without "entirely subverting" the hearsay rule (PC-R 250). Section 90.804's preference for live testimony would certainly be "impaired," however, if hearsay testimony were admitted notwithstanding the availability of the hearsay declarant to testify himself. The point is not that the statement is more reliable if the declarant is unavailable, United States v. Powell, 973 F.2d 885, 893 (10th Cir. 1992), it is that, when the declarant is unavailable, the choice is between hearsay evidence and no evidence, and the hearsay is reluctantly admitted out of necessity. Jones has not demonstrated such necessity. As the trial court recognized:

> The most reliable evidence concerning the statements Schofield may have made concerning his involvement in the murder of Officer Szafranski is the direct testimony of Glen Schofield. To suspend the application of the declaration against penal interest exception to the rule against hearsay is tantamount to placing as much importance, trustworthiness and emphasis upon secondary, unreliable hearsay as one would place upon direct, trustworthy and primary evidence. (PC-R 244).

The Williams rule cases cited by Jones have no bearing on this case. William rules evidence is not hearsay, and the standards adopted for the admission of similar-crime evidence do not entail the same kinds of reliability concerns inherent with hearsay evidence. Besides, the limitations on the use of hearsay declarations against penal interest apply equally to the state and the defendant.

Jones has not offered anything reliable enough and probative enough to obtain a conviction of Schofield, even if the witnesses who allegedly heard Schofield confess would be willing to testify at any prosecution of Schofield, which is doubtful.

The trial court correctly concluded Jones has failed to establish that the hearsay testimony he proffered would be admissible at any retrial of this case, and that it therefore is not newly-discovered admissible evidence.

B. THE TRIAL COURT PROPERLY REFUSED TO CONSIDER PROCEDURALLY-BARRED EVIDENCE

In its opinion remanding this case to the trial court for hearing, this Court held that "the use of Marr's statement in this proceeding is procedurally barred because it was known at the time of Jones' first motion." 591 So.2d at 916 (fn. 2). This Court also stated that "it appears" that other evidence did not qualify as "newly discovered." The implication of the opinion is that anything not newly discovered is procedurally barred. Jones, however, contends that evidence should have been considered by the trial court in corroboration even if not newly

discovered. He cites Johnson v. Singletary, 647 So.2d 106 (Fla. 1994) in support for his contention. Nothing in Johnson, however, holds that procedurally-barred testimony can be used to corroborate proffered newly-discovered evidence. This Court held only that the admissibility of Johnson's proffered hearsay declarations against penal interest could not be determined without a hearing, and remanded the case to the trial court for a hearing to give Johnson a chance to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of Pruitt's statements." Id. at 111. The autopsy report of Johnson's alleged real killer, which this Court discussed as possible evidence in corroboration, obviously did not exist at the time of Johnson's trial, because Pruitt had died only a couple of weeks before this Court issued its opinion. This Court did not hold that information and testimony which could have been introduced at trial--but was not--may be considered in "corroboration." A defendant may not rehash a procedurally-barred ineffective assistance of counsel claim in support his newly-discovered evidence claim. Cf., id. at 111 (fn. 4); Jones, 591 at 913.

Moreover, the procedurally-barred, non-newly-discovered evidence does not corroborate Jones' profferred hearsay evidence. As noted in the Statement of Facts, Jones' claim that his confession was involuntary has been addressed many times, and it has always been found to be meritless. Nothing Bobby Hammond has said establishes the contrary, nor does his testimony otherwise corroborate any evidence that Schofield was the real killer. As noted previously, Hammond has never

testified that Schofield was armed with a rifle when he left the apartment, or that he returned to the apartment with or without a rifle.

Evidence that "a witness heard someone running down the alley by Mr. Jones' apartment right after the murder" , Brief of Appellant at 57, does not corroborate Pittro's testimony that Schofield said he shot the officer from inside a house and left out the back way, and is inconsistent with Jones' own trial witness Annie Nelson, who testified that she did not hear any noises in the alley (TR 1194). If by "evidence that Schofield was known to possess guns similar to the murder weapon," Jones is referring to Linda Dixon's affidavit, the trial judge properly refused to consider this affidavit as substantive evidence, and she never testified. Thus, there is no such "evidence." Routly v. State, supra, 590 So.2d at 401. Moreover, nothing in her affidavit identifies Schofield as the owner of the gun she found in her closet, or establishes that she had personal knowledge that the gun was "similar" in any way to the murder weapon.

Paul Marr's 1986 testimony that Schofield told him he shot the officer from downstairs and then went back up the stairs to return the rifle to its gun case in the apartment is not consistent with Pittro's testimony, and is certainly inconsistent with the testimony of Reed and Cole that they saw Schofield leaving the scene of the murder carrying the rifle, and also is inconsistent with Jones' own trial testimony that Schofield never returned to the apartment.

In fact, if we are to consider all the affidavits and testimony that have been proffered over the years, we find that nothing is consistent except the bare allegation of Schofield's involvement; everything else changes with the seasons. Even if the trial court was wrong not to consider non-newly-discovered evidence along with the newly-discovered evidence, there are no corroborating circumstances sufficient to show the trustworthiness of Jones' hearsay evidence that Schofield has confessed.

C. THE TRIAL COURT APPLIED THE CORRECT STANDARD TO JONES' CLAIM, AND ITS FACTUAL AND CREDIBILITY FINDINGS ARE PRESUMPTIVELY CORRECT.

When ordering an evidentiary hearing, this Court held that "the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal." 591 So.2d at 916. The trial judge applied that standard (PC-R2 252, 261, 262, 264). Quoting phrases from the order out context, however, Jones argues that the trial court required him to disprove the state's evidence, to "invalidate" Jones' confession, and to "exonerate" himself. Brief of Appellant, pp. 60-61. Jones further contends that the trial court "did not find that the witnesses were not credible" and, in any event, the trial court had no business trying to "weigh the new evidence as though it were a jury, determining what is true and what is false." Brief of Appellant, p. 62-63.

Of course, this Court told the trial court that it would "necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the

trial" in order to determine whether the newly-discovered evidence would probably result in an acquittal. 591 So.2d at 916 (emphasis supplied). That appears to be just what the trial court did.

Jones complains because the trial court addressed "individually" the various incriminating evidence presented at trial, rather than weighing the newly-discovered evidence against "all" the evidence. But "all" the evidence is the sum of its parts. The fact that the trial court pointed out in its order that various highly incriminating aspects of the trial evidence remain untouched by the newly discovered evidence is entirely consistent with the consideration of all the evidence.

The trial evidence includes these salient factors:

(1) A week before officer Szafranski was murdered, Jones was arrested on several charges, including possession of a firearm by a convicted felon. Jones told his arresting officers that "he was tired of police hassling him, that the police weren't the only ones that had guns and that he was going to shoot a mother-fucking pig."

(2) Jones and Schofield were roommates. Jones' cousin Hammond was a visitor to the apartment the evening of the murder. According to both Jones and Hammond, Schofield left the apartment an hour before the murder, armed at most with a pistol. He did not return.

(3) Hammond told police that Jones left the apartment shortly before the murder carrying a rifle. He reconfirmed his original statement when he testified at trial that Jones left the apartment armed with a rifle. He explained that his

contrary pretrial deposition testimony had been motivated by his fear of Jones.

(4) A number of police cars responded to a domestic dispute one block west of Jones' apartment. After a period of time, they left the scene of that dispute in a small convoy of police cars, headed down 6th Street toward Jones' apartment. As they turned left on Davis Street, someone shot officer Szafranski. Officer Dyal saw flashes from gunshots coming from Jones' apartment building.

(5) Hammonds testified that Jones immediately returned to the apartment, carrying his rifle.

(6) Officers responding to the shooting went to the apartment building. One downstairs apartment was empty, but showed signs of being the place where the shots had come from. The occupants of the other downstairs apartment were women and children and one young man, who allowed the police to enter. There were no guns in this apartment. One of the two upstairs apartments was occupied by one elderly man, who allowed the police to enter. There were no guns in this apartment. Meanwhile, people were running back and forth in the other upstairs apartment, but when the police knocked on the door, no one answered. When the police used the front porch to cross over and gain entry to Jones' apartment, all the lights were out, and the fully-dressed occupants were pretending to be asleep. When initially confronted, Hammonds told the officers that there were no guns and no other person in the apartment. This statement was false.

(7) Leo Jones was hiding in his bedroom. Two Marlin 30-30 lever action rifles were under his bed, one of which had Jones' fingerprint on it. During a police pat-down, Jones attempted to dispose of a .380 caliber bullet, and fought with the police when they tried to pick up the bullet. There was also a fully-loaded M-14 semi-automatic rifle in Jones bedroom, and two more guns in the living room.

(8) Although the murder bullet was fragmented, ballistics examination conclusively established that the murder weapon was a Marlin 30-30 lever action rifle. That examination also eliminated one of the two Marlin 30-30 lever action rifles as the murder weapon, but the other--which had Jones' fingerprint on it--was consistent (albeit not conclusively so) with having been the murder weapon.

(9) After being taken to the hospital for treatment of minor injuries sustained during his attempt to resist arrest, Jones was taken to breakfast. Jones testified at trial that between the time he was taken to the hospital until he confessed six hours later, no one "laid a hand on him."

(10) Police officers who observed Jones that morning testified that he was smug and belligerent, cocky and hostile, repeatedly stating that he knew and understood his rights. Eventually, he signed a written confession, admitting that he had taken a rifle from his apartment, walked downstairs to the empty apartment, shot the policeman from the window, returned to his apartment and hid the rifle under the bed. He gave and additional oral statement, explaining that he was tired of "being fucked with" by the police, and decided that he would kill a policeman, and "that's why I did it."

(11) Jones testified at trial that the guns belonged to Schofield and that he confessed because he was "all whipped up." He denied owning any guns, and denied knowing any guns at all were in his apartment, when in fact the place contained a small arsenal, and all the guns were either in the living room or under Jones' own bed, including one having his fingerprint on it. Moreover, although he denied even liking guns he admitted that he had at least one gun in his possession not long before the murder.

Against all this, the only newly-discovered admissible evidence Jones can present is the testimony of Reed and Cole that shortly after the shooting, they saw Schofield running down a street a couple of blocks away, carrying a rifle. Cole has been convicted of five felonies, while Reed is a long-time friend of Jones' family, living in the same neighborhood. Both Reed and Cole waited until the "eleventh hour" to reveal their information, allegedly out of fear of Schofield, even though he was sent to prison not long after the instant murder, and has been there much of the time since. As the trial court recognized, their testimony is of dubious credibility, and a jury could conclude that they "are testifying for no other reason than to help the defendant." (PC-R2 262).

In any event, this testimony would not probably cause an acquittal. Since Schofield was living in the same apartment as Jones, and left that residence without a rifle (according to Hammond and Jones himself), one has to wonder where Schofield could have picked up a rifle. But even if he was in the area carrying a rifle, that evidence does nothing to call into

question the fact that Jones: bragged about having guns; threatened to use one of his guns to kill a police officer; confessed to having carried out that threat; was present in the apartment building from where the shots were fired; was hiding in a bedroom containing numerous high-powered rifles, including the likely murder weapon (which just happened to have Jones' fingerprint on it); acted suspiciously before and after the police entered his apartment; and gave unpersuasive testimony at trial denying not only ownership but all knowledge of any guns in his apartment, and claiming to have been undressed and in bed when the shots were fired, even though he was fully dressed when the police entered the apartment.

Because the mere fact that Schofield may have been in the area armed with a rifle does nothing to call into question Jones' confession and other evidence establishing his guilt, the testimony of Reed and Cole would not probably result in an acquittal of Jones, as the trial court ruled (PC-R2 264-265).

The trial court went further, however, and found that even if the testimony of the inmate witnesses and Patricia Owens were admitted as an exception to the hearsay rule, Jones is still not entitled to a new trial, because these witnesses are not credible and their testimony lacks corroboration.

Jones argues that the trial court "did not find that the witnesses were not credible," but only speculated that a jury might find them not to be. Brief of Appellant , pp. 62-63. This is incorrect. These witnesses, according to the court, "suffer credibility deficiencies." (PC-R2 265, 267). That is merely another way of saying they are not credible. Besides,

the court had earlier in its order found that this evidence was unreliable (PC-R2 245).

The same considerations that support the exclusion of Jones' proffered hearsay evidence also support the trial court's determination that these witnesses would not be persuasive to a jury. Unlike Jones' own confession, which was reported within hours of the crime and is corroborated by considerable circumstantial evidence, as well as by his own previous threat, Schofield's confessions were not reported until the "eleventh hour" by non-credible witnesses, and are not consistent with Jones' own trial testimony, or with other circumstantial evidence in the case. Schofield's confessions are not even consistent with each other.

The court also found that even if one believes that Schofield actually has confessed, "this evidence does not exonerate the defendant in view of the defendant's confession and the circumstantial evidence connecting the defendant to the crime for which he was convicted" (PC-R2 267). Given the many inconsistencies surrounding Schofield's alleged confessions and the theories alleged over the years concerning Schofield's alleged participation in this murder, the trial court's conclusion is surely correct. This "evidence would not have affected the outcome of the trial." Miles v. Nix, 911 F.2d 146, 148 (8th Cir. 1990).

Since this Court ostensibly has adopted the federal rule concerning newly-discovered-evidence-of-innocence claims, Id. at 915, federal court decisions should provide some guidance here. The Second Circuit Court of Appeals has held:

> A motion for a new trial on the ground of newly discovered evidence is committed to the discretion of the district judge, whose factual findings are accepted unless clearly erroneous, and whose denial of the motion will be upheld unless there has been an abuse of discretion.

United States v. Underwood, 932 F.2d 1049, 1052 (2d Cir. 1991).

The Eleventh Circuit has held that motions for new trial based upon newly discovered evidence "are greatly disfavored and thus are viewed with much caution." Moody v. United States, 874 F.2d 1575, 1577 (11th Cir. 1989). Such a motion is addressed to the sound discretion of the trial court, and the denial of a new trial motion will not be reversed absent an abuse of discretion. United States v. Garcia, 13 F.3d 1464, 1472 (11th Cir. 1994); United States v. Obergon, 893 F.2d 1307, 1312 (11th Cir. 1990); United States v. Reed, 887 F.2d 1398, 1404 (11th Cir. 1989). Further:

> In ruling on a motion for new trial based upon newly discovered evidence, it is within the province of the trial court to consider the credibility of those individuals who give statements in support of the motion.... Where there is a grave question of the credibility of after-discovered evidence, the role of the trial judge is that of the fact finder, so much so that the Supreme Court in United States v. Johnson, 327 U.S. 106, 66 S.Ct. 4611, 90 L.Ed. 562 (1946), said that an appeal from his resolution of the facts should be dismissed as frivolous. [United States v. Reed, supra at 1404, fn. 12]

The Florida cases are similar. See, e.g., Glendening v. State, 604 So.2d 839, 840 (Fla. 2d DCA 1992) ("A motion for new trial is addressed to the sound judicial discretion of the trial court and unless an abuse of discretion is clearly shown, the action of the trial ocurt in this respect will not be disturbed."). In addition, it is well settled under Florida

law that the appellate court should not substitute its judmennt for that of the trial court, but should defer to the trial court's authority as fact finder. E.g., Mason v. State, 597 So.2d 776, 779 (Fla. 1992); Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); Tibbs v. State, 397 So.2d 1120 (Fla. 1981). This should be especially true with respect to a claim of newly discovered evidence of innocence. The trial court's factual findings are well supported by the record, and are certainly not clearly erroneous. This Court directed the trial court to conduct an evidentiary hearing, to determine what alleged newly-discovered evidence would be admissible, to evaluate the weight of both the newly discovered evidence and the original trial evidence, and to determine whether Jones has produced newly-discovered, admissible evidence "of such nature that it would probably produce an acquittal on retrial." 591 So.2d at 915, 916. The trial court did what this Court asked it to do, and determined that Jones was not entitled to a new trial.

Jones' attempts, however, to raise one additional issue in part C (3) of his brief, in which he complains that "the lower court failed to consider whether the newly discovered evidence would be admissible at a penalty phase or the effect of this evidence on the outcome of a penalty phase." Brief of Appellant at 64. The obvious reason for the trial court's omission to consider the possible effect of this evidence on the penalty phase is that Jones did not present this issue to the trial court. No such issue was presented in his 3.850 motion, or argued on appeal from the original denial of the motion, or addressed by this Court on appeal. Nor did Jones

raise such issue in his pre-hearing memorandum (PC-R2 81 et seq). Nor did he raise such issue in his post-hearing memorandum (PC-R2 191 et seq). The issue presented and addressed by this Court and the trial court was whether Jones could present sufficient newly-discovered, admissible evidence that "it would probably produce an acquittal on retrial." 591 So.2d at 915 (emphasis changed). It is well settled that for an issue to be preserved for appellate review, the appellate arguments must be the same as the arguments raised in the lower court. Peterka v. State, 640 So.2d 59 (Fla. 1994); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Moreover, claims which could have been raised in a 3.850 motion cannot be raised for the first time on appeal. Doyle v. State, 526 So.2d 909, 911 (Fla. 1988). Jones' innocent-of-the-death-penalty argument is procedurally barred.

Moreover, even if this argument is not procedurally barred, it is "scarcely logical;" Jones' claim has been "not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison." Herrara v. Collins, supra, 122 L.Ed.2d at 220.

Although Florida law allows hearsay evidence at the penalty phase, it still must be "relevant" and "probative." Section 921.141 (1), Florida Statutes (1979). Residual or

lingering doubt is not a mitigating circumstance in Florida King v. Dugger, 555 So.2d 355, 358 (Fla. 1990), and, furthermore, although "a defendant must be permitted to introduce any mitigating evidence at the sentencing phase of a capital case if the evidence relates to the defendant's character, record or the circumstances of the particular offense....," a trial court is not constitutionally obligated to admit "otherwise inadmissible evidence which it determines lacks considerable assurances of trustworthiness." Alderman v. Zant, 22 F.3d 1541, 1557 (11th Cir. 1994) (distinguishing Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) and Chambers v. Mississippi, supra).

The trial court's order denying Jones' motion for new trial should be affirmed.

D. THIS COURT SHOULD RECONSIDER ITS "PROBABLY PRODUCE AN ACQUITTAL" STANDARD FOR EVALUATING A CLAIM OF NEWLY DISCOVERED EVIDENCE OF INNOCENCE PRESENTED LONG AFTER TRIAL

Because the parties were directed to file simultaneous briefs in the last appearance of this case before this Court, this is the State's first real opportunity to address this Court's adoption of a new standard for assessing claims of newly-discovered evidence of innocence. The State will not ask this Court to return to the Hallman "conclusive" standard which this Court rejected as too strict in its previous opinion. However, this Court may have overlooked the fact that the "federal" standard which it adopted applies only to motions raised within two years of final judgment. The State would ask this Court to reconsider whether it really wishes to adopt a "federal" probably-produce-an-acquittal standard which in fact

is not a federal standard for reviewing newly-discovered evidence claims that are more than two years old. In fact, the federal rules do not provide for any review of a newly-discovered evidence claim that is more than two years old.[3]

The federal rule may be described as follows:

> The rule that new evidence is not a claim for which the writ of error coram nobis may be issued is consistent with the limitations imposed on movants seeking a new trial based upon newly discovered evidence. Motions for new trials based upon new evidence must be filed within two years after final judgment. Fed.R.Crim.P. 33. Even when timely filed, such motions are greatly disfavored and, thus, are viewed with much caution. 3 C. Wright & K. Graham, Federal Practice and Procedure § 557 (1982). See United States v. Metz, 652 F.2d 478, 479 (5th Cir. 1981). The writ of error coram nobis, therefore, cannot be available for new evidence only potentially relevant to a factual issue decided long ago by a jury for, if it were, the limitations of Rule 33 would be meaningless and the writ would no longer be extraordinary. More troublesome still, such a remedy would prolong litigation once concluded, thus thwarting society's compelling intererst in the finality of criminal convictions. See [United States v.] Morgan, 346 U.S. [502] at 511, 74 S.Ct. [247] at 252[, 98 L.Ed. 248 (1954)].

Moody v. United States, 874 U.S. 1575, 1577 (11th Cir. 1989). All the federal cases cited in this Court's previous opinion involved Rule 33 claims that were filed within two years of the conviction, except for Miles v. Nix, 911 F.2d 146 (8th Cir. 1990), which applied the probably-produce-an-acquittal standard in granting habeas relief from a state court conviction. It is clear now, however, that Miles v. Nix was incorrectly decided.

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[3] The State would note that only 15 States "allow a new trial motion based on newly discovered evidence to be filed more than 3 years after conviction." Herrara v. Collins, supra, 122 L.Ed.2d at 233.

Since this Court issued its previous opinion in this case, the United States Supreme Court has ruled that, absent a "truly persuasive demonstration of 'actual innocence,'" federal habeas review is not available to a petitioner claiming that he has newly discovered evidence of innocence. Herrara v. Collins, supra, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed. 203, 216, 227. A six-justice majority rejected a standard urged by the three dissenting justices that would allow the petitioner to obtain relief if he could show that he is "probably is innocent." Id., 122 L.Ed.2d at 244. (Justice O'Connor described the dissent's proposed standard as "rather lax." 122 L.Ed.2d at 233.) Instead, "because of the very disruptive effect that entertaining claims of actual inocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." 122 L.Ed.2d at 227.

It is notable that just in the past year and one half, this Court has had to address many claims of newly-discovered evidence, including several based upon newly-discovered evidence from inmate witnesses, comparable to this case. See Lightbourne v. State, 644 So.2d 54 (Fla. 1994); Johnson v. Singletary, 647 So.2d 106 (Fla. 1994); Williamson v. State, 651 So.2d 84 (Fla. 1995); Bolender v. State, No. 86,020 (Fla. July 11, 1995). This should not be surprising. Ten years after his conviction, Herrara collected affidavits which he claimed proved his innocence. Most of them, like the ones

offered in this case, were hearsay reports of confessions by someone Herrara now claimed was the real killer. "Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him." 122 L.Ed.2d at 231 (O'Connor, J., concurring). It is especially easy to find life-sentenced inmates (for whom the possibility of further prosecution offers little or no deterrence to perjury) to present such affidavits, although, as this case demonstrates, it is not quite so easy to count on their testifying consistently with their affidavits.

Such evidence should be "treated with a fair degree of skepticism." Ibid. Otherwise, the courts will be "deluged with frivolous claims of actual innocence," 122 L.Ed.2d at 233 (O'Connor, J., concurring), and eleventh-hour newly-discovered-evidence-of-innocence claims "will become routine and even repetitive." 122 L.Ed.2d at 234-35 (Scalia, J., concurring).

Absent a "truly persuasive" demonstration of innocence, a fairly convicted and therefore presumptively guilty death-sentenced defendant should not be awarded an evidentiary hearing in which to rehash an issue which has already been decided by a jury in a trial which has repeatedly been held to be free of demonstrable constitutional error. If a hearing is granted, the claim should fail unless the defendant can convince the "court ... itself ... that those new facts unquestionably establish" that the defendant is "innocent." Schlup v. Delo, 130 L.Ed.2d 808, 829 (1995).

In any event, Jones has not even met the lesser probably-produce-an-acquittal standard, much less offered a "truly persuasive" demonstration of innocence. Contrary to Jones' claim that only has to "raise a reasonable doubt" to prove his claim, the United States Supreme Court has held that even the less rigorous "probably resulted" standard "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." Schlup v. Delo, supra, 130 L.Ed.2d at 837 (emphasis supplied).

Because Jones has not "shown that it is more likely than not that no reasonable juror would have convicted him" in light of newly discovered evidence of innocence, Id. at 836, much less "unquestionably" established his innocence, Id. at 829, he is not entitled to a new trial.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm the judgment of the court below.

Respectfully submitted,

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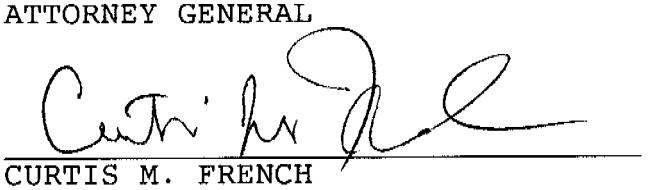
ATTORNEY GENERAL



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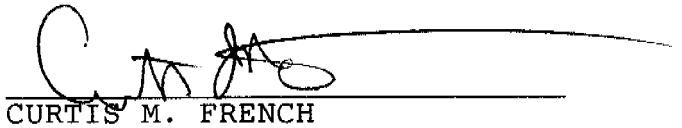
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gail E. Anderson, Esq., Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida, 32314-5498, this 13th day of July, 1995.



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