IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1527

JOHNNY WILLIAMSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CORRECTED INITIAL BRIEF OF APPELLANT

BRODY & HAZEN, P.A.
Attorneys at Law
P.O. Box 16515
Tallahassee, FL 32317

HARRY P. BRODY
Florida Bar No. 0977860

JEFFREY M. HAZEN
Florida Bar No. 0153060

Attorneys for Appellant

PRELIMINARY STATEMENT

This appeal is from the denial of Appellant's motions for post-conviction relief by Circuit Court Judge E. Vernon Douglas, Third Judicial Circuit, Dixie County, Florida. This appeal challenges Appellant's convictions and sentences, including his sentence of death. References in this brief are as follows:

"R. ___." The record on direct appeal to this Court.

"PC-R. ___." The post-conviction record on appeal for Appellant's initial post-conviction motion.

"PC-RII. ___." The post-conviction record on appeal for Appellant's instant post-conviction motions.

"EHT. ___." The transcript of the post-conviction evidentiary hearing related to the instant post-conviction motion.

All other references will be self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to develop the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Appellant, through counsel, accordingly urges the Court to permit oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Appellant was indicted October 22, 1985 on one count each of first-degree murder and possession of contraband in a correctional facility. (R. 10) Appellant pled not guilty. (R. 946) The jury found Appellant guilty of both charges on April 9, 1986 (R. 838) The jury recommended a death sentence by a vote of 11-1 the following day. (R. 946) The trial court imposed the death sentence May 8, 1986. (R. 958) This Court affirmed Appellant's convictions and sentences. Williamson v. State, 511 So.2d 289 (Fla. 1987). The United States Supreme Court denied certiorari. Williamson v. Florida, 108 S.Ct. 1098 (1988). Under death warrant, Appellant filed his initial post-conviction motion on November 6, 1989. (PC-R. 523-26) The lower court held a limited evidentiary hearing and denied all relief. This Court affirmed the lower court's order as well as denying habeas corpus relief. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994). The United States Supreme Court denied certiorari. Williamson v. Singletary, 116 S.Ct. 146 (1995). Appellant filed a federal Petition for Writ of Habeas Corpus in the Northern District Court of Florida on May 15, 1995. The petition was denied on

February 2, 1998. The 11th Circuit Court of Appeals affirmed that denial. Williamson v. Moore, 221 F.3d 1177 (11th Cir. 2000). The United States Supreme Court denied certiorari. Williamson v. Moore, 122 S.Ct. 234 (2001).

On January 2, 1997, Appellant filed a successor post-conviction motion in the trial court alleging newly discovered evidence involving trial witnesses Kenneth Baez and Omer Williamson ("Omer"). On June 17, 2003, Appellant filed a supplemental post-conviction motion based on the United States Supreme Court opinion in Ring v. Arizona, 122 S.Ct. 2428 (2002). On August 12, 2003, Appellant filed a second supplemental post-conviction motion regarding trial witness Omer Williamson.[1] The lower court conducted a Huff[2] hearing as to the three pending motions on April 21, 2004. The lower court granted an evidentiary hearing only as to the second supplemental motion involving Omer Williamson. That hearing was held July 28, 2004.[3] Subsequent to the evidentiary hearing, the lower court denied all relief in

---

[1] Both the supplemental motion dated June 17, 2003 and that dated August 12, 2003 were intended to supplement the post-conviction motion dated January 2, 1997.

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

[3] The evidentiary hearing was held in the Columbia County Courthouse where Judge Douglas sits. Two witnesses, Omer Williamson and his trial attorney, Baya Harrison, were

an order dated September 10, 2004.[4] This appeal follows.

I. STATEMENT OF THE TRIAL FACTS

An indictment filed in the circuit court for Dixie County on October 22, 1985, charged Appellant, Omer, and James Robertson with first degree murder and the unlawful possession of a knife while inmates at Cross City Correctional Institution. (R. 1) Appellant pled not guilty.

Appellant was tried from April 7-10, 1986, before the Honorable Judge Arthur Lawrence and found guilty of both counts. (R. 137) Omer had earlier pled guilty to first degree murder with the condition that he would be sentenced to life in prison without the possibility of parole for 25 years. (R. 582) Ostensibly, the state agreed with this plea and sentence on the condition that Omer cooperate with the state against Appellant and Robertson. (R. 581)

Robertson was found guilty only of the possession charge. (R. 838)

Appellant testified at the penalty phase. At the conclusion of the penalty phase, the jury returned a

---

called as witnesses.

[4]The order denied relief as to the initial successive motion and the two supplemental successive motions.

recommendation of death by a vote of 11-1. (R. 138)

The trial court sentenced Appellant to death, finding three aggravating factors[5] (R. 143-144) The Court found nothing in mitigation. (R. 150) The Court also sentenced Appellant to 15 years in prison for the possession conviction (R. 143) to be served concurrently with the death sentence. (Id.)

II. STATEMENT OF THE INITIAL POST-CONVICTION FACTS

Jack Green gave a sworn statement to Lt. W.J. Dixon, of the Cross City Correctional Institution's Investigator's office on July 16, 1988 (PC-R. 884). In that statement Green told authorities that Omer related to him that during the confrontation that took place on June 20, 1985, victim Daniel Drew pulled a knife, that Appellant took the knife away from Drew, that Omer hit Drew in the face, and that Appellant stuck Drew with the knife. (PC-R. 886) Green's name was known to counsel and he was available to testify at trial. (PC-R. 720)

At the hearing, Green testified that Drew made a move toward Appellant with a knife and that Appellant had

---

[5]These aggravating factors were: (1) committed while under sentence of imprisonment; (2) prior violent felony conviction and; (3) cold, calculated, and premeditated, without pretense of legal or moral justification. (R. 148-

nothing in his hand. (PC-R. 8—9)

Green's testimony that Drew lunged with a knife at a weaponless Appellant was known by the state, as Green testified that prison investigators interviewed him and knew of the information. (PC-R. 14) Additionally, Green testified as to Drew's reputation for retaliatory violence. (PC-R. 19-21) Further, Green testified that Drew invariably carried a knife while at Cross City C.I. (PC-R. 14) Obviously, Green completely contradicted Omer Williamson's trial testimony that Appellant planned and was the aggressor in Drew's death. Appellant testified at the penalty phase of his trial that he was aware of Drew's reputation for violence and had in fact received some of that information from Green (R. 881).

Trial counsel testified that Green's statement and testimony would have been helpful. (PC-R. 159)The second eyewitness to the stabbing incident was Michael Haager, who wrote a letter to Appellant's trial counsel:

> Dear Mr. McKeever:
>
> I read where Bama and Chickenhead got convicted in Dixie County for the 1985 killing of Drew at Cross City Correctional Institution. I know this conviction is a <u>miscarriage of justice</u> because I <u>seen for myself</u> what happened that Thursday afternoon behind the

---

49)

carpenter shop where I work. I had spoken earlier in the day with Drew, he told me Bama and that tall guy(Jim I think his name is) owed him some money and after draw he was going to get paid, he showed me a knife he made (a Sharpened Butter Knife). I know he made knives for other guys but that's eleravant (sic). That afternoon they argued behind the Carpenter shop when Drew pulled out his knife with his left hand, when Bama got the chance he took the knife away from him or got hold of his arm and they went closer to the wall out of my vision, I couldn't see what happened back there because I was looking thru the fan grill from inside my shop. When they left I came out of the shop going to the entrance of maintenance when another inmate came around the corner and said loud get the M.T.'s a man is stabbed back here. I went around there and seen Drew against the wall trying to get up, I tried to calm him and got a piece of plywood from my shop layed him down and pulled his pants off and applied pressure on the wound in his leg, I didn't know he had been hit in the back until blood started coming out of his mouth, when I started to turn him on his side to clear his breathing the M.T. and Doctor arrived, they started checking his pause (sic), and giving him respiration...

No one has ever questioned me about this...

Please view the drawing. I would make a formal statement if you request it. I'll even take a polygraph test.

Sincerely

Drawing enclosed Michael Haager

(PC-R. 847-49). Haager was an additional eyewitness to the critical initial stages of the fight (PC-R. 307-08), and he was not contacted by Appellant's trial counsel (PC-R. 312). In fact, Haager was subpoenaed to trial by co-defendant Robertson and brought back to Cross City for the trial (PC-

R. 313-14).

At the evidentiary hearing, Haager testified to the substance of the letter he wrote to trial counsel. (PC-R. 306-07) A third eyewitness to the incident, Paul Williams, testified that:

> One of the weapons was a long instrument is all I could see, cause I wasn't that close to them. The other was a short wide blade knife, which the inmate knocked out of DREW'S hand. He's the one that had that one, and was stabbing him with his own knife.

(PC-R. 1055)(emphasis added). Williams further stated: "In fact, I think the day when he got stabbed he told me that night before he anticipated some trouble out of these people cause they wouldn't pay him his money, . . ." (PC-R. 1058)(emphasis added). Williams was never interviewed by trial counsel (PC-R. 104). Charles Jones testified at the evidentiary hearing that Drew was expecting trouble in collecting his money from Omer on the day of the stabbing incident and that as a result of that expected trouble, Drew made himself a shank from a table knife. (PC-R. 187-88) The knife was made by Drew to protect himself, not to give to Omer or Appellant as Omer claimed. (Id.)

Jones also testified at the hearing that knives were

plentiful at Cross City Correctional Institution. (PC-R. 188) Jones was also well aware of Drew's reputation and that Drew would not back down from a confrontation (PC-R. 189, 191).

Jones was available to trial counsel. (PC-R. 719-20, 725), but trial counsel never spoke with him. (PC-R. 190) Trial counsel had no explanation, strategic or otherwise, for this failure. (PC-R. 107)

On October 18, 1989, co-defendant Robertson gave an affidavit confirming he had written a statement and an affidavit describing the events surrounding the June 20, 1985, incident. The affidavit states:

> I, JAMES ROBERTSON, BEING DULY SWORN OR AFFIRMED DO HEREBY DEPOSE AND SAY:
>
> 1. MY NAME IS JAMES ROBERTSON AND I AM PRESENTLY INCARCERATED AT FLORIDA STATE PRISON.
>
> 2. I WAS INCARCERATED AT CROSS CITY CORRECTIONAL INSTITUTION DURING THE MONTH OF JUNE, 1985.
>
> 3. AFTER THE ALTERCATION BETWEEN DREW, JOHNNY WILLIAMSON, AND OMER WILLIAMSON, I OF COURSE WAS INDICTED.
>
> 4. DURING THIS TIME I WROTE A STATEMENT COVERING MY KNOWLEDGE OF WHAT HAPPENED BETWEEN JUNE 19, 1985 AND JUNE 20, 1985. EVERYTHING IN THIS STATEMENT, WHICH IS ATTACHED TO THE AFFIDAVIT, IS TRUE EXCEPT FOR THE PART ABOUT JOHNNY WILLIAMSON HANDING ME THE KNIFE. TO THE BEST OF MY KNOWLEDGE JOHNNY HANDED THE KNIFE TO STEPHEN MARK BISHOP. BISHOP THEN WENT AND BURIED

> THE KNIFE. I NEVER TOUCHED OR SAW THE KNIFE. I PUT THE FALSE INFORMATION BECAUSE I KNEW THAT BISHOP WAS GOING TO TESTIFY AGAINST ME AND MORE IMPORTANTLY, I WAS FACING A MURDER TRIAL.
>
> 5. ADDITIONALLY, I FELT THAT THE STATE ATTORNEY WOULD PUT ON OTHER WITNESSES THAT WOULD LIE LIKE BISHOP DID. ONLY THEY WOULD LIE ABOUT MY BEING INVOLVED IN THE MURDER. I BELIEVED THAT THE JURY WOULD THINK I WAS INVOLVED IN ONE WAY OR THE OTHER AND I FIGURE BISHOP'S LIE WOULD BE TO MY BEST ADVANTAGE.
>
> 6. MOST OF ALL, I MADE OUT THE STATEMENT BECAUSE I WANTED TO TESTIFY BUT MY ATTORNEY SAID THAT IF I WAS GOING TO TESTIFY I HAVE TO GIVE THEM SOMETHING. HE ADVISED ME TO GO ALONG WITH BISHOP'S LIE ABOUT THE KNIFE. ADDITIONALLY, JOHNNY WILLIAMSON TOLD ME AT LEAST A DOZEN TIMES THAT HE WANTED TO TESTIFY AT HIS TRIAL, DURING THE GUILT PHASE.
>
> 7. JOHNNY WILLIAMSON NEVER ASKED ME FOR A KNIFE, TO LOOK FOR A KNIFE, OR ANYTHING ABOUT A KNIFE AT ALL. THAT WAS TOTALLY OMER WILLIAMSON'S STORY. I DID NOT KNOW EITHER OF THE WILLIAMSON'S VERY WELL, ONLY KNOWING THEM FROM WORK.

(PC-R. 906-08)

Robertson's pre-trial statement, referred to in the affidavit, states importantly that the night prior to the killing, Robertson witnessed Omer and Drew arguing in a prison common area. (PC-R. 910-11Appellant testified at his penalty phase. (PC-R. 1166-214)[6] Appellant testified he met Omer at Cross City Correctional Institution and became friends with him because they had the same last names. (R.

[6] A transcript of Appellant's trial testimony was

868) Omer did not disclose he owed Drew $40 (not $15, as Omer stated), until June 20, 1985. (R. 880) Omer told Appellant that Drew had given Omer eight bags of marijuana and that Omer did not have the money to pay Drew. (R. 880) Appellant testified he was fully aware of Drew's reputation for violence with a knife, not only through Green, but from Drew also. (R. 881) Appellant told Omer that Drew would not stand for Omer's refusal to pay, hoping that Omer would decide to pay his debt. (R. 882) After pleading with Omer to pay Drew, Omer told Appellant he would be getting some money on Saturday and would pay Drew at that time. Appellant agreed to go with Omer to talk to Drew on Omer's behalf and ask Drew to allow Omer until Saturday to pay the debt. (R. 884)

Appellant testified he went to see Drew on Omer's behalf, and did so in broad daylight, in front of witnesses, because he had nothing to hide. (R. 890) Mr. Bannister testified at the evidentiary hearing that most people were still working at the time Appellant and Omer approached Drew as only the paint crew quit at 3:30. (PC-R. 323) As Appellant stated he did not attempt to hide, and indeed asked another inmate, Mr. Harris, to ask for Drew.

---

introduced into the initial post-conviction record.

(R. 891)

What occurred on that afternoon of June 20, 1985, was described by Appellant:

> Q. All right. And when Drew came out, what happened.
>
> A. He come out and we exchanged just normal everyday pleasantries. . .You know, I hadn't seen him that day, because he lived over in F dorm and I lived in B dorm. And I didn't get up till 9:00 o'clock, so I hadn't had no opportunity to see him. But he said, "What's up?" I said, "I just come over to talk to you about old Jimmy here." He said, "Yeah?". And he give Jimmy one of them what-is-he-doing- here looks. You know what I mean? You would have to know Drew personally, when he was living, to appreciate what I'm saying. He had a way of looking at you. If he didn't like you, you could see the disapproval right quick on his face.
>
> Q. Did you know if Jimmy had a weapon with him or not?
>
> A. No, sir, I didn't.
>
> Q. Did you have a weapon with you?
>
> A. No, sir.
>
> Q. What happened next?
>
> A. Well, you know, it's going fairly fast the talk did. Drew said, "Well, what's up?" I said, "Listen. Jimmy, for some reason or another, ain't got your money," you know. I just didn't want to come out and tell Drew that he had been smoking all your dope up. So I said, "He ain't got your dough." I said, "But he can have it by Saturday or Sunday." I said, "Why don't you give him a little slack there?"
>
> He said, "I can't give him no slack Bama." He

said, “I got gambling debts to pay.” He owed about $300 or $400 on that yard for that card playing. I said, “You can stall them other guys.”

He said, “I’m not going to stall nobody.” He said, “I don’t stall people. And I don’t want people stalling me.” But he is not sounding angry at me. He is just explaining himself, and he is cutting his eyes at Jimmy, you know.

Well, I noticed Drew had his whole hand in his pocket. Well, I didn’t know it at the time, but him and Jimmy had had words the night before. And I hadn’t been told about this by Jimmy, and I hadn’t seen Drew. I am sure Drew would have mentioned it to me. But, anyway, I know Drew is left-handed too.

But that hand was riding high. A man don’t stand with his hand riding high unless he has got it on something . .

And I tell Drew, I said, “Look Drew–” I see Drew don’t like this idea of having to wait two or three days. I says, you know, I said, “I got a little money out at my cell.” I said, “But I have got some other business to tend to.” So I’m going to throw a pacifier in there. I said, “Look here, let me give you this here $5.” And I offered him $5. I said, “I realize it won’t cover the debt or nothing.” But I said, “Jimmy is going to have to pay me back too now.” I am trying to make it look like Jimmy owed me and you both now, so he is going to pay us.

Well, Drew said, “All right. I’ll take it, Bama.” I said, “You know you don’t need that thing in your pocket there anyway.” I was just jacking with him then, you know, because I see Drew starting to get in a good mood, I’m thinking. But when I said that there, Jimmy said, “What’s that he got in his pocket?” I says, “It ain’t nothing.” And as far as I was concerned, at that very moment, the conversation was terminated. I was ready to go, which I would

see Drew later on in the evening. We would get together and smoke a joint or something and talk a little bit more.

I turn like this here, Wham! Jimmy got off on Drew. When he did–

THE WITNESS: Your Honor, if I might, can I stand up and explain this here?

THE COURT: Yes.

THE WITNESS: See, I had turned like this here. I am ready to go on. Ba-wham! And, naturally, I turned. When I turned, Drew came out with that thing. I think that's at the time I got my hand cut. I'm going to reach for that arm like that (indicating), like that wrist, that left hand, and come up with this here, because it's time for me to fight. Because I don't know Jimmy has got a knife, see. I don't know nothing about that so-called rod that they put in here, which I would like to explain.

I go like that there to bang him. I guess the tip of it hit my hand. I got him like that there. And I remember hitting him with the left hand and – (Witness pausing.)

Excuse me. Anyway – (Witness crying.) Excuse me.

BY MR. McKEEVER:

Q. Do you remember the details of what happened then?

A. I had to get – excuse me –hold of that knife. I must have got hold of it. Basically, the next thing I remember, I hear my nickname, "Bama". And I look. (Witness crying.) I look. I get up. I was on top of Drew. Excuse me.

(PC-R. 892-896).

Appellant had this to add during cross-examination by the state:

> A. Well, let me tell you something. I ain't lying. I ain't lying. I told Dan McKeever this same thing that I'm saying today on this thing six months ago, when I first met him. I ain't lying. And what bothers me is I killed my friend.
>
> Q. That's right. You killed your friend, didn't you?
>
> A. I killed him. I killed him. But I didn't go over there premeditating to kill him.
>
> Q. Now your memory is admittedly very poor that day, isn't it?
>
> A. Hmm, it's not poor up to the time the fight went down and then, obviously, what did happen disturbed me to the point that I got a little bit hazy. But I remember sketches of that.
>
> Q. It's not poor up until the time when the killing and then, all of a sudden, your memory gets very poor; is that what you're saying?
>
> A. I know I had to fight the man. I remember snatching at his wrist. I remember that there.

(PC-R. 904-906).

> Q. So you were sort of keen on it. You were on edge. You know that there was something wrong. Is that what you are saying?
>
> A. I knew he probably had a knife in his pocket. It didn't worry me because he wasn't after me.
>
> Q. Uh-huh. But your instincts, as it were, were alert; is that right?
>
> A. Naturally, Naturally.

> Q. Yet you still couldn't avoid this killing, could you?
>
> A. I went over there as intermediary.
>
> Q. Would you answer the question. You still couldn't avoid this killing, could you?
>
> A. No, not after Jimmy got up off of him and I seen that blade coming out of Drew's, I don't reckon I could. It happened.

(PC-R. 904-911).[7]

Mr. Bannister was an employee at Cross City Correctional Institution, the immediate supervisor of Appellant, and a grand juror responsible for indicting Appellant. The state's theory via Omer's testimony was that there was a "plan" to meet with Drew after everybody was gone. However, Bannister testified at the evidentiary hearing that at 3:30 p.m. on the afternoon of the stabbing

[7] Appellant's testimony demonstrates a clear case of self-defense. His description of the fight demonstrates that Drew came at him with a knife, that he was cut with that knife, that he felt he had to fight back. His description of the fight is consistent with the testimony of the hearing witnesses as to the beginning of the fight There was absolutely no evidence that Appellant had an opportunity to retreat after getting the knife from Drew. In fact, the evidence clearly establishes that the struggle between Appellant and Drew continued. Appellant was in fear for his life. Trial counsel testified that Appellant consistently expressed that fear to him (PC-R. 134). Appellant's testimony is also consistent with the new evidence from Sanchez-Velasco and Omer that there was no premeditated plan, or any plan, for Appellant to kill Daniel Drew.

incident, most of the maintenance area personnel were still in the area. (PC-R. 322-23) In fact, the paint crew was the only crew that had finished work.[8] (Id.) See also (John Bannister's affidavit at PC-R. 880-82) Sergeant King's hearing testimony was similar to Bannister's testimony. (PC-R. 200-03)Charles Jones testified that the availability of knives at Cross City C.I. was widespread and that knives were very easy to get. (PC-R. 188-89) This directly refutes the fantastic trial testimony of the two-day search for a knife.[9]

---

[8] Bannister was not called as a trial witness. He stated he discussed the incident with an inmate and had viewed the scene the next day when he returned to work. He further stated he was the inmate advisor at CCCI at the time and was concerned about sitting on the grand jury. Bannister testified at the hearing that he advised the State Attorney of this and was told it did not matter (PC-R. 324). He was the only grand juror familiar with the prison area where the incident had occurred. Bannister testified at the hearing that he explained to the grand jury what the witnesses were testifying to regarding their position in the area and the truthfulness of facts they were testifying to (PC-R. 325-26). Bannister said many inmates would lie and testify to anything just to receive special treatment, and he related this to the grand jury. Lastly, he stated during his hearing testimony that Johnny Williamson was one of the best and most reliable workers he has ever had work for him.

[9] Appellant never looked for a weapon. The fact that he went to meet Drew without a weapon is evidence that he never sought to find one. As Jones makes clear, if Appellant had wanted a weapon he could have easily found one. Appellant knew that Omer owed Drew money on a drug

On March 25, 1986, co-defendant Robertson's attorney deposed Kenneth Baez. Baez testified that he saw Appellant once in the morning. Baez's grand jury testimony was that he was positive he saw Appellant three times only in the afternoon (PC-R. 807-15). In the grand jury version, Baez stated that Appellant first approached him in the afternoon and asked for a knife. Baez then said Omer afterward came looking for a knife. At deposition, Baez said that Omer was the first one to ask him for a knife, in the afternoon. (PC-R. 952-53) At trial, Baez testified that Appellant, and Appellant only, asked him for a knife during the morning (PC-R. 598-600)

Steven Bishop's trial testimony on direct examination was that "somebody" asked about getting a knife, but he was not even sure who it was. (PC-R. 621-22) Trial counsel was in possession of Bishop's deposition dated March 25, 1986, which made no mention whatsoever of any conversation regarding a knife during that first meeting. (PC-R. 971)[10]

---

debt. However, Appellant did not know that Drew and Omer had an argument that prior evening. Appellant went along as a peacemaker. This explains a weaponless Appellant going with Omer to meet with Drew. Omer knew how upset Drew was with him and took a "rod" with him. The "rod" was a makeshift weapon, and Omer secreted this weapon in his pants.

[10] Trial counsel failed to impeach Bishop with this prior

The state's last key witness was Ronnie Presley who was used to corroborate Omer's story. During grand jury testimony, Presley simply repeated what Omer allegedly told him:

> Just like Jimmy told me that the knife they killed
> the man with was his own knife. They went over there and told the guy, 'Hey, look, we're having trouble collecting some of his money for this dope.
> Let us get that knife.' And so Drew handed them the knife . . .

(PC-R. 8-9)

---

inconsistent statement. This was unreasonable. A reasonable doubt as to the credibility of Bishop's trial testimony would have required the jury to find Appellant not guilty of the heightened premeditation required for the aggravator of cold, calculated, and premeditated, the culpability required for premeditated first degree murder, and the acts required to be in furtherance of a "conspiracy." Bishop's reference to "somebody" asking for a knife is hearsay. Without even being able to remember who asked, there is no way to assess the admissibility of this statement. Thus, it was not admissible. Trial counsel objected to the reference to a knife; however, trial counsel's failure to object to this testimony was deficient performance. This improper creation of a premeditated plan was prejudicial to Appellant's guilt and penalty phases. Bishop could not remember when he was asked about a knife (the day or the time), when he looked for a knife as opposed to wine, or even who asked him to look for a knife (PC-R. 971-72). Bishop was certainly impeachable, and his testimony created the illusion of a conspiracy to get a knife. Thus, the failure to impeach Bishop was unreasonable and prejudiced Appellant's trial outcome.

This story was directly contradicted by the hearing testimony of Jack Green (PC-R. 8-9), Charles Jones (PC-R. 187), and Michael Haager (PC-R. 308). Drew did not hand Appellant the knife. Presley testified at trial that he saw Omer hold Drew while Appellant hit him. (PC-R. 610-11) Presley's sworn statement of June 25, 1985 was that he did not see the "stabbing done or nothing," he didn't "really have a good view of what was happening. . (He) just seen scuffing" (PC-R. 933). He further swore Omer told him both he and Bama had stabbed Drew. At his deposition, Presley confirmed both statements (R. 124-25; PC-R. 938-42). In addition, Presley's grand jury testimony was that he was:

> walking around the track that day, just right around the hospital, post office and all, and I noticed a fight going on . . .

(PC-R. 868). Presley was thoroughly impeachable.

Appellant's trial attorney could have impeached Omer's story of getting a knife from the victim, if he had spoken to Mr. Nielson. Nielson had been contacted by Mr. Slaughter, co-defendant Robertson's trial attorney. Yet, no one talked to him. Nielson stated in an affidavit:

> During the first week in October, October 3, 1985, Omer James Williamson was moved into the cell next to me from N wing 2- North 17 to cell number 6. I was in 2-North 7 N-Wing and Johnny Williamson was on the other side of me. I had

known Omer Williamson prior to this time.

On approximately October 6 or 7 I was awakened by an argument between Omer Williamson and Johnny Williamson. Omer stated to Johnny that 'I don't care about you or Chickenhead and I will say whatever I have to say if it will keep me off death row.

At one point after the argument Johnny Williamson was called out of his cell. During this time I had a conversation with Omer in which he told me that he was going to testify falsely against Johnny Williamson. I had previously stated to him that I thought he had said some pretty harsh things to Johnny and I was concerned that he was going to testify falsely against Johnny and about those guys, that he would say whatever he had to save his own life.

On the next day I was moved to another location. Although I was subpoenaed in this case and brought to Cross City for the trial in April, 1986, no attorney for Johnny or Chickenhead ever talked to me, and I was never called as a witness.

Had I been called as a witness I would have testified to what I have told you here today. While I know both Williamsons I am not friends or enemies with either one and I have no personal interest in helping or harming either one. What I am relating to you here, and would have related on the stand is simply what happened while I was living in between these two people. What I am positive of though is that Omer was definitely planning to testify falsely in order to save his own life.

(PC-R. 929-31). Neilson was available but not called as a trial witness.

In his February 11, 1986, interview, Omer denied

asking any Cuban for a knife. The report and notes reflect: "Omer denies asking any Cuban for a knife. He never dealt with a Cuban in the institution. Drew was supposed to have been making a knife for them in the shop. Says Baez is lying. . ." (PC-R. 1132, 1134-35).

Trial counsel believed the state was withholding evidence from him and noted in his affidavit:

> There seemed to be Brady problems all over the place; I would take a statement from a witness and get new facts that I would then realize the State should have had but had not disclosed. I still don't feel that the real truth of the matter came out in the trial either due to the facts that were omitted or misrepresented.

(PC-R. 715)

This statement also indicates that Garvin Owensby was the only witness to the incident according to Omer. The typed notes of the interview indicate:

> The only person according to Omer who was in a position to have witnessed the whole thing was a black inmate at pride. Omer did not know his identity, but it turns out to be Garvin Owensby.

(PC-R. 1133) On the above typed statement, the importance of this statement is highlighted by the State Attorney's hand- written notation to "play down 'only' witness could have been Owensby."[11] (PC-R. 1133)

---

[11] Trial counsel never discovered that Omer told the state that only Owensby could have witnessed the event. In

In the "secret statement" given on February 11, 1986, Omer related an entirely different story from any found in his testimony at deposition or trial:

> Alabama was the one who decided to kill Drew. After everything was all over, Omer learned that Alabama told the Chief that he was going to kill Drew. His mind was made up before he had discussed it with Omer. Alabama told Omer to pay up all his debts so other inmates would not feel cheated and testify against them.

(PC-R. 1132) The state intentionally withheld this statement so it could present the final version of Omer's

---

addition, the state wanted to hide Owensby because Owensby, like Mr. Williams, said he saw Robertson participate in the stabbing of Drew. This information would have impeached most of Omer's portrayal of the events of the fight. Beyond the intentional withholding of that crucial evidence, handwritten notes on that statement indicate that the state not only had a "problem" with Omer's story, but they proposed a "solution." The handwritten notation which directly followed the notation to play down Omer's statement that the "only witness could have been Owensby," is as follows:

> Problem: A (Mr. Williamson) would stand to gain if V (Mr. Drew) lived:
> Solution: A (Mr. Williamson) no longer trusted V (Mr. Drew).

(PC-R. 133) The state recognized Appellant had absolutely no reason to murder Drew and it manipulated the evidence to deal with this "problem." Additionally, the state not only withheld the information Omer provided, concerning Owensby being the only witness to the incident, their notation indicates their conscious and intentional decision to "play down" that information.

story, a version the state also knew was false. The "trial" version was that Omer was not going to pay Drew and he decided at that time, with Appellant, that Drew needed to be killed. Trial counsel testified at the hearing that this information would have been useful at trial, and he would have used it. (PC-R. 77)

The state also withheld notes from an interview of Baez and the defense failed to discover this information. The state's knowledge is demonstrated as follows:

KENNETH BAEZ	Grand Jury testimony
Inmate	Unrecorded interview

> Baez knows Alabama and Chicken Head by their nicknames and knows Omer only as the tall skinny one who was with Alabama the day of the killing. Baez said that about 10:30 or 11:00 in the morning, Alabama approached him and said "Ken, you got a shank I could use? I'm going to kill the son of a bitch". Baez told him that he didn't have one, he didn't know anything about it, and Alabama left. Later on that day, Alabama came back and asked about the knife the second time. Omer also asked about a knife. At the grand jury, he was very vague as to what Omer had done. The day of the killing in his interview, Baez said very clearly that in the morning Alabama had asked for a knife and in the afternoon just before the killing, Omer approached and said have you got another knife, and again Baez told him he had nothing to do with knives. Carlos Carrillo was with him at the time that he was approached by Alabama. Baez says that after Alabama contacted him the second time about the knife they decided to watch to see what would happen, so they walked over around the maintenance area and between the buildings the only thing that he could really see was when the

tall skinny one, referring to Omer.

(PC-R. 945) In addition, the state created another document referring to Baez. This document reads as follows:

> And the next sentence: About 2:30 p.m. to 3 p.m. he and Carrillo were walking towards the canteen. Tall, skinny guy asked Baez if he had, quote, another knife. Told him no. He was acting freaky, so they followed him and saw him enter the maintenance gate. He and Carrillo walked along fence on front of maintenance building, turned right and walked towards clinic. Looked to back of maintenance and saw what appears to be blue zap or cap, in parenthesis. Drew and Williamson, Alabama together, dash, saw freaky coming from west end of building. After saw Alabama, saw freaky walking in compound with no shirt and shoes.

(PC-R. 1381) Trial counsel testified at the hearing to this document:

> Q In fact, that would have directly impeached Mr. Baez's testimony that Alabama and Freaky approached him at the same time.
>
> A Yes.
>
> Q And in fact that would also impeach Mr. Omer, Jimmy Williamson's testimony that he never asked Mr. Baez for a knife.
>
> A Yes.
>
> Q And that is information you would've tried to get in front of the jury.
>
> A Yes.

(PC-R. 81)

The June 20, 1985, Baez interview notes read: "The day of the killing in his interview, Baez said very clearly that in the morning Alabama had asked for a knife, and in the afternoon just before the killing, Omer approached and said have you got another knife, . . ." (PC-R. 945); see (PC-R. 1381). Trial counsel should have pointed out that Baez's testimony that Appellant had only asked him for a knife in the afternoon directly contradicted his initial statement to the prison investigators. This information was crucial to an effective and fair cross examination. Trial counsel testified at the hearing that:

> [W]e knew that there were grand jury witnesses whose testimony may not have been recorded. And, of course, it would be useful to have those paraphrased moments, no matter whose notes they were.

(PC-R. 78)

One of the documents summarizing state witness Marvin Harris' taped statement noted the following:

> Harris knew all three of the defendants. Knew Omer by the nickname of Slim. He was a tool room assistant in the welding shop and Drew's partner in that area. On the day of the killing, all three defendants came up and one or more said they needed to see Drew. They did not act threatening at the time. So he went in and told Drew that his partner, referring to Alabama, was out there and needed to see him. Drew went out and Harris went back in to make coffee. While he was making coffee he glanced out the window. What he saw appeared to be a fight between Omer

> and Drew. Alabama was, when he first looked, not involved. Then Alabama stepped in and stabbed Drew. Harris then went outside. He saw Alabama and Chicken Head walking down the road with blood all over Alabama's right hand. He then looked for Drew and found him leaning against the building. He asked Drew if he could hear him, Drew nodded his head yes. He asked him "do you have anything hot on you" referring to a knife. Drew shook his head no. He then said sit still, the man's coming and he went to get Hicks.

After this typed analysis there appears in the form of State Attorney handwritten notes the following: "Problem: can't see much out window." (PC-R. 1044) On another document (the summary and analysis of Mr. Hicks' taped statement and grand jury testimony), another handwritten notation concerning the view out the window, reads: "Play down view from window." (PC-R. 1046) At the evidentiary hearing, trial counsel testified that this would have been useful in impeaching Harris' testimony.[12] (PC-R. 87-88)

Appellant's initial motion to vacate was supplemented with Howard Hendrix's affidavit (PC-R. 924-26) and Frank Idom's affidavit (PC-R. 918-21) Hendrix provided a sworn

[12] The state limited Hicks's testimony to the bare minimum. (R. 399-412) The state knew that Hicks could not be allowed to testify on the view from the welding shop window. Then the state allowed Harris to testify that he could see the fight. (R. 468-76) The state knew, and the defense should have known, that one could not see out of the welding shop window. Harris' testimony was the state's only evidence of the actual fight, except for Omer's now thoroughly discredited testimony.

affidavit which explained:

> My name is Howard Hendrix and I am presently [at] St. Claire Correctional Facility. In the early part of 1988 I met an inmate by the name of Omer James Williamson while at West Jefferson Correctional Facility.
>
> While walking in the exercise yard Omer told me about a prison killing. Omer told me that he was responsible for another man's death but got scared for his life and lied about the killing. Omer knew that he was facing the electric chair and he told me how he put the blame on two other guys, one of them being Johnny Williamson.
>
> It appeared to me that Omer's conscience was bothering him and he needed to tell somebody about it. After he told me I told him not to talk with me anymore.
>
> I just don't think it is right for Omer to lie at trial and put an innocent man on death row.
>
> I gave a statement to another one of Johnny Williamson's attorneys after I wrote him a letter about what I knew. I also told the truth in that statement. I am willing to testify in court about what Omer told me.

(PC-R. 924-25) Idom, in a sworn affidavit, stated:

> My name is Frank Idom and I am presently incarcerated at West Jefferson Correctional Facility in Bessemer, Alabama.
>
> While I was in lock-down back sometime around Christmas of 1988 I met a guy by the name of Omer James Williamson. During our exercise period Omer would talk with me. On several occasions he spoke of his involvement in a prison murder in Florida.
>
> Omer told me that he was the main instigator of the killing. He would joke and laugh about how

> the guy lost his life over only $15.00. He told me that the $15.00 was for dope or cigarettes.
>
> Omer told me that he lied to the Florida authorities so that he could avoid the electric chair and get transferred out of Florida. He acted like he had done something really fabulous. Omer made it clear that his lieing [sic] and putting the wrong man on death row did not bother him at all.
>
> After talking with Omer, I definitely believe that what he told me is true and that the State of Florida is fixing to kill an innocent man (Johnny Williamson).
>
> No one would talk like Omer did in this prison unless it was true. It just does not make sense.
>
> While here in West Jefferson, Omer showed that he is the type of person to snitch on other inmates to avoid the blame for something he did.
>
> It really makes me mad that a guy like Omer gets away with being responsible for a murder and then turn around and make jokes about it.
>
> An investigator visited me here at West Jefferson sometime within the last year asking me questions about Omer. Everything I told him was also the truth. I would also be willing to testify about Omer in court.

(PC-R. 918-20)

Appellant's initial post-conviction evidentiary hearing also established a wealth of mitigation never presented at trial, including both statutory mental health mitigating factors (PC-R. 1303-12), an emotionally deprived and dysfunctional family life (PC-R. 379), alcohol abuse in

the family (PC-R. 372-73), physical abuse within the family (PC-R. 409), severe drug addiction dating back to age twelve (PC-R. 1307), brain damage (PC-R. 389-91), and non-diagnosis of anti-social personality disorder (PC-R. 435)[13]

III. STATEMENT OF THE INSTANT POST-CONVICTION FACTS

In his January 2, 1997 post-conviction motion, ppellant averred that newly discovered evidence, in the form of an affidavit from Rigoberto Sanchez-Velasco, undermined his conviction and sentence. The affidavit stated as follows:

> My name is Rigoberto Sanchez-Velasco. I am presently incarcerated at Florida State Prison. While incarcerated in Cross City, my name was Raphael Martinez, but all my friends knew me as "Ricky."
>
> In March of 1985 I was incarcerated at Cross City Correctional Institution. I remember the day Daniel Drew was killed. I heard that an inmate known as "Skinny" (Jimmy Williamson) was involved in the murder. The news of the killing spread very quickly among inmates.
>
> At the time of the killing "Skinny" owed me money for having sold him marijuana. I knew that he could be involved and, therefore, they could take him from Cross City. Therefore, I went to his cell hoping that he would give me the money he owed me. When I got to his cell, I noted that "Skinny" had blood on his clothes. I looked at him and said, "Do you have anything for me?" He said, "I fucked up. I do not have anything for

[13] Trial counsel presented only Appellant's testimony at the penalty phase of trial. No other witnesses, lay or expert, were presented.

you." A few years later I saw "Skinny" again while we were both incarcerated at Marion Correctional Institution. At that point he paid me the money he owed me.

My cell was in the same dorm as "Skinny's". After talking with him I went to my own cell. A few minutes later the guards came over and arrested "Skinny", "Alabama" (Johnny Williamson) and an older man.

While at Cross City I spent most days playing cards. I always played with Kenneth Baez and Carlos Carillo. Baez and I were good friends. We met in Miami in about 1980. We became very close friends and I felt that we could trust one another. We both ended up being incarcerated at Cross City. Our friendship continued while we were both incarcerated.

I clearly remember that I was playing cards with both Baez and Carillo on the day Drew was killed. As usual we were playing cards. That day we played from about nine in the morning until about three in the afternoon. Neither "Alabama" or "Skinny" came near the area where we were playing cards. Actually, "Alabama" never came near us.

Drew was playing poker with his American friends. About two or three days before Drew was killed, I saw that Drew and "Skinny" were having an argument about money. At nighttime we have to stay indoors. The two of them were playing poker at a table near mine and I could see and hear the argument very clearly. It was clear that the argument was about money.

Baez and Carillo testified against "Alabama." The only reason they testified was because they wanted to get some money and transfer to a prison close to their families. Baez told me that the prison officials were offering money and transfers in exchange for a "voluntary" statement. Baez also told me that those who agreed to testify were told what to say. I told him that I could not testify about something that

> I had not seen. I advised Baez not to testify to something that he did not witness. Our friendship worsened because of this.
>
> Before Baez left the prison, he showed me a receipt for one hundred dollars that was deposited in his prison account. Baez afterwards was transferred to another prison near his family in Miami.
>
> Americans and hispanics generally do not hang around with one another while in prison. There is no way that "Alabama" asked Baez for a knife so he could kill Drew. Even further, "Alabama" and Baez barely knew each other. Prisoners in a prison, generally, do not ask strangers, especially of another race, where to get a knife to kill someone. You never know who is a snitch. Therefore, you never try to get contraband from someone you do not know.
>
> Like I said, Baez and I were very good friends. I think that if Baez needed a knife, he would have come to me. I was Baez's connection. That did not happen. I think that if Baez needed a knife to give to "Alabama" he would have talked to me about this.
>
> I never spoke to any attorneys or investigators about the killing. I would have told the truth had anyone questioned me. I would have testified to this information at "Alabama's" trial, but no one asked me.

(Affidavit of Rigoberto Sanchez-Velasco)(original in Spanish)

Omer Williamson testified at the evidentiary hearing held July 28, 2004. (EHT. 5-58) Omer testified that he knows Appellant and that he was incarcerated with him in 1985. (EHT. 5) Omer testified against Appellant in this

case. (EHT. 6) Omer filed a sworn 3.850 motion in this case dated July, 1993. (Id.) Omer stated that his attorney, Baya Harrison, told him to lie in his testimony against Appellant. (EHT. 7) Omer stated that he was not aware that his lawyer was conducting plea negotiations with the state attorney. (Id.) Omer testified that when he went to court to enter his plea in the case, he did not know what he was going there for. (EHT. 10) Omer's attorney advised him that his testimony was the only evidence of plan, conspiracy, or premeditation. (Id.) Omer's attorney advised the state that he would testify against Appellant and Robertson if the state agreed not to seek the death penalty against him. (EHT. 11) Omer's attorney did this without consulting Omer and getting his approval. (EHT. 14) Omer first learned of the plea deal when he was brought to a conference room at the Suwannee County Jail. (EHT. 16) Omer was told that if he did not testify to a premeditated plan to kill Daniel Drew, there would be no deal. (Id.) The state attorney and his lawyer told Omer this. (Id.) It was made clear that this would be his testimony. (EHT. 17) Omer asserted that his testimony was the truth. (EHT. 18) The 3.850 motion he filed was also sworn. (Id.) Omer stated that he was angry

when he filed his 3.850 because he thought he “got a raw deal.” (EHT. 19) Further, he is guilty of “what I did.” (Id.) Omer testified that Assistant State Attorney Phelps and State Attorney Jerry Blair were there when the plea deal was presented to him. (EHT. 20) Omer had five minutes to decide whether to save his life and take the deal. (Id.) The death penalty was going to be sought against him if he did not testify. (Id.) Omer’s life would be spared if he did testify as the state expected. (EHT. 21) Omer felt as though he was being pressured. (EHT. 29) The Lord told him to save his life. (EHT. 21) The choice was an ultimatum put to him by his attorney and the state attorney. (Id.) The state attorney told him that if he did not agree to the plea deal in five minutes that he would face the death penalty. (EHT. 25-26) State Attorney Jerry Blair told Omer he had five minutes to decide whether to live or die. (EHT. 34) Omer testified that his attorney was not worried about truth, only saving Omer’s life. (EHT. 22) After he agreed to testify against Appellant, Omer was taken into Judge Lawrence’s chambers, but he is not sure if he entered the plea then. (EHT. 23) Omer also stated that he signed the plea deal immediately after the negotiation and in the judge’s chambers. (EHT.

30) Omer had to tell Judge Lawrence what he was going to testify to. (EHT. 24) Assistant State Attorney Phelps reminded Omer that his co-defendants were trying to kill him. (EHT. 28) Omer did not recall swearing in his motion that David Phelps told him at the time of the plea that if he did not "play ball," the state could not protect him from his co-defendants. (EHT. 26) Omer alternatively stated that the information must have been "transcribed" incorrectly. (Id.) Omer then stated that the information is not true. (EHT. 27) Omer agreed that he demanded to be housed away from his co-defendants prior to trial, given a new name, and imprisoned out-of-state after the trial. (Id.) Omer was in fact imprisoned out-of-state after trial and still is. (EHT. 28) Appellant's attorney was not part of the plea negotiations. (Id.) Omer stated that he does not recall swearing in his motion that he had no choice in pleading guilty, but if it is in the motion, the statement is true. (EHT. 30-31) Omer felt that if he did not testify, he would be killed by the state via execution or by his co-defendants. (EHT. 31) Omer reiterated that he was angry when he wrote his post-conviction motion. (Id.) Omer testified that when he is angry, he will lie. (Id.) At the time of trial, Omer was scared and knew that his

testimony could lead to someone being executed. (EHT. 32) Omer felt that he would be killed if he didn't provide the testimony that he ultimately did. (EHT. 33) Omer filed his post-conviction motion and averred that everything in it was true. (EHT. 35) Omer was angry with prosecutors because he felt that his plea deal was not honored. (EHT. 36) Omer expected a name change and to be moved out-of-state. (EHT. 37) Omer was moved out of state. (EHT. 39) Omer alleged that his plea deal was secured by threats and harassment from the state, but at the evidentiary hearing, he could not remember what these were specifically. (EHT. 41) At the time of his plea deal, Omer believed that if he did not testify as the state wanted him to, his co-defendants would be put in the same cell with him. (EHT. 42) Omer stated that having five minutes to decide whether to plea or not was unfair and wrong. (EHT. 43) Prior to the five minute ultimatum, Omer had declined to testify. (EHT. 44) Omer stated that he testified against Appellant because he felt that his life would be in danger if he did not. (EHT. 47) Omer testified that his sworn post-conviction motion contained material untruths. (EHT. 49) Omer told these untruths because he was hoping to get his sentence set aside. (Id.) Omer said these things to try

and help himself. (EHT. 50) Omer agreed that he will twist the truth depending on how much he has to gain from the lie being told. (EHT. 52) Omer's post-conviction motion was not withdrawn out of a concern for the lies he told therein. (EHT. 53) If the motion would have kept him out of prison, Omer would have kept pursuing it. (Id.) After Appellant's trial, Omer was sent to Marion Correctional Institution where he was held in protective custody until he could be moved to Alabama. (EHT. 45-46)

On cross-examination, Omer stated that Appellant's trial counsel, Dan McKeever, was present when he pled guilty in front of Judge Lawrence. (EHT. 54)

On redirect, Omer stated that he was not aware of the factual basis for his plea until he was brought before the judge to enter the plea. (EHT. 58) He had not discussed the factual basis of the plea with his lawyer prior to the plea hearing. (EHT. 57)

Baya Harrison testified that he represented Omer Williamson in this case. (EHT. 61) Harrison stated that Omer wanted him to negotiate a plea deal. (Id.) Harrison testified that Omer pled without any promises, threats, or coercion. (EHT. 63) Harrison could not recall if he met with Omer more than once regarding the plea. (Id.)

On cross-examination, Harrison testified that the state wanted to use Omer's testimony to establish premeditation. (EHT. 66) Harrison stated that Omer was able to plea, in part, because he "beat the other side to the state attorney" and was able "to cut a deal before anybody else did." (EHT. 67-68) Harrison was not sure that all the facts of the case had been established when Omer entered his plea. (EHT. 68-69) Harrison stated that the state knew what Omer was going to testify to before he entered the plea deal. (EHT. 72) Omer did not tell Harrison that he and Appellant had a plan to murder the victim. (EHT. 78) Further, Harrison had not talked with Omer about the facts of the case. (EHT. 79) Omer wrote Harrison a threatening letter. (EHT. 82)

SUMMARY OF THE ARGUMENT

The lower court erred in denying Appellant's successor post-conviction motions asserting newly discovered evidence of his innocence of first-degree murder and the death penalty. The new evidence, an affidavit of a former inmate at Cross City Correctional Institution and the post-conviction motion and testimony of co-defendant Omer Williamson, demonstrates and verifies that the trial testimony of Omer and Kenneth Baez was completely

unreliable. Omer and Baez were the most crucial witnesses for the state's case of premeditated murder. The former inmate, Rigoberto Sanchez-Velasco, provided an affidavit in which he stated that trial witness Kenneth Baez admitted perjury and, further, that Omer Williamson made statements to Sanchez-Velasco that were inconsistent with Omer's trial testimony. Appellant's co-defendant, Omer Williamson, filed a post-conviction motion in which he alleged that his plea and testimony in Appellant's case were coerced by physical and psychological threats of both the state and his own attorney. Further, he averred that he never participated in a plan to kill the victim, an assertion diametrically opposed to his trial testimony. During his evidentiary hearing testimony, Omer disavowed parts of his sworn motion while reasserting others. Omer testified at the hearing, crucially, that he will lie under oath when it is to his advantage. The lower court's finding that the Sanchez-Velasco affidavit is not newly discovered evidence and merely inadmissible hearsay disregards the fact that such testimony could be of impeachment value and further, that impeachment evidence may be newly discovered. Further, the lower court ignored the non-impeachment value of the affidavit. The lower court's finding that Omer's

motion and testimony did not sufficiently undermine Appellant's conviction and sentence relies heavily on Omer's statement at the hearing that he was angry when he filed the motion and that there was in fact a plan to kill the victim. This finding is erroneous in that it ignores the entire context of this 20-year lie perpetrated by Omer Williamson to save himself. The finding particularly ignores Omer's hearing testimony that he lied under oath when filing his post-conviction motion and that he will lie, generally, if it will help ***him*** The newly discovered evidence presented in Appellant's motions below further demonstrate the obvious and appalling dishonesty of the state's star witness, Omer Williamson. The evidence additionally demonstrates the incredibility of the only non-Omer evidence of premeditation at Appellant's trial, Kenneth Baez. Finally, from a standpoint of cumulative analysis, the new evidence further undermines the state's inherently unreliable case, a case built entirely on the testimony of convicts looking to help themselves. This is especially distressing given that the state is seeking the ultimate sanction.

STANDARD OF REVIEW

The lower court denied the claim involving the

Sanchez-Velasco affidavit without an evidentiary hearing. Therefore, the facts presented herein must be taken as true, even in a successor motion. Roberts v. State, 678 So.2d 1232, 1235 (Fla. 1996) Such a motion for post-conviction relief should only be denied without hearing if the motion, files, and records in the case conclusively show that Appellant is entitled to no relief. Id. The claim of newly discovered evidence involving Omer Williamson's post-conviction motion requires an independent review of the lower court=s legal conclusions, while giving deference to the lower court=s factual findings. Rogers v. State, 782 So.2d 373 (Fla. 2001); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

ARGUMENT

THE LOWER COURT ERRED IN DENYING RELIEF AS TO APPELLANT'S CLAIMS OF NEWLY DISCOVERED EVIDENCE. THE LOWER COURT ERRED IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIM INVOLVING AN AFFIDAVIT FROM WITNESS SANCHEZ-VELASCO IMPEACHING THE TRIAL TESTIMONY OF TRIAL WITNESSES KENNETH BAEZ AND OMER WILLIAMSON. FURTHER, THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM, AFTER AN EVIDENTIARY HEARING, REGARDING NEWLY DISCOVERED EVIDENCE IN THE FORM OF A POST-CONVICTION MOTION FILED BY CO-DEFENDANT AND TRIAL WITNESS OMER WILLIAMSON IMPEACHING AND RECANTING HIS CRITICAL TRIAL TESTIMONY AGAINST APPELLANT.

A. FACTS OF SANCHEZ-VELASCO AFFIDAVIT

Appellant filed his successor post-conviction motion related the affidavit of Rigoberto Sanchez-Velasco on January 2, 1997. At the Huff hearing in the instant matter held on April 21, 2004, the lower court denied the claim without an evidentiary hearing. (Transcript of Huff hearing at page 8) The basis of the lower court's ruling in that regard was that the asserted evidence would be inadmissible hearsay and therefore not newly discovered evidence. (Id.) This ruling was reiterated in the lower court's order denying relief. (PC-RII. 20-21)

Again, the substance of the Sanchez-Velasco affidavit is as follows:

> My name is Rigoberto Sanchez-Velasco. I am presently incarcerated at Florida State Prison. \

While incarcerated in Cross City, my name was Raphael Martinez, but all my friends knew me as "Ricky."

In March of 1985 I was incarcerated at Cross City Correctional Institution. I remember the day Daniel Drew was killed. I heard that an inmate known as "Skinny" (Jimmy Williamson) was involved in the murder. The news of the killing spread very quickly among inmates.

At the time of the killing "Skinny" owed me money for having sold him marijuana. I knew that he could be involved and, therefore, they could take him from Cross City. Therefore, I went to his cell hoping that he would give me the money he owed me. When I got to his cell, I noted that "Skinny" had blood on his clothes. I looked at him and said, "Do you have anything for me?" He said, "I fucked up. I do not have anything for you." A few years later I saw "Skinny" again while we were both incarcerated at Marion Correctional Institution. At that point he paid me the money he owed me.

My cell was in the same dorm as "Skinny's". After talking with him I went to my own cell. A few minutes later the guards came over and arrested "Skinny", "Alabama" (Johnny Williamson) and an older man.

While at Cross City I spent most days playing cards. I always played with Kenneth Baez and Carlos Carillo. Baez and I were good friends. We met in Miami in about 1980. We became very close friends and I felt that we could trust one another. We both ended up being incarcerated at Cross City. Our friendship continued while we were both incarcerated.

I clearly remember that I was playing cards with both Baez and Carillo on the day Drew was killed. As usual we were playing cards. That day we played from about nine in the morning until about three in the afternoon. Neither "Alabama" or "Skinny" came near the area where we were playing cards. Actually, "Alabama" never came near us.

Drew was playing poker with his American friends. About two or three days before Drew was killed, I saw that Drew and "Skinny" were having an argument about money. At nighttime we have to stay indoors. The two of them were playing poker at a table near mine and I could see and hear the argument very clearly. It was clear that the argument was about money.

Baez and Carillo testified against "Alabama." The only reason they testified was because they wanted to get some money and transfer to a prison close to their families. Baez told me that the prison officials were offering money and transfers in exchange for a "voluntary" statement. Baez also told me that those who agreed to testify were told what to say. I told him that I could not testify about something that I had not seen. I advised Baez not to testify to something that he did not witness. Our friendship worsened because of this.

Before Baez left the prison, he showed me a receipt for one hundred dollars that was deposited in his prison account. Baez afterwards was transferred to another prison near his family in Miami.

Americans and hispanics generally do not hang around with one another while in prison. There is no way that "Alabama" asked Baez for a knife so he could kill Drew. Even further, "Alabama" and Baez barely knew each other. Prisoners in a prison, generally, do not ask strangers, especially of another race, where to get a knife to kill someone. You never know who is a snitch. Therefore, you never try to get contraband from someone you do not know.

Like I said, Baez and I were very good friends. I think that if Baez needed a knife, he would have come to me. I was Baez's connection. That did not happen. I think that if Baez needed a knife to give to "Alabama" he would have talked to me about this.

I never spoke to any attorneys or investigators about the killing. I would have told the truth had anyone questioned me. I would have testified to this information at "Alabama's" trial, but no one asked me.

(Affidavit of Rigoberto Sanchez-Velasco)(original in Spanish).

B. FACTS OF OMER'S POST-CONVICTION MOTION AND TESTIMONY

Omer Williamson filed a post-conviction motion with a service date of July 15, 1993. (PC-RII. 2) In that motion, Omer stated that he threatened to kill his trial attorney. (PC-RII. 17) Omer's trial attorney allegedly encouraged Omer to lie at Appellant's trial. (PC-RII. 18) Omer averred in his motion that he wanted to plead guilty because he was believed he was. (Id.) Omer's motion states that in February 1986 he was transported to the Suwannee County courthouse whereupon his trial attorney informed him that he had "struck a deal" with the state. (PC-RII. 23) Omer stated to counsel that he did not want to make the deal. (PC-RII. 24) Omer's counsel responded that Omer had to sign off on the deal or the "State" would sentence him to death that day. (Id.) After Omer refused again to sign off on the deal, his trial counsel told him that Omer was obligated to enter the proposed plea because trial counsel had already informed the state of Omer's consent. (Id.) According to Omer's motion, at this point trial counsel left the room and State Attorney Jerry Blair,

Assistant State Attorney David Phelps, and two correctional officers entered the room. (Id.) Omer's motion avers that Blair told him that if he did not enter the plea "within the next five minutes" that Judge Lawrence was prepared to immediately sentence him to death. (PC-RII. 25) Phelps added that the state could not protect Omer from his co-defendants if he did not enter the plea and, further, Omer would be transported and housed with his co-defendants. (Id.) Omer's motion states that he told Blair and Phelps that he was being forced into the plea deal. (Id.) Omer's motion further alleges that he was coerced, both physically and psychologically, into agreeing to testify against Appellant. (PC-RII. 26) Omer's motion further asserts that he participated in the killing in this case only because "he believed his life would be in imminent danger." (PC-RII. 28) Further, Omer avers that he did not participate, ***plan***, or commit the "murder" in this case. (Id.)

At the July 28, 2004 evidentiary hearing in this case, Omer testified. Omer reasserted the allegations in his motion that he was not aware of ongoing plea negotiations or why he was brought to court (EHT. 7-10), that he was given five minutes decide whether or not to plea and save

his life (EHT. 20), that he was pressured into agreeing to the plea deal and had no choice (EHT. 29), and that the State Attorney told him that if he did not agree to the plea in five minutes that he would be sentenced to death. (EHT. 25-26, 34)

Omer further testified that his post-conviction motion was sworn and that he was angry when he wrote it. (EHT. 6, 19) Omer added that when he is angry, he will lie. (EHT. 31) Omer asserted that his allegations in his motion regarding lack of premeditation and plan were untrue. (EHT. 49) Omer testified that he lied about this in an attempt to help himself and get his sentence set aside. (EHT. 49-50) Omer stated that he will lie depending on how much he has to gain from the lie being told. (EHT. 52) Omer did not withdraw his post-conviction motion out of any concern about its veracity. (EHT. 53) If the motion would have kept him out of prison, he would have continued to lie. (Id.) Omer also testified that he was told by his attorney and the State Attorney that if he did not testify to a premeditated plan to kill Drew that there would be no deal. (EHT. 16) Omer also testified at the hearing that Assistant State Attorney Phelps reminded him at his plea hearing that his co-defendants were trying to kill him.

(EHT. 28) Omer added that he felt that if he did not testify against Appellant, he would be killed by the state or his co-defendants. (EHT. 31) Omer believed when he pled that if he did not do as the state wanted, he would be put in a cell with his co-defendants. (EHT. 42)

C. LAW AND ANALYSIS

The information contained in both Sanchez-Velasco's affidavit and Omer’s motion and testimony establish many important facts that are of a nature that would likely produce an acquittal on retrial and also completely refute the state's theory of premeditation. The new facts independently undermine the state’s case as well as supporting prior claims made by Appellant at trial, on direct appeal, and in his initial post-conviction motion. Confidence in the outcome is undermined. This new evidence additionally supports Appellant's prior claims under Brady v. Maryland, 373 U.S. 83 (1961), Giglio v. United States, 405 U.S. 105 (1972), Strickland v. Washington, 466 U.S. 668 (1984). The lower court denied the 1997 motion regarding the Sanchez-Velasco affidavit without an evidentiary hearing. The standard for reviewing the denial of an evidentiary hearing has been clearly established by this Court. This Court has held that a post-conviction

defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Lemon v. State, 498 So.2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. Similarly situated capital post-conviction defendants have received evidentiary hearings based on newly discovered evidence. State v. Mills, 788 So.2d 249, 250 (Fla. 2001) (noting that lower court held an evidentiary hearing on allegations that co-defendant had made inculpatory statements to an individual while incarcerated); Lightbourne v. State, 742 So.2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So.2d 746 (Fla. 1998)(noting that the lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which the defendant was charged and convicted); Swafford v. State, 679 So.2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal). See also Roberts v. State 678 So.2d 1232, 1235 (Fla. 1996); Scott v. State, 657 So.2d 1129, 1132 (Fla. 1995); Johnson v. Singletary, 647 So.2d 106, 111 (Fla. 1994); Jones v. State,

591 So.2d 911, 916 (Fla. 1991).[14] The lower court erred in denying the Sanchez-Velasco claim without an evidentiary hearing. The lower court's holding that the evidence was not in fact evidence, but inadmissible hearsay ignores the fact that the evidence would have been of value in impeaching the testimony of both Omer and Ken Baez. Evidence as such would be admissible and is recognized as constituting newly discovered evidence. Jones; Guidinas v. State, 693 So.2d 953 (Fla. 1997); State v. Smith, 573 So.2d 306 (Fla. 1990). The information is relevant independently and as verifying prior claims made by Appellant. In Jones v. State, 591 So.2d 911 (Fla. 1991), this Court revised the standard upon which a post-conviction defendant can obtain relief based upon a claim of newly discovered evidence. "In order to obtain relief on a claim of newly discovered evidence, a claimant must show, first, that the newly discovered evidence was unknown to the defendant or defendant's counsel at the time of trial and could not have been discovered through the exercise of due diligence and, second, that the evidence is of such a character that it probably would produce an acquittal on retrial. Mills v.

[14] Notably, many of these defendants were under active death warrant at the time of the claims made. Appellant is not.

State, 786 So.2d 547 549 (Fla. 2001); see also Jones v. State, 709 So.2d 512 (Fla. 1998). The same standard is applicable when the issue is whether a life or death sentence should have been imposed. Jones v. State, 591 So.2d 911, 915 (Fla. 1991). In Garcia v. State, 622 So.2d 1325 (Fla. 1993), this Court found that the failure to present evidence of inculpatory statements by a co-defendant undermines confidence in the outcome of a sentencing phase. Garcia v. State, 622 So.2d 1325 (Fla. 1993). This Court's conclusion in Garcia that the defendant was prejudiced by his counsel's failure to present evidence of another's inculpatory statements supports Appellant's argument that his claims of newly discovered evidence entitle him to relief. Also, pursuant to Garcia, the unavailability of impeachment evidence at trial may undermine confidence in the outcome of the trial and require relief during post-conviction. Additionally, in State v. Mills, 788 So.2d 249 (Fla. 2001), this Court affirmed the lower court's grant of relief based on newly discovered evidence concerning the true culpability of those individuals involved in the crime. The newly discovered evidence consisted of the testimony of an inmate who had been incarcerated with Mills' co-defendant and who

the co-defendant had confessed to. Id at 250. The inmate did not provide Mills' attorneys with the evidence until twenty years after he obtained it. Mills received a new penalty phase based on this evidence. Id Because Appellant reasserted his innocence of first-degree murder at his penalty phase, the new evidence would have corroborated his testimony and provided a reasonable basis for lingering doubt as to Appellant's guilt. Oregon v. Guzek, ___ U.S. ___ (2005)(certiorari review was granted to determine if lingering doubt is a mitigating circumstance under the Eighth Amendment)[15] Also, the mitigating value of the new evidence must be considered with other evidence of mitigation presented at trial and particularly at Appellant's post-conviction evidentiary hearing A cumulative analysis is required. Appellant contends, as he always has, that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Appellant's contention that this entire process itself has failed him. That failure has been demonstrated by the sheer number and types of errors

[15] Oral argument was conducted in the United States

involved in his trial and post-conviction litigation that, when considered as a whole, virtually dictated the current conviction and sentence in this case. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Included in the error that has permeated this case is the utter void of credibility demonstrated by the witnesses against Appellant. That lack of credibility, demonstrated by Appellant over the course of the litigation in this case, must be considered as a whole, especially as concerns Omer Williamson and Kenneth Baez. This Court must consider anew the affidavits signed by witnesses from the West Jefferson Correctional Unit at the time of Appellant's initial post-conviction motion. Those affidavits have now been proven true. Rather than mere cumulative impeachment evidence, those affidavits now stand in support of Omer Williamson's recent testimony. In sum, Omer Williamson has now verified the truth of those affidavits. The evidence of those affidavits must be considered anew and in concert with all other available evidence. Additionally, Kenneth Baez' testimony must be further scrutinized. Baez' testimony, called into question by the affidavit of Rigoberto Sanchez-Velasco, is now even more circumspect

---

Supreme Court on December 7, 2005.

given the new evidence involving Omer. Baez provided testimony supporting the state's theory of premeditation, a theory in turn supported by the indispensable statements of Omer Williamson. Now that Omer has admitted his own lack of credibility, Baez' testimony becomes more worthless than it was heretofore. This Court must also consider the previous evidence presented by Appellant regarding eyewitnesses to the incident, discussed herein. Those eyewitnesses, who demonstrated that that this killing was committed in self-defense, are verified by the evidence in the instant appeal.

The United States Supreme Court has recognized that, though a Brady violation may be comprised of individual instances of non-disclosure, proper constitutional analysis requires consideration of the cumulative effect of the individual non-disclosures. Kyles v. Whitley, 115 S.Ct. 1555 (1995). The reason for this, as explained by the United States Supreme Court, is to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 115 S. Ct. at 1566. In Kyles v. Whitley, the United States Supreme Court explained the appropriate standard of review of a Brady claim:

> The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.

Kyles, 115 S.C.t at 1567.

> The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather that the cumulative evaluation required by Bagley, as the ensuing discussions will show.

Kyles, 115 S. Ct. at 1569.

> In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officer, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibres, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime,

> rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.
>
> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Kyles, 115 S. Ct. at 1573 n. 19 (citations omitted).

Moreover, this Court, in Jones v. State, 709 So. 2d 512 (Fla. 1998), and reaffirmed in Lightbourne, made it clear that the cumulative analysis discussed in Gunsby is in fact the legally required analysis where a Brady claim, an ineffective assistance claim, and/or a newly discovered evidence claim are presented in a 3.850 motion. In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or newly discovered evidence using the following analysis:

> Gunsby raises a number of issues in which he contends that he is entitled to a new trial, two of which we find to be dispositive. First, he argues that the State’s erroneous withholding of exculpatory evidence entitles him to a new trial.

> *Second, he asserts that he is entitled to a new trial because new evidence reflects that the State's key witnesses at trial gave false testimony in order to implicate him in a murder he did not commit* and to hide the true identity of the murderer. (Emphasis added)
>
> * * *
>
> Nevertheless, when we consider the cumulative effect of the testimony presented at the 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996)(emphasis added). See Mordenti v. State, 894 So. 2d 161, 174-5 (Fla. 2004); Young v. State, 739 So. 2d 553 (Fla. 1999). This means Appellant's claims require cumulative consideration. If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young; Kyles. The lower court erred in that it conducted ***no cumulative analysis***, either of the claims directly before it, or of the evidence from trial and in the initial post-

conviction motion. The lower court also clearly did not analyze the new evidence for its effect on Appellant's death sentence.

In the instant matter, the lower court erroneously applied the Jones standard. The lower court's order denying relief mischaracterizes and gives inappropriate weight to trial evidence. Additionally, the lower court gives weight to Omer Williamson's testimony that is beneficial to the state, but completely ignores other testimony from Omer demonstrating his patent unreliability as a witness, particularly his own admission that he will lie if it benefits him and has done so in this case.[16] The lower court failed to address in any manner the effect the newly discovered evidence would have on Appellant's sentence of death. Further, and of critical importance, the lower court failed to engage in the appropriate cumulative analysis. This is especially important given Appellant's continuous assertion of self-defense, the dubious nature of the entirely prison-generated evidence against him, and the gradual eroding of that evidence over

[16] This should not be surprising given that the lower court adopted the state's proposed order denying relief word for word. In fact, the lower court signed the actual draft order sent to it by the state, making a hand-made correction (PC-RII. 18) and hand-writing the notation of

the course of this litigation. ***An examination of the entire evidence is required.*** The information contained in Sanchez-Velasco's affidavit establishes that Omer owed a debt to Sanchez-Velasco and that Omer needed money to pay it back:

> At the time of the killing "Skinny" (Omer) owed me money for having sold him marijuana.
>
> Sanchez-Velasco tried to collect that debt from Omer because he had learned about Drew's death and Omer's involvement. Sanchez-Velasco wanted to get his money from Omer before the authorities took Omer away from Cross City C.I. The affidavit further establishes that Omer made an inculpatory statement about himself regarding Drew's killing. When confronted by Sanchez-Velasco about the debt, Omer had blood on him and stated: "**I** fucked up" (emphasis added).

The Sanchez-Velasco affidavit also establishes that Omer and Drew were arguing over money two to three days prior to the day Drew was killed:

> Drew was playing poker with his American friends. About two or three days before Drew was killed, I saw that Drew and "Skinny" were having an argument about money. At nighttime we have to stay indoors, the two of them were playing poker at a table near mine and I could see and hear the argument very clearly. It was clear that the argument was about money.

Clearly, Omer had the motive to kill Drew. Appellant did not. Appellant was not involved in the dispute over money between Omer and Drew. Omer also had a motive to lie, that

---

service copies rather than redraft the order. (PC-RII. 26)

is, to protect himself. Further, as Omer admitted at the evidentiary hearing, he will lie, and has lied in this case, in order to help himself. The Sanchez-Velasco affidavit and Omer's motion cannot be viewed in isolation. The new information verifies statements received two years subsequent to Appellant's trial.[17] Hendrix explained in his sworn statement:

> My name is Howard Hendrix and I am presently [at] St. Claire Correctional Facility. In the early part of 1988 I met an inmate by the name of Omer James Williamson while at West Jefferson Correctional Facility.
>
> While walking in the exercise yard Omer told me about a prison killing. Omer told me that he was responsible for another man's death but got scared for his life and lied about the killing. Omer knew that he was facing the electric chair and he told me how he put the blame on two other guys, one of them being Johnny Williamson.
> I.
> It appeared to me that Omer's conscience was bothering him and he needed to tell somebody about it. After he told me I told him not to talk with me anymore.

---

[17] As the statement of facts, *supra*, reveals, Appellant supplemented his initial post-conviction motion with non-record evidence consisting of affidavits from Howard Hendrix and Frank Idom (PC-R. 9224-26; 918-21) Both Hendrix and Idom were told by Omer that Omer lied to insure Appellant's death sentence and to protect himself. The affidavits contain information that Omer confessed to lying at Appellant's trial. The trial court refused to consider this evidence at Appellant's evidentiary hearing in 1990. This Court affirmed that denial. The lower court in the instant appeal, erroneously, failed to consider this evidence.

> I just don't think it is right for Omer to lie at trial and put an innocent man on death row.
> I.
> I gave a statement to another one of Johnny Williamson's attorneys after I wrote him a letter about what I knew. I also told the truth in that statement. I am willing to testify in court about what Omer told me.

(PC-R. 924-25) Hendrix's information matches Sanchez-Velasco's encounter with Omer right after the killing when Omer stated "**I** fucked up" and establishes that what Omer was likely referring to when he made this admission was that Omer was trying to get the money he owed Sanchez-Velasco and failed. Hendrix's information is also consistent with much of Omer's hearing testimony. It is especially consistent with his testimony that he was physically and psychologically coerced into testifying against Appellant, that he did not participate in a plan, and that he was not aware of the factual basis of his plea. It is, obviously, also consistent with Omer's bald admission that he will lie, even under oath, to help himself.

The new evidence also confirms Idom's sworn affidavit:

> My name is Frank Idom and I am presently incarcerated at West Jefferson Correctional Facility in Bessemer, Alabama.
>
> While I was in lock-down back sometime around

> Christmas of 1988 I met a guy by the name of Omer James Williamson. During our exercise period Omer would talk with me. On several occasions he spoke of his involvement in a prison murder in Florida.
>
> I.
>
> Omer told me that he was the main instigator of the killing. He would joke and laugh about how the guy lost his life over only $15.00. He told me that the $15.00 was for dope or cigarettes.
>
> II.
>
> Omer told me that he lied to the Florida authorities so that he could avoid the electric chair and get transferred out of Florida. He acted like he had done something really fabulous. Omer made it clear that his lying [sic] and putting the wrong man on death row did not bother him at all.
>
> III.
>
> After talking with Omer, I definitely [sic] believe that what he told me is true and that the state of Florida is fixing to kill an innocent man (Johnny Williamson).
>
> IV.
>
> No one would talk like Omer did in this prison unless it was true. It just does not make sense.
>
> V.
>
> While here in West Jefferson, Omer showed that he is the type of person to snitch on other inmates to avoid the blame for something he did.
>
> VI.
>
> It really makes me mad that a guy like Omer gets away with being responsible for a murder and then turn around and make jokes about it.
>
> VII.
>
> An investigator visited me here at West Jefferson sometime within the last year asking me questions about Omer. Everything I told him was also the truth. I would also be willing to testify about Omer in court.

(PC-R. 918-20)[18]

[18] At trial, trial counsel attempted to discredit Omer through Mr. Thompson. Thompson testified that Omer told

The fact that Omer alone had the motive to kill Drew is revealed by the new evidence contained in the Sanchez-Velasco affidavit. Appellant did not plan this killing as Omer falsely testified to at trial. Omer received a life sentence for that testimony. Omer had a motive to lie -- to avoid the death penalty and save his life. Omer lied at Appellant's trial and the new evidence establishes this fact. This fact is also established by Omer's own admission that he will lie to help himself. It is also established by Omer's testimony that he was coerced by the state into providing the trial testimony that he did. In

---

him he knew how to "fix his ass" referring to Appellant. Thompson did not have knowledge as to how Omer would do so. (R. 723-724) This new evidence is exactly the evidence counsel needed to impeach Omer's testimony on the theory Omer was lying to save himself. The evidence fit with the defense's theory. This evidence, if available at the time of trial, would most certainly have affected the outcome. In Smith v. Wainwright, a reversal was required because:

> The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

799 F.2d at 1444. Appellant's case is virtually the same. The new evidence presented in the instant motions further support the affidavits of Hendrix and Idom.

the opinion affirming the denial of Appellant's initial post-conviction motion, this Court premised its conclusions upon its direct review of the record, based primarily upon Omer's false testimony. This Court further opined that the Hendrix and Idom affidavits constituted impeachment evidence of Omer at best. This Court wrote:

> Aside from the assertion that Omer lied in his testimony at trial, the affidavits do not set forth in what particular way Omer lied.

Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994).

The new evidence now provides particulars this Court found lacking. For example, the new evidence demonstrates that Omer alone had a disagreement with Drew which Sanchez-Velasco observed a few days prior to the murder. The new evidence demonstrates that Omer was responsible, stating "**I** fucked up." The new evidence also demonstrates that Appellant did not ask Baez for a knife, the state's alleged crucial premeditation evidence. Further, the new evidence, through Omer's own statements, provides new details about Omer's agreement with the state to testify against Appellant, particularly his averment that there was no plan to murder Drew, and that critically, Omer's natural self-preservation instinct is to lie. The new evidence makes sense out of each piece of evidence the state has withheld.

For example, the state knew that Appellant had absolutely no reason to murder Drew. Appellant and Drew shared 30-40 acquaintances and Drew knew Appellant's uncle from Atlanta (R. 871). They had a friendly relationship. It made no sense that Appellant planned or premeditated Drew's death. Because of this, the state had to create a motive for Appellant in order to support Omer's fictitious story that Appellant planned the killing of Drew. Accordingly, the state attorney documented his file in the following manner:

> Problem: A (Mr. Williamson) would stand to gain if V (Mr. Drew) lived.
> Solution: A (Mr. Williamson) no longer trusted V (Mr. Drew).

(state attorney notes, PC-R. 1133)

The state's notes reveal that the state knew Appellant only stood to gain if Drew lived Drew was supplying Appellant with the marijuana that Appellant sold. The source of the marijuana was Drew. Without Drew, Appellant had no source. Because of Drew, Appellant was making $100 to $150 a week. Clearly, Appellant had no motive - this was a "problem" for the state. The state therefore had to create a motive - this was the "solution" according to the state's fictitious motive that "Mr. Williamson no longer trusted Mr. Drew." Since Omer was doing the state's

bidding, the state had to create a motive in order to tailor its case around Omer's lies and, in turn, in convict Appellant. The newly discovered evidence proves that Appellant did not plan Drew's murder. It also explains why the state needed to resolve the "Problem" by manufacturing a false "Solution." The new evidence contained in Sanchez-Velasco's affidavit and Omer's motion and testimony shed light upon the state's misconduct and manipulation of evidence.

The state's theory was that Appellant killed Drew in a premeditated fashion. In order to establish premeditation, the state presented the testimony of Kenneth Baez at trial. The state needed to show why Appellant met Drew without a weapon. Thus, the state presented Baez who testified that Appellant and Omer approached him in search of a knife. Baez testified that Appellant asked Baez for a knife in the morning and that Omer asked Baez for a knife in the afternoon on the day Drew was killed. Sanchez-Velasco's affidavit clearly refutes Baez's testimony. Omer's statement that he did not participate in a plan also refutes Baez' testimony. This is in addition to Omer's 1986 statement to law enforcement that "Baez is lying." (PC-R. 1132-35)

Sanchez-Velasco and Baez were friends in prison and often played cards together. Referring to the same day that Baez alleged that Appellant asked him for a knife (the day Drew was killed), Sanchez-Velasco stated:

> I clearly remember that I was playing cards with both Baez and Carillo on the day Drew was killed. As usual we were playing cards. That day we played from about nine in the morning until about three in the afternoon. Neither "Alabama" or Skinny came near the area where we were playing cards. Actually Alabama never came near us.

Appellant did not ask Baez for a knife. Sanchez-Velasco was playing cards with Baez up until the time Drew was killed. During this time, "Alabama" (Appellant) never came near them. This is the time-frame Baez told the jury that Appellant asked him for a knife. This new evidence completely refutes Baez's testimony that Appellant asked Baez for a knife. Baez was with Sanchez-Velasco the entire time during which Appellant allegedly asked Baez for a knife. Appellant never came near them. Appellant never asked Baez for a knife. Baez lied. Baez's lie was a premise of the state's case of premeditation against Appellant.

This evidence, clearly showing that Baez lied, now explains the various inconsistent statements Baez made. On March 25, 1986, Mr. Slaughter (co-defendant Robertson's

attorney) deposed Baez. Appellant's trial counsel did not make an appearance at that deposition (PC-R. 1940) Baez testified that he saw Appellant once in the morning Baez's grand jury testimony was that he was positive he saw Appellant three times only in the afternoon (PC-R. 807-15) In the grand jury version, Baez stated that Appellant first approached him in the afternoon and asked for a knife. He then said Omer afterward came looking for a knife. At deposition, Baez stated that Omer first asked for the knife, not Appellant. (PC-R. 952-53)(emphasis added) At the grand jury, Baez was sure it was Appellant who asked for the knife the last time, right before they went to the maintenance area. Baez stated at trial that Omer was standing over by the fence and Appellant walked over to join him. At deposition Baez said both of them came up to him and his partner with their request. This story is the complete opposite of the story told to the grand jury. Both stories were given under oath. Defense counsel was deficient in not impeaching Baez with these prior inconsistent statements, and the prejudice is that without Baez's corroborating testimony the state would have only been left with Omer's testimony of a premeditated "plan." The unsupported testimony of a co-defendant would have

foreclosed the state's conspiracy theory. Baez was certain of one fact in every statement he made, and that was that Omer had asked him for a knife, either in the morning or in the afternoon. Omer denied this. One or both were lying.

Baez's testimony allowed the state to create a premeditated plan and create a conspiracy foundation. Once a conspiracy was established, the state was able to use otherwise inadmissible co-conspirator statements. In addition, it contradicted Appellant's testimony that he had gone as a peacemaker. Baez had a third story to tell at trial, stating that only Appellant asked for a knife and that he did so before lunch. (PC-R. 598-600) Baez also testified that Appellant stated that he wanted to kill someone. (Id.) This was the substance of direct trial examination of Baez by the state. The state steered completely away from any questions concerning the number of times the alleged request for a knife had been made, the time of day the request was made, or whether there was more than one request. Baez also contradicted his deposition testimony that only Omer first asked him for a knife in the morning. The new evidence clearly explains why Baez could not keep his story straight -- he lied.

Sanchez-Velasco’s affidavit reveals that Appellant

barely knew Baez and that it made absolutely no sense for Appellant to ask Baez (someone of "another race" and whom he barely knew) for contraband. In prison, strangers simply do not ask strangers for contraband.

The newly discovered evidence establishing that Appellant never asked Baez for a knife must be considered in light of the evidence that the state concealed. The state's undisclosed notes further show that Baez lied, and the state had direct knowledge of this fact. During a secret interview on February 11, 1986, Omer denied asking "any Cuban for a knife." The reports and notes state:

> Omer denies asking any Cuban for a knife. He never dealt with a Cuban in the institution. Drew was supposed to have been making a knife for them in the shop. **Says Baez is lying** ...

(state's notes, PC-R. 1132-1135)(emphasis added).

Sanchez-Velasco's affidavit confirms the state's secret evidence. In refuting Baez' testimony, it also confirms Omer's sworn averments that that he did not, contrary to his ultra-critical trial testimony, participate in a plan to kill Drew. Omer's statement that "**Baez is lying**" would have been valuable impeachment material of Baez. The February 11, 1986 statement provided a direct and glaring contradiction between the state's two most

important witnesses, Omer and Baez. Furthermore, the contradiction was on a critically material issue concerning whether or not Baez was approached about obtaining a knife. This goes directly to the essence of the state's theory of premeditation, affecting both the guilt/innocence and penalty phases of the trial. Under a fictitious "conspiracy" theory, the state used Baez to testify that he was asked for a knife by Omer and Appellant, thus establishing an "act" had been performed in furtherance of the conspiracy in order to have admitted into evidence, hearsay statements. The newly discovered evidence confirms what the state knew but hid -- Baez was lying.

The state also failed to disclose notes from an interview of Baez:

KENNETH BAEZ	Grand Jury testimony
Inmate	Unrecorded interview

> Baez knows Alabama and Chicken Head by their nicknames and knows Omer only as the tall skinny one who was with Alabama the day of the killing. Baez said that about 10:30 or 11:00 in the morning, Alabama approached him and said "Ken, you got a shank I could use? I'm going to kill the son of a bitch". Baez told him that he didn't have one, he didn't know anything about it, and Alabama left. Later on that day, Alabama came back and asked about the knife the second time. Omer also asked about a knife. At the grand jury, he was very vague as to what Omer had done. The day of the killing in his interview, Baez said very clearly that in the morning

> Alabama had asked for a knife and in the afternoon just before the killing, Omer approached and said have you got another knife, and again Baez told him he had nothing to do with knives. Carlos Carrillo was with him at the time that he was approached by Alabama. Baez says that after Alabama contacted him the second time about the knife they decided to watch to see what would happen, so they walked over around the maintenance area and between the buildings the only thing that he could really see was when the tall skinny one, referring to Omer, grabbed Drew. He did not see any stabbing. Baez did not provide any direct information concerning Chicken Head.

(PC-R. 945) Another state created document referring to Baez consisted of the following:

> About 2:30 p.m. to 3 p.m. he and Carrillo were walking towards the canteen. Tall, skinny guy asked Baez if he had, quote, another knife. Told him no. He was acting freaky, so they followed him and saw him enter the maintenance gate. He and Carrillo walked along fence on front of maintenance building, turned right and walked towards clinic. Looked to back of maintenance and saw what appears to be blue zap or cap, in parenthesis. Drew and Williamson, Alabama together, dash, saw freaky coming from west end of building. After saw Alabama, saw freaky walking in compound with no shirt and shoes.

(PC-R. 1381) Trial counsel testified at the initial evidentiary hearing to this latter document:

> Q In fact, that would have directly impeached Mr. Baez's testimony that Alabama and Freaky approached him at the same time.
>
> A Yes.
>
> Q And in fact that would also impeach Mr. Omer, Jimmy Williamson's testimony that he never asked Mr. Baez for a knife.

A Yes.

Q And that is information you would've tried to get in front of the jury.

A Yes.

(PC-R. 81) Trial counsel was shown this information at the initial evidentiary hearing. Trial counsel testified that he had not seen or received that information before and that he could have used it. (PC-R. 78-79) Trial counsel stated that he did not feel the true facts came out at Appellant’s trial. (PC-R. 1371)

As previously discussed, Omer's statement that Baez was a liar was not disclosed or discovered by trial counsel. Trial counsel's testimony at the evidentiary hearing reflected on the importance of the state's information obtained from Omer regarding Baez being a liar:

Q Would that have been important information in the defense [sic] Mr. Johnny Williamson?

A Yes.

Q Is it safe to say that the information that we review in that statement could have been significant evidence for you to use in the development of your defense of Mr. Johnny Williamson had you had it for trial?

A Yes.

(PC-R. 75-76)

The fact that Baez lied would have been invaluable to defense counsel. The impeachment material contained therein is as damaging to Baez and the state's case as the "Baez is lying" statement. With these documents counsel could have demonstrated that Baez had changed his story, or really had no recollection of what occurred, or was committing perjury. At the very least, the statements in this document contradict Omer's testimony that he did not talk to Baez, that according to Omer they quit looking for a knife when he returned with his "rod" and remembered they already had a "plan" to get a knife. Further, during his grand jury testimony he and the state made it emphatically and unequivocally clear that Appellant had asked for the knife in the afternoon. He made this statement three times. The Sanchez-Velasco affidavit now proves what the state knew -- Baez was lying. Omer’s own motion asserts that there was no plan and that he was coerced into testimony of premeditation. This is consistent with, and verifies, Omer’s pre-trial 1986 statement that Baez was lying.

Baez also made statements to a prison investigator in June, 1985. These statements were contained in yet another

"secret" set of notes. His statements in that set of notes significantly contradict his testimony at grand jury. The June 20, 1985 interview notes read: "The day of the killing in his interview, Baez said very clearly that in the morning Alabama had asked for a knife, and in the afternoon just before the killing, Omer approached and said have you got another knife, . . ." (PC-R. 945); (see PC-R. 1381). With copies of the two secret interviews counsel could have pointed out that if Baez was absolutely certain that Appellant had only asked him for a knife in the afternoon, why did he tell prison investigators Appellant had asked him for a knife in the morning? This information was crucial to an effective and fair cross examination. It was material evidence that should have been provided to trial counsel. Trial counsel testified at the hearing that:

> [W]e knew that there were grand jury witnesses whose testimony may not have been recorded. And, of course, it would be useful to have those paraphrased moments, no matter whose notes they were.

(PC-R. 78)

Omer told the state that Baez lied. Omer's post-conviction motion verifies this point in asserting a lack of premeditation. The state never disclosed this statement.

Appellant's attorney should have known this information. The Sanchez-Velasco affidavit further verifies information that only the state knew - Baez was a liar and lied at Appellant's trial.

The new evidence shows that in reality, on the day Drew was killed, Baez was playing cards with Sanchez-Velasco the entire time until Drew was killed and that Appellant **never** came near them. The new evidence exposes Baez's statement that Appellant asked him for a knife for what it really is, a lie.

The Sanchez-Velasco affidavit not only establishes that Omer alone had a motive to kill Drew and that Baez lied, it also establishes that state witnesses were paid money and received transfers in exchange for false testimony:

> Baez and Carillo testified against "Alabama" The only reason they testified was because they wanted to get some money and transfer to a prison close to their families. Baez told me that the prison officials were offering money and transfers in exchange for a voluntary statement.

(Sanchez-Velasco affidavit) Baez clearly had a motive to lie. The new evidence reveals that Baez would benefit financially and personally in exchange for his false testimony against Appellant. Furthermore, Baez's

willingness to testify falsely against Appellant is believable given the fact that Baez and Appellant barely knew each other. Baez had nothing to lose and everything to gain by taking the state up on its secret dealings.

The new evidence further confirms what Appellant has tried to establish in the past. The state kept from defense counsel a secret ongoing deal with another witness, Stephen Bishop. Bishop, like Baez, was a tool for the state to get into evidence "co-conspirator" statements. The negotiations of that deal and the benefits of Bishop began in September, 1985, one month before the grand jury convened and the state attorney wrote a letter on his behalf which was never disclosed to trial counsel (PC-R. 236). At Appellant's evidentiary hearing in 1990, the prosecutor testified that there was no deal. This Court, in affirming the denial of Appellant's initial post-conviction motion, relied upon the prosecutor's statement and that it was "unrebutted." Williamson v. Dugger, 651 So. 2d 84, 88 (Fla. 1994). This new evidence proves that the state was dealing with inmates giving money and transfers in exchange for false testimony against Appellant. This pattern of behavior is also further established by Omer's motion and testimony that the state

coerced him, both physically and psychologically, into testifying against Appellant. The fact that the state manufactured a case against Appellant is confirmed by the new information contained in the Sanchez-Velasco affidavit:

> Baez also told me that those who agreed to testify were told what to say.

The new evidence, in conjunction with the evidence the state failed to disclose, glaringly exposes the state's pattern of manipulating evidence and creating false evidence in order to convict Appellant. The state chose Omer to deal with. Once the state made that choice and realized that Omer's story did not add up, the state resorted to fashioning the evidence to fit Omer's fictitious story.

The jury never heard evidence of eyewitnesses that established Drew was the initial aggressor who lunged at Appellant with a knife and that Appellant defended himself with that knife. Evidence also existed that would establish that Drew made threats to Omer the night before the killing, stated he was going to make a knife in order to collect a debt owed to him and establishing that Drew planned to attack Omer. The omitted evidence would also have shown that Drew had a reputation for attacking people

with knives. The jury however, was never given the opportunity to hear this evidence. None of the witnesses presented by the state saw the actual start of the fight. Drew's crucial, initial aggressive acts were never presented to the jury.

The February 11, 1986 statement of Omer also contained information exculpatory to Appellant. The statement indicates that inmate John Henry wanted to give Omer money to hurt Drew because Drew owed him eighty dollars. The jury never knew this information.

The jury also never heard that the February 11, 1986 statement also indicated that Garvin Owensby was the only witness to the incident according to Omer. The typed notes of the interview indicate:

> The only person according to Omer who was in a position to have witnessed the whole thing was a black inmate at pride. Omer did not know his identity, but it turns out to be Garvin Owensby.

(PC-R. 1133) The importance of this statement is highlighted by the state attorney's handwritten notation to:

> **play down `only' witness could have been Owensby.**

(state's notes, PC-R. 1133)

More information was known by the state but never

disclosed and never presented to the jury. Marvin Harris was the state's only "eye-witness" to testify at trial. The state portrayed Harris as having seen the fight from a shop window. On one of the documents summarizing Harris' taped statement and deposition, the state noted the following:

> Harris knew all three of the defendants. Knew Omer by the nickname of Slim. He was a tool room assistant in the welding shop and Drew's partner in that area. On the day of the killing, all three defendants came up and one or more said they needed to see Drew. They did not act threatening at the time. So he went in and told Drew that his partner, referring to Alabama, was out there and needed to see him. Drew went out and Harris went back in to make coffee. While he was making coffee he glanced out the window. What he saw appeared to be a fight between Omer and Drew. Alabama was, when he first looked, not involved. Then Alabama stepped in and stabbed Drew. Harris then went outside. He saw Alabama and Chicken Head walking down the road with blood all over Alabama's right hand. He then looked for Drew and found him leaning against the building. He asked Drew if he could hear him, Drew nodded his head yes. He asked him "do you have anything hot on you" referring to a knife. Drew shook his head no. He then said sit still, the man's coming and he went to get Hicks.

The state attorney's handwritten notes further reflect the following:

> "**Problem: can't see much out window**"

(state's notes, PC-R. 1044)

What is interesting about this notation is that the

state, on another document (the summary and analysis of Mr. Hicks' taped statement and grand jury testimony), had another handwritten notation concerning the view out the window - there the state wrote:

"**Play down view from window**"

(state's notes, PC-R. 1046) Hicks was not a witness to the fight. Hicks was the shop supervisor and would have known about the view from the window. The state knew Mr. Harris could not see from that window. The state knew this and therefore had to "**play it down**".

Appellant's case hinged upon a theory of self defense and reduced intent. The jury never heard any of the critical evidence which supported this defense. The new evidence presented by the Sanchez-Velasco affidavit and Omer’s motion and hearing testimony now proves the claims Appellant has maintained and continues to maintain.

The state's manipulation of evidence is patently obvious. Sanchez-Velasco's affidavit and Omer’s sworn averments verify each and every piece of evidence revealing the state's pattern of deception. The state stacked its case against Appellant with false testimony. The new evidence exposes the state's case against Appellant for what it really was - manufactured upon untruths and

perjury. Appellant's innocence of first-degree murder is inescapable in light of the entire facts in this case.

Omer and Baez were the key, critical elements of the state's case against Appellant. The deletion of Omer and Baez's testimony would have left the state's case for premeditation and death non-existent. The further reduction in their credibility demonstrates that the new evidence, considered cumulatively with previous evidence, would likely produce an acquittal. Omer and Baez were the state's case. Without them the state's case is considerably, if not completely, damaged. An examination of this Court's opinion on direct appeal demonstrates why this is so:

> There is also sufficient evidence from which the jury and the trial Court could have concluded that Williamson was the "dominant force behind the homicide." See Marek v. State, 492 So. 2d 1055 (Fla. 1986). There was testimony that Williamson first suggested the killing, that he formulated the plan
> . . . .

Williamson v. State, 511 So. 2d at 292 (emphasis added). The only evidence of the "plan" came from Omer and Baez. The new evidence, and previous evidence, refute this.

Clearly, the allegations of newly discovered evidence meet the first two prongs of Jones. As to the third prong,

it cannot be denied that evidence of the state's two most critical witnesses perjuring themselves does not create a probability of a different result. The flaws in the system which convicted Appellant are many. They have been pointed out throughout not only this brief, but throughout the litigation of this case; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly obtained conviction and improperly imposed death sentence – safeguards which are required by the Constitution. These errors cannot be harmless. As stated, the lower court failed to consider the case cumulatively. By not doing so, the court ignored the entire context of Omer's and Baez's testimony, focusing only on inculpatory statements. Such an analysis is incomplete and, thus, flawed.

There can be no doubt, and Appellant would suggest that the state cannot argue otherwise, that Omer Williamson and Kenneth Baez were the crucial witnesses against Appellant. Omer was Appellant's co-defendant and the only witness with purported direct knowledge supporting a theory of first-degree murder in this case. Omer testified to a plan to commit first-degree murder. Without Omer's

testimony, the maximum conviction in this case would have certainly been less than first-degree murder, if any at all. The paramount importance of Omer's testimony at Appellant's trial is not in dispute. Equally important was Baez, who provided crucial premeditation testimony separate from Omer. Without Omer and Baez, a probable acquittal at Appellant's trial becomes the result. The lower court seemingly accepted Omer's hearing testimony that he lied when averring in his post-conviction motion that there was no plan. (PC-RII. 24) Conversely, the Court seems to have disbelieved or ignored everything else in Omer's testimony. It was the state who chose to use Omer's testimony at trial to convict Appellant of first-degree murder and obtain a sentence of death. It is more than just darkly ironic that the state would take the position that Omer is to be only selectively believed. If Omer Williamson is unbelievable on any point, he is no more so now than he was at the time the state vouched for his testimony at trial. In fact, Omer certainly had more motivation to lie at trial so that he could avoid being executed by the very authorities he was helping. To rest a sentence of death so squarely on a person like Omer Williamson goes against any notion of justice or fairness. The trial testimony of Omer Williamson

and Kenneth Baez has now been thoroughly discredited, not merely by fellow inmates in an Alabama prison, but by the Sanchez-Velasco affidavit and Omer Williamson himself. Omer's sworn averments in his post-conviction motion, combined with his hearing testimony, undermine completely the factual basis of his trial testimony. The Sanchez-Velasco affidavit does the same for Baez as well as Omer. It must be remembered that Omer Williamson admitted, unequivocally, that he lies when he thinks it will benefit him. Omer admitted that he would have continued to pursue his "untrue" 3.850 motion if he believed he could obtain relief. Omer further conceded that he benefited by testifying against Appellant. Thus, Omer's self-admitted instinct, in the situation he faced after being indicted and threatened with execution, is to lie. Could there be any more motivation to lie? As it turns out, Omer's and Baez's testimony of a premeditated plan to kill Daniel Drew, testimony relied on by the jury in this case, the trial court in sentencing Appellant to death, and every appellate court that has affirmed the conviction and sentence in this case, was inherently incredible and almost certainly bogus. The absence of reliability in Omer's and Baez's testimony, which has been demonstrated herein,

undermines completely the reliability of Appellant's conviction and sentence. With the crumbling of these crucial witnesses' testimony, and the cumulative consideration of other errors, all sense of justice in this case evaporates.

Appellant did not commit first-degree murder. Appellant's convictions and death sentence are constitutionally unreliable. Execution of an innocent man violates the Eighth and Fourteenth Amendments. Herrera v. Collins, 113 S. Ct. 853, 870, 876 (1993) (O'Connor, J. concurring: "the execution of a legally and factually innocent person could be a constitutionally intolerable event")(Blackmun, J. dissenting: "the execution of an innocent person is 'at odds with contemporary standards of fairness and decency"). When viewed in conjunction with the evidence never presented because of trial counsel's deficient performance, the evidence withheld in violation of Brady, and the false and misleading evidence presented, there can be no question that the new evidence shows Appellant is innocent of first-degree murder and his execution cannot withstand the requirements of the Eighth Amendment and Fourteenth Amendment due process.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully urges this Court to reverse the Order of the Lower Court and to grant him relief on his claims as this Court deeps proper, including ordering the vacation of his convictions and sentences and granting him a new trial.

CERTIFICATE OF SERVICE

Counsel for Appellant certifies that all opposing counsel were served with a true copy of this Corrected Initial Brief of Appellant on February 6, 2006 by U.S. Mail.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel certifies that this Corrected Initial Brief was generated in a Courier non-proportional 12-point font.

_____
Harry Brody
Fla. Bar No. 0977868

_____
Jeffrey M. Hazen
Fla. Bar No. 0153060
Attorneys for Appellant

BRODY & HAZEN, P.A.
Attorneys at Law
P.O. Box 16515
Tallahassee, FL 32317
(850) 942-0005