**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC05-1527**

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**JOHNNY WILLIAMSON,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# REPLY BRIEF OF APPELLANT


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## ARGUMENT IN REPLY

Appellee's rendition of the case facts contains several statements which mischaracterize the facts or are incomplete. At page 7 of Appellee's answer, Appellee states that witness Rigoberto Sanchez-Velasco refuted his affidavit and statement to CCR investigators which was the basis of the January 2, 1997 successor 3.850. Appellee repeats this several times throughout the brief. The statement is inaccurate. Sanchez-Velasco was deposed on the eve of his 2002 execution in order to preserve his testimony supporting the 1997 successor motion. At the deposition, the witness simply refused to testify. He did not, contrary to Appellee's continual suggestion to the contrary, refute the affidavit or statement given to CCR investigators. Sanchez-Velasco, about to commit state-assisted suicide, would not testify about anything.

Again at page 7 of Appellee's answer, Appellee, in outlining arguments made to the lower court at the Huff hearing, argues that the claims made by Appellant are not relevant to penalty phase considerations. The argument, made again throughout Appellee's answer brief, and apparently accepted by the lower court, is inaccurate. First, it should be noted that the trial court found, and this Court affirmed, a finding of the cold, calculated, and premeditated aggravating factor.

Williamson v. State, 511 So.2d 289 (Fla. 1987). The thrust of the successive motions below and the instant appeal is that the witnesses who provided the evidence of premeditation, and by logical extension evidence of the CCP aggravator, were lying. The evidence below, contrary to Appellee's argument and the lower court's disposition, is clearly relevant to the penalty phase. Further, evidence that Appellant's co-defendant, who beyond any credible argument provided the crucial testimony resulting in verdict and sentence, was lying about Appellant's role in Daniel Drew's death, is relevant to the sentencers' consideration of the appropriate penalty. Finally, although this Court's precedent may cut against Appellant, lingering doubt is a factor that weighs in jury's consideration. Any lawyer with experience in capital sentencing knows this to be true. For lawyers or courts to deny this is, like much of our capital jurisprudence, the perpetuation of a fantasy.

At page 8-9 of Appellee's answer, Appellee makes a statement outlining the allegations of Omer Williamson's 3.850 motion. In that statement, Appellee leaves out what is most relevant to the instant appeal. That is, Omer Williamson averred in his post-conviction motion that he never participated in a plan to murder Daniel Drew. If Omer's allegation in this regard is true, the theory of first-degree murder and for

capital punishment is left without support.[1] This would seem to be a fairly important allegation yet it is not included in Appellee's restatement of Omer's 3.850 motion.

Appellee states in response at page 24 and again repeatedly that Omer Williamson reaffirmed his trial testimony. The suggestion made by Appellee is that Omer repudiated every allegation made in his post-conviction motion. This is not true. Clearly, Omer reaffirmed his post-conviction averments that he was coerced against his will into entering a plea and testifying. This is obviously something the jury did not, but should have, considered. Omer never repudiated this allegation. To the extent that Omer "reaffirmed" his trial testimony regarding premeditation, Appellee ignores Omer's unequivocal testimony at the hearing that he would not have withdrawn his post-conviction averments if he believed it would benefit him legally. (EHT. 50-53) Stated more simply, Omer would keep lying if he thought he could get out of prison. Thus, Omer has not "reaffirmed" his trial testimony with the force, or to the extent, suggested by Appellee.

Appellee, at page 27 of its answer brief, argues that the claim regarding Omer's post-conviction motion is time-barred.

[1] Omer Williamson himself testified at the evidentiary hearing that his testimony was the only evidence of premeditation.

The argument made by Appellee was never asserted in its response below. In a response to the motion filed on October 17, 2003, the state merely asserted that the allegations were "ludicrous" and conceded, in fact requested an evidentiary hearing ***on the merits***. There is no assertion of a time-bar. Additionally, at the Huff hearing in this matter, there was no argument that the claim involving Omer Williamson is time-barred. The state restated its position that an evidentiary hearing on the substance of the claim was appropriate. Further, at the evidentiary hearing, no argument was made by the state that the claim was time-barred. The time-bar suggestion does not appear until Appellee's proposed order denying post-conviction relief submitted to the lower court. Notably, the lower court adopted Appellee's proposed order word for word without any deviation whatsoever. The assertion of a time-bar as to this claim was waived and, further, Appellant submits that had it not been, he would have vigorously challenged the contention.

At page 28-31 of its answer, Appellee makes much of the fact that Omer's post-conviction motion is mainly aimed at the voluntariness of his own plea and that such allegations are irrelevant to Appellant's case. This is inaccurate. The fact that Omer was coerced and threatened with death and that he pled and testified, crucially, against Appellant out of fear is

extremely relevant. To suggest that those facts would not be relevant to a jury deciding Appellant's fate is an inaccurate assessment of the evidence.[2]

Again, Appellee argues at page 33 that Omer "***has never*** recanted his trial testimony in either his *pro se* 3.850 motion or at the evidentiary hearing in this case" (emphasis added). Omer stated in his post-conviction motion that he did not participate in a plan to murder Daniel Drew. At trial, Omer testified that there was a premeditated plan to kill Drew and that he fully participated in it. Thus, Omer clearly, in his post-conviction motion, recanted his trial testimony. Appellee's suggestion otherwise is wrong. Appellee's reliance on Brown v. State, 381 So.2d 690 (Fla. 1980) is misplaced. Brown did not involve, as the instant case does, numerous other post-conviction claims demonstrating that the state's case

[2] Appellant would also point out, to the extent this Court would be concerned by it, Appellee's acknowledgement of the arbitrariness of capital cases involving co-defendant's and relative culpability. Appellee cites to and acknowledges Baya Harrison's testimony that in this case, like other capital cases involving multiple defendants, "you have to beat the other side to the State Attorney's Office to cut a deal to save your client's life." (PC-R. 67, footnote 4, p. 29 of Appellee's answer) Undersigned counsel would suggest that this frankly candid acknowledgment does not instill confidence that death sentences are only reserved for the "worst of the worst."

against the defendant was a fraud.[3] Specifically, Appellant's initial post-conviction motion involved affidavits from Alabama inmates who served with Omer Williamson and averred that Omer told them he lied to put a man on death row in Florida. Appellee also asserts, citing Brown, that there is "no affidavit" recanting Omer's trial testimony, inferring that an affidavit is required to establish the merit of the claim. (Answer Brief at page 34-5) Appellee makes a fine distinction to say the least. Omer's post-conviction motion was sworn to and notarized. At the hearing, Omer testified that he signed and swore to the allegations therein.[4]

As to the claim involving the Sanchez-Velasco, Appellee asserts at page 34 of the answer brief, in support of the lower court's order, that the claim is time-barred. Appellee's assertion, and the lower court's finding, are without support. The motion asserted the claim as one involving newly discovered evidence. Further, that it had been obtained during Appellant's

[3] It should be noted that the Appellant in Brown, Joseph Green Brown, was later released from prison when the state's case against him unraveled. This was despite the fact that his conviction and sentence were unanimously affirmed by this Court.

[4] Omer did testify, beyond any shred of credibility, that he did not remember the averment in the motion that there was no plan or premeditation and, further, there might have been a typographical error in this regard.

post-conviction process. The lower court's order and Appellee's argument are without support. Had Appellant been given an evidentiary hearing, he certainly would have demonstrated diligence had it been an issue. Appellee correctly points out that the lower court held that Sanchez-Velasco's testimony would be inadmissible hearsay. Appellee is wrong in asserting that the lower court's ruling was correct. First, the testimony would be impeachment evidence of both Omer and Ken Baez and therefore admissible. Impeachment evidence may qualify under Jones v. State, 591 So.2d 911 (Fla. 1991) as evidence of innocence that may establish a basis for Rule 3.850 relief. State v. Mills, 788 So.2d 249 (Fla. 2001). Also, under Chapter 921.141, Florida Statutes, hearsay evidence is admissible in the penalty phase of a capital trial. Therefore, even if not admissible as impeachment evidence, the evidence is admissible under Florida's capital sentencing statute. As argued previously, the evidence at issue is relevant to sentencing.

At page 38 of the answer brief, Appellee argues the lack of relevancy of Sanchez-Velasco's statement. Appellee's argument that there is only one reference to Omer Williamson, Omer's statement to Sanchez-Velasco that "I fucked up," ignores Kenneth Baez's statements to Sanchez-Velasco admitting perjury and paid

for testimony. Appellee fails to address the clear relevance of Baez's statement s to Sanchez-Velasco.

Appellee argues at page 39 of the answer brief that because Sanchez-Velasco is now dead, the lower court could not have granted an evidentiary hearing regardless. However, certainly the investigators who procured Sanchez-Velasco's affidavit and statement could have testified to the contents of the conversation. The same arguments made *supra* regarding hearsay concerns would be applicable.

To the extent that Appellee argues, at page 41 of the answer brief, that prior claims are not to be considered, the argument is legally inaccurate. The cumulative effect of claims is to be considered. State v. Gunsby, 670 So.2d 920 (Fla. 1996). See Young v. State, 739 So.2d 553 (Fla. 1999); Rogers v. State, 782 So.2d 373 (Fla. 2001); Floyd v. State, 902 So.2d 775 (Fla. 2005).

Finally, as to Appellee's argument regarding Oregon v. Guzek, 126 S.Ct. 1226 (2006), the United States Supreme Court did not hold, as suggested by Appellee, that residual or lingering doubt could not be considered as mitigating evidence. More narrowly, the Court seemed to hold that a defendant could not introduce additional evidence of arguable innocence at a capital sentencing. Id at 1232-33. Of course, as most lawyers

involved in capital cases would acknowledge, juries very often do consider residual doubt when recommending sentence in capital cases. To argue, or accept as fact otherwise, is to ignore what is patently and intuitively obvious.

## CONCLUSION

Based upon the foregoing arguments and upon the record, Appellant respectfully urges the Court to vacate his sentences and to remand the case for a new trial, sentencing, or such other relief as the Court deems proper.

Respectfully submitted,

_____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Meredith Charbula, Assistant Attorney General, The Capitol-PL-01, Tallahassee, Florida 32399, on this _____ day of July, 2006.

## CERTIFICATE OF TYPE SIZE AND STYLE

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