IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-23

MARCO NORDELO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON APPEAL FROM THE
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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INTRODUCTION

Petitioner, Marco Nordelo, was the defendant in the trial court and the Appellant in the district court of appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the district court of appeal. The parties will be referred to in this brief as they appear before this Honorable Court. The symbol "R." will refer to the Record on Appeal from Case Number 3D09-1269, and the symbol "IB." will refer to the Petitioner's Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Procedural History

On December 17, 1990, in lower court case number F90-25016, the Petitioner, Marco Nordelo, and his codefendant, Angel Manuel Lopez, were charged with the following crimes which occurred on May 29, 1990: armed robbery, a violation of § 812.13 and § 777.011, Fla. Stat. ("Count I"); kidnapping with a weapon, a handgun, a violation of § 787.01 and § 777.011, Fla. Stat. ("Count II"); and another count of robbery, a violation of § 812.13 and § 777.011, Fla. Stat. ("Count III") (R. at 23-25).

On April 1, 1991, the codefendant, Lopez, entered a plea of no contest to the charges and was sentenced to concurrent terms of twenty-five years in state prison. (R. at 2). On the same date, April 1, 1991, the Petitioner proceeded to a jury trial, at the conclusion of which, he was found guilty of Counts I and III. On April 2,

1991, the Petitioner was sentenced to concurrent terms of life in prison as a habitual violent offender. (R. at 8).

Following his conviction and sentence, the Petitioner filed his direct appeal in case number 3D91-1163, arguing that the trial court erred in: (1) allowing introduction of evidence of the Petitioner's commission of an unrelated crime and (2) adjudicating the Petitioner guilty of two counts of armed robbery when the taking of the victim's property was the result of one criminal transaction. The Third District Court of Appeal affirmed in part, reversed in part, and remanded the case to the trial court to vacate one count of armed robbery. *See Nordelo v. State*, 603 So. 2d 36 (Fla. 3d DCA 1992). In its opinion, the Third District described the facts of the case:

> The victim, a convenience store clerk, recognized Nordelo as a customer from the previous day. Nordelo committed this armed robbery by first taking money from the cash register, then the victim was pusillanimously beaten, and then the victim's wallet was taken. Nordelo fled the scene in a white car. A month later, the victim identified Nordelo in a photo display.

Id. at 37.

More than seventeen years after the decision in 3D91-1163, the Petitioner filed, in the trial court, a "Motion for New Trial Based on Newly Discovered Evidence and Prosecutorial Misconduct Pursuant to Rule 3.850.[1]" (R. at 26-47). Attached to the motion was a notarized affidavit from the codefendant, Lopez,

[1] Fla. R. Crim. P. 3.850.

which alleged that the Petitioner had not participated in the robbery and that the Petitioner had been misidentified by the victim, Mr. Benavides. The codefendant alleged that he accepted the plea and then refused to testify. "I did not come forward with this information sooner, as I was afraid that the Office of the State Attorney would take away my plea offer." (R. at 47).

On December 3, 2008, the State filed a written response to the motion (R. at 48-55), noting in part:

> With respect to the defendant's first claim, the claim of newly discovered evidence, the State respectfully submits that [it] should be denied as conclusively refuted by the record and inherently incredible. The State would note the overwhelming evidence of guilt that was presented during the trial and set forth in page 2 herein. The evidence reflects that the victim, Mr. Benavides, identified the defendant, Mr. Nordelo, and his co-defendant, Mr. Lopez, from photo lineups with 100% certainty. T. 148.
>
> Moreover, the testimony from Officer Julio Pino was clear that at the time the defendant and Mr. Lopez were arrested, the defendant was driving the white Ford Taurus vehicle. T. 180-181. During the trial the defendant never disputed that he was the driver of the vehicle at the time of the arrest. Yet Mr. Lopez's affidavit, submitted by the defendant, states that Mr. Lopez was the driver of the vehicle and the defendant was a passenger.
>
> The defendant's claim of newly discovered evidence should thus be summarily denied in accordance with *Taylor v. State*, 877 So.2d 842, 843 (Fla. 3d DCA 2004):
>
> Defendant's newly discovered evidence claim is based on an affidavit provided by an alleged witness to the crime, a fellow inmate. The fellow inmate offered an affidavit which states that he saw the shooting which defendant was convicted. The affidavit states that both shooters wore ski masks and that the build of the shooters did not

resemble the build of the defendant. The affidavit concludes that because the description of the shooters did not match the build of the defendant, the defendant could not have committed the crime.

The state properly argues, and our review of the transcript reveals, that two eyewitnesses to the crime identified defendant as one of the shooters. Both eyewitnesses had known defendant for years. Further, there was no mention by these eyewitnesses-or any suggestion by the prosecutor, the defense, or anyone at the trial-that the shooters were wearing ski masks or masks of any type. Thus, the trial court could properly reject the affidavit, for it is "inherently incredible."

Furthermore, to be newly discovered evidence, the evidence must be such that neither the defendant, his counsel, nor the trial court could have discovered the facts in the affidavit at the time of trial through the exercise of due diligence, and must be such that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512, 521 (Fla. 1998), *cert. denied*, 523 U.S. 1040, 118 S.Ct. 1350, 140 L.ED.2d 499 (1998).

The record is clear that the defendant and his counsel, Mr. Casabielle, were given the opportunity by the court to speak with Mr. Lopez after the acceptance of his plea and prior to the presentation of opening statements in the defendant's trial. T. 9, 19. While the content of any conversation that may have taken place prior to trial between the defendant's counsel and Mr. Lopez would not be included in the record, the record is clear that Mr. Lopez was not called as a witness by the defense. In fact, Mr. Lopez was not called as a witness by either side.

Over seventeen years after the defendant's trial, Mr. Lopez now claims in his affidavit that the reason he did not come forward with this information sooner was because he "was afraid that the Office of the State Attorney would take away my plea offer." This claim is conclusively refuted by the record and inherently incredible. Mr. Lopez had already accepted his plea prior to the commencement of the defendant's trial. In fact, nowhere in Mr. Lopez's plea colloquy does it indicate that he would have to testify as a condition of his plea. T. 10-18. Mr. Lopez could have come forward with this information at any time after the court's acceptance of his plea and the State would

> have had no discretion or authority to withdraw the plea offer or vacate the plea the court had already accepted. Therefore, Mr. Lopez's claim that he was afraid that the State would take his plea away is inherently incredible. Therefore, the defendant's first claim should be denied as conclusively refuted by the record and inherently incredible. In the alternative, the court may set the matter for an evidentiary hearing.

(R. at 51-53).

On January 15, 2009, a hearing was held. (R. at 63-73). At the hearing, the Petitioner, through counsel, argued that the affidavit was not refuted by the record; that the jury would have believed the codefendant if he had testified; and that the codefendant did not testify because he felt that his plea would have been in jeopardy if he testified at that time. The State responded that the codefendant was a nineteen-time convicted felon who decided to come forward seventeen years after the Petitioner had been tried and convicted; that the affidavit was not newly discovered evidence; and that there was overwhelming evidence of guilt; the State then reiterated the arguments that it made in its written motion. (R. at 66-69). The trial court listened to the parties, after which, the judge concluded:

> THE COURT: Counsel, here's the finding, I am finding the evidence is not newly discovered evidence.
>
> MR. GONZALEZ: Over our objection.
>
> THE COURT: Very, well. It's not newly discovered.
>
> There was an issue of successiveness in prior newly discovered evidence –

> MR. MENENDEZ-APONTE: That would be in regards to claim two, the State agree[s] it's –
>
> THE COURT: I agree it's not newly discovered evidence. The evidence could have been obtained through due diligence simply, because the witness now, because his custodial status changed, has decided to come forward does not render the evidence newly discoverable.
>
> MR. GONZALEZ: Judge, most respectfully –
>
> THE COURT: Counsel, I have ruled on it.

(R. at 70).

On April 6, 2009, the trial court entered a written order, indicating that the evidence was not newly discovered and could have been obtained through due diligence. The order directed the clerk to attach necessary record excerpts from the court file that supported the court's ruling. (R. at 57).

In case number 3D09-1269, the Third District Court of Appeal affirmed the trial court's order in a written opinion. *See Nordelo v. State*, 47 So. 3d 854 (Fla. 3d DCA 2010). In its decision, the Third District explained that the Petitioner had not satisfied the requirements for newly discovered evidence as set forth in *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *see also Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994); *McLin v. State*, 827 So. 2d 948, 956 (Fla. 2002). The Third District also distinguished the Petitioner's case from those situations involving the testimony of defendants who were previously unwilling to testify or the recantation of a codefendant. Further, under the applicable case law concerning

summary denial of post-conviction motions, the Third District held the Petitioner's allegations were facially insufficient and conclusively refuted by the record. 47 So. 3d at 856-58.

The Third District explained that the affidavit provided no information that neither Nordelo nor his counsel could have discovered at the time of trial through the exercise of due diligence. The Third District further explained that his claim was conclusively refuted by the record and that the State presented overwhelming evidence of his guilt during the trial, which as noted by the State in its response to the Rule 3.850 motion, included the victim's identification of both defendants from photo lineups with one hundred percent certainty. Moreover, as to the affidavit's credibility, the court noted, Lopez had claimed that he was the driver of the white car, while the record showed that the arresting officer testified – and Nordelo never disputed – that Nordelo was driving at the time of his arrest. 47 So. 3d at 858.

Judge Cope filed a dissenting opinion, asserting that the Petitioner's post-conviction motion was legally sufficient and should either have been remanded for an evidentiary hearing or affirmed with leave to amend the motion. *Nordelo*, 47 So. 3d at 858-62. On October 28, 2010, following the Third District's affirmance, the Petitioner filed a motion for rehearing/motion for rehearing en banc, which was denied on November 18, 2010. The Petitioner subsequently sought jurisdiction in this Court, which was granted.

STANDARD OF REVIEW

This Court has enunciated the standard of review of a summary denial of a rule 3.850 claim, including a claim of newly discovered evidence, as follows: To uphold the trial court's summary denial of claims raised in a rule 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held in the trial court, a district court must accept the defendant's factual allegations to the extent they are not refuted by the record. *See McLin*, 827 So. 2d 954; *Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999).

SUMMARY OF ARGUMENT

The Third District properly upheld the trial court's ruling that the Petitioner failed to satisfy the requirement of due diligence so as to qualify codefendant Lopez's affidavit as being "newly discovered" evidence. Lopez entered into a plea agreement prior to the start of Petitioner's trial. Once Lopez had been sentenced, the State and the trial court could not revoke the agreement for which he had bargained. Although Lopez alleged in his affidavit that he feared coming forward as a witness for the Petitioner could adversely affect his sentence, he did not claim that he was coerced or threatened by anyone, including the State.

The Petitioner notably failed to allege in his post-conviction motion that he ever, in seventeen years, asked his codefendant to testify on his behalf. Put in the

context of due diligence, if the Petitioner was innocent, or if he believed that he was innocent, he would have or should have had a reasonable basis for believing that his codefendant would come forward and testify on his behalf and should, in turn, have actively sought the codefendant's cooperation, which he did not do.

The present case is distinguishable from those cases where a defendant files a newly discovered affidavit but was either previously refused or had other difficulties in obtaining such information, none of which was alleged here. This case is also distinguishable from the line of cases involving recanted testimony. For any and all of those reasons, the lower court's decision should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY UPHELD THE TRIAL COURT'S RULING THAT PETITIONER FAILED TO EXERCISE DUE DILIGENCE IN PURSUIT OF HIS POSTCONVICTION CLAIM OF "NEWLY DISCOVERED" EVIDENCE.

The Petitioner argues that the district court erred in affirming the trial court's summary denial of his Rule 3.850 motion for post-conviction relief based on newly discovered evidence. In order for a defendant to obtain a new trial based on newly discovered evidence, the defendant must meet ***two*** requirements: ***First***, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. *Torres-Arboleda*, 636 So. 2d at 1324-25.

Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) ("*Jones II*"). Newly discovered evidence satisfies the second prong of this test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id*. at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)).

As this Court has instructed, in determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) ("*Jones I*"). This determination includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and ***"any inconsistencies"*** in the newly discovered evidence. *Jones II*, 709 So. 2d at 521; *Green v. State*, 975 So. 2d 1090, 1099-1100 (Fla. 2008).

Although a defendant is not automatically entitled to an evidentiary hearing on filing a motion asserting newly discovered evidence, *see Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994) (determination must be made on case-by-case

basis); *Hough v. State*, 679 So. 2d 1300, 1300 (Fla. 5th DCA 1996) (hearing was unnecessary on affidavit stating that someone else the committed crime, where the Petitioner had been identified as the perpetrator by the victim as well as by the other codefendant), if there is conflicting evidence of a defendant's guilt, it is necessary for the trial court to evaluate the weight of the newly discovered evidence and the evidence which was introduced at the trial to determine whether the new evidence would probably have resulted in an acquittal. *Peede*, 748 So. 2d at 257 ("[W]here no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.") (citing *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989)).

However, the holdings in *Peede* and *Lightbourne* do not mean that the court must accept as true what the new witness allegedly would say; only that it is to be accepted, as true, that the witness, if called as a witness at trial, would testify as alleged by the defendant. Just because a new witness comes along and allegedly says that a defendant did not commit the crime should not mean that the court, in reviewing the motion, must accept that the defendant did not commit the crime; only that the witness does, in fact, make this assertion.

In this case, the codefendant's affidavit attached to the Petitioner's post-conviction motion alleged that Petitioner had not participated in the robbery and named a different co-perpetrator. The codefendant claimed that he did not come

forward with this information sooner because he was afraid that the State would revoke its plea offer, which had been accepted by the court before the Petitioner's trial. The Petitioner argues that, under controlling decisions of this Court, the allegations of his post-conviction motion sufficiently met the requirements for pleading newly discovered evidence. (IB. at 15). The State, however, maintains that the district court properly concluded, *inter alia*, that the Petitioner's newly discovered evidence claim was facially invalid.

As this Court instructed in *Jacobs v. State*, 880 So. 2d 548, 551 (Fla. 2004), "A determination of facial insufficiency will rest upon an examination of the face, or contents, of the postconviction motion." Here, the Third District pointed out in its opinion that Petitioner failed to allege in his motion that he ***ever***, in seventeen years, asked his codefendant to testify. Furthermore, the district court noted that the codefendant did not state in his affidavit, nor did Nordelo allege, that he was coerced or threatened by anyone into previously withholding his information. *Nordelo*, 47 So. 3d at 857.

The district court reiterated that the codefendant's affidavit provided "no information that neither Nordelo nor his counsel could have discovered at the time of trial through the exercise of due diligence." *Nordelo*, 47 So. 3d at 857. Thus, unlike the error made by the trial court and the district court in *Jacobs*, it is clear that the Third District in this case properly looked to the legal sufficiency of the

allegations of Petitioner's motion, ***not*** to the record, in separately determining that Petitioner's claim was facially invalid. Especially given the lack of adequate factual support in Petitioner's motion, this holding was perfectly consistent with the decision of this Court in *Jacobs*.

Indeed, the State maintains that, consistent with holdings from this Court, the trial court's written order properly denied the Petitioner's post-conviction motion upon finding that he failed to exercise due diligence in discovering the information contained in the codefendant's affidavit. In *Hunter v. State*, 29 So. 3d 256 (Fla. 2008), this Court analyzed a motion alleging newly discovered evidence where a codefendant, Eric Boyd, confessed to shooting Taurus Cooley, one of the surviving victims, in a dispute over drugs.

The *Hunter* Court noted that in similar (but distinguishable) circumstances from Nordelo's case, Florida's appellate courts have found post-trial confessions from codefendants to qualify as newly discovered in the sense that the evidence was not known at the time of trial and could not have been known by the use of due diligence. *See Brantley v. State*, 912 So. 2d 342, 342-43 (Fla. 3d DCA 2005) (remanding for an evidentiary hearing based on the affidavit of a codefendant which stated the defendant was not present and was not involved in the shooting and based on the postconviction motion which alleged that defense counsel tried to obtain the codefendant's cooperation but was refused).

The *Hunter* Court also cited *Roundtree v. State*, 884 So. 2d 322, 323 (Fla. 2d DCA 2004) (the defendant's allegations that his codefendant admitted that the defendant had no role in the robbery and that the codefendant had not testified on the defendant's behalf ***because he had been coerced by the State*** were sufficient to state a prima facie claim of newly discovered evidence); *Kendrick v. State*, 708 So. 2d 1011, 1012 (Fla. 4th DCA 1998) (stating that a ***codefendant's sworn post-trial testimony that he lied to police*** and that he was told by police to say he got the cocaine from the defendant in order to keep his own prison time to a minimum qualified as newly discovered evidence because it was unknown, the codefendant was unwilling to give the testimony previously, and the testimony could not have been secured through due diligence); *see also State v. Gomez*, 363 So. 2d 624, 626-28 (Fla. 3d DCA 1978) (treating as newly discovered evidence ***third-party confession to having committed a robbery*** without the defendant's assistance), *rev'd on other grounds by Tafero v. State*, 406 So. 2d 89 (Fla. 3d DCA 1981).

The critical fact in the instant case is that the codefendant, Lopez, is never alleged to have either testified against Nordelo, or to have advised Nordelo that if called to testify, Lopez would incriminate Nordelo. Unlike the cases cited above, no recantation was involved in the present case. The only thing that emerges from the allegations in Nordelo's Rule 3.850 motion and the supporting affidavit from Lopez is that Lopez refused to testify at the trial – either for the State or the

defense. Therefore, in contrast to those situations, the Petitioner's motion was not "sufficiently pled" to require an evidentiary hearing on the due diligence issue. *See Davis v. State*, 26 So. 3d 519, 529 (Fla. 2009) (allegation of newly discovered evidence based on witness recantation).

As Lopez is not alleged to have either incriminated the Petitioner or threatened to incriminate him, the only reason for Lopez's refusal to testify was that he was afraid he would jeopardize his plea, and was therefore refusing to say anything at that time. However, as the Third District held, since the trial court had already accepted Lopez's plea (the terms of which did not require Lopez to testify for the State or refrain from testifying for the Petitioner), the State had no legal grounds to vacate the plea. Furthermore, given the absence of any allegations that Lopez had actually threatened to incriminate Nordelo if Lopez were called to testify, it is patently unreasonable and contrary to the requirements of due diligence for Nordelo to wait 17 years to contact Lopez to see if Lopez had reached the point of being willing to assist Nordelo.

If Nordelo truly believed that he was innocent of the charges, and if Nordelo truly believed that Lopez could exculpate him, once Lopez's criminal case had been finalized, he would no longer have had any impediment to testifying on behalf of Nordelo. Thus, if Nordelo truly maintained his own innocence, he had every reason to contact Lopez for such assistance as soon as Lopez's own case was

finalized; there was no reason to wait for 17 years. As such, given the fact that the Petitioner waited nearly two decades before pursuing this claim, the trial court, and in turn, the district court, properly found that the Petitioner failed to satisfy the "due diligence" requirement of Rule 3.850(b)(1).

To that end, this case is distinguishable from the line of cases involving recanted testimony. Further, this case is significantly different from one in which a codefendant had actually testified against the defendant or made it clear that, if called, he would testify against the defendant. No such allegation existed in the instant case. When such facts exist, a defendant would understandably not have any reason to pursue the codefendant any further. That does not hold true when the codefendant has never implicated the other defendant and has never threatened to implicate him.

The State also notes that in addition to finding that the Petitioner's "newly discovered" evidence was invalid on its face, and in addition to finding that the affidavit provided no information that neither the Petitioner nor his counsel could have discovered at the time of his trial through the exercise of due diligence, the Third District found that the summary denial was proper, as the State presented overwhelming evidence of his guilt during the trial. 47 So. 3d at 858. By reviewing the totality of the evidence that had been presented at trial, the Third District compared it to the new evidence, and concluded, by weighing the two, as did the

lower court, that the Petitioner did not demonstrate that the new evidence, if presented to the jury, would probably have affected the outcome of the trial.

The Third District's decision was in keeping with well-established principles from this Court regarding the summary denial of post-conviction claim of newly discovered evidence. First, this Court has stated that an evidentiary hearing is not required where an affidavit is inherently incredible or obviously immaterial to the verdict and sentence. *Johnson*, 647 So. 2d at 111; *Davis*, 26 So. 3d at 526 (citing *See Stephens v. State*, 829 So. 2d 945 (Fla. 1st DCA 2002) (citing *Robinson v. State*, 736 So. 2d 93, 93 (Fla. 4th DCA 1999); *Venuto v. State*, 615 So. 2d 255, 256 (Fla. 3d DCA 1993)).

For example, if a defendant was convicted of robbing a supermarket by two men with guns, and if there were 75 witnesses at the scene, and at trial, all 75 witnesses identified the perpetrators, and the clerk knew the perpetrators from the day before, and there was overwhelming evidence of fingerprints and DNA, an evidentiary hearing would be unnecessary, where years later, a single witness comes forward with a "newly discovered" affidavit that says that the defendant was with him many miles away. Under those circumstances, both the trial and appellate courts can conclude that the defendant has not established that the alleged new evidence would probably affect the outcome of the trial; and no evidentiary hearing is required for that.

Correspondingly, in upholding the summary denial of a post-conviction motion, this Court has routinely based its ultimate analysis on a comparison of the testimony and evidence that had been presented at trial and an assessment of the new evidence presented by the defendant without an evidentiary hearing for the weighing process. For example, in *Davis*, this Court found that the new evidence (the statements and affidavit of recanting witnesses) did not eliminate the other evidence supporting premeditation or the other evidence presented at trial. Specifically, this Court explained:

> However, our ultimate analysis is that this claim was properly denied on the alternative basis that the recantation would not eliminate the other evidence supporting premeditation to commit the murder and the proportionality of the death sentence. Even if we assume an evidentiary hearing had been conducted and Davis provided sufficient evidence to strike the CCP aggravating factor, ***the recantation would not eliminate Davis's confession and the additional, nonrecanted testimony*** that he said he planned to "rip [the victim] off." First, the witnesses' new interpretation of these statements does not probably change the ability of the jury to interpret the statements during the guilt phase to mean that Davis intended to rob the victim. If the jury interpreted these statements to mean Davis planned to rob the victim, the capital conviction would be supported under the theory of felony murder.

Davis, 26 So. 3d at 529-30 (emphasis added). This Court further noted:

> The newly discovered evidence claim provides Davis with no relief from his judgments and sentences because the ***recantation does not refute the additional evidence presented at trial*** to demonstrate premeditation, felony murder, and the proportionality of the death sentence. Even if we assume that the recantation would eliminate Castle's original testimony as support for premeditation and CCP, the newly discovered evidence still would *not* undermine the evidence

> against Davis such that it would give rise to a reasonable doubt as to his culpability and also would not demonstrate that admitting it would probably yield a less severe sentence. *See Jones II*, 709 So.2d at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla.1996)); *Jones I*, 591 So.2d at 915. Accordingly, the motion was properly denied because the record conclusively demonstrates that Davis is not entitled to relief.

Davis, 26 So. 3d at 529-31 (emphasis added); *see also Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006) (upholding the summary denial of a claim of newly discovered evidence in the form of affidavits relating to a witness's possible involvement in the murder).

In *Rutherford*, this Court held that the newly discovered evidence was not such that it would probably produce acquittal on retrial or result in imposition of sentence less than death on retrial, and, as such, the evidence did not entitle the defendant to post-conviction relief in the form of new trial; the witness' statement to the affiants concerning whether she committed the murder were contradictory on their face, when viewed against the impeachment evidence presented at the trial concerning witness's mental problems, the witness's inconsistent statements to affiants only served to impeach her credibility further, and, at most, the conflicting versions of events suggested that witness's involvement in crime might have been greater than was presented at trial. *See also Hough*, 679 So. 2d at 1300 (upholding the summary denial of a claim of newly discovered evidence; the evidence was not of such a nature that it would probably produce an acquittal on retrial. Not only

was the defendant identified as a perpetrator by the recanting codefendant, but also by the victim of the crime as well as another, unrecanting codefendant).

Here, in accord with the reasoning in *Davis*, *Rutherford*, and *Hough*, the Third District considered the new evidence and the old evidence and found that there had been overwhelming evidence of guilt from the trial. In the instant case, the Petitioner's Rule 3.850 post-conviction motion and the State's response cited extensively to the trial transcript, which the trial court would have had available in conjunction with its review of the motion. The Rule 3.850 motion and the State's response confirmed the following facts, none of which were contested by the Petitioner in the district court, on rehearing, or in the briefs filed in this Court:

The victim, Benavides, had been working at a Circle K convenience store on May 29, 1990; towards the end of his shift, at about 6:30 a.m., two men entered the store, who he recognized from the previous day. (R. at 32, 49) (citing trial court transcript "T." at 139-41). The younger subject asked Benavides about the price of a bottle of wine and then walked to the back of the store while the older subject remained near the front facing the victim. The younger man said that he did not have enough money, and Benavides told him to get one of the cheaper bottles. (R. at 32) (citing T. at 142).

When the victim opened the register, the younger man struck him in the face and said, "This is a holdup." (R. at 32, 49) (citing T. at 142-43).The older subject

produced a handgun and ordered Benavides to go to the corner, behind the counter, then pistol whipped him from behind. While he was lying on the ground, the older subject took his wallet, and the older subject kicked Benavides until he lost consciousness momentarily. (R. at 32-33, 49) (citing T. at 144-45).

Benavides called the police immediately after the assailants fled the store. When he was dialing 911, he saw a white car at the end of the street, which he believed was driven by the perpetrators. (R. at 33, 49) (citing T. at 149-50). Approximately one month after the robbery, the police showed him photo lineups, and he identified both assailants, Nordelo and Lopez, with one hundred percent certainty. (R. at 33, 49) (citing T. at 148).

During trial, the State also called Officer Julio Pino. (R. at 34, 49) (citing T. at 179). Officer Pino testified that he was involved in a car chase with Nordelo, and that as a result, he arrested him. (R. at 34, 49) (citing T. at 180). The officer indicated that Nordelo was driving a white Ford Taurus and that there was a passenger in the vehicle. (R. at 34, 49) (citing T. at 181). At trial, the Petitioner never disputed that he was the driver of the vehicle at the time of the arrest, yet Lopez's affidavit, submitted by Nordelo, stated that Lopez was the driver of the vehicle and Nordelo was a passenger.

Although evidence of the Petitioner's commission of an unrelated crime was later found to be erroneous, given the permissible, un-refuted evidence that had

been presented at trial – the fact that the victim recognized both men, Nordelo and Lopez, from the previous day; the fact that the victim identified both men from a photo lineup; the fact that the victim identified both of them with one hundred percent certainty; and the fact that both of the men were obviously connected to each other, regardless of whether Nordelo was the actual driver or the passenger of the vehicle – and comparing that evidence to the "newly discovered" evidence, as in *Davis*, it cannot be said that the outcome of the trial or proceedings would have been any different. Moreover, in light of the fact that there would not have been a different outcome, there is no good faith basis for amending the motion, as in *Spera v. State*, 971 So. 2d 754 (Fla. 2007). Thus, there is no need to remand this case for that purpose.

Based on the above, the Third District properly affirmed the lower court's ruling that the allegations in the Petitioner's Rule 3.850 motion did not establish due diligence and did not qualify as newly discovered evidence. Even if Lopez's affidavit constituted newly discovered evidence, an evidentiary hearing was not required since the Third District weighed the new and the old evidence that had been presented, in determining that the Petitioner did not carry the burden of proving that the outcome of the trial probably would have been altered; and found that this did not require an evidentiary hearing, as in *Davis*, *Rutherford*, and *Hough*. For all of those reasons, the district court's decision should be approved.

CONCLUSION

Based upon the arguments and authorities cited herein, the State of Florida, respectfully requests that this Court approve the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits was mailed to Gary L. Sasso, Esquire, Adam S. Tanenbaum, Esquire, and Allison L. Kirkwood, Esquire, Carlton Fields, P.A., Post Office Box 3239, Tampa, Florida, 33601-3239, this ___ day of September, 2011.

_____
NICHOLAS MERLIN
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief on the Merits complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
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