IN THE SUPREME COURT OF FLORIDA

JOHNNY WILLIAMSON, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC05-1527

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR DIXIE COUNTY, FLORIDA

ANSWER BRIEF

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS ii

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS..... 2

SUMMARY OF ARGUMENT 22

ARGUMENT..... 24

ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE NEWLY DISCOVERED EVIDENCE CLAIM FOLLOWING AN EVIDENTIARY HEARING? (Restated) 24

CONCLUSION..... 43

CERTIFICATE OF SERVICE 43

CERTIFICATE OF FONT AND TYPE SIZE..... 43

TABLE OF CITATIONS

CASES	PAGE(S)
Bell v. State, 90 So. 2d 704 (Fla. 1956)	32
Bolender v. State, 658 So. 2d 736 (Fla. 1996)	25
Bonifay v. State, 680 So. 2d 413 (Fla. 1996)	26
Brown v. State, 381 So. 2d 690 (Fla. 1980)	31,32
Bryan v. State, 748 So. 2d 1003 (Fla.1999)	39
Buenoano v. State, 708 So. 2d 941 (Fla. 1998)	26
Cottle v. State, 733 So. 2d 963 (Fla. 1999)	29
Davis v. State, 703 So. 2d 1055 (Fla. 1997)	39
Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)	8,30
Franklin v. Lynaugh, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988)	40
Glock v. Moore, 776 So. 2d 243 (Fla. 2001)	26,34
Huff v. State, 622 So. 2d 982 (Fla. 1993)	6,39
Huffman v. State, 909 So. 2d 922 (Fla. 2 DCA 2005)	36
Jones v. State, 591 So. 2d 911 (Fla. 1991)	26
Jones v. State, 709 So. 2d 512 (Fla.1998)	27,28
King v. State, 514 So. 2d 354 (Fla. 1987)	41

Lightbourne v. State,
644 So. 2d 54 (Fla. 1994) 34,36

Lightbourne v. State,
841 So. 2d 431 (Fla. 2003) 28

Mills v. State,
684 So. 2d 801 (Fla. 1996) 34

Mills v. State,
786 So. 2d 547 (Fla. 2001) 24

Oregon v. Guzek,
546 U.S. -, 126 S. Ct. 1226 40

Pearce v. State,
880 So. 2d 561 (Fla. 2004) 30,38

Randolph v. State,
853 So. 2d 1051 (Fla. 2003) 35,36

Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)..... 6

Rutherford v. State,
- So. 2d -, 2006 WL. 204838 (Fla. January 27, 2006) 38

State v. Hicks,
2004 WL. 2340285 (Ohio App. Ct Sept. 30, 2004) 38

Suggs v. State,
923 So. 2d 419 (Fla. 2005) 39

Swafford v. State,
679 So. 2d 736 (Fla. 1996) 25

Swafford v. State,
828 So. 2d 966 (2002) 25

Tison v. Arizona,
481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) 30

United States v. Kaczynski,
239 F.3d 1108 (9th Cir. 2001) 30

United States v. Torres-Rosario,
- F.3d -, 2006 WL 1216655 (1st Cir. May 08, 2006) 29

Williamson v. Dugger,
651 So. 2d 84 (Fla. 1994) 4,5,26,40

Williamson v. Florida,
485 U.S. 929, 108 S. Ct. 1098, 99 L. Ed. 2d 261 (1988) 3

Williamson v. Moore,
221 F.3d 1177 (11th Cir. 2000) 5,6

Williamson v. Moore,
534 U.S. 903, 122 S. Ct. 234, 151 L. Ed. 2d 168 (2001) 6

Williamson v. Singletary,
516 U.S. 850, 116 S. Ct. 146, 133 L. Ed. 2d 91 (1995) 5

Williamson v. State,
511 So. 2d 289 (Fla.1987) 2,3

Woods v. State,
733 So. 2d 980 (Fla. 1999) 39

OTHER

§ 90.804(2) 35

Fla. R.Crim. P. 3.171(c)(2) 29

PRELIMINARY STATEMENT

Appellant, JOHNNY WILLIAMSON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. The trial transcript will be referred to as T followed by the volume and page. (T. Vol. page). The evidentiary hearing will be referred to as EH followed by the volume and page. (EH Vol. page). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal, in a capital case of a trial court's denial of a successive 3.851 motion denied after conducting an evidentiary hearing. The facts of the crime are recited in this Court's direct appeal opinion:

> While inmates at Cross City Correctional Institution, the appellant, Johnny Williamson, and his "partner" Omer Williamson (no relation) were selling marijuana for Daniel Drew, also an inmate at that facility. According to Omer Williamson's testimony, Omer owed Drew $15 in connection with a marijuana sale. Omer decided not to pay Drew because Omer believed Drew had been lying to him. When Omer told the appellant that he did not intend to repay Drew, Williamson said that they would have to kill Drew because Drew was "a country boy" who would stab Omer if he didn't pay his debt. "Chickenhead" Robertson, another inmate at the facility and co-defendant in Williamson's trial, learned of the plan to kill Drew and offered to look for a knife. When Robertson and Williamson were unable to find a knife, Omer went to his cell and got a metal rod from the sink which Drew had previously sharpened to a point. While Robertson acted as a lookout, Williamson and Omer went to the maintenance shop building where Drew was working. Williamson asked an inmate working at the shop to send Drew outside. When Drew came out Omer stood behind him, while Williamson gave him $5 so that it would look like they had given Drew less than Omer owed him and he had gotten upset and pulled a knife on them. Williamson then told Drew that Omer was having trouble getting the rest of the money and needed a knife to collect. Drew had apparently made a knife for Williamson and gave it to him at that point in the conversation. On Williamson's signal, Omer grabbed Drew by the throat from behind. Williamson stabbed Drew and a struggle ensued, with Omer throwing Drew to the ground, kicking him in the head several times. Williamson continued to stab Drew with the knife. When Omer became "grossed out" he gave

> Williamson the rod and left. Williamson then straddled Drew stabbing him repeatedly with the knife and metal rod. After leaving Drew, Williamson then returned the rod to Omer and gave the knife to Robertson. Omer returned the rod to the sink in his cell and Robertson put the knife in a cast he was wearing, eventually burying it underneath a tree where it was later found.

Williamson v. State, 511 So.2d 289, 290 (Fla.1987)

Williamson, Omer, and Robertson were charged with first-degree murder and the unlawful possession of a knife while an inmate. Omer pled guilty to first-degree murder and agreed to testify against Williamson and Robertson in return for the state's agreement not to seek the death penalty. Williamson and Robertson were tried together. Robertson was found guilty of the possession charge. Williamson, who did not testify during the guilt phase of the trial but did testify during the penalty phase, was found guilty of both charges. Following the jury's recommendation of death, the trial court imposed the death penalty, finding three aggravating circumstances: 1) the capital felony was committed while Williamson was under a sentence of imprisonment; 2) Williamson had been previously convicted of a violent felony; and 3) the murder was committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification. The trial court found no mitigating circumstances. *Williamson*, 511 So.2d at 291.

On appeal, the Florida Supreme Court affirmed the conviction and sentence. *Williamson*, 511 So.2d at 291. Williamson filed a petition for writ of certiorari in the United States Supreme Court. On February 29, 1988, the United States Supreme Court denied certiorari. *Williamson v. Florida*, 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).

Williamson filed an initial 3.850 motion. On appeal, Williamson raised six claims relating to his rule 3.850 motion: (1) Trial counsel was ineffective for failing to present available evidence to support a theory of justifiable use of deadly force or "reduced intent," and by failure to adequately challenge the State's case, thereby depriving Williamson of a defense; (2) Williamson was denied a fair adversarial testing of the prosecution's case through the ineffective assistance of counsel at the guilt phase, through the State's nondisclosure of material exculpatory evidence, and through the State's use of false or misleading evidence and argument; (3) Williamson was denied effective assistance of counsel at the sentencing phase; (4) Trial court's summary denial of Williamson's newly discovered evidence claim, without an evidentiary hearing, was erroneous as a matter of law and fact; (5) Security measures undertaken in the presence of the jury abrogated the presumption

of innocence, diluted the State's burden to prove guilt beyond a reasonable doubt, and injected misleading and unconstitutional factors into the trial and sentencing proceedings, and counsel's failure to object amounted to ineffective assistance; and (6) The cold, calculated, and premeditated aggravating circumstance was applied to Williamson's case in violation of the eighth and fourteenth amendments of the United States Constitution. *Williamson v. Dugger*, 651 So.2d 84, 87 (Fla. 1994).

In his habeas corpus petition, Williamson claimed: (1) The jury was incorrectly instructed that he had no right to defend himself from an unlawful attack by the victim; (2) Security measures undertaken during the trial by court officers in the presence of the jury abrogated the presumption of innocence, diluted the state's burden to prove guilt beyond a reasonable doubt, and injected misleading and unconstitutional factors into the proceedings; (3) The trial court improperly asserted that sympathy and mercy were improper considerations; and (4) The penalty phase jury instructions improperly shifted the burden to Williamson to prove that death was inappropriate, and the judge employed this improper standard in sentencing Williamson to death. Williamson also claims that appellate counsel was

ineffective for failing to raise each of these claims on direct appeal. *Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994).

Williamson filed a petition for writ of certiorari in the United States Supreme Court. On October 2, 1995, the United States Supreme Court denied certiorari. *Williamson v. Singletary*, 516 U.S. 850, 116 S.Ct. 146, 133 L.Ed.2d 91 (1995).

Williamson filed a federal habeas petition in the Northern District of Florida, No. 95-10056-CV-MMP. The federal district court denied the habeas petition. On August 8, 2000, the Eleventh Circuit affirmed the denial of habeas corpus relief, finding no ineffective assistance of counsel and no *Brady* violation based on the prosecutor's notes. *Williamson v. Moore*, 221 F.3d 1177 (11th Cir. 2000).[1]

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[1] On appeal to the Eleventh Circuit, Williamson raised nine issues: (1) whether counsel was ineffective during the guilt phase of the trial, (2) whether there was a *Brady* violation, (3) whether there was a *Giglio* violation, (4) whether Petitioner was unconstitutionally denied an instruction on self-defense and whether appellate counsel was ineffective for failing to raise this issue on appeal, (5) whether counsel was ineffective during the sentencing phase of the trial, (6) whether newly discovered evidence entitles Petitioner to a new trial, (7) whether Petitioner was prejudiced at sentencing by the use of nonstatutory aggravating factors, (8) whether it was error for the sentencing jury to have been instructed on the "cold, calculated, and premeditated" aggravating factor, and (9) whether the state's closing argument warranted a reversal. The Eleventh Circuit concluded "that issues 3, 4, 5, 6, 7, 8 and 9 lack serious merit and warrant no discussion. They were

Williamson filed a petition for writ of certiorari in the United States Supreme Court. On October 1, 2001, the United States Supreme Court denied certiorari. *Williamson v. Moore*, 534 U.S. 903, 122 S.Ct. 234, 151 L.Ed.2d 168 (2001).

On January 2, 1997, Williamson filed a successive postconviction motion raising a newly discovered evidence claim based on the affidavit of Sanchez-Velasco.

On July 17, 2003, Williamson filed a supplemental successive postconviction motion raising a *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim.

On August 12, 2003, Williamson filed a supplemental successive postconviction motion raising a newly discovered evidence claim based on the *pro se* 3.850 motion of Omer Williamson (no relation).

The trial court held a *Huff* hearing[2] on April 21, 2004. (PC Vol. III). At the hearing, collateral counsel acknowledged that no evidentiary hearing was required on his *Ring v. Arizona*, 536

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addressed (with no reversible error) in the district court's opinion." *Williamson*, 221 F.3d 1177 at n.1.

Williamson's main claims of ineffectiveness at the guilt phase were: (1) counsel failed to investigate and to present a self-defense argument, (2) counsel failed to challenge the state's case on premeditation, and (3) counsel failed to cross-examine witnesses adequately. *Williamson*, 221 F.3d at 1180.

[2] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim. (PC Vol. III 3-4). Collateral counsel argued that he was entitled to an evidentiary hearing based on the affidavit of Sanchez-Velasco, a death row inmate who had been executed by the time of the hearing. (PC Vol. III 4-5). The prosecutor explained that Sanchez-Velasco had been deposed on October 1, 2002 pursuant to an emergency order to perpetuate testimony. (PC Vol. III 5). The prosecutor explained that no evidentiary hearing was required because the trial court could take a look at Sanchez-Velasco's deposition and noted the testimony was the only evidence available or needed. In the deposition, Sanchez-Velasco refused to testify. (PC Vol. III 6). The prosecutor explained that Sanchez-Velasco had refuted his affidavit in his deposition by refusing to testify to the contents of the affidavit. (PC Vol. III 6). Collateral counsel noted that Sanchez-Velasco was executed the day after his deposition. (PC Vol. III 6). Collateral counsel noted that hearsay is admissible in the penalty phase. The Assistant Attorney General, Curtis French, pointed out that the claim was not a penalty phase claim; rather, it was a guilt phase issue. (PC Vol. III 8). The Assistant Attorney General explained that under the test for the newly discovered evidence, the new

evidence must be admissible at a new trial. (PC Vol. III 7). “If it is not admissible, it is not newly discovered evidence.” (PC Vol. III 7). Collateral counsel admitted that the issue was “primarily a guilt phase issue” but it could affect the penalty phase as well. (PC Vol. III 8). The trial court ruled that the affidavit was hearsay that would not be admissible and that it was a claim as to the guilt phase. (PC Vol. III 8). The trial court accepted the affidavit itself as a proffer. (PC Vol. III 9). Collateral counsel explained that the next claim came from the co-perpetrator Omer Williamson’s *pro se* 3.850 motion. (PC Vol. III 11). Omer Williamson had filed a postconviction motion on July 13, 1993 which was ruled on by Judge Peach on January 27, 1994. (PC Vol. III 12). The prosecutor agreed to a hearing on this claim. (PC Vol. III 11). The trial court agreed to an evidentiary hearing on the Omer Williamson claim. (PC Vol. III 13).

Omer Williamson filed a *pro se* 3.850 motion on July 14, 1993. (PC II 12-41). In his *pro se* 3.850 motion, Omer Williamson admitted that he held the victim, fellow inmate Daniel Drew, while the defendant, Johnny Williamson, stabbed him. (PC Vol. II 28). Most of the allegations in Omer Williamson’s postconviction motion related to the voluntariness

of his plea. One of the allegations was that his plea was coerced because the prosecutor only give him five minutes to decide whether to accept the plea deal or not. Another allegation was that the prosecutor told him if he did not accept the plea deal, he would be facing death. He argued that under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), he was not subject to the death penalty and his lawyer mislead him by incorrectly informing him that he was subject to the death penalty. Another of his allegation was that his lawyer, Baya Harrison, started plea negotiations without his knowledge. He felt he would be killed if he did not testify. The main allegation was that the prosecutor promised that his life sentence would run concurrently with his prior sentence that he was serving at the time of the murder but his life sentence was not concurrent. Judge Peach denied Omer Williamson' *pro se* 3.850 motion as untimely on January 27, 1994. (PC II 66-67).

The trial court held an evidentiary hearing on July 28, 2004. (PC Vol. IV). Omer James Williamson, the co-perpetrator, who testified for the State at trial, testified at the hearing. (PC Vol. IV 5-6). He had filed a 3.850 motion in his own case but withdrew it. (PC Vol. IV 6). It was a sworn motion filed in

July of 1993. (PC Vol. IV 6). In his 3.850 motion, Omer Willaimson alleged that his lawyer, Baya Harrison, wanted him to lie. (PC Vol. IV 6). When asked if his lawyer coerced him into testifying against Johnny Williamson, he responded: “I don’t think he coerced me or anything like that.” (PC Vol. IV 6). His lawyer wanted him to lie on the stand. (PC Vol. IV 7). According to Omer Williamson, his lawyer told him he could beat the murder charge if he would lie. (PC Vol. IV 7). He refused to lie. (PC Vol. IV 7). He told his lawyer he would not lie. (PC Vol. IV 7). He was not aware the his lawyer was conducting plea negotiations with the State Attorney’s Office. (PC Vol. IV 7). He did not go to the courthouse to plead guilty, he knew nothing about that. (PC Vol. IV 7). He had five minutes to decide whether or not to pled guilty. (PC Vol. IV 8). He decided that he would pled guilty and testify against Johnny. (PC Vol. IV 8). He told the judge the truth. (PC Vol. IV 8). He told the judge what happened, how “we conspired to kill Daniel Drew.” (PC Vol. IV 8). “We had a signal, that he was going to scratch his hand, and I would grab him and he would stab him.” (PC Vol. IV 8). That was his testimony at trial. (PC Vol. IV 8-9). He told the judge that at his plea as well. (PC Vol. IV 9). He alleged in his 3.850 motion that his lawyer,

Baya Harrison, engaged in plea negotiations without his knowledge. (PC Vol. IV 9). His lawyer told the prosecutor that he would plead guilty and testify. (PC Vol. IV 10). His lawyer had not told him about the plea deal previously. (PC Vol. IV 10). Williamson stated that his trial testimony was the only evidence of premeditation in the murder case. (PC Vol. IV 10). The prosecutor objected stating that Omer Williamson's testimony was not the only evidence of premeditation. (PC Vol. IV 10). His lawyer did not tell him that he could bargain if he provided evidence of premeditation. (PC Vol. IV 11). His attorney advised the prosecutor that he would pled guilty to first degree murder and testify against Williamson and Robertson in exchange for a life sentence. (PC Vol. IV 11). In his motion, he alleged that upon learning of the unilateral negotiations, he told his attorney that he did not want to testify against his codefendants. (PC Vol. IV 11-12). He did not want to testify against them but knew that he had to testify. (PC Vol. IV 12). Collateral counsel requested that the court take judicial notice of the 3.850 motion. (PC Vol. IV 12-13). The prosecutor objected to the entire record of the case but agreed that Omer Williamson's 3.850 motion was part of the record. (PC Vol. IV 13). However, the prosecutor objected to the allegations in the

motion being considered as substantive evidence because the witness was testifying at the evidentiary hearing.(PC Vol. IV 13). The trial court ruled that he would take judicial notice of the motion but agreed that it was the witness testimony that was the substantive evidence. (PC Vol. IV 13). His lawyer went to the prosecutor and told the prosecutor that he would testify against the codefendants without talking to him about it. (PC Vol. IV 14). In his motion, he alleged that he told his lawyer he would not testify and was not willing to make any deal with the State. (PC Vol. IV 14). He first learned of the deal in a conference room in the Suwannee County jail. (PC Vol. IV 16). If he did not testify, he would not get the deal. (PC Vol. IV 16). Both his lawyer and the prosecutor explained the deal. (PC Vol. IV 16-17). They did not say anything about premeditation. (PC Vol. IV 17). They just said to "tell the truth in the whole matter" (PC Vol. IV 17). They did not really stress premeditation. (PC Vol. IV 17). He told them about the plan and he made it clear that would be his testimony. (PC Vol. IV 17). The plan was the truth. (PC Vol. IV 18). He was very angry at the time he filed his 3.850 motion. (PC Vol. IV 19). He thought he got a "raw deal" and was in solitary confinement at the time. (PC Vol. IV 19). But the Lord spoke to his heart and he decided

to take what the State had given him because he was guilty of participating in the crime. (PC Vol. IV 19). He was in solitary confinement because he had assaulted an officer. (PC Vol. IV 19). He had five minutes to decide whether or not to accept the plea offer. (PC Vol. IV 20,21). They were going to seek the death penalty for him if he did not testify against his codefendants. (PC Vol. IV 20). His attorney urged him to accept the plea offer. (PC Vol. IV 21-22). Johnny Williamson's attorney was in the courtroom that day which upset him because he knew that Williamson's lawyer knew that he was going to testify against his client. (PC Vol. IV 23,24). The prosecutor told him if he did not accept the plea deal, he would be facing death. (PC Vol. IV 25-26).[3] He did not recall the prosecutor telling him that the State would not protect him from the codefendants if he did not accept the plea and testify against them. (PC Vol. IV 26). He testified that the allegation in motion that if he would not "play ball" with the prosecution, the prosecution would put him in the same cell with the codefendants, he thought was "wrong" (PC Vol. IV 26). He testified that this allegation was not true even though he swore

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[3] The allegation in the motion was that he would be sentenced to death rather than facing death but the testimony at

it was true in his 1993 motion. (PC Vol. IV 26). He directly testified that the prosecutor "never said anything like that." (PC Vol. IV 27). State Attorney Jerry Blair agreed to house him in the county jail and then move him out of state because he was afraid for his safety. (PC Vol. IV 27). He was moved out of state. (PC Vol. IV 28). The prosecutors only gave him five minutes to decided and they pressured him to accept the plea. (PC Vol. IV 29). The prosecutors reminded him during the five minutes that the time was ticking. (PC Vol. IV 29). He then signed the plea agreement. (PC Vol. IV 30). He felt that he either had to plead guilty or the State would kill him or his codefendants would. (PC Vol. IV 31). He wrote the motion when he was angry and when he is angry, he will lie. (PC Vol. IV 31). At the time of trial, he was scared, not angry. (PC Vol. IV 32). He provided the testimony to save his life. (PC Vol. IV 32). He felt he would be killed if he did not testify. (PC Vol. IV 33). State Attorney Jerry Blair told him he had five minutes to decide. (PC Vol. IV 34). He pled guilty not just to save his life but to tell the truth. (PC Vol. IV 34). He felt the family had a right to know the truth. (PC Vol. IV 34-35). He did not recall the allegations in his motion that the facts were

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the evidentiary hearing clarified that allegation.

misrepresented to him. (PC Vol. IV 35-36). He was angry because the prosecutor said that his life sentence would run concurrently with his prior sentence that he was serving at the time of the murder but his sentence was not concurrent. (PC Vol. IV 36). He felt that the prosecutors lied about his consecutive sentence. (PC Vol. IV 36). The prosecutors promised to transfer him out of Florida State Prison which they did. (PC Vol. IV 36-37). They transferred him to Marion and then Alabama and then to Kentucky. (PC Vol. IV 37). He did not expect to be transferred out of state because the prosecutors told him that they could not do that. (PC Vol. IV 38). The prosecutor had asked the sentencing judge to impose his life sentence consecutively, not concurrently. (PC Vol. IV 40 quoting Vol. II 52-53). He did not think that the prosecutors would have put him in the same holding cell as his codefendants. (PC Vol. IV 42). He and Johnny Williamson were on the same cell block at Florida State Prison. (PC Vol. IV 42). He wanted to get away from Johnny Williamson. (PC Vol. IV 43). He was angry about being given only five minutes and felt it was “unfair.” (PC Vol. IV 43). It did not like being taken immediately to the judge to sign the plea agreement and thought it was “wrong” (PC Vol. IV 43). This was the improper conduct he referred to in his

motion. (PC Vol. IV 44). He testified that he probably would have testified against Johnny Williamson regardless of this conduct and was thinking about doing so prior to the incident. (PC Vol. IV 44). He was put in protective custody in Marion. (PC Vol. IV 45). There was a contract on his life once word got around about the trial. (PC Vol. IV 45). He was then sent to Alabama. (PC Vol. IV 45). He felt that if he did not help Johnny with the murder, Johnny would attempt to kill him. (PC Vol. IV 46). At no time did he strike a fatal wound to the victim. (PC Vol. IV 47). His participation was limited to holding the victim as the codefendant stabbed him. (PC Vol. IV 47). In his motion, he had written: “at no time did the defendant agree of his own free will to participate, plan or commit the act of murder upon Drew.” (PC Vol. IV 47). He did not recall writing that sentence in his motion. (PC Vol. IV 48). He testified that there was a plan. (PC Vol. IV 47). He testified that the sentence in the motion was “not true.” (PC Vol. IV 49). The testified that his current testimony was “the truth of the whole matter”. (PC Vol. IV 49). He was involved in the plan - “we had planned it out.”(PC Vol. IV 50). “There was a plan.” (PC Vol. IV 50). He said that at the time because he was trying to help himself. (PC Vol. IV 50).

On cross, the prosecutor established that what happened in the Live Oak Courthouse that day was he entered a plea in front of Judge Lawrence. (PC Vol. IV 54). Following the murder at Cross City Correctional, he and his codefendants were all transferred to Florida State Prison. (PC Vol. IV 55). Johnny Williamson was on the same block and was trying to get a knife. (PC Vol. IV 55). He thought that Johnny was attempting to get a knife to kill him with. (PC Vol. IV 55-56). His lawyer had already prepared the written plea before discussing the plea with him. (PC Vol. IV 58).

Baya Harrison, Omer Williamson's attorney, who arranged the plea deal, testified. (PC Vol. IV 60). He testified via telephone because he had suffered a stroke. (PC Vol. IV 60,4). Judge Douglas recognized Mr. Harrison from his 10 or 15 years of practice before the court and both parties stipulated that the voice was Mr. Harrison's. (PC Vol. IV 60). He represented Omer James Williamson in the murder of Daniel Drew. (PC Vol. IV 61). He negotiated a plea in the case. (PC Vol. IV 61). Omer Williamson had told him that he wanted to plea. (PC Vol. IV 61). The plea agreement was that the State would recommend a life sentence in exchange for his testimony. (PC Vol. IV 61-62). His client entered a plea at the Suwannee County Courthouse in front

of Judge Lawrence. (PC Vol. IV 62). There were no promises threats or coercion used to make Omer Williamson enter the plea. (PC Vol. IV 62-63). They arrived at the decision to enter a plea after one discussion. (PC Vol. IV 63). Omer Williamson wanted to avoid the death penalty and his client instructed him to proceed on that basis. (PC Vol. IV 63). His client, early in their conversations, expressed a desire to avoid the death penalty, and he engaged in plea negotiations with the prosecutor on that basis. (PC Vol. IV 64).

On cross, Baya Harrison, stated that he scanned but did not read carefully Omer Williamson's 3.850 motion. (PC Vol. IV 64). He understood the main allegations to be: (1) that his attorney had "mislead or tricked him or something" and (2) that the prosecutor had threatened him that if he did not sign the plea agreement, the prosecutor was going to cause him to receive the death penalty. (PC Vol. IV 65). He thought that was a "bit much". (PC Vol. IV 65). The allegation was that the prosecutor was going to make the final decision as to whether or not he was going to receive the death penalty as opposed to the judge. (PC Vol. IV 65). He thought that was "odd" because that "just is not true." (PC Vol. IV 65). The prosecutor has the power to seek the death penalty. (PC Vol. IV 66). He negotiated with the

state and the state wanted Omer to testify. (PC Vol. IV 66). His client wanted him to negotiate the agreement that was reached and “was very insistent upon it”. (PC Vol. IV 66). He “pretty much raced to the State Attorney’s Office and then to the courthouse”, hoping to spare his client’s life. (PC Vol. IV 67). He was advised by the defendant that he was guilty and the State could probably prove his guilt and he had an extensive prior record. (PC Vol. IV 67). Both he and Omer Williamson felt that he would be sentenced to death. (PC Vol. IV 67). It was a situation of multiple defendants which means you have to beat the other side to the State Attorney’s Office to cut a deal to save your client’s life. (PC Vol. IV 67). He was trying to beat the other side to the prosecutor’s office to cut a deal before anyone else did. (PC Vol. IV 67-68). Judge Lawrence accepted the plea and was the same judge who tried this case. (PC Vol. IV 68). He did not remember the factual basis of the plea but, based on what his client told him, there was enough evidence for Omer to be convicted. (PC Vol. IV 69-70). He could not say exactly what Omer Williamson was going to testify to and was not sure exactly what the prosecutor knew about what Omer’s testimony would be. (PC Vol. IV 70-71). This was “pretty vicious murder” and according to Omer, there were witnesses and

he had a “terrible prior record.” (PC Vol. IV 70-71,79). “You don’t have to be a genius lawyer to figure out you’ve got to cut a pretty quick deal, which is what we did”. (PC Vol. IV 71). He may have relayed what the substance of Omer’s Williamson testimony would be at trial to the prosecutor as part of the plea deal. (PC Vol. IV 72-76). He does not recall the prosecutor asking if Omer’s Williamson’s testimony would specifically be about a plan or premeditation. (PC Vol. IV 77). He did not think that his client went into any great detail about whether they plotted to do this. (PC Vol. IV 78). He did not think that the state was going to have a problem proving premeditation. (PC Vol. IV 78). His client may have had a prior conviction for sexual battery. (PC Vol. IV 80). In his professional opinion, given his client’s “serious prior criminal record”, this “was a death case.” (PC Vol. IV 82). His client’s desire to plea was “stronger” or at least as strong as his. (PC Vol. IV 82). He was acting on his client’s wishes and he also felt that make a plea deal was “the right thing.”(PC Vol. IV 82). He did not remember his client threatening to kill him if he did not provide discovery material but the client wrote him a threatening letter. (PC Vol. IV 82). But criminal defense lawyers get threatened - “that goes with the territory” (PC Vol.

IV 83). Regarding the allegation in the motion that his lawyer encouraged him to lie under oath, Mr. Harrison testified that "I assure you that I did not do that." (PC Vol. IV 83).

Collateral counsel then introduced a copy of the plea offer as Defense exhibit #1. (PC Vol. IV 84). It was Omer James Williamson's offer of plea dated February 11, 1986, submitted to the court on February 12, 1986. (PC Vol. IV 86). The trial court ordered the parties to submit proposed orders including findings of fact and conclusions of law within 30 days. (PC Vol. IV 89-90).

Collateral counsel submitted a proposed order.(PC Vol. I 1-11). The State also submitted a proposed order. (PC Vol. I 12-26). The trial court adopted the State's propsoed order. (PC Vol. I 13-26). The trial court made the following findings:

TESTIMONY PRESENTED AT THE GUILT PHASE OF TRIAL

> Williamson's co-defendant Omer Williamson (Omer) testified that he and Johnny Williamson (Williamson) had been selling marijuana for the victim Daniel Drew (OR 502-03). (OR __) is a citation to the original trial record in this case. They owed Drew money (OR 503-04). Omer testified that when he decided not to pay Drew, Williamson told him they would have to kill him (OR 510). Williamson recruited Chickenhead Robertson to help them look for a knife, without success (OR 515-16). Omer then supplied a sharpened brass rod from under his sink (OR 517). While Robertson acted as a lookout, Williamson and Omer went to where Drew worked (OR 523-24). Williamson gave Drew $5 claiming that that the rest of the money had

been stolen and they needed a knife to recover it (OR 525). When Drew handed over a knife he had been making for them, Omer grabbed Drew while Williamson stabbed Drew (OR 526). Omer admitted kicking Drew in the head "a couple of times," and admitted holding Drew while Williamson stabbed Drew repeatedly as "blood just spurted" and Williamson became covered with blood (OR 526-27). Omer acknowledged that, in exchange for his plea of guilty to first-degree murder, the State would not seek the death penalty against him and would give him "protection" (OR 538-39, 559).

Kenneth Baez testified that on the day of the murder Williamson had asked him for a "shank," stating he "wanted to kill the son-of-a-bitch" (OR 599-600. Marvin Harris, who supervised Drew, testified that Williamson had come by and asked him to send Drew outside (OR 467). When Harris looked out a few minutes later, he saw Williamson stab Drew (OR 469). Carl Hicks testified that he saw Robertson standing under a tree near the murder scene (OR 401-03). Hicks left to make a telephone call; when he returned, he observed Drew lying on his side, bleeding profusely (OR 404-05). James Chavous testified that he saw Williamson leaving the scene with "wet-looking red material on his pants leg (OR 430-32). Ronnie Presley testified that he saw Omer hold Drew while Williamson stabbed him (OR 610-11). Afterwards, Williamson, covered with blood, told Presley, "I wanted to get away with this, but there ain't no way that I am now" (OR 612). Williamson went to the laundry to get new clothes, complaining "The son-of-a-bitch wouldn't die" (OR 612). He pulled the knife from under his shirt and gave it to Robertson (OR 613). Stephen Bishop saw Williamson covered with blood and heard him admit, "I killed that motherfucker" (OR 624, 627).

Medical examiner Dr. Floro testified that Drew had a broken nose, multiple bruises on the forehead, nose, cheekbone and chest; and numerous stab wounds to the head, chest, back, abdomen, arms and legs (OR 690, 695, 697-98). His left lung and his spleen had been perforated (OR 698, 703). Officer Higginbotham testified that he retrieved clothes from Williamson's locker (OR 650-51). Although someone had tried to

clean the clothes, the crime laboratory found blood on Williamson's sock that was consistent with that of the victim (OR 681).

Williamson's trial counsel attacked Omer's credibility through cross-examination and testimony.

TESTIMONY PRESENTED AT THE JULY 28, 2004 EVIDENTIARY HEARING

This court heard the testimony of two witnesses, Omer Williamson (called by the defendant) and his trial counsel Baya Harrison (called by the State).

Omer testified that he filed a Rule 3.850 motion in July of 1993 (PC 6). (PC __) is a citation to the transcript fo the evidentiary hearing. He denied having been coerced into pleading guilty, but did say that his attorney, Baya Harrison, had told him "he could beat this murder charge if I could lie" (PC 7).

Omer testified that he refused to lie and that he "told the judge the truth" at his plea colloquy and at his trial (PC 7-8, 54). The "truth" was that "we conspired to kill Daniel Drew, that we were going to do it on Thursday . . . . And . . . we had a signal, that he was going to scratch his hand, and I would grab him, and he would stab him" (PC 8).

Omer testified that he had been unaware that Harrison had been conducting plea negotiations with the State Attorney's Office until he was brought to the courthouse one day and told he could plead guilty and testify as a State's witness at Williamson's trial in exchange for a life sentence; if he declined the offer, the State would seek a death sentence (PC 7-8, 10-11, 16). Omer testified he was given only five minutes to make up his mind (PC 8, 20-21, 29).

When asked if he was informed by the State and by his attorney that he must provide evidence of premeditation to receive his deal, Omer agreed, but then testified: "They were just saying to tell the truth in the whole matter" (PC 16-17). Omer subsequently agreed that "they wanted you to provide the testimony regarding the plan [to murder Drew]."

This Court expressed its confusion about Omer's answers and asked him if the "plan" was the "truth" (PC 18). Omer answered that it was the "whole truth" (PC 18). Omer expressly disavowed the allegation in

his 3.850 motion that he had participated in the murder of Drew only because of his fear of Williamson and that he had never willingly agreed to the plan to commit murder; there was a plan to murder Drew and Omer was a willing participant (PC 48-50, 57).

Omer denied that Assistant State Attorney Phelps had threatened to put him in a cell with Williamson if he did not plead guilty and testify against Williamson, and he did not believe the State "would have done that" (PC 26-27, 42). Omer explained that he had been "very angry" when he had filed his 3.850 motion, but eventually accepted that he had been given what he deserved because he was guilty (PC 19). Omer testified that he had asked to be housed away from Williamson pending trial and thereafter moved out of state, for his own safety, because he knew Williamson was trying to get a knife "for our court dates," and he knew from his own experience that Williamson was capable of "killing somebody" (PC 27, 42-43, 55-56). He still felt that if he had not pled guilty, he "would have been killed" (PC 33). However, he pled guilty not just to save his life, "but to tell the truth of the matter" (PC 34).

Omer's trial counsel Baya Harrison testified that Omer admitted to him early on that he was guilty and had an extensive prior record, and was "very insistent" that Harrison negotiate a plea to avoid a death sentence (PC 63-64, 66-67). Harrison testified that no promises, threats or coercion were used to obtain a plea (PC 62-63).

Harrison testified that, in a case with two defendants who "were both involved in stomping and knifing this guy to death," and a client that was not only involved in the murder but had a "terrible prior record," he felt it was important to seek a negotiated plea before the other defendant did, rather than wait until questions of "who was more culpable and every little detail was shaken out" (PC 67-69, 71, 73). Harrison did not recall providing the State a "specific laundry list" of potential testimony from his client during the plea negotiations; he assumed that the State already had sufficient "information" about how the crime had occurred (PC 75). In fact, Harrison did not recall that Omer had gone "into any great detail" with

> him about whether he and Williamson had “plotted” the murder in advance; in Harrison’s view, in a case in which one defendant held the victim while the other stabbed him numerous times, the State was not “going to have a problem proving premeditation” (PC 77-78).

(PC Vol. I 15-20).

The trial court denied the successive postconviction motion. (PC Vol. I 13-26). This is the appeal of the trial court order denying the successive 3.851 motion following an evidentiary hearing.

SUMMARY OF ARGUMENT

ISSUE I

Williamson asserts a newly discovered evidence claim based on the postconviction motion of one of the State's main witnesses in this case. Omer Williamson, who testified for the state in exchange for a life sentence, filed a postconviction motion claiming his plea was involuntary. However, Omer Williamson reaffirmed his trial testimony at the evidentiary hearing. Omer Williamson has not recanted his trial testimony. This Court has repeatedly held that when a State's witness reaffirms his trial testimony at the evidentiary hearing, a new trial is not warranted. The trial court properly denied this claim following an evidentiary hearing.

Williamson also asserts the trial court the improperly denied him an evidentiary hearing on a claim of newly discovered evidence based on an affidavit from a capital defendant, now deceased Sanchez-Velasco, which stated that the codefendant, Omer Williamson, made a statement that could be interpreted to mean that he was the sole perpetrator. First, as the trial court found, this claim of newly discovered evidence is time barred. Moreover, Sanchez-Velasco, in effect, retracted and disowned his affidavit when he refused to testify at the

deposition to perpetuate his testimony. The trial court granted collateral counsel's emergency motion to perpetuate testimony prior to Sanchez-Velasco's execution but Sanchez-Velasco refused to testify. The trial court properly refused to consider Sanchez-Velasco's affidavit in light of his reputation of it. The trial court correctly ruled that the affidavit was hearsay that would not be admissible at any retrial. There is no hearsay exception that covers the affidavit and therefore, it would not be admissible at trial. Newly discovered evidence must be admissible at a retrial to warrant granting a new trial. The trial court properly denied this claim without holding an evidentiary hearing. The trial court properly denied the successive postconviction motion.

ARGUMENT
ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE NEWLY DISCOVERED EVIDENCE CLAIM FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Williamson asserts a newly discovered evidence claim based on the postconviction motion of one of the State's main witnesses in this case. Omer Williamson, who testified for the state in exchange for a life sentence, filed a postconviction motion claiming his plea was involuntary. However, Omer Williamson reaffirmed his trial testimony at the evidentiary hearing. Omer Williamson has not recanted his trial testimony. This Court has repeatedly held that when a State's witness reaffirms his trial testimony at the evidentiary hearing, a new trial is not warranted. The trial court properly denied this claim following an evidentiary hearing.

Standard of review

The standard of review for a newly discovered evidence claim is abuse of discretion. *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001)(stating "absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence will not be overturned on appeal."). The trial court did not abuse its discretion. The trial court conducted a full

evidentiary hearing on one of the claims even though it was a successive 3.851 motion.

The trial court's ruling

> In his final motion for relief, Williamson argues that newly discovered evidence "thoroughly discredit[s]" Omer's trial testimony and that Williamson must be given a new trial. This Court granted an evidentiary hearing on this claim.
>
> Williamson's August 12, 2003 supplemental motion relies upon a Rule 3.850 motion filed by Omer on July 10, 1993, in support of his claim that Omer's plea had been coerced by threats and fear for his life, and that he had given false testimony about whether the murder had been committed pursuant to a "plan." Initially, the Court notes that Williamson waited more than 10 years to present this basis for relief to the Court. Absent any explanation for the delay, the claim must be deemed time barred. E.g., *Mills v. State*, *supra*; *Bolender v. State*, 658 So.2d 736, 839 (Fla. 1996) (burden to allege and prove due diligence rests upon the defense); *Swafford v. State*, 679 So.2d 736, 739 (Fla. 1996)(defendant bears burden to prove that "his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence"); *Swafford v. State*, 828 So.2d 966 (2002)(affirming denial of relief on ground that Swafford had failed to demonstrate that his postconviction counsel could not, in the exercise of due diligence, have earlier discovered his alleged new evidence).
>
> Aside from being time-barred, the claim is meritless. The testimony presented at the evidentiary hearing fails to support the claim that Omer's trial testimony

is now so discredited that he probably would be acquitted on a retrial.

Initially, the Court notes that it is not newly discovered evidence that Omer received the benefit of a lesser, life sentence and avoided the possibility of a death sentence by entering his guilty plea and agreeing to testify. This fact was disclosed at trial and explored by Williamson's trial counsel in his cross-examination of Omer. Omer's testimony fails to support the claim that he was the subject of any improper threats or other misconduct to obtain his plea. His testimony that his trial counsel negotiated the plea without discussing the matter beforehand with Omer is contradicted by the testimony of his trial counsel, Baya Harrison, whose testimony this Court finds more credible on this matter. But even if Omer had no foreknowledge of the plea negotiations, as he still insists, it is clear from the record and from the testimony presented at this hearing that Omer nevertheless voluntarily pled guilty. Further, this Court finds that no one told him what to say in his testimony at trial, other than simply to tell the truth, which Omer insists that he did.

Omer acknowledged at the hearing that he had alleged in his 3.850 motion that "at no time did the defendant, Omer James Williamson, of his own free will, participate, plan, or commit the act of murder upon Daniel Inman Drew" (PC 49). Williamson cites this allegation in support of his argument that there was no "plan" and the murder was therefore unpremeditated. The initial difficulty with this argument is that the allegation does not directly say there was no plan, but only that Omer did not willingly participate in it. Secondly, Omer explained that he had been angry when he had filed the motion, and that this allegation was false (PC 49). His firm, unwavering testimony at the evidentiary hearing was that there was a plan to murder Drew, and that, notwithstanding his earlier denial, he had willingly participated in that plan. This Court finds Omer's testimony in this regard to be credible and persuasive.

Omer's 3.850 motion would not be substantively admissible at any retrial. At best, it might be

> admissible to impeach by inconsistent statements. However, newly-discovered evidence that is merely impeaching generally is insufficient to entitle a defendant to a new trial. *Williamson v. Dugger*, *supra*, 651 So.2d at 89; *Buenoano v. State*, 708 So.2d 941, 951 (Fla. 1998). Here, Omer was impeached at trial. Thus, his allegations in his 3.850 motion are, at best, no more than cumulative impeachment that is insufficient to warrant a new trial.
>
> The trial evidence was overwhelming that Williamson stabbed Drew repeatedly while Omer held him. Williamson's own statements and the testimony of numerous witnesses aside from Omer establish that fact. Omer's testimony that the killing had been planned in advance was corroborated by testimony from Baez that Williamson had sought to obtain a weapon in advance. Additionally, this Court finds that the brutality and "deliberate ruthlessness" of this killing was itself sufficient to demonstrate a premeditated intent to kill. See *Bonifay v. State*, 680 So.2d 413, 418-19 (Fla. 1996)(that a defendant's conduct exhibits "deliberate ruthlessness" supports finding of heightened premeditation).
>
> This Court finds that the newly discovered evidence presented by Williamson at this hearing, considered alone or cumulatively, is not "of such nature that it would probably produce an acquittal on retrial." *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991).

(PC Vol. I 22-25).

Time bar

This claim is time barred. *Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001)(noting that "any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence."). Omer

Williamson's *pro se* 3.850 motion was filed on July 14, 1993. (PC II 12-41). Judge Peach denied Omer Williamson' *pro se* 3.850 motion as untimely on January 27, 1994. (PC II 66-67). Collateral counsel's successive motion raising a newly discovered evidence claim based on Omer Williamson' *pro se* 3.850 motion was filed on August 12, 2003, over ten years later. Collateral counsel did not establish, or even aver in his pleadings, when he obtained Omer Williamson's postconviction motion. Even in the face of the trial court's ruling that the claim was time barred, collateral counsel makes no argument regarding the timing of obtaining Omer Williamson's postconviction motion or attempt to explain the ten year delay in his brief.

Merits

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

the use of diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Jones*, 709 So.2d at 521.

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

Williamson does not meet the requirements for a new trial based on newly discovered evidence established in *Jones* and *Lightbourne*. Omer Williamson's allegations of ineffectiveness

and involuntariness of his plea are irrelevant to this trial and conviction. Most of the allegations in Omer Williamson's postconviction motion related to the voluntariness of his plea, not the truthfulness of his trial testimony in this case.[4] None

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[4] Most of the allegations in Omer Williamson's postconviction motion related to the voluntariness of his plea. While the trial court properly denied the motion as untimely, it was also meritless. For example, one of the allegations is that his plea was coerced because the prosecutor only give him five minutes to decide whether to accept the plea deal or not. This is not coercion. *United States v. Torres-Rosario*, - F.3d -, 2006 WL 1216655 (1st Cir. May 08, 2006)(rejecting a motion to withdraw a plea where prosecutor gave defendant only 15 minutes to consider the plea offer because prosecutor's haste while "perhaps distasteful", was not wrongdoing and observing: "[t]he hard reality is that plea bargaining in criminal cases is not for the delicate minded."). Plea bargaining in criminal cases is not for the delicate minded. Prosecutors may set time limits on their plea offers, including time limits of only several minutes.

Another of his allegation was that his lawyer, Baya Harrison, started plea negotiations without his knowledge. (PC Vol. IV 9). Lawyers may start plea negotiations without their client's knowledge or consent. Defendants do not have a constitutional right to be informed of every step of plea negotiations. A lawyer is only required to inform his client of the final plea offer. *Cottle v. State*, 733 So.2d 963, 966-67 (Fla. 1999)(holding that failure to inform a client of a plea offer can constitute ineffective assistance of counsel); American Bar Association Standards for Criminal Justice as confirmation that the failure to notify clients of plea offers falls below professional standards. See, e.g., Lloyd, 373 S.E.2d at 2. The ABA standards ABA Standards for Criminal Justice: Prosecution Function and Defense Function, stds. 4-6.2(b)(3d ed.1993)(requiring defense attorneys to "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor." and the commentary to standard 4-6.2 states: Because plea discussions are usually held without the accused

being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. … It is important that the accused be informed both of the existence and the content of proposals made by the prosecutor); Fla. R.Crim. P. 3.171(c)(2) (mandating that counsel advise of "(A) all plea offers; and (B) all pertinent matters bearing on the choice of which plea to enter"). Moreover, the failure to be informed of the start of plea negotiations does not render his plea involuntary. It was a situation of multiple defendants which means you have to beat the other side to the State Attorney's Office to cut a deal to save your client's life. (PC Vol. IV 67). He was trying to beat the other side to the prosecutor's office to cut a deal before anyone else did. (PC Vol. IV 67-68). "You don't have to be a genius lawyer to figure out you've got to cut a pretty quick deal, which is what we did" (PC Vol. IV 71). An attorney in this situation must act quickly or there will be no plea offer to inform his client of.

Another allegations was that the prosecutor told him if he did not accept the plea deal, he would be facing death. (PC Vol. IV 25-26). This is not coercion; it is reality. This is merely an accurate statement of the prosecutor's intention to seek the death penalty and the actual consequences of rejecting the plea offer.

United States v. Kaczynski, 239 F.3d 1108, 1115-1116 (9th Cir. 2001)(finding guilty plea voluntary where defendant plead guilty in exchange for the government's giving up its intent to seek the death penalty and observing being forced to choose between unpleasant alternatives is not unconstitutional). A person who holds the victim while another person stabs the victim in accordance with a preexisting plan certainly may be sentenced to death without violating the *Enmund/Tison* doctrine. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)(holding that a sentence of death in the felony murder context can be imposed if the defendant is a major participant in the felony and the defendant's state of mind amounts to a reckless indifference to human life). Omer Williamson was a major participant with a reckless indifference to human life. Moreover, the *Enmund/Tison* doctrine does not apply to this crime because this was a premeditated plan to murder. *Pearce v. State*, 880 So.2d 561, 575 (Fla. 2004)(explaining that where there is substantial, competent evidence to uphold a conviction under a premeditation theory, *Enmund/Tison* is not applicable).

of this would be admissible as impeachment in a retrial. It is not relevant impeachment. The voluntariness of Omer's plea is a legal issue for the judge who accepted his plea to determine, not a fact question for the jury in this case. The only issue that is relevant in this case is whether Omer Williamson lied

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He felt he would be killed if he did not testify. (PC Vol. IV 33). It is not clear whether he means by the his codefendants or by the State. It makes no sense if he is referring to the codefendants. It was only by testifying against the his codefendants that he gave them a motive for wanting to kill him - either prior to trial to prevent his testimony or after trial as revenge for testifying against them. It was accepting the plea, not rejecting it that he became a possible target of his codefendants. If he means that the State would kill him by seeking and obtaining the death penalty, this is not coercion either.

The main allegation was that the prosecutor promised that his life sentence would run concurrently with his prior sentence that he was serving at the time of the murder but his life sentence was not concurrent. (PC Vol. IV 36). He received a consecutive sentence instead. This allegation was conclusively rebutted by the transcript of his sentencing hearing. It was clear from defense counsel's presentation of mitigation in front of Judge Lawrence that the main sentencing issue was whether the life sentence would to imposed concurrently or consecutively to his current sentence. (PC Vol. II Ex. B 47-51). The prosecutor asked the judge to impose the life sentence consecutively and responded that the State already gave him a break by recommending that Count I be concurrent with Count II which allows for parole. (PC Vol. II Ex. B 52-53). It is clear from this lengthy exchange at sentencing and the written plea agreement that Omer Williamson was not promised a concurrent sentence. (PC Vol. II written plea agreement which contain this language: "In return for my plea, the State Attorney has agreed to: not seek the Death Penalty in this cause and recommend that the sentence in Count II run concurrently with the sentence in Count I.").

during his trial testimony in this case. It is his testimony's veracity that counts and only its veracity.

In his *pro se* 3.850 motion, Omer Williamson admitted that he held the victim, fellow inmate Daniel Drew, while the defendant, Johnny Williamson, stabbed him. (PC Vol. II 28). In his motion, he had written: "at no time did the defendant agree of his own free will to participate, plan or commit the act of murder upon Drew." (PC Vol. IV 47). However, at the evidentiary hearing, Omer Williamson testified that he did not recall writing that sentence in his motion. (PC Vol. IV 48). He testified that there was a plan. (PC Vol. IV 47). He testified that the sentence in the motion was "not true." (PC Vol. IV 49). He was involved in the plan - "we had planned it out."(PC Vol. IV 50). "There was a plan." (PC Vol. IV 50). Omer Williamson did not recant his trial testimony against Williamson - far from it - at the evidentiary hearing, Omer Williamson reaffirmed his trial testimony repeatedly. As the trial court found: Omer Williamson "firm, unwavering testimony at the evidentiary hearing was that there was a plan to murder Drew, and that, notwithstanding his earlier denial, he had willingly participated in that plan." The trial court found "Omer's

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None of Omer Williamson's allegation amount to coercion or

testimony in this regard to be credible and persuasive." Omer Williamson has never recanted his trial testimony in either his *pro se* 3.850 motion in which he admitted his holding the victim while the defendant stabbed him or at the evidentiary hearing in this case. Without a recantation, there is no newly discovered evidence.

In *Brown v. State*, 381 So. 2d 690, 692 (Fla. 1980), the Florida Supreme Court held that Brown was not entitled to a new trial where the state's main witness had recanted his trial testimony but reaffirmed his trial testimony at the evidentiary hearing. Brown was convicted of rape, robbery, and first-degree murder. The "conviction was based primarily on the testimony of Ronald Floyd, who was with the appellant immediately prior to the crime and immediately afterwards." *Brown*, 381 So. 2d at 691. After the trial, Floyd signed an affidavit saying that his testimony against Brown was false. *Brown*, 381 So. 2d at 692. The affidavit was notarized by the defense counsel and given by Floyd while he was incarcerated at the Union Correctional Institute. Floyd and Brown's counsel were the only persons present at the time the affidavit was prepared and signed. On appeal, this court granted a motion for remand for further

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render his plea involuntary.

consideration in light of Floyd's affidavit. At a hearing on the motion for a new trial, Floyd admitted signing the affidavit, but reaffirmed his trial testimony and said that statements to the contrary in the affidavit were false. The trial court denied the motion for a new trial because it was based solely on the Floyd affidavit which had been retracted and denounced by Floyd at the hearing. This Court agreed with the trial court that "a witness's post trial recantation of testimony, followed by a clear retraction of the post trial statements, is not sufficient to overturn a jury verdict and sentence." *Brown*, 381 So. 2d at 693; see also *Bell v. State*, 90 So.2d 704 (Fla. 1956)(holding trial court did not abuse its discretion in denying motion for new trial based on affidavit of accomplice that he had testified falsely at trial where he had recanted prior to trial at a preliminary hearing but reaffirmed his original statements implicating defendant in his testimony at trial).

Here, as in *Brown*, Omer Williamson reaffirmed his trial testimony at the evidentiary hearing. However, here, unlike *Brown* or *Bell*, Omer Williamson never actually recanted his trial testimony even in his postconviction motion. The trial court found that "no one told him what to say in his testimony at

trial, other than simply to tell the truth, which Omer insists that he did." Omer Williamson has never recanted his trial testimony in either his *pro se* 3.850 motion or at the evidentiary hearing in this case. There is no affidavit recanting his trial testimony in this case. Here, like *Brown*, the facts are "not sufficient to overturn a jury verdict and sentence." The trial court properly denied the newly discovered evidence claim following an evidentiary hearing.

Sanchez-Velasco's affidavit and testimony

Williamson asserts the trial court the improperly denied him an evidentiary hearing on a claim of newly discovered evidence based on an affidavit from a capital defendant, now deceased Sanchez-Velasco, which stated that the codefendant, Omer Williamson, made a statement that could be interpreted to mean that he was the sole perpetrator. First, as the trial court found this claim of newly discovered evidence is time barred. Moreover, Sanchez-Velasco, in effect, retracted and disowned his affidavit when he refused to testify at the deposition to perpetuate his testimony. The trial court granted collateral counsel's emergency motion to perpetuate testimony

prior to Sanchez-Velasco's execution but Sanchez-Velasco refused to testify. The trial court properly refused to consider Sanchez-Velasco's affidavit in light of his reputation of it. The trial court correctly ruled that the affidavit was hearsay that would not be admissible at any retrial. There is no hearsay exception that covers the affidavit and therefore, it would not be admissible at trial. Newly discovered evidence must be admissible at a retrial to warrant granting a new trial. The trial court properly denied this claim without holding an evidentiary hearing.

The trial court's ruling

> Williamson's initial claim for relief is based upon an affidavit from Rigoberto Sanchez-Velasco, a now-deceased capital defendant. This claim is time barred because it was not presented within one year of the discovery of the affidavit. *Mills v. State*, 684 So.2d 801, 804-05 (Fla. 1996). It is also meritless. This Court authorized a deposition to perpetuate the testimony of Mr. Sanchez-Velasco. At the deposition, Mr. Sanchez-Velasco offered no testimony. Mr. Sanchez-Velasco was subsequently executed, and Williamson now seeks the substantive consideration of Mr. Sanchez-Velasco's affidavit in support of his claim of newly discovered evidence of innocence. Affidavits, however, are hearsay and, as such, are not admissible substantively absent stipulation by the parties. E.g., *Lightbourne v. State*, 644 So.2d 54, 56-7 (Fla. 1994). Williamson has not identified any recognized exception to the hearsay rule which would allow its admission in evidence in any retrial. Alleged newly-discovered evidence that would not be

> admissible at trial is not "evidence' and cannot "be of such nature that it would probably produce an acquittal on retrial." *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). Thus, the Sanchez-Velasco affidavit affords no basis for awarding Williamson a new trial. For the foregoing reasons, Williamson's Sanchez-Velasco newly-discovered evidence claim is denied.

(PC Vol. I 20-21).

Time bar

This claim is time barred. *Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001)(noting that "any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence."). Collateral counsel did not establish, or even aver in his pleadings, when he obtained Sanchez-Velasco's affidavit (the affidavit is not part of this record nor was it attached to either the 1997 or the 2003 successive postconviction motion). Even in the face of the trial court's ruling that the claim was time barred, collateral counsel makes no argument regarding the timing of obtaining Sanchez-Velasco's affidavit in his brief.

Merits

In *Randolph v. State*, 853 So. 2d 1051, 1062 (Fla. 2003), the Florida Supreme Court held that the trial court did not

abuse its discretion by declining to admit the affidavit of a dead person at the evidentiary hearing. Randolph claimed the postconviction court erred in refusing to admit the affidavit of Timothy Calhoun as evidence at the evidentiary hearing. The court was asked to admit this affidavit dated in 1992 from a person who subsequently died. The affidavit indicated that at some unspecified time prior to the murder, Randolph drank beer, smoked marijuana, and became addicted to crack cocaine. This Court noted that the admissibility of evidence lies in the sound discretion of the trial court and trial court decisions will be affirmed absent a showing of abuse of discretion. This Court concluded that Randolph had shown no abuse of the trial court's discretion and failed to offer any legal or factual support for his argument that the trial court's ruling was in error. This Court explained that the affidavit did not fall under one of the four hearsay exceptions by which the statement of a declarant who is unavailable as a witness may be admitted into evidence. See§ 90.804(2), Fla. Stat. (1997) (providing that when a declarant is unavailable as a witness, hearsay evidence can be admitted only if it qualifies under one of the following four exceptions: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; and (4)

statement of family or personal history). This Court found that the trial court correctly refused to admit the affidavit into evidence. *Randolph*, 853 So. 2d at 1062; see also *Lightbourne v. State*, 644 So.2d 54, 56-57 (Fla. 1994)(rejecting claim that trial court should have admitted affidavits from other inmates who were unavailable to testify at the defendant's postconviction hearing).

The trial court correctly ruled that the affidavit was hearsay that would not be admissible at any retrial. The affidavit is not admissible under the "former testimony" exception because it is not testimony. Indeed, the attempt to obtain Sanchez-Velasco's testimony by filing a motion to perpetuate his testimony failed because he refused to testify. Nor is it admissible under the "statement under belief of impending death" exception. The affidavit must have been obtained some time prior to the January 2, 1997 successive motion being filed in which this claim was first made and Sanchez-Velasco was not under an active warrant at that time. There is no hearsay exception that covers the affidavit and therefore, it would not be admissible at trial. Newly discovered evidence must be admissible at a retrial to warrant granting a new trial. *Huffman v. State*, 909 So.2d 922, 923 (Fla.

2 DCA 2005)(noting that the newly discovered evidence must be admissible). The only admissible evidence is the refusal to testify at the deposition, not the affidavit.

Sanchez-Velasco's affidavit stated that he saw Omer shortly after the murder with blood on him and that Omer Williamson stated: "I fucked up". IB at 41-44. (the affidavit seems to be in Spanish) However, Sanchez-Velasco was also deposed and refused to testify in the case prior to his execution. (PC Vol. III 5-6). Sanchez-Velasco refuted his own affidavit in his deposition by refusing to testify to the contents of the affidavit. (PC Vol. III 6). Sanchez-Velasco's affidavit basically contained prison gossip related to the inmate murder. Sanchez-Velasco was not an eyewitness to the murder and had no personal knowledge of the murder. The only statement that involves personal knowledge was that he saw Omer shortly after the murder with blood on him and that Omer Williamson stated: "I fucked up". Collateral counsel emphasizes the "I" in this statement attempting to show that it means Omer was the sole perpetrator but this statement is more readily construed as establishing Omer's involvement with other perpetrators. Omer Williamson was alone when he made this statement; he was not with Johnny Williamson at the time he made this statement.

Using “we” instead of “I” would not makes sense when he was alone. The use of “I” is ambiguous and certainly does not establish Johnny Williamson’s innocence of the murder. Nor did collateral counsel attempt to explore what Omer Williamson meant by the statement at the evidentiary hearing or even if Omer, in fact, made the statement.

Williamson was not entitled to an evidentiary hearing based on

Sanchez-Velasco’s affidavit. *Rutherford v. State*, - So.2d -, 2006 WL 204838 (Fla. January 27, 2006)(denying an evidentiary hearing, in the context of a successive motion for post-conviction relief, based on two contradictory affidavits from a state witness and distinguishing many of the same cases Williamson relies on). Sanchez-Velasco’s affidavit was contradicted by own his deposition testimony. Indeed, as a practical matter, the trial court could not grant an evidentiary hearing on this claim. Sanchez-Velasco was dead at the time of the evidentiary hearing. The only evidence available at the time of the evidentiary hearing (or at any possible retrial) was the affidavit itself and Sanchez-Velasco’s refusal to testify at the deposition to the contents of the affidavit.

Williamson complains of the "utter void of credibility" of the state's witnesses in this case. IB at 52. This is true of almost all inmate murders prosecutions. Angels are not available to the prosecution in inmate murder cases, only other convicted felons.

State v. Hicks, 2004 WL 2340285, *3 (Ohio App. Ct Sept. 30, 2004)(observing that the trial court, in a bench trial, stated: "In a play cast in hell, there are no angels," and the appellate court observing: "most of the witnesses relied upon by the State are not angels, and, in fact, other than the professionals, they all had extensive criminal records."). The credibility of the State's witness was a matter for the jury and they determine that these inmates, including Omer Williamson, were worthy of belief. *Pearce v. State*, 880 So.2d 561, 572 (Fla. 2004)(noting that once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses citing *Davis v. State*, 703 So.2d 1055, 1060 (Fla. 1997)); *Woods v. State*, 733 So.2d 980, 986 (Fla. 1999)(noting that determining the credibility of witnesses is solely within the province of the jury).

Williamson also complains that the trial court did not considered the evidence cumulatively and did not consider the affect on Williamson's death sentence. IB at 57. There was no affect on the death sentence for the trial court to consider. This evidence, as the trial court noted at the *Huff* hearing, went to guilt, not penalty. Moreover, the trial court does not need to consider the newly discovered evidence cumulatively because it found that this was not newly discovered evidence. Moreover, the trial court is not required to consider evidence or claims cumulatively unless it finds some merit to the individual claims. *Suggs v. State*, 923 So.2d 419, 433-434 (Fla. 2005)(explaining that because he failed to prove a deficiency in any one of the above alleged instances of ineffective assistance of counsel, Suggs' cumulative claim of prejudicial error also fails); *Bryan v. State*, 748 So.2d 1003, 1008 (Fla.1999)(observing "where allegations of individual error are found without merit, a cumulative-error argument based thereon must also fall."). Zero plus zero equals zero.

Williamson improperly relies on the affidavits of Howard Hendrix and Frank Idom which this Court has previously rejected. IB at 59-62; *Williamson v. Dugger*, 651 So.2d 84, 88 (Fla. 1994)(affirming trial court's summarily denial of a newly

discovered evidence claim based on affidavits obtained from two inmates who were incarcerated with key State witness Omer Williamson in an Alabama prison that alleged that Omer told the inmates that he had “lied to the Florida authorities so that he could avoid the electric chair” because the impeachment evidence contained in these affidavits was cumulative because Omer was substantially impeached at trial, including impeachment by a witness who heard Omer state that he intended to “fix [Williamson's] ass” and concluding that “such cumulative impeachment evidence would not probably produce an acquittal on retrial.”). Williamson may not reopen his habeas appeal by filing a successive 3.851 motion. Nor may he relitigate the claims presented in his first evidentiary hearing. Nor may counsel rely in the prosecutor’s notes. ***Williamson v. Dugger***, 651 So.2d 84, 88 (Fla. 1994)(rejecting a ***Brady*** claim because most of the “withheld” evidence consisted of the prosecutor's trial preparation notes which included trial strategy notations by the prosecutor and his personal interpretation of remarks made by the witnesses which are “not subject to disclosure.”). The trial court is not required to consider evidence or claims already rejected by this Court.

Williamson's reliance on Oregon v. Guzek, 546 U.S. -, 126 S.Ct. 1226, - L.Ed.2d - (2006), is misplaced. The United States Supreme Court in *Guzek*, noted that "sentencing traditionally concerns how, not whether, a defendant committed the crime." See also *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 2327, 101 L.Ed.2d 155 (1988)(observing that the Eighth Amendment "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt ... [s]uch lingering doubts are not over any aspect of petitioner's character, record, or circumstance of the offense."). Lingering or residual doubt is not a mitigating circumstance in Florida. *King v. State*, 514 So. 2d 354, 357-358 (Fla. 1987). Lingering doubt actually is not mitigation; it is a standard of proof. Traditional mitigation concerns the defendant's background and character. Lingering doubt, by contrast, increases the State's burden of proof in the penalty phase from beyond a reasonable doubt to absolute certainty and there is no Eighth Amendment justification for doing so. Neither the federal constitution nor Florida law require lingering doubt be considered in mitigation. The trial court properly denied this claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the successive motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Harry Brody, Brody & Hazen, PO Box 16515 Tallahassee, FL 32317 this 12th day of May, 2006.

_____

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CERTIFICATE OF FONT AND TYPE SIZE

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

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