IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,522

JUDY A. BUENOANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

GREGORY C. SMITH
Capital Collateral Counsel
Florida Bar No. 279080

SYLVIA W. SMITH
Assistant CCC-NR
Florida Bar No. 0055816

ROBERT FRIEDMAN
Assistant CCC-NR
Florida Bar No. 500674

OFFICE OF THE CAPITAL COLLATERAL COUNSEL
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376
Attorneys for Appellant

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Ms. Buenoano's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- Record on direct appeal to this Court;

"PC-R1" -- Rule 3.850 record on appeal to this Court from January 25, 1990, consisting of three (3) volumes of record and a fourth (4th) volume of transcript (referred to in this brief as T1.

"PC-R2"--Record on appeal to this Court from the lower court's rulings upon Motions to Compel and the State's Request for In Camera Inspection, including documents and transcripts dated August 31, 1984 through January 27, 1998. This record consists of five (5) volumes of record and three (3) volumes of transcript. The transcripts will be referred to in this brief as T2., T3., and T4., respectively.

"PC-R3"--Record on appeal to this Court from the lower court's rulings regarding the State's Motion for Protective Order and Public Records Requests, comprising seven (7) volumes.

"PC-R4"--Record appeal to this Court from the lower court's denial of appellant's Rule 3.850 motion, Motion for Stay of Execution, and Public Records Requests, consisting of five (5) volumes of record and one (1) volume of transcript, which will be referred to in this brief as T5.

"T1"--Transcript of January 18, 1990 Motion for Stay of Execution and Motion for Evidentiary Hearing, consisting of seventy-one (71) pages.

"T2"--Transcript of January 6, 1998 Public Records Hearing Proceedings, consisting of forty-six (46) pages.

"T3"--Transcript of January 12, 1998 Proceedings regarding State's In Camera Inspection Request, consisting of twenty-nine (29) pages.

"T4"--Transcript of January 23, 1998 Status Conference and State's Supplemental Request for In Camera Inspection, consisting of thirty-two (32) pages.

"T5"--Transcript of March 11, 1998 Motions hearing, including Huff hearing, Public Records hearings, Rule 3.850 consideration, and Application for Stay hearing, consisting of one hundred eighty-nine pages.

"App." -- appendix to current Rule 3.850 motion.

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ARGUMENT IN REPLY[1]

ARGUMENT I

To the contrary, Ms. Buenoano has not asserted any procedurally barred claims and can prove her assertions of due diligence as to every claim. The state's reliance on Correll and Jones are erroneous.

The state here argues that Ms. Buenoano should not be able to rely on an expert she has retained, Dr. Frederic Whitehurst, because he has no "personal knowledge" pertaining to any tests conducted prior to 1986. The state's understanding of the role of an expert witness is sophomoric but perhaps more interesting is the glaring absence in the state's answer of any acknowledgement of the opinions provided by Ms. Buenoano's experts.

ARGUMENT II

Because Ms. Buenoano has exhibited evidence that bears "directly on the testimony admitted at trial" and the "validity of the results which were entered via stipulation" (Answer at 44) and that evidence was not addressed by the Court, the State attempts to deny that the evidence exists and obfuscate the issues present be alleging that Ms. Buenoano's claim amounts solely to a claim that Martz could have been impeached with the findings made by the OIG. (Answer at 49). Not once does the state respond to the specific assertions by experts for Ms.

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[1]Ms. Buenoano hereby replies to those representations by the State that merit a reply.

Buenoano (and neither did the circuit court).[2] The sole issue is not whether Martz is a bad examiner in general and has misled other juries in other prosecutions with faulty and unacceptable science (although the OIG Report certainly supports this conclusion), but, rather, that Martz was a critical government witness[3] in both the Escambia and Orange County prosecutions, that his unreliable, misleading, and/or false testimony denied Ms. Buenoano a full adversarial testing at trial and its exclusion or impeachment would probably have changed the result of both the Escambia and Orange County proceedings and that the OIG Report was the gateway to these revelations.

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[2]Further, the state's reliance on United States v. Gonzalez, 938 F. Supp. 1199 (U.S.D.C. Del. 1996) (finding pre-OIG Report allegations of unprofessionalism not to constitute Bradv violation when the only specific testimony adduced by FBI agent was brought out on cross-examination) is inapposite.

[3]Without Martz's faulty analysis of the Vicon-C tablets in the Escambia County prosecution, Ms. Buenoano would not have been arrested and, lacking an arrest, neither tried nor convicted of the attempted murder of John Gentry. Public records obtained from the City of Pensacola reveal a forensic toxicology request dated July 6, 1983, from Chief of Police Louis Goss and Crime Scene Technician James E. Richbourg to the FBI Toxicology Laboratory regarding the Vicon-C tablets. Therein, the Pensacola authorities state the following:

> The pills were given to the victim prior to the bombing incident and may be an earlier attempt on the victim's life. The FDLE Lab Pensacola, Tallahassee, Jacksonville, are unable to do the examination and at their request, we are forwarding exhibits for examination to your laboratory. Note: Please Rush. The outcome of the examination will determine if an arrest will be made on a possible suspect still in the local area at this time.

See, City of Pensacola reports attached hereto as Attachment A.

Then having argued that it would not be appropriate for Ms. Buenoano to challenge her Escambia County conviction in Orange County circuit court, the State argues that Ms. Buenoano has never challenged the findings of FDLE chemist Estees in the Escambia County prosecution. The state's reliance on the fact that the capsules were destroyed in 1992 is meaningless. These arguments are all advanced to support some sort of meritless procedural bar argument. If the ways in which Roger Martz repeatedly (and in this case) tweaked inconclusive scientific evidence in favor of the prosecution is barred - why did the federal government bother to investigate. Why take on the burden of investigating and discovering what they discovered and then make it public (little by little), if all it amounts to is procedurally barred impeachment evidence.

As to the argument that "toxicity" has not been attacked - that is a misrepresentation. Martz mislead defense counsel when he stated in his report that he could conclude paraformaldehyde was "highly toxic." Ms. Buenoano has alleged that Martz testimony was "seriously inaccurate, unsubstantiated and unreliable" as it is based on his faulty report.

In its response, the state finally starts to see how their frequent reliance on the defense presentation of Dr. Potter in Orange County does nothing but support Ms. Buenoano's claim. He was a state witness in Escambia County - he relied on Martz, another state witness - and he was called by the defense to

attempt to counter Martz's testimony of the tablets' toxicity.[4] Moreover, Dr. Hegert's testimony and that of Ms. Buenoano's is meaningless and all would have been excluded anyway as irrelevant if trial counsel had known then what is known now about Martz.

In fact, the state finally concedes what Ms. Buenoano has been arguing all along - that the testimony of Special FBI Agent Roger Martz was the "underlying foundation" of the admission of the additional expert testimony in the instant case (Answer at 47).

Ms. Buenoano had to confront the testimony against her with facts available at the time of her 1985 trial. In Orange County, the jury deliberated for over ten and one-half (10 1/2) hours without the benefit of knowing that Roger Martz, the "underlying foundation" of the government's forensic case, presented misleading and faulty scientific testimony (R.1470-74). Ms. Buenoano is entitled to a new trial because there is a reasonable likelihood that the false testimony of Roger Martz affected the jury's verdict, United States v. Baqlev, 473 U.S. 667, 679 n.9 (1985), quoting, United States v. Aqurs, 427 U.S. 97, at 102 (1976), and appellee has failed to demonstrate that this false testimony was harmless beyond a reasonable doubt.

As to the Frve issue, the state again relies erroneously on a procedural bar argument which must fail. The state further misrepresents the law which applies to the Frve test for

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[4]The entirety of which is now questioned by Ms. Buenoano's experts conclusions that Martz's tests misidentified the substance.

admissibility of scientific evidence which requires that the proponent of the evidence must establish by a preponderance of the evidence that both: (1) the underlying scientific principle, theory or methodology used to develop the evidence is generally accepted in the scientific community; and (2) the specific testing procedures employed to develop the evidence are generally accepted in the scientific community. See, Haves v. State, 660 so. 2d 257, 263-265 (Fla. 1995); Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995). In other words, contrary to appellee's assertions (Answer at 55-6), both the general scientific method and the specific procedures utilized pursuant to that method must meet community standards. The Hayes/Ramirez two-part standard stems directly from this Court's adoption of Frve v. United States, 293 F. 2d 1013 (D.C. Cir. 1923), as the basis for evaluating the admissibility of proffered scientific testimony. See, Brim v. State, 695 So. 2d 268, 271 (Fla. 1997); Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997); Haves, 660 So. 2d at 262; Ramirez, 651 So. 2d at 1167; Flannasan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993); Stokes v. State, 548 So. 2d 188, 193-194 (Fla. 1989).

Under the first prong of the Hayes/Ramirez/Frve test, scientific testimony is inadmissible at trial as a matter of law if it is based upon novel techniques that are not yet generally accepted within the scientific community. See, Haves, 660 So. 2d at 264; Ramirez, 651 So. 2d at 1167. This prong examines the testing technique and determines whether the technique is

sufficiently established to have gained general acceptance in the scientific field. Id. See also, Frye, 293 F. 2d at 1014. Ms. Buenoano has alleged and can prove that Martz's testimony is inadmissible as a matter of law because his testing techniques in this case did not comport with those generally accepted within the scientific community.

Under the second prong of Hayes/Ramirez/Frye, the results of specific experiments based upon generally accepted scientific principles are inadmissible if the testing done in the particular case did not adhere to procedures themselves generally accepted within the scientific community. See, Haves, 660 So. 2d at 263-264; Ramirez, 651 So. 2d at 1168. Accord, Holley v. State, 523 So. 2d 688, 689 (Fla. 1st DCA 1988) (holding that expert testimony regarding results of a paternity test admissible, in part, because defendant did not produce any evidence indicating that any significant errors were made in the administration of tests or calculations of results). This prong focuses on the quality of lab work and the testing procedures followed. See,e.g., Haves, 660 So. 2d at 263-264 (finding DNA evidence based upon accepted methods still inadmissible because of flaws in particular testing). Further, the evidence offered at trial must be based upon actual test results and not just the opinion of the expert witness. See, e.g., Young-Chin v. Homestead, 597 So. 2d 879, 882 (Fla. 3d DCA 1992) (holding expert testimony inadmissible because based on suppositions rather than review of physical evidence). Ms. Buenoano has alleged and can prove that Martz's

testimony was inadmissible as a matter of law under this second prong.

Only if the proponent of the evidence satisfies both prongs of the above-described test is the scientific evidence admissible under Frve. This Court has explained the importance of ensuring that scientific evidence comports with both prongs of the test:

> If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.

Stokes v. State, 548 So. 2d 188, 193-194 (Fla. 1989).

In fact, this Court has recently reaffirmed the importance of reliable scientific evidence. In Hadden v. State, 690 So. 2d 573 (Fla. 1997), this Court stated:

> We firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence...In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

Hadden, 690 So. 2d at 577.

Here, the newly discovered evidence establishes that the scientific evidence presented by the State (the "proponent" of the evidence) at Ms. Buenoano's trial fails both prongs of the Hayes/Ramirez/Frye test and therefore was inadmissible as a matter of law. Its presentation deprived Ms. Buenoano of a full

and fair proceeding. Based upon the OIG Report and the opinions available from the limited review made of the extensive documents provided thus far, it is clear that had trial counsel been aware of Martz's testing methods, his habitual failure to follow established protocols, and tendency toward exaggerating test results and/or his failure to perform reliable physical tests in this case, not only would Martz's testimony not have been stipulated to, but it would have been excluded under prevailing law. The State would have been wholly incapable of meeting its burden to demonstrate admissibility, as the OIG Report and Ms. Buenoano's preliminary expert opinions establish.

It was the duty of the State of Florida to disclose evidence of Martz's misleading or false testimony to counsel for Ms. Buenoano, as this knowledge was imputed to the government. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984) (citations omitted). Further, falsehoods which bear on a witness's credibility are required to be disclosed just as those bearing directly on a defendant's guilt or innocence. Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir. 1986), auoting Williams v. Griswald, susra, and Napue v. Illinois, 360 U.S. 264 (1959). The State attempts to turn the law on its head and establish a standard whereby the accused must discover suppressed and hidden material exculpatory and impeachment evidence, solely within the control of the prosecuting authority, or suffer a lack of due diligence allegation and procedural bar. In fact, it is the prosecuting authority which has a continuing duty to disclose

to Ms. Buenoano any evidence favorable to her during postconviction proceedings. Pennsylvania v. Ritchie, 107 S. Ct. 989, 1002-1003 (1987); Smith v. Roberts, 115 F.3d 818 (10th Cir. 1997); State v. Hall, 509 So. 2d 1093 (Fla. 1987). The State asserts that appellant has had years to discover this information and analyze Martz's work, despite Ms. Buenoano having no prior notice of the potential false/misleading nature of his forensic work.

The State erroneously asserts that Ms. Buenoano "...has not even made a prima facie showing of the existence of critical exculpatory evidence at the time of trial" (Answer at 44). Despite severe time restraints, the newly discovered nature of the Martz evidence and the difficulties Ms. Buenoano has experienced in consulting with Mr. Whitehurst, facts have been developed that Martz falsely testified that his various tests enabled him to identify paraformaldehyde in the Vicon-C tablets. (Appellant's Initial Brief at 41-45). Curiously, the State makes no comment and offers no response whatsoever to these asserted facts. Ms. Buenoano must conclude that the State fears what an adequate and full investigation into these matters would reveal about Roger Martz's scientific testing in the Escambia County prosecution and the affect that investigation would ultimately have on the reliability of the Orange County jury verdict.

Ms. Buenoano presented a facially valid claim in her Rule 3.850 motion; alleging that the OIG Report formed the foundation for newly discovered evidence regarding Martz (PC-R4. 645-46) and

specifically alleging that Martz's testimony in the Escambia County trial, which was utilized during both guilt/innocence and penalty phases in the instant prosecution, had a "very high chance" of being false (PC-R4. 657) and was extensively utilized by the government to both convict (PC-R4. 651-52) and obtain the death sentence (PC-R4. 653) in Orange County. The motion and files and records in this case do not "conclusively show that [Ms. Buenoano] is entitled to no relief" and she should be granted an evidentiary hearing on this issue after an adequate and reasonable time to fully plead the claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986). The trial court erred in summarily denying this claim.

Regarding Ms. Buenoano's due process objections to these proceedings, the court simply misunderstood the complaint. Ms. Buenoano is not making an argument that she should be granted relief on a barred claim on the basis of the past ineffectiveness of her postconviction counsel - she is arguing that she should not be executed as long as her counsel is rendered ineffective.

ARGUMENT III

The State makes the bold assertion that the DOJ "has not been misled for purposes of making any critical decision regarding whether Roger Martz' testimony was presented." (Answer at 65). There are no facts to support this assertion, rather the evidence points to the opposite conclusion and indicates that the FBI was "investigating" Ms. Buenoano's case in late June when counsel was informed that Ms. Buenoano's request for records has

been forwarded to the Task Force "investigating the FBI Laboratory" for review and response (PC-R4. 319) and when on June 27, 1997, the FBI forwarded Martz's work product to Buenoano - the file containing the test result charts and examiner's notes - for the first time.[5]

On June 4, 1997, a representative from the U.S. Attorney's Office faxed Jabloner a copy of a June 2, 1997 letter from U.S. Attorney Patterson to First Judicial Circuit State Attorney Curtis Golden which stated that his recollection was that the defense stipulated to the results of Martz's chemical analysis and he therefore did not testify during Ms. Buenoano's attempted murder trial in Escambia County (PC-R4. 149-50).

On June 12, 1997, DOJ FBI Task Force attorney, Lucy Thompson wrote First Judicial Circuit Assistant State Attorney John C. Spencer and forwarded to him as requested, a copy of the Office of the Inspector General's report on the FBI Lab, the lab reports for the Buenoano case and a "case information form" to fill out and return. Attachment B. Then in a letter dated June 17, 1997, the DOJ informs Ms. Buenoano that her request for records has been forwarded to the Task Force "investigating the FBI Laboratory" for review and response (PC-R4. 319) and on June 27, 1997, the FBI forwards Martz's work product - the file containing the test result charts and examiner's notes - to Buenoano for the first time.

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[5]The illegibility of which is being hopefully resolved in Ms. Buenoano's FOIA case.

Meanwhile, on June 26, 1997, Spencer wrote Thompson representing that Martz did not testify in the Escambia County trial and that his chemical analysis was not significant in either the prosecution or verdict.[6] Spencer also forwarded an "FBI Laboratory Case Review" form to Thompson which stated that the forensic analysis performed by the FBI lab was not material to the verdict. Attachment C. Jabloner wrote Assistant State Attorney Coffman forwarding information to Coffman and requesting a case information report be completed and returned (PC-R4. 38). Coffman never returned the report. The DOJ was "investigating" the Buenoano cases when the Spencer incorrectly informed the DOJ that Martz never testified against Ms. Buenoano and when Coffman failed to report back to the DOJ by providing the case information they requested.

Then on December 22, 1997 Assistant State Attorney Coffman forwarded Martz's testimony to Jabloner for what had to be first time because according to Spencer's after the fact explanation, he made his June and August misstatements without referring to the transcript of the Escambia trial. Clearly Spencer never provided the DOJ with Martz's testimony. The State's argument comes down to this - the federal government was not misled in June because they got the testimony in December and anyway Spencer "immediately" corrected his misrepresentations in February.

"A second identical letter was sent dated August 4, 1997.

Regardless, it remains unclear exactly what information the State has ever provided the federal government. DOJ attorney Thornton's February 25 letter to collateral counsel clears nothing up (PC-R4. 163).

The State's claim that Buenoano has "never alleged that Martz was unable to recognize paraformaldehyde" is a gross misrepresentation of the record. See Argument II.

Regarding the documents, Ms. Buenoano now knows that the NACDL received 1500 documents in July 25, 1997 after the federal government decided to make the documents public (PC-R4. 322). But as is clear from the proceedings in this case, the federal government never intended at least some of the documents provided to the State in December to be made public, at least not at that time. What is not clear is which documents it made public when. The most likely scenario is that the decision to make documents public is and has been an ongoing process contingent in part on the government's processing of FOIA requests.

But no decision to make the documents public was necessary for the federal government to have decided to forward materials to the State, in fact even when the did so in December, they did so under the express instruction that the documents only be released under protective order. Only months later did the government's position become more fine tuned; did the decide to release several documents as public documents; and did their request for a protective order become more narrowed.

This reality is demonstrated by the government's position regarding Ms. Buenoano's attempts to obtain documents from the DOJ. First, the DOJ withheld all requested documents. Now the government is representing that they need till the 19th to product the 11,000 OIG document. As to the remaining documents to be processed, on the one hand the government indicated it would be just hundreds of additional documents, but on the other in the Whitehurst case, as much as 5%. In the last status hearing on this matter, the government represented that "there may be five percent of documents that haven't been produced. That is not my understanding from talking to the attorney who is actually going to move these and determine what needs to be produced. I don't think that they have completed it. She has not indicated to me they have completed going through all that." Attachment D, Buenoano v. U.S. Dep't of Justice, **Case** No. 98-6124, Transcript of March 13, 1998 status conference at 12. The U.S. Attorney further explained, "when it is released to NACDL, we would release it to Mrs. Buenoano's counsel." Id. at 13.

In its order, the circuit court holds that any claim predicated upon the FBI documents pertaining to Roger Martz "would be a claim based either newly discovered evidence or Brady evidence" (PC-R4. 770) and further that Ms. Buenoano must satisfy the Jones standard in this case. The state is incorrect. Ms. Buenoano must satisfy her burden of due diligence in order to bring a timely claim but must thereafter satisfy the legal

standard appropriate to the claim raised - which in no case is the Jones standard.

The Court continues with a finding that it is "undisputed that prior to April 1997, the facts regarding the problems associated with Roger Martz's work on FBI cases were now known by the trial court, Buenoano, or counsel for either the State or Buenoano." The Court further finds, without any supporting facts, that "most of the cases in which he apparently 'erred' had not yet even occurred at the time of Buenoano's trial and "could not have been known by Buenoano by the use of due diligence" (PC-R4. 770). The circuit court then finds that there is no "responsible probability that this evidence would produce an acquittal on retrial." (PC-R4. 770).

The state has, as the court did throughout its order, completely avoided Buenoano's allegations by characterize them as "evidence regarding Martz's problems at the FBI Laboratory" (Answer at). The court further states: "Buenoano does not have nay basis to assert that the conclusions he reached regarding the Vicon C capsules were erroneous,"[7] (Answer at ___), completely missing or ignoring that Ms. Buenoano has alleged that the tests result charts' show that Martz was unable

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[7]This assertion like the one at page 73 of the State's response, "Buenoano has never alleged that Martz was unable to recognize paraformaldehyde," makes no sense in light of Ms. Buenoano's assertions.

[8]And completely avoiding dealing with the problem that the FBI never released the charts until it was investigating in light of Whitehurst's allegations.

in fact to determine that the Vicon C capsules contained paraformaldehyde. Counsel made detailed assertions (as detailed as possible under the circumstances) of exactly that - Martz could not, based on the testing he performed and what is know known about his failure to utilize any standard protocol in this case - truthfully testify that he had determined the tablets contained paraformaldehyde. In conducting its analysis, the court and the state attempt to side-step those assertions. The court's holding that there is no reasonable probability that the result of the proceeding would have been difference had the "evidence regarding Martz's problems at the FBI Laboratory" been disclosed to the defense. The state engages in a similarly curious analysis here: "Buenoano has not, and cannot, establish that she is entitled to any relief based on Frederic Whitehurst's subsequent criticisms of Martz in unrelated cases."

First, the Court makes no evaluation of the impact that impeachment evidence of a pattern or practice of unreliable scientific work would have had on the admissibility and/or weight of the evidence. Second, the state completely overlooks Dr. Whitehurst's specific allegations about Martz's work in this case presented by Ms. Buenoano. This glaring failure is how the State attempts bootstraps the facts here into the facts of Correll. The state's argument fails.

ARGUMENTV

The materiality of the Martz testimony in the Escambia County trial has been conceded. This Court is not being asked to

vacate the Escambia County conviction. The State's argument and the circuit court's findings ignore that counsel for Buenoano made it extremely clear that as soon as humanly possible, the Escambia County motion to vacate will be filed.

The state relies on Correll v. State, 698 So. 2d 522 (Fla. 1997) for the proposition that Ms. Buenoano has not presented any newly discovered evidence. The State's argument fails for the obvious reason that the State has conceded throughout these proceedings that the revelations unearthed by the DOJ could not have previously been known. Furthermore, the Court in Correll held that because the evidence proffered by Correll was not newly discovered, the trial court's summary denial of his public records issue was proper. Here this Court directed the disclosure of the records which have provided basis to Ms. Buenoano's claims - records created during the OIG investigation and only made public after this Court's February 9, 1998 order when the federal government changed its position and significantly reduced the number of documents it requested only be released under protective order.

The State asserts that had the Martz evidence of the existence of paraformaldehyde not come in, the evidence that "Buenoano bombed Gentry's car" would have remained intact. The state overlooks the fact that during the guilt phase, the court specifically ruled that evidence of the bombing was not proper Williams rule evidence and defense counsel's objections to the evidence were sustained (R. 971).

The state also overlooks the fact that no direct evidence was adduced at trial whatsoever to support this contention and that had Martz's testimony been excluded or impeached based on the newly discovered evidence, Ms. Buenoano probably, like her son, would have been acquitted. Therefore, no such evidence would have been admissible in the Orange County penalty phase and no testimony of P. Michael Patterson would have been presented.

The state has invented the following assertion: "John Gentry and prosecutor Michael Patterson testified only as to the bombing of Gentry's case. Neither testified about the Vicon-C tablets." (Answer at 85). First, Gentry testified extensively in Orange County (R. 948-90). That testimony included numerous references to Vicon-C (R. 954-55; 58-61; 85). None of this testimony would have been admissible had Martz and his conclusions been excluded or had Ms. Buenoano been acquitted. Remember, the FDLE found no drug substances in the tablets. The state's attempt to separate the evidence presented at trial from its effect on the penalty phase is specious. If the Vicon-C evidence, presented so extensively during the guilt phase and again during the penalty phase was unimportant, why did the state jump on the evidence in closing:

> Where was God in her life when she tried to murder John Gentry, and when the sinsle dose of woisonins and when the double dose didn't work she tried dynamite? . . . And what mercy did she show John Gentry? When she couldn't poison him, what did she do? Took him out for what they thought would be his last supper when he went out that night, and only God saved that man's life

(R. 1713, 1715) [emphasis added].

Patterson testified extensively in the penalty phase (R. 1518-50). Second, he specifically testified that Ms. Buenoano "started giving Mr. Gentry some Vicon-C tablets. The Vicon-C, contains poison, formaldehyde, note of which came to light." (R. 1525).

Like Preston, Ms. Buenoano's case is one in which evidence "later revealed be materially inaccurate" was admitted. Preston, 564 So. 2d 120, 123 (Fla. 1990). The state cannot demonstrate that the error of admitting the evidence of the bombing, the paraformaldehyde or the Escambia County conviction was harmless beyond a reasonable doubt.

Any newly discovered evidence must be reviewed not only scrutiny on its own merits, but rather the Court is required to re-evaluate Ms. Buenoano's previous allegations regarding the lack of an adversarial testing so that a collective analysis can be conducted. Kyles v. Whitlev, 115 S. Ct. 1555, 1567 (1995); Battle v. Delo, 64 F.3d 347 (8th Cir. 1995) (applying the "cumulative effect" test announced in Kvles v. Whitlev to a newly discovered evidence claim); State v. Gunsbv, 670 So. 2d 920 (Fla. 1996) (holding that the combined effect of Bradv violations, ineffective assistance of counsel, and newly discovered evidence requires a new trial); Swafford v. State, 679 So. 2d 736 (Fla. 1996) (directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion, and the evidence presented at

trial). Kyles v. Whitlev is not limited to Bradv claims; its cumulative effect analysis has been applied to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996) ; United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo; State v. Gunsbv.

ARGUMENT VI

Ms. Buenoano's Orange County conviction is unconstitutional under the Sixth Amendment of the United States Constitution and corresponding provisions of the Florida Constitution. Juror Battle concealed his prior felony conviction for involuntary manslaughter from the trial court in violation of Ms. Buenoano's right to a fair and impartial jury. At a minimum, Ms. Buenoano is entitled to a jury composed of persons who are statutorily competent to serve as jurors. Ms. Buenoano is entitled to a new trial.

Florida Statute § 40.023 (1) (1997) provides:

> No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or county of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

§ 40.013(1) (1997), Fla. Stat. Before the jury panel was brought into the courtroom for voir dire, the Clerk of Court qualified the prospective jurors for jury service in Ms. Buenoano's case

(R. 4). Juror Battle was not excused at this time. It is completely reasonable to assume that Ms. Buenoano's trial counsel was under the belief that disqualified prospective jurors would not have been empaneled.

The trial judge then spent considerable time educating the jury panel about the importance of being truthful, straightforward, and honest in their voir dire responses (R. 33-35).

The prosecuting attorney, who began questioning the panel at the conclusion of the judge's remarks, asked the jury panel a very narrow question: "[H]ave you or any of your family members or close friends ever been personally interested in the outcome of any criminal case, that is, have any interest in the outcome of any criminal case? Anyone here?" (R. 48) (emphasis added). To this specific and direct question, Juror Battle failed to disclose his prior felony conviction.

The State attempts to avoid dealing with the merits of this claim by arguing it is procedurally barred. First, the State attempts to argue this issue should have been raised on direct appeal ten years ago, even though the information concerning Juror Battle's prior felony conviction just came to light on February 19, 1998 (PC-R3 752). The State directs this Court's attention to a juror questionnaire filled out by Juror Battle, Juror Battle checked "yes" to the general question, "have you or any member of your family ever been accused, complainant, or witness in a criminal case."

The jury panel was qualified by the Clerk of Court. The judge counseled the jury panel to be truthful in their responses. Prosecutor Perry asked the jury panel specifically if they had ever been personally interested in the outcome of any criminal case. The fact that Juror Battle checked yes to the question of whether "you or any member of your family [has] ever been accused, complainant, or witness in a criminal case" is not at all indicative of an irregularity when the voir dire process as a whole is examined. The panel was asked vague, general, sweeping questions in a questionnaire. The vague question that Juror Battle marked "yes" was followed up with a much more specific question by the prosecutor, as is the general process in jury selection. There is absolutely no indication from this record that Juror Battle was concealing his prior felony conviction or that Ms. Buenoano's trial counsel should have been aware of any irregularity.

The State then attempts to cast blame on collateral counsel for failing to diligently discover Juror Battle's concealment. This argument fails for several simple and obvious reasons. First, as previously stated, there is absolutely no indication from the record that Juror Battle was concealing a prior felony conviction. Second, the State argues that part of the responsibilities of collateral counsel must be to conduct invasive, country-wide, rights-invading investigations into the backgrounds of each and every prospective juror, their families, and close friends. Perhaps the true intent of the State is to

see every collateral counsel disbarred for violating Rule 4-3.5(d)(4), Rules Regulating the Florida Bar. The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states:

> A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar. Therefore, it is disingenuous for the State to argue this claim is barred because collateral counsel failed to exercise due diligence in discovering Juror Battle's concealment.

An analogous situation was explored in Porter v. Sinsletary, 49 F. 3d 1483 (11th Cir. 1995). Allegations of judicial partiality arose well after Porter's death sentence were affirmed on direct appeal. On appeal of the denial of his successive habeas petition, the court was faced with the propriety of whether counsel ought to conduct interviews of a judge and court personnel to diligently investigate a claim of judicial partiality. The Eleventh Circuit concluded that in light of the Canons governing judicial conduct:

> [A]n attorney conducting a reasonable investigation would [not] consider it appropriate to question a judge or the court personnel in the judge's court, about the judge's lack of impartiality. Canon 3E(1) requires a judge to sua sponte disqualify himself if his impartiality might reasonably

> be questioned. Commentary to Canon 3E(1) provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process-all to the detriment of the fair administration of justice.

Id. at 1489 (remanding case for further proceedings, including an evidentiary hearing on the merits once Porter establishes cause). The ruling sought by the State here would in effect create a presumption that all jurors lie during voir dire and that counsel has an affirmative duty to uncover these lies. This standard would certainly undermine public confidence in the judicial process and disrupt the judicial process to the detriment of the fair administration of justice.

Next the State argues that even if this Court finds that the claim is not procedurally barred, it must fail because " [Ms.] Buenoano must demonstrate that the error would probably produce an acquittal on retrial." This is the wrong standard to apply in juror misconduct claims. The State is comparing apples to oranges. Claims of constitutional error are held to the standard that would apply on direct appeal. See Mason v. State, 489 So. 2d 734 (Fla. 1986) (remanded for evidentiary hearing to inquire

if defendant's due process rights were violated by failure to discover he was incompetent to stand trial); see also James v. State, 489 So. 2d 737 (Fla. 1986) (denial of adequate pretrial competency evaluation cognizable in post conviction); see also Porter v. Singletary, 49 F. 3d 1483 (11 Cir. 1995) (remanding case back to state court for evidentiary hearing on judicial bias) . Ms. Buenoano must overcome the due diligence hurdle, which she has unquestionably done, to then reach the merits of whether Juror Battle's concealment violated her sixth and fourteenth amendment rights to a fair and impartial trial by jury.

As stated in Ms. Buenoano's initial brief, the appropriate inquiry is whether there was a material[9] concealment of some fact by the juror upon his voir dire examination and the failure to discover this concealment must not be due to the want of diligence of the complaining party. De La Rosa v. Zequeria, 659 So. 2d 239 (Fla. 1995); Skiles v. Ryder Truck Lines, Inc., 267

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[9]The State attempts to create an additional requirement to the test annunciated in De La Rosa v. Zequeria, 659 So. 2d 239 (Fla. 1995). The De La Rosa test does not require the complaining party to make a showing that the concealment denies to the party affected the right to make an intelligent judgment as to whether a juror should be excused. Id. at 241. The test is simply whether the concealment is material and relevant to jury service in the case. Id. (Emphasis added).

Furthermore, the State argues that because the prosecutor asked the question at issue, only the prosecution can complain that Juror Battle concealed his prior felony conviction. As was pointed out in Appellant's Initial Brief at footnote 32, the party that appealed (and was granted a new trial) in Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2nd DCA 1972), cert. den. 275 So. 2d 253 (Fla. 1973) did not ask the question to which the juror concealed information. The question was asked by Skiles attorney but Ryder brought the appeal. Id.

So. 2d 379 (Fla. 2nd DCA 1972); Lowrey v. State, 1998 WL 10589 (Fla. 1998) (concurrence).

In Lowrey, a juror concealed he was currently under prosecution by the same office prosecuting Lowrey. Lowrey, 1998 WL 10589 at 1. This Court granted Lowrey a new trial based on the fact that the there was a "clear perception of unfairness, and the integrity and credibility of the justice system was patently affected." Id. at 3. This Court reached this conclusion even though the juror made a statement that implied a strong bias in favor of the defense. During voir dire, the prospective jurors were asked whether they believed the defendant was guilty merely because he had been accused. Id. The juror responded, "The last few months I have learned that all you've got to be done is accused of something, and then you've got to prove you are innocent."[10] Id.

Ms. Buenoano contends that Juror Battle's concealment of his prior conviction also creates a clear perception of unfairness and undermines the integrity and credibility of the justice system. Juror Battle was charged with murdering either his spouse or a family member,[11] convicted of involuntary manslaughter, sentenced to a state correctional facility, and was

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[10]This Court did not bar Lowrey's claim under the theory that this response should have put defense counsel on notice of some "irregularity" and thus his failure to further explore this response procedurally barred the claim. If Lowrey was not procedurally barred for failing to inquire, then certainly Ms. Buenoano can not be faulted for the alleged failure to spot a perceived inconsistency in Juror Battle's responses.

[11]Ms. Buenoano was on trial for murdering her husband.

unqualified to serve on Ms. Buenoano's jury panel. Juror Battle's prior felony conviction was not for a totally unrelated crime such as cocaine possession or burglary.

Lowrey was facing charges of carrying a concealed weapon. Id. at 1. Ms. Buenoano received the death penalty. The United States Supreme Court has stated that death is different:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from live imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 28, 305 (1976). Because "[d]eath is a different kind of punishment from any other that may be imposed," Gardner v. Florida, 430 U.S. 349, 357, 97 S. Ct. 1197, 1205 (1977), the Supreme Court's due process jurisprudence demands that more reliable procedures be used in capital cases. Beck v. Alabama, 408 U.S. 238, 367-368, 100 S. Ct. 2382, 2387-2388 (1980). Florida "jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings." Swafford v. State, 679 So. 2d 736, 740 (Harding, J., concurring) (citing California v. Ramos, 463 U.S. 992, 998-999 (1983) (other citation omitted)). Therefore, just as Lowrey was entitled to a new trial on his concealed weapon charge to prevent the perception of unfairness, Ms. Buenoano is also entitled to a new trial so society can have confidence in the integrity of Florida's judicial system,

especially when that judicial system is imposing the ultimate sanction -- death.

Because of the problematic practical applications of Rodgers[12], under which Ms. Buenoano would be required to make a showing that Juror Battle's concealment had an influence upon the final result, Judge Hatchett poignantly expressed:

> I am concerned with the practical application of such a rule. How can the convicted defendant or the state "demonstrate that the juror's nonage affected her ability to render a fair and impartial verdict or that she failed to do so"? Should the moving party be allowed to call all of the jurors before the court for examination? Do we inquire into their discussions or examine their thought processes in arriving at a verdict? Or should the juror without the statutory qualifications be questioned as to the part she played in reaching the verdict? Do we try to determine what influence she had on the other jurors? Finally, must the showing of prejudice be by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt?

Id. at 3 (Anstead, J., concurring) (quoting Rodgers, 347 So. 2d at 614) (Hatchett, J., dissenting). Members of this Court wrote: "The logic and clarity of Justice Hatchett's opinion is striking. Obviously, and at a minimum, Florida citizens are entitled to a

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[12]The State failed to inform this Court that Rodsers and the federal cases relied upon (Rogers v. McMullen, 673 F. 2d 1185 (11th Cir. 1982), Ford v. United States, 201 F. 2d 300 (5th Cir. 1953), Depree v. Thomas, 946 F. 2d 784 (11th Cir. 1991)) all held that the complaining party must be granted a hearing to develop the factual basis for the claim. To the extent that this Court would agree with the State that there must be a showing of actual prejudice, Ms. Buenoano is clearly entitled to a hearing on this claim.

jury composed of persons who are statutorily competent to serve as jurors." Id. Ms. Buenoano could not have phrased it better.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 17, 1998.

GREGORY C. SMITH
Capital Collateral Counsel
Florida Bar No. 279080

SYLVIA W. SMITH
Assistant CCC - Northern Region
Florida Bar No. 0055816

ROBERT FRIEDMAN
Assistant CCC - Northern Region
Florida Bar No. 500674

OFFICE OF THE CAPITAL COLLATERAL COUNSEL
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376
Attorneys for Appellant

Copies furnished to:

Candance Sabella
Assistant Attorney General
Department of Legal Affairs
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607