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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1958
L.T. CASE NOS. 3D11-3250, 99-15105

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL PEREZ,

Respondent.

________________________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review from a Decision
of the Third District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

The State's statement of the case and facts is incomplete, one-sided, and fails to appreciate that allegations in Perez's 3.850 motion and attached affidavits must be accepted as true unless refuted by the record given the lower court's summary denial. *See Derrick v. State*, 983 So. 2d 443, 450 (Fla. 2008). We therefore submit the following statement of the case and facts as more complete and in keeping with the posture of the case on review.

The Shooting

On April 15, 1999, at 9:45pm, 21-year-old Jimmy Ramirez was shot while riding his bicycle down a residential street in Miami. (R. 62, 130, 133-34).[1] He died later at the hospital. (R. 136).

Michael Perez was across the street at the time of the shooting, visiting a friend at the home of 14-year-old Carlos Hernandez. (R. 67, 210). Perez was 16 years old at the time, had "borderline intellectual functioning," struggled with learning in school, and recently withdrew from the ninth grade. (R. 44-45, 130, 165-66). Perez also had a history of seizures for which he was taking medication. (R. 43-44, 46). At the time of the shooting, Perez was on Hernandez's porch. Hearing gunshots, he looked up, witnessed a drive-by shooting, observed the vehicle speeding away, and saw Ramirez fall from his bicycle. (R 67, 210).

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[1] References to the Record will be designated as: R. Page Number.

Perez's "Confession"

The following evening, police brought Perez in for questioning, notifying only his next-door neighbor of his whereabouts. (R. 138-39, 185-86). As the State concedes, for two hours Perez consistently told his interrogators that Ramirez was killed in a drive-by shooting and that he was not involved. (R. 139). Nonetheless, three to four investigators interrogated Perez without counsel for nearly four hours (from 7:38pm to 11:07pm) seeking to exact a confession. (R. 44-45, 139-40, 191). They made no transcript of the first two to three hours when Perez insisted he was innocent. They recorded only the final hour when they succeeded in procuring a confession. (R. 163, 191).

During the interrogation, investigators screamed at Perez and refused to honor his repeated requests for a lawyer, telling him he did not need one and that they could not help him if he secured one. (R. 44-45). When he asked to see his family, investigators told Perez they were having trouble contacting them. (R. 186). Eventually, Perez broke down and "confessed." (R 139).

Perez only recently disclosed that he confessed because the actual perpetrator, Steve Guiton ("Fat Steve"), threatened to kill him and his sister if he told the truth about the drive-by shooting. (R. 58, 62, 66-67). Fat Steve was notorious in the community for intimidating youths and was recently killed by members of a rival gang in retaliation for Ramirez's murder. (R. 62, 72). At the

time, Perez was unwilling to identify Fat Steve because of this threat. (R. 62, 66-67)..

Hernandez's Statement

Aside from Perez, the police identified only one eyewitness to the shooting, 14-year-old Carlos Hernandez, whose home Perez was visiting at the time of the shooting. (R. 107, 109). Police records confirm that he, too, initially insisted that Ramirez was killed in a drive-by shooting. (R. 109). It was only after police secured a confession from Perez that Hernandez changed his story and supported Perez's confession that he had killed Ramirez. (R. 206, 218). Thereafter, however, Hernandez refused to cooperate and testify. (R. 107). As newly discovered evidence would come to reveal, Fat Steve had threatened Hernandez to change his initial statement to police to say he witnessed Perez commit the crime. (R. 71-72).

The Plea

After Perez was charged with first degree murder, the trial court appointed a public defender to represent him. (R. 4, 8). Perez's counsel moved to suppress his confession, and the State responded that neither the lack of parental notification nor Perez's mental limitations rendered it involuntary. (R. 196, 199). A court-ordered psychiatrist examined Perez and included in his report Perez's history of epileptic seizures, borderline IQ, and marginal intellectual functioning. (R. 10, 43-46). The examiner ultimately concluded that Perez understood the charges and the

meaning of his *Miranda*[2] rights. (R. 46). The examiner noted, however, that he was expressing no opinion on whether Perez had been "intimidat[ed]" into confessing by investigators. (R. 46).

Faced with the prospect of standing trial under the threat of violence from Fat Steve if he told the truth, having given a "confession" under dubious circumstances, and having no known witnesses to testify on his behalf, Perez pleaded guilty to the lesser charge of second degree murder with a firearm. (R. 10). The State's file shows that prosecutors offered this plea agreement because of concerns over the reliability of Perez's confession, his initial claims of innocence, and the highly impeachable character of Hernandez's testimony. (R. 107). The trial court accepted the plea, adjudicated Perez guilty, and sentenced him to a 40-year term on the second-degree murder charge and a concurrent 15-year term on the firearm charge. (R. 156, 159-62).

The Newly Discovered Evidence

After serving nine years in prison, two new eyewitnesses to the murder came forward, Javier Delarosa and Albert Montanez. (R. 71, 74). It is undisputed that Delarosa was not known previously to police, Perez, or his counsel. (R. 59-61, 71). It is also undisputed that neither he nor Montanez were identified as witnesses during the investigation.

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

In their affidavits, both eyewitnesses explained that they saw Fat Steve kill Jimmy Ramirez in a drive-by shooting, committed in a manner that was consistent with Hernandez's (and Perez's) initial account. (R. 71, 74). Both stayed silent, however, because they did not want to end up like Ramirez. (R 71, 74). In addition to seeing the shooting, Montanez was with Perez the following day when Fat Steve approached and took Perez away in his vehicle. (R. 74). Montanez stated that Fat Steve personally threatened him to keep his mouth closed. (R. 74). Both came forward only upon learning of Fat Steve's death. (R 71, 74).

Perez's Post-conviction Motion

Based on this newly discovered evidence, Perez moved for relief from his conviction under Florida Rule of Criminal Procedure 3.850(b)(1), arguing that the withdrawal of his plea was necessary to correct a manifest injustice. (R. 58). Specifically, Perez explained he could not testify in his own defense before because he was afraid of Fat Steve, who was killed only recently and long after Perez pleaded guilty and commenced serving his sentence. (R. 58, 62-67). Perez also explained he had no other witnesses or exculpatory evidence to offer at trial. (R. 58-59, 62). With Fat Steve dead, Perez stated he felt free to testify truthfully and now had two other witnesses who stood ready to corroborate his actual innocence. (R. 65-67).

The trial court summarily denied Perez's motion, stating that Delarosa's and Montanez's statements merely corroborated what Perez already knew and thus did

not constitute newly discovered evidence. (R. 6). Further, the court determined that Perez had not met his burden of demonstrating a manifest injustice because he had confessed to the crime and the trial court had previously accepted his guilty plea. (R. 6-7).

The Third District Court of Appeal reversed. (R. 319-23). The Third District faithfully applied the decisions of this Court holding that, where, as here, a defendant adduces newly discovered evidence undermining the integrity of his or her conviction, the defendant's proffer of that evidence must be accepted as true for purposes of the motion. (R. 321-22). The Third District determined that Perez was entitled to an evidentiary hearing to ascertain whether he was unfairly prejudiced in deciding to plead guilty in the absence of the newly discovered evidence. (R. 322-23).

The State moved for rehearing because the Third District cited cases involving challenges to convictions after trial rather than a guilty plea. (R 300, 303). The court granted the State's motion for the purpose of revising its opinion to rely upon cases granting relief after a plea, but otherwise adhered to its conclusion that Perez had shown an entitlement to a hearing. (R. 463-68); *see Perez v. State*, 118 So. 3d 298 (Fla. 3d DCA 2013).

The State then moved to certify a question as to the meaning of "manifest injustice" in light of the court's opinion. (R. 470). The Third District granted the motion, certifying the following question to this Court:

> HOW SHOULD MANIFEST INJUSTICE BE DEFINED FOR PURPOSES OF A CLAIM OF NEWLY DISCOVERED EVIDENCE AFTER A GUILTY PLEA?

(R. 480).

SUMMARY OF ARGUMENT

The definition of "manifest injustice" for purposes of evaluating a motion to withdraw a guilty plea is well-settled in Florida. It means "clear prejudice." This has been the definition of manifest injustice ever since this Court adopted the ABA Standard for withdrawing pleas after sentencing in *Williams v. State*, 316 So. 2d 267 (Fla. 1975). The most compelling examples of manifest injustice and "clear prejudice" associated with a guilty plea are when (1) the defendant later obtains newly discovered evidence of actual innocence that would have materially improved his prospects of acquittal, thus altering the calculus leading to his or her decision to plead guilty in the first place, or (2) the newly discovered evidence establishes that the defendant's plea was involuntary.

Here, Perez adduced newly discovered evidence of two eyewitnesses to the drive-by shooting whose testimony would have wholly exonerated him, and he further averred that the man who had been coercing his own silence, Fat Steve, was recently killed. The only evidence of guilt was Hernandez's inconsistent testimony and Perez's own dubious confession, which he made under threat of violence by the actual perpetrator, prolonged interrogation under questionable circumstances, and in the absence of reason to know that other witnesses would testify in his behalf. He was unmistakably prejudiced in making his decision to plead guilty in the absence of this newly discovered evidence of actual innocence, enabled by the

cessation of the very conditions—Fat Steve's threats—stifling the truth all these years.

The State does not challenge the Third District's ruling that Delarosa's and Montanez's statements were newly discovered. Nor does the State refute Perez's assertion that Fat Steve threatened Perez not to tell the truth or was recently killed. The State argues, instead, that this Court should recede from *Williams* and adopt a more restrictive federal standard. This Court should reject the State's proposal and answer the certified question by holding, consistent with *Williams*, that a defendant may obtain relief from a guilty plea by showing that a manifest injustice has occurred, and this may be established by showing that the defendant has suffered "clear prejudice" at the time he or she entered the plea. This standard may be satisfied, where, as here, the defendant adduces newly discovered evidence of actual innocence that either (1) would have had a material bearing on his or her prospects for acquittal had the defendant gone to trial, and therefore, upon the defendant's decision to plead guilty in the first place, or that (2) demonstrates the defendant's plea was involuntary. This standard is satisfied in the circumstances of this case.

ARGUMENT

I. **FOR PURPOSES OF A MOTION TO WITHDRAW A PLEA, "MANIFEST INJUSTICE" MEANS CLEAR PREJUDICE, WHICH MAY BE ESTABLISHED BY NEWLY DISCOVERED EVIDENCE HAVING A MATERIAL BEARING ON THE LIKELIHOOD OF ACQUITTAL AND THUS ON THE DEFENDANT'S DECISION TO PLEAD GUILTY, OR BY A SHOWING THAT THE PLEA WAS INVOLUNTARY**

A. Standard of Review – De Novo

This Court's review of the certified question is de novo to the extent it involves a question of law. *See Hernandez v. State*, 124 So. 3d 757, 759 (Fla. 2012); *Nelson v. State*, 875 So. 2d 579, 582 (Fla. 2004).

B. Florida Has Adopted the ABA Standard for Manifest Injustice

The definition of manifest injustice has its genesis in *Williams v. State*, 316 So. 2d 267 (Fla. 1975). There, this Court adopted Standard 2.1 of the American Bar Association Standards for Criminal Justice, Pleas of Guilty, as establishing the minimum guidelines necessary for complying with constitutional requirements concerning guilty pleas set forth in *Boykin v. Alabama*, 395 U.S. 238 (1969), and its progeny. *Id.* at 270. In pertinent part, the ABA Standard requires a court to allow a defendant to withdraw a guilty plea upon a showing "that withdrawal is necessary to correct a manifest injustice." *Id.* at 273.

The *Williams* Court defined "manifest injustice" as "clear prejudice." *Id.* at 274. (citing *Richardson v. State*, 246 So. 2d 771, 774 (Fla. 1971) (equating reversible error with harmful error or prejudice)); *see also* Fla. R. Crim. P. 3.172(j)

(requiring prejudice to withdraw a plea); *Peart v. State*, 756 So. 2d 42, 50 n.10 (Fla. 2000) ("[T]he specific facts of a given case will dictate whether the requisite manifest injustice or prejudice has been established.") (Anstead, J., specially concurring), *receded from on other grounds by State v. Green*, 944 So. 2d 208, 217 (Fla. 2006). Virtually every state adopting the ABA Standard employs this same definition.[3]

C. Clear Prejudice Applied

The ABA Standard lists several examples of manifest injustice that concern circumstances where the accused was uninformed, misled, or coerced in making his or her decision to take the plea. For instance, manifest injustice occurs when the defendant was denied effective assistance of counsel, when he or she did not knowingly or voluntarily enter the plea, or when the prosecutor failed to honor the basis for the bargain. *See Williams*, 316 So. 2d at 274 (citing 1968 Approved Draft).

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[3] *See, e.g.*, *Peterson v. State*, 988 P.2d 109, 117 n.29 (Alaska 1999) ("actual prejudice"); *State v. Barahona*, 132 P.3d 959, 609 (Kan. Ct. App. 2006) ("something obviously unfair or shocking to the conscience"); *State v. Wooden*, 2004 WL 239996, at *2 (Ohio Ct. App. Feb. 10, 2004) ("fundamental flaw"); *Commonwealth v. Starr*, 301 A.2d 592, 595 (Pa. 1973) ("a showing of prejudice on the order of manifest injustice"); *Johnson v. Anis*, 731 S.E.2d 914, 916 (Va. 2012) ("open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident"); *State v. Taylor*, 521 P.2d 699, 701 (Wash. 1974) ("an injustice that is obvious, directly observable, overt, not obscure"); *State v. Krieger*, 471 N.W.2d 599, 603 (Wisc. Ct. App. 1991) ("a serious flaw in the fundamental integrity of the plea"); *see also State v. Evans*, 454 S.E.2d 468, 473 (Ga. 1995) ("the test will by necessity vary from case to case"); *Hart v. State*, 1 P.3d 969, 972 (Nev. 2000) ("Whether an 'injustice' is 'manifest' will depend upon a variety of factors").

These examples are not intended to provide an exhaustive list. *See* ABA Standards for Criminal Justice, Pleas of Guilty, § 14-2.1 (2d ed. 1980); *accord State v. Cain*, 816 N.W.2d 185 n.6 (Wis. 2012). They all illustrate the point, however, that when a defendant's plea is induced by duress or a misconception material to his or her decision to enter the plea, the plea will be deemed the product of clear prejudice. In these circumstances, the court should conclude that upholding the plea would be manifestly unjust. *See, e.g.*, *Adams v. State*, 957 So. 2d 1183, 1187 (Fla. 3d DCA 2006) (determining manifest injustice occurred where court not apprised of cap placed on defendant's exposure to imprisonment in plea agreement before sentencing defendant with schizophrenia and low IQ to life for technical violation).

This Court has reaffirmed the *Williams* standard equating manifest injustice with clear prejudice on several occasions. *See Campbell v. State*, 125 So. 3d 733, 735 (Fla. 2013); *LeDuc v. State*, 415 So. 2d 721, 722 (Fla. 1982); *Robinson v. State*, 373 So. 2d 898, 902-03 (Fla. 1979). Florida's district courts have consistently applied the ABA Standard to motions seeking plea withdrawal after sentencing, whether brought under Florida Rule of Criminal Procedure 3.170 or 3.850. *See, e.g.*, *Woodall v. State*, 39 So. 3d 419, 421 (Fla. 5th DCA 2010); *State v. Sion*, 942 So. 2d 934, 937 (Fla. 3d DCA 2006); *State v. Wiita*, 744 So. 2d 1232,

1234 (Fla. 4th DCA 1999); *Ford v. State*, 433 So. 2d 1335, 1336 n.1 (Fla. 2d DCA 1983); *Broeck v. State*, 317 So. 2d 100, 101 (Fla. 1st DCA 1975).[4]

D. Newly Discovered Evidence of Actual Innocence Is the Quintessential Example of Manifest Injustice

In a system where "[t]he very essence of judicial trial is a search for the truth of the controversy," *Ex parte Welles*, 53 So. 2d 708, 711 (Fla. 1951), there is no greater example of a manifest injustice than the conviction of an actually innocent defendant due to the unavailability at that time of later-discovered exculpatory evidence. In fact, manifest injustice may be proved under circumstances falling far short of later-developed proof of actual innocence. *See Williams*, 316 So. 2d at 274 ("The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.") (quoting ABA Standard for Criminal Justice, Pleas of Guilty, § 2.1 (1968 Approved Draft). *A fortiori*, the prejudice ensuing from a guilty plea entered in the absence of newly discovered evidence tending to establish the actual innocence of the defendant is abundantly clear.

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[4] In considering motions to withdraw a plea, Florida courts do not differentiate between guilty and nolo contendere pleas because both pleas operate as a waiver of the right to a trial and authorize the court to adjudicate the defendant guilty. *See State v. Braverman*, 348 So. 2d 1183, 1187 (Fla. 3d DCA 1977) ("[Rule 3.170(f)] is also applicable to a nolo contendere plea since such a plea for our present purposes has the same effect as a guilty plea."); *accord Pope v. State*, 857 So. 2d 271, 273 (Fla. 2d DCA 2003) (rejecting argument Rule 3.170(*l*) did not apply to nolo contendere pleas and stating, "[t]here seems to be no rational basis to create such a distinction.").

It is therefore no surprise that Florida courts recognize newly discovered evidence of actual innocence as a valid ground for withdrawing a plea after sentencing. *See, e.g.*, *Hernandez v. State*, 20 So. 3d 417, 419 (Fla. 3d DCA 2009) (reversing summary denial and remanding for evidentiary hearing to determine whether newly discovered evidence of eyewitness recantation amounted to manifest injustice); *Deck v. State*, 985 So. 2d 1234, 1237 (Fla. 2d DCA 2008) (same based on codefendant's admission to crime); *Mason v. State*, 976 So. 2d 80, 81 (Fla. 3d DCA 2008) (same based on codefendant's exculpatory testimony); *Johnson v. State*, 936 So. 2d 1196, 1197 (Fla. 1st DCA 2006) (same based on victim recantation); *Taylor v. State*, 662 So. 2d 1031, 1032 (Fla. 1st DCA 1995) (same based on newly discovered evidence concerning falsified police reports); *see also Malcom v. State*, 605 So. 2d 945, 948 (Fla. 3d DCA 1992) (reversing denial of writ of error coram nobis, sought after completion of sentence and based on new evidence of actual innocence, to correct a "miscarriage of justice").[5]

What these cases make clear is that newly discovered evidence of actual innocence negates any confidence that the defendant's original decision to plead guilty was fully informed and truly voluntary. It shows, instead, that the defendant was clearly and unfairly prejudiced in being forced to face a materially lower

[5] Florida law also recognizes actual innocence as a ground for withdrawing a plea before sentencing, on the rationale it serves "the ends of justice" to have the plea withdrawn where newly discovered evidence "raises a substantial question as to the guilt or innocence of the defendant." *Braverman*, 348 So. 2d at 1188.

prospect of acquittal at the time he or she had to make the immensely consequential decision whether to plead guilty or stand trial. This is especially true for a youthful offender.[6]

E. The Defendant Carries the Initial Burden of Proving a Manifest Injustice

When moving to withdraw a plea after sentencing, the defendant carries the initial burden of proving a manifest injustice. *See Williams*, 316 So. 2d at 274; *Robinson*, 373 So. 2d at 902-03; *James v. State*, 886 So. 2d 1032, 1034 (Fla. 4th DCA 2004). If unsubstantiated, the claim will fail. *See, e.g., Wilkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981) ("The mere fact that the court neglected to specifically ask appellant if the plea was voluntary is insufficient to show a manifest injustice."); *Demartine v. State*, 647 So. 2d 900, 902 (Fla. 4th DCA 1994) ("Standing alone, the failure of a trial court to formally accept a plea does not constitute a manifest injustice."). If the defendant satisfies his or her burden, then the State has an opportunity to present evidence. *See State v. Caudle*, 504 So. 2d

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[6] Newly discovered evidence that tends only to reduce, but not eliminate, culpability, however, may not be sufficient to show prejudice. *See MacFarland v. State*, 929 So. 2d 549 (Fla. 5th DCA 2006) (holding no manifest injustice where new evidence "did not absolve MacFarland of all criminal liability."); *Miller v. State*, 814 So. 2d 1131 (Fla. 5th DCA 2002) (concluding no manifest injustice where defendant "is not claiming he is innocent but merely that he is guilty of a lesser offense."). *But see Whitsett v. State*, 993 So. 2d 1115, 1116 (Fla. 4th DCA 2008) (reversing and remanding for evidentiary hearing to consider victim's recantation that defendant did not do most of unlawful acts described in charges).

419, 421 (Fla. 5th DCA 1987) ("Only after the defendant has made a *prima facie* showing is the state required to come forward with contrary evidence.").

Because most actual innocence claims arise well after sentencing, they typically require newly discovered evidence to overcome the two-year limitation applicable to post-conviction motions. *See* Fla. R. Crim. P. 3.850(b)(1). An untimely and unsubstantiated post-conviction claim based on actual innocence alone will fail. *See Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006); *Doby v. State*, 25 So. 3d 598 (Fla. 2d DCA 2009); *see also Smith v. State*, 41 So. 3d 1037, 1040 (Fla. 1st DCA 2010) ("[C]laims of insufficient evidence have long been held to be procedurally barred in collateral proceedings.").

To qualify as newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of due diligence." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (quotation marks omitted). This first prong of the *Jones* standard "contemplates a fact in the sense of evidence, which is anything which tends to prove or disprove a material fact." *Regan v. State*, 787 So. 2d 265, 267 (Fla. 1st DCA 2001).

When a motion for post-conviction relief is brought after a full trial, the second prong of the *Jones* standard requires the trial court to compare the new evidence with the evidence produced at trial to determine whether the new

evidence is "of such nature that it would probably produce an acquittal on retrial." *Id.* The court in *Scott v. State*, 629 So. 2d 888 (Fla. 4th DCA 1993), recognized that this prong is necessarily inapplicable in plea cases after sentencing where "there was no trial and no evidence introduced." *Id.* at 890. Instead, the *Scott* court explained that a defendant seeking to withdraw a plea had to show that upholding the plea in the face of the newly discovered evidence, under the circumstances in which the plea was made, demonstrated a manifest injustice. *Id.* The other district courts of appeal are in agreement with *Scott*. *See Perez v. State*, 118 So. 3d 298, 301 (Fla. 3d DCA 2013); *Bradford v. State*, 869 So. 2d 28, 29 (Fla. 2d DCA 2004); *Miller v. State*, 814 So. 2d 1131, 1132 (Fla. 5th DCA 2002); *Taylor*, 662 So. 2d at 1032.

F. Newly Discovered Evidence of Actual Innocence Shows a Manifest Injustice Where the New Evidence Would Have a Material Bearing on the Likelihood of Acquittal and thus on the Defendant's Decision to Plead Guilty, or Indicates That the Plea Was Involuntary

Although *Scott* did not detail what would qualify as a manifest injustice in cases involving newly discovered evidence of actual innocence, Florida courts have had little trouble identifying a manifest injustice when it occurs. As the cases in Florida and other states demonstrate, a manifest injustice is shown where the newly discovered evidence could reasonably be expected to have a material bearing on the likelihood of acquittal and thus on the defendant's decision to plead guilty in the first place, or where it indicates that the plea was involuntary.

1. Florida Cases Apply This Standard

No Florida case better illustrates this standard than *Taylor v. State*, 662 So. 2d 1031 (Fla. 1st DCA 1995). There, the defendant entered a plea of convenience to the charge of sale or delivery of cocaine.[7] In his motion to withdraw his plea, the defendant explained that he entered the plea because "he could not beat the testimony of a Jacksonville police officer, even if it [was] false." *Id.* at 1032 (quotations omitted) (alternation in original). After sentencing, a newspaper reported that the police officer in question had resigned after allegations surfaced and authorities began investigating whether the officer falsified police reports. According to the defendant, the new evidence would have substantially discredited the officer's testimony and affected his decision to enter the plea.

Reversing the trial court's summary denial of the defendant's motion, the First District concluded "that appellant's allegations are sufficient to call into question the integrity of the process by which he was accused and, therefore, to suggest that 'a manifest injustice' occurred." *Id.* at 1032 (citing *Scott*). The court explained that, on remand, the defendant would have the burden of proving a manifest injustice "occurred in the process by which he was accused of sale or

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[7] A plea of convenience, also known as a "best interest" or *Alford* plea, admits there is sufficient evidence on which a conviction could be obtained and allows a defendant to maintain his or her innocence, similar to a nolo contendere plea. *See Whitsett*, 993 So. 2d at 1115 (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)); *see also* Fla. R. Crim. P. 3.172(e). As explained *supra* at footnote 4 on page 13, such pleas have the same effect as guilty pleas for purposes of withdrawal motions.

delivery of cocaine," which would be satisfied with evidence that would lead a reasonable person to conclude that the officer falsified the police report leading to the arrest in his case. *Id.* If that occurred, the court explained that the defendant would be entitled to withdraw his plea "and to plead anew." *Id.* at 1032-33.

Likewise, in *Johnson v. State*, 936 So. 2d 1196 (Fla. 1st DCA 2006), the defendant entered a plea of convenience to a charge of showing obscene material to a minor. After sentencing, the victim denied that any sexual abuse occurred or that the defendant showed her obscene material. The defendant filed a Rule 3.850 motion to withdraw the plea, and the trial court summarily denied the motion. Reversing, the First District explained that the victim's recantation negated "the basis of appellant's conviction," and that the trial court could not pass on the credibility of her recantation, and thus determine whether a manifest injustice had been shown, without an evidentiary hearing. *Id.* at 1198.

In *Hernandez v. State*, 20 So. 3d 417 (Fla. 3d DCA 2009), the defendant pleaded guilty to cocaine sale based on the identification and testimony of the sole witness to the crime, the alleged buyer. Twenty-five years later, the witness recanted, claiming he was pressured by police and his family into lying and identifying the defendant. The defendant subsequently filed a motion to vacate his conviction, which the trial court summarily denied. Reversing the trial court, the Third District remanded for an evidentiary hearing to determine "not only the

truthfulness of the statements . . . , but also to ascertain whether Hernandez can meet his burden of demonstrating manifest injustice." *Id.* at 419.

As these cases demonstrate, a manifest injustice occurs when the newly discovered evidence would have had a material bearing on the likelihood of acquittal and thus on the defendant's decision to accept the plea proffered by the State in the absence of that evidence.

Additionally, Florida courts recognize that a manifest injustice occurs where it is shown that the plea was not knowingly or voluntarily made. *See* Fla. R. Crim. P. 3.850(a)(5) (listing involuntary plea as ground for post-conviction relief). While most involuntary plea cases involve mistaken information from counsel, the trial judge, or law enforcement, *see Brazeail v. State*, 821 So. 2d 364, 366 (Fla. 1st DCA 2002), a defendant's plea can be unduly influenced by any means.

For instance, in *State v. Wiita*, 744 So. 2d 1232, 1235 (Fla. 4th DCA 1999), the defendant pleaded guilty to sexual crimes involving a child pursuant to a detailed plea agreement that did not require any registration. Six years later, the Legislature enacted a mandatory registration statute, causing the defendant to move to withdraw his plea based on the fact the legislation rendered it involuntary. The trial court agreed and the Fourth District affirmed, concluding that the newly-enacted legislation "thrust upon him" publicity he sought to avoid in his plea deal, thus rendering it unknowing and involuntary. *Id.* at 1235.

Just the same, a threat on the defendant's life if he or she revealed the truth about the crime would unduly influence and render involuntary the defendant's guilty plea. An evidentiary hearing would be required where newly discovered evidence reveals that the threat had only recently subsided. *Cf. LeDuc*, 415 So. 2d at 722 (reversing and remanding for evidentiary hearing where defendant alleged "trial counsel coerced him to plead guilty," and "[t]he motion and attached transcripts do not conclusively show that LeDuc is entitled to no relief.").

2. The Majority of States Providing Relief from Pleas Based on Newly Discovered Evidence Apply This Standard

Florida is not alone in recognizing that defendants do choose to enter guilty pleas for reasons other than clear guilt. Most states—26—that have addressed the issue allow a defendant to withdraw a plea after sentencing based on newly discovered evidence of actual innocence.[8] Included in that number are at least two

[8] *Ex parte Heaton*, 542 So. 2d 931, 933 (Ala. 1989); *State v. Fritz*, 755 P.2d 444, 445 (Ariz. Ct. App. 1988); *People v. Schneider*, 25 P.3d 755, 760 (Colo. 2001); *Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1130-31 (Conn. 1997); *State v. Young*, 2003 WL 1847262, at *2 (Del. Super Ct. Apr. 9, 2003) (unpublished); *Britten v. State*, 328 S.E.2d 556, 557 (Ga. Ct. App. 1985); *Zepeda v. State*, 274 P.3d 11, 17 (Idaho Ct. App. 2012); *Smith v. Commonwealth*, 2013 WL 2450530, at *2 (Ky. Ct. App. Mar. 29, 2013) (unpublished); *State v. Matthews*, 999 A.2d 1050, 1056 (Md. 2010); *Commonwealth v. Igoe*, 977 N.E.2d 106 (Mass. App. Ct. 2012) (unpublished); *Saiki v. State*, 375 N.W.2d 547, 549 (Minn. Ct. App. 1985); *Chancy v. State*, 938 So. 2d 251, 252-53 (Miss. 2006); *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 284 (Mo. Ct. App. 2008); *State v. Graham*, 57 P.3d 54, 57 (Mont. 2002); *State v. Slater*, 966 A.2d 461, 469 (N.J. 2009); *Moore v. State*, 734 N.W.2d 336, 339 (N.D. 2007); *State v. Bennett*, 2006 WL 3042955, at *9 (Ohio Ct. App. Jan. 23, 2006); *Commonwealth v. Peoples*, 319 A.2d 679, 681 (Pa. 1974); *Reise v. State*, 913 A.2d 1052, 1056 (R.I. 2007); *State v. DeAngelis*, 182 S.E.2d 732, 734

states that recognize newly discovered evidence claims under the rubric of an involuntary plea procured by duress or coercion,[9] and another that asks whether the new evidence undermines the factual basis for the plea.[10]

In contrast, six states expressly do not recognize newly discovered evidence of actual innocence.[11] The remaining states appear either solely concerned with the constitutional dimensions of the plea (*e.g.*, ineffective assistance of counsel), or have not yet addressed the issue.[12]

(S.C. 1971); *Ex parte Tuley*, 109 S.W.3d 388, 392-93 (Tex. Crim. App. 2002); *Medel v. State*, 184 P.3d 1226, 1237-38 (Utah 2008); *State v. Krieger*, 471 N.W.2d 599, 604 (Wis. Ct. App. 1991).

Not included in that figure are five more states that strongly suggest they would recognize such claims: *Goldsbury v. State*, 2010 WL 1930150, at *2 (Alaska Ct. App. Dec. 24, 2003) (unpublished); *People v. Ward*, 594 N.W.2d 47, 53 (Mich. 1999); *State v. Oakley*, 330 S.E.2d 59, 62 (N.C. Ct. App. 1985); *Johnson v. State*, 521 P.2d 93, 96 (Okla. Crim. App. 1974); *Howell v. Commonwealth*, 732 S.E.2d 722, 727 (Va. Ct. App. 2012) (within 21 days).

[9] *People v. Villarama*, 2002 WL 259948, at *3 (Cal. Ct. App. Feb. 25, 2002) (unpublished) (citing *People v. Perez*, 98 P. 870 (Cal. Dist. Ct. App. 1908) (duress from mob violence)); *People v. Knight*, 937 N.E.2d 789, 771 (Ill. App. Ct. 2010) (coercion from gang threat).

[10] *State v. Green*, 153 P.3d 1216, 1226 (Kan. 2007).

[11] *Norris v. State*, 896 N.E.2d 1149, 1153 (Ind. 2008); *Walters v. State*, 2014 WL 69589, at *6 (Iowa Ct. App. Jan. 9, 2014); *State v. Cardosi*, 498 A.2d 599, 600 (Me. 1985); *People v. Latella*, 491 N.Y.S.2d 771, 773 (N.Y. App. Div. 1985); *In re Reise*, 192 P.3d 949, 955 (Wash. Ct. App. 2008); *Garnett v. State*, 769 P.2d 371, 374 (Wyo. 1989).

[12] *State v. Herred*, 964 S.W.2d 391, 397 (Ark. 1998); *State v. Bell*, 781 So. 2d 843, 847 (La. Ct. App. 2001); *State v. Hurley*, 299 N.W.2d 152, 155 (Neb. 1980); *Hargrove v. State*, 686 P.2d 222, 225 (Nev. 1984); *State v. McGurk*, 958 A.2d

Of those 26 states that recognize newly discovered evidence of actual innocence, most adhere to a test that requires the defendant to present evidence that: (1) is newly discovered; (2) is material to the issue of actual innocence and not merely cumulative or impeaching; and (3) will possibly (or in some states probably) change the result if a trial is granted.[13]

There are variations to the majority test. In Alabama, the court considers the totality of the circumstances. *See, e.g.*, *Banks v. State*, 845 So. 2d 9, 30 (Ala. Crim. App. 2002) (expressing concern over "the circumstances surrounding the uncounseled, three-day, custodial interrogation of Banks, a mentally retarded adult with a verbal IQ of 57 . . . ."). In New Jersey, the court considers other factors: whether the defendant raised a colorable claim of innocence; the reason for the

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1005, 1013 (N.H. 2008); *Boag v. State*, 605 P.2d 304, 305 (Or. Ct. App. 1980); *Newsome v. State*, 995 S.W.2d 129, 134 (Tenn. Crim. App. 1998); *In re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 507 (W. Va. 1993). Hawaii, New Mexico, South Dakota, and Vermont do not appear to have cases one way or the other.

[13] *See Ex parte Heaton*, 542 So. 2d 931, 933 (Ala. 1989); *State v. Fritz*, 755 P.2d 444, 445 (Ariz. Ct. App. 1988); *People v. Schneider*, 25 P.3d 755, 762 (Colo. 2001); *State v. Young*, 2003 WL 1847262, at *2 (Del. Super Ct. Apr. 9, 2003) (unpublished); *Britten v. State*, 328 S.E.2d 556, 557 (Ga. Ct. App. 1985); *Zepeda v. State*, 274 P.3d 11, 17 (Idaho Ct. App. 2012); *Saiki v. State*, 375 N.W.2d 547, 549 (Minn. Ct. App. 1985); *Sykes v. State*, 919 So. 2d 1064, 1066 (Miss. Ct. App. 2005); *Moore v. State*, 734 N.W.2d 336, 339 (N.D. 2007); *Commonwealth v. Peoples*, 319 A.2d 679, 681 (Pa. 1974); *Reise v. State*, 913 A.2d 1052, 1056 (R.I. 2007); *State v. Krieger*, 471 N.W.2d 599, 604 (Wis. Ct. App. 1991), *cited with approval by State v. Taylor*, 829 N.W.2d 482, 497 n.17 (Wis. 2013).

At least one of these states, Colorado, recognizes the differences between plea and trial cases, like Florida, and has modified its newly discovered evidence test in plea cases as a result. *See Schneider*, 25 P.3d at 762.

plea withdrawal; the existence of a plea bargain; and any prejudice to the state. *See State v. Slater*, 966 A.2d 461, 468 (N.J. 2009). In Massachusetts, the likelihood of success is whether the newly discovered evidence "casts real doubt on the justice of the conviction." *Commonwealth v. Ivey*, 817 N.E.2d 340 (Mass. App. Ct. 2004) (unpublished) (quotation omitted). And in Maryland and Washington, D.C., the issue is governed by statute. *See* Md. Code § 8-301; D.C. Code § 22-4135(i). The Maryland statute grants relief if the new evidence creates a "substantial or significant possibility that the result may have been different" with the new evidence. § 8-301(a)(1). The D.C. statute provides that if the evidence shows that it is more likely than not the defendant is actually innocent, the defendant is entitled to withdraw the plea, § 22-4135(g)(2). If the evidence is clear and convincing, the conviction is vacated with prejudice. § 22-4135(g)(3).

Only a small minority of states (six) apply something similar to the State's proposed standard, requiring the defendant to show clear and convincing evidence sufficient to establish that no reasonable juror would find the defendant guilty beyond a reasonable doubt.[14] These states either have post-conviction procedures dissimilar to Rule 3.850, or adhere to the traditional use of the writ for habeas

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[14] *See Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1130-31 (Conn. 1997); *State v. Green*, 153 P.3d 1216, 1226 (Kan. 2007); *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 284 (Mo. Ct. App. 2008); *State v. Graham*, 57 P.3d 54, 57 (Mont. 2002); *Ex parte Tuley*, 109 S.W.3d 388, 392-93 (Tex. Crim. App. 2002); *Medel v. State*, 184 P.3d 1226, 1237-38 (Utah 2008).

corpus. Accordingly, they have aligned themselves with one or both of the federal actual innocence standards, discussed and distinguished *infra* at pages 34-37.

Thus, Florida's approach to handling newly discovered evidence claims of actual innocence in plea cases is consistent with the approach taken by most states that recognize such claims. While no clear consensus exists regarding whether the evidence should demonstrate that an acquittal is reasonably possible, as opposed to probable, the threshold in Florida should be materiality or reasonable possibility given the absence of a fully developed trial record. Without such a record, assessing the actual probability of acquittal after a full trial may be elusive. Further, the manifest injustice standard has its roots in the Florida standard for harmless error, *see Williams*, 316 So. 2d at 274, which in turn involves an assessment of whether there is a reasonable possibility—not probability—that the error in question affected the outcome. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986).

It must also be remembered that, in the context of a plea, the fundamental issue is whether the defendant suffered clear prejudice in reaching his or her decision to enter the plea. This entails consideration of whether the defendant was materially misinformed at the time the defendant made the plea about his or her prospects for an acquittal, or whether the defendant pleaded under duress or coercion. As the following case illustrates, credible evidence of actual innocence that materially improves the prospects of an acquittal may satisfy this inquiry.

In *People v. Knight*, 937 N.E.2d 789 (Ill. App. Ct. 2010), *appeal den'd*, 943 N.E.2d 1105 (Ill. 2011), a factually similar case, the defendant filed a successive post-conviction motion seeking relief from his plea based on newly discovered evidence of actual innocence. Specifically, the new evidence showed that the defendant pleaded guilty to a murder while in prison because a gang instructed him to take responsibility for the crime. *Id.* at 768-69. Like the instant case, the defendant and others came forward only after the gang leader died and the gang no longer controlled the prison. *Id.* at 770. Reversing the trial court's summary denial, the Illinois appellate court reasoned that the change in the prison dynamic following the gang leader's death by way of the cessation of the gang leader's threat over the defendant and other witnesses, who could now come forward and tell the truth, had a material bearing on whether the defendant's plea was coerced and involuntary. *Id.* at 773-74. The appellate court explained that, at the evidentiary hearing following remand, the defendant's success on the motion would hinge on the credibility of the newly discovered evidence of actual innocence. *Id.* at 774.

Accordingly, as this case and the majority approach illustrate, the manifest injustice standard is satisfied when the newly discovered evidence of actual innocence would have a material bearing on the outcome of trial and thus on the defendant's decision to plead guilty, or when the new evidence proves the plea was involuntary. Sometimes, as in this case, the newly discovered evidence of actual

innocence satisfies both conditions. If this threshold is met, then the defendant is entitled to withdraw the plea "and to plead anew." *Taylor*, 662 So. 2d at 1032-33.

3. Policy Favors This Standard

This standard also strikes the proper balance between finality and fairness. By necessity and design of our criminal justice system, a significant portion of crimes—approximately 91 percent—are resolved by a plea. *See* ABA Standards for Criminal Justice, Pleas of Guilty, at xi–xii (3d ed. 1999); *see also Macker v. State*, 500 So. 2d 256, 259 (Fla. 3d DCA 1986). A plea waives several fundamental constitutional rights, including the right to a jury trial, the privilege against compulsory self-incrimination, the right to confront one's accusers and present witnesses, and the right to have the State prove its case beyond a reasonable doubt. *See Boykin*, 395 U.S. at 243; *United States v. Gines*, 964 F. 2d 972, 980 (10th Cir. 1992); *State v. Partlow*, 840 So. 2d 1040, 1045 (Fla. 2003) (Cantero, J., concurring); *Macker*, 500 So. 2d at 258.

While the system is designed to ensure that every conviction based on a plea is fair and just, "there always exists the possibility of a defendant who in fact is entitled to relief, . . . including the possibility of actual innocence or credible newly discovered evidence that sheds doubt on the validity of the conviction." *In re Amends. to Fla. R. Crim. P.*, 38 Fla. L. Weekly S247, S250 (Fla. Apr., 18, 2013) (Pariente, J., concurring in part, dissenting in part). In that situation, the law favors a trial on the merits. *See Ward v. State*, 22 So. 2d 887, 889 (Fla. 1945).

II. PEREZ IS ENTITLED TO AN EVIDENTIARY HEARING TO DEMONSTRATE THAT THE WITHDRAWAL OF HIS PLEA IS NECESSARY TO CORRECT A MANIFEST INJUSTICE

Applying the above manifest injustice framework to this case, the Third District aptly recognized that Perez stated a facially sufficient claim to withdraw his plea and thus is entitled to an evidentiary hearing. Perez's newly discovered evidence, in the form of Delarosa's and Montanez's previously unknown eyewitness testimony, as well as Fat Steve's death and prior role in the murder and in suppressing Perez's ability to tell the truth, is compelling evidence of Perez's actual innocence such that it could reasonably be expected to have a decisive impact on his decision to plead guilty.

A. Standard of Review – Factual Allegations Accepted as True

Because the trial court summarily denied Perez's Florida Rule of Criminal Procedure 3.850 motion, this Court "must accept the defendant's factual allegations to the extent they are not refuted by the record." *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *see also Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011). The same is true of the allegations in Delarosa's and Montanez's affidavits. *See McLin v. State*, 827 So. 2d 948, 955 (Fla. 2002).

B. Delarosa's and Montanez's Affidavits Constitute Newly Discovered Evidence and Are Not Conclusively Refuted by the Record

The Third District properly concluded that Delarosa's and Montanez's previously unknown eyewitness accounts constitute newly discovered evidence pursuant to Florida Rule of Criminal Procedure 3.850(b)(1).

Newly discovered evidence is evidence that was unknown by the trial court, by the party, or by counsel at the time of trial. *See Wyatt v. State*, 71 So. 3d 86, 100 (Fla. 2011); *see also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (explaining newly discovered evidence criteria, as discussed *supra* at page 16). Previously unknown eyewitness testimony is a common example of newly discovered evidence. *See, e.g.*, *Goodman v. State*, 845 So. 2d 253, 254 (Fla. 1st DCA 2003); *Clugston v. State*, 765 So.2d 816, 818 (Fla. 4th DCA 2000). Unless "inherently incredible," an evidentiary hearing is required to determine whether the new evidence is credible. *See McLin*, 827 So. 2d at 955-56.

In its brief, the State does not challenge the Third District's conclusion that the evidence is newly discovered. Nor could it challenge whether Perez acted diligently upon discovering it given that Delarosa and Montanez came forward only after Fat Steve's recent death. *Cf. Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009) ("Logically, even if counsel had or could have located these witnesses at an earlier date such earlier date does not conclusively establish that the witnesses would have recanted their testimony at that earlier time.").

Rather, the State argues the record evidence refutes Perez's allegations and Delarosa's and Montanez's eyewitness testimony. (I.B. at 34). The State identifies two pieces of evidence that ostensibly refute their claims: (1) Hernandez's sworn statement; and (2) Perez's confession. Both fail in that regard.

1. Hernandez's Sworn Statement Does Not Refute the New Allegations

In relying on Hernandez's sworn statement, the State completely ignores the fact that Hernandez's *initial* account of the shooting to investigators described a drive-by shooting consistent with that described in Delarosa's and Montanez's affidavits. Moreover, Hernandez never explained why he changed his story to inculpate Perez several days later. Delarosa, on the other hand, explained that Hernandez changed his account of the shooting after Fat Steve threatened him to do so. Additionally, at some point after he changed his story, Hernandez refused to testify or to cooperate further with the authorities. Rather than refute Perez's allegations, Hernandez's statement and the circumstances surrounding it actually corroborate Perez's motion and the newly discovered evidence.

2. Perez's Coerced Confession Does Not Conclusively Refute His Allegations Because He Falsely Confessed under Duress

As for Perez's dubious confession, the State completely ignores Perez's allegation that he falsely confessed under duress. The State appears to presume that false confessions do not occur. The State cannot be more wrong.

Recent studies have shown that in cases overturned by DNA evidence, 25 percent involved false confessions. *See* The Florida Innocence Commission, *Final Report To The Supreme Court Of Florida*, at 27 (June 2012) (available at http://www.flcourts.org/core/fileparse.php/248/urlt/finalreport2012.rtf). Consistent with that figure, three of the 11 exonerations in Florida examined by the Commission in 2011 involved false confessions. *Id.* at 27.[15]

There are several reasons why an innocent person confesses to a crime he or she did not commit: intimidation by law enforcement officers during the interrogation; use of devious interrogation techniques, such as untrue statements about incriminating evidence; factors affecting the reasoning ability of the suspect, such as mental limitations and limited education; or the suspect's fear. *See* Innocence Project, *False Confessions & Recording Of Custodial Interrogations Fact Sheet*, http://www.innocenceproject.org/Content/False_Confessions__Recording_Of_Custodial_Interrogations.php (last visited Mar. 6, 2014). As noted by the Florida Innocence Commission, "some categories of people, such as juveniles and mentally incapacitated individuals, are especially susceptible to making a false confession." *Final Report* at 26.

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[15] The vast majority of criminal cases do not involve biological evidence (80–90%), and thus are predicated on, as here, newly discovered evidence. *See* Daniel S. Medwed, *Up The River Without A Procedure: Innocent Prisoners And Newly Discovered Non-DNA Evidence In State Courts*, 47 ARIZ. L. REV. 655, 656 (2005).

Virtually all of those factors are present here. Perez was a juvenile at the time of his confession and had a low IQ exhibiting a "borderline intellectual functioning." (R. 44-45, 130). Despite these educational and mental limitations, three to four investigators questioned Perez for nearly four hours, even though Perez insisted for the first two to three hours that he was innocent. (R. 44-45, 139-40, 191). He asked for legal counsel, yet his interrogators told him that was unnecessary. (R. 44-45). He repeatedly asked to have family members present, and he was told the police could not locate any. (R. 186). The recording made of the interrogation and confession upon which the State relied below in claiming the interrogation was proper represents only the last hour of the protracted session, *after* investigators had already induced Perez into admitting he committed the crime. (R. 163, 191). There is no transcript of the first two to three hours, when Perez insisted he was innocent. Even then, the self-serving transcript shows that investigators continued to interrogate Perez despite his request to have family members present. As part of their interrogation tactics, investigators screamed at Perez and cajoled him into believing it was in his best interest to proceed without a lawyer present. (R. 44-45).

Of course, this whole time, Perez was operating under threats made by Fat Steve, who said he would kill Perez and his sister if he revealed the truth. That fear receded only recently when Perez learned Fat Steve had been killed. Similar to the change in the prison dynamics in *Knight*, 937 N.E.2d 789, Fat Steve's death

freed up Perez and the other previously unidentified exculpatory eyewitnesses to come forward and explain what really happened.

C. The Newly Discovered Evidence Could Reasonably Be Expected To Have a Decisive Impact on Perez's Decision To Plead Guilty Because of Its Exculpatory Power

Had Perez gone to trial instead of pleading guilty, knowing he would not have been able to testify truthfully about what he actually saw and with no knowledge of other exculpatory witnesses, he would not have been able to recant his confession credibly and effectively. Any defendant expecting to be impugned by a dubious confession, without knowledge of other exculpatory evidence and under the threat of violence, is going to take the plea.

But once Perez learned that the threat against his life became moot and other witnesses also felt free to step forward and inculpate Fat Steve, he could reasonably be expected to believe his chances of acquittal have changed materially and even dramatically. Thus, holding Perez to his plea entered under very different and untenable circumstances would be manifestly unjust and clearly prejudicial.

III. THIS COURT SHOULD REJECT THE STATE'S PROPOSED STANDARD, WHICH CONFLATES TWO DIFFERENT FEDERAL ACTUAL INNOCENCE STANDARDS, BECAUSE IT IS INAPPLICABLE TO STATE COURT PROCEEDINGS UNDER RULE 3.850 AND IGNORES *WILLIAMS*

According to the State's argument, a "manifest injustice" can be shown only when new reliable evidence of actual innocence demonstrates it is more likely than not that no reasonable juror would find the defendant guilty beyond a reasonable

doubt. (I.B. at 16-17). The State adds that the showing is "so extraordinarily high," because it requires proof that the defendant's guilt is an impossibility. (I.B. at 25, 28-29, 30).

This Court should reject the State's standard. Not only does the State conflate and confuse two different types of federal actual innocence standards in its analysis, but this Court has previously announced these federal habeas corpus standards are inapplicable to state court post-conviction proceedings. Instead, Rule 3.850 applies, as does *Williams*, 316 So. 2d 267, and the well-settled definitions of manifest injustice and prejudice. Nevertheless, assuming, *arguendo*, one or both of these standards apply, Perez's actual innocence claim warrants an evidentiary hearing in any event.

A. The State Conflates the *Herrera* Freestanding Actual Innocence Standard with the *Schulp* Gateway Actual Innocence Standard, Both of Which Are Inapplicable under Rule 3.850

The State's proposed manifest injustice standard conflates and confuses two separate federal standards applicable to different actual innocence claims under federal habeas corpus jurisprudence. The first is the freestanding actual innocence standard from *Herrera v. Collins*, 506 U.S. 390 (1993), and the second is the gateway actual innocence standard from *Schulp v. Delo*, 513 U.S. 298 (1995).

In *Herrera*, a defendant convicted of murder and sentenced to death filed an untimely and successive federal habeas petition claiming that newly discovered evidence proved he was actually innocent, and thus his conviction violated the

Eighth and Fourteenth Amendments. 506 U.S. at 396-98. The district court dismissed the claim, and the court of appeals affirmed, holding that the existence of newly discovered evidence of actual innocence was not a ground for relief under federal habeas corpus absent an independent constitutional violation. *Id.* at 398. Affirming, the Supreme Court explained that federal habeas courts are not forums to re-litigate state trials but to ensure individuals are not imprisoned in violation of the Constitution. *Id.* at 400-01. Nevertheless, "for the sake of argument," the Court assumed that a "truly persuasive demonstration" of actual innocence may render the execution of a defendant unconstitutional, but concluded that defendant's claim failed to meet this "extraordinarily high" threshold. *Id.* 417.

Although the Court did not pass on whether freestanding actual innocence claims are viable,[16] and has yet to do so,[17] some federal courts "hypothetically" consider such claims under the "extraordinarily high" threshold standard. *See, e.g.*, *Cress v. Palmer*, 484 F.3d 844, 855 (6th Cir. 2007); *Thomas v. Taylor*, 170 F.3d 466, 473 (4th Cir. 1999); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997).

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[16] *Herrera*, 506 U.S. at 427 ([T]he Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence.") (O'Connor, J., concurring).

[17] *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) ("Whether such a federal right exists is an open question."); *House v. Bell*, 547 U.S. 518, 555 (2006) ("[W]hatever burden a hypothetical freestanding would require, this petitioner has not satisfied it.").

Some refuse to recognize such claims. *See e.g.*, *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001).

In contrast, the defendant in *Schulp*, who was convicted of murder following a jury trial, filed an untimely and successive habeas petition alleging an actual innocence claim as well as *Strickland*[18] and *Brady*[19] violations. 513 U.S. at 307. The district court summarily dismissed the motion as procedurally barred, and the court of appeals affirmed. *Id.* at 309, 312. On certiorari review, the Supreme Court explained that the defendant's actual innocence claim was procedural, rather than substantive like in *Herrera*, because it did not form the basis for relief. *Id.* at 314. Instead, the actual innocence claim operated as a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (quoting *Herrera*) (quotation marks omitted). To obtain relief, the petitioner had to prove it is more likely than not that no reasonable juror would have convicted the defendant in light of the new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—not presented at trial. *Id.* at 324-27. Such claims have come to be known as *Schulp* gateway actual innocence claims and are well-recognized. *See, e.g.*, *Teleguz v. Pearson*, 689 F.3d 322, 328 (4th Cir. 2012).

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[18] *Strickland v. Washington*, 466 U.S. 668 (1984).

[19] *Brady v. Maryland*, 373 U.S. 83 (1963).

In crafting a new standard, the State conflates these two federal standards to form a confusing and inherently contradictory standard. On one hand, the State claims the defendant's new and reliable evidence must be of such a nature that no rational juror could find the defendant guilty. (I.B. at 16). And on the other hand, the defendant's guilt must be an impossibility. (I.B. at 28-29, 30).

Just because Rule 3.850's predecessor was taken from 28 U.S.C. § 2255 over 50 years ago, does not mean Florida's current post-conviction statute must mirror the federal habeas corpus law in every respect. Indeed, states have "more flexibility in deciding what procedures are needed in the context of postconviction relief." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). While there have been instances where this Court has indirectly referenced the *Schulp* gateway actual innocence standard, *see, e.g.*, *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002), this Court has unanimously and unambiguously stated that "*Schulp* is not applicable to state court proceedings." *Peterka v. State*, No. SC08-1413, at 1 (Fla. May 22, 2009) (unpublished order).

In Florida, unlike under *Schulp*, "[i]f newly discovered evidence surfaces, Florida allows a defendant to bring a newly discovered claim, as announced in *Jones*." *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008). There is no requirement for an accompanying independent constitutional violation. Thus, the Florida standard "is more liberal than the standard for raising an actual innocence claim in federal courts." *Id.* at 1089. According to *Williams* and *Scott*, so too is

the requisite showing of a manifest injustice based on a claim of newly discovered evidence.

By the same token, *Herrera* does not state the test for accepting newly discovered evidence in the absence of an independent constitutional violation. Rule 3.850, *Williams* and *Scott* delineate the state standard.

B. The State Impermissibly Ignores *Williams* and This Court's Definition of a Manifest Injustice as "Clear Prejudice"

In support of its standard, the State makes an incredible claim when it asserts "there is no authority to allow manifest injustice to be considered as a basis to withdraw a guilty plea after sentencing." (I.B. at 15). That position is contrary to *Williams* and plain wrong. The State cannot avoid *Williams* on the basis it did not involve a newly discovered evidence claim or "attempt to provide a general definition of 'manifest injustice.'" (I.B. at 13-14). As the discussion *supra* at page 10 demonstrates, *Williams* did just that by adopting the ABA Standard in all plea withdrawal motion cases, based on challenges involving newly discovered evidence or otherwise, and defining "manifest injustice" as "clear prejudice," a necessarily flexible definition given the innumerable circumstances in which a defendant may be prejudiced in making a plea.

Two such circumstances occur when newly discovered evidence of actual innocence would have materially improved the defendant's prospects of an acquittal, thus altering the defendant's calculus leading up to the original plea, or

when the new evidence shows the plea was involuntary. The State can point to no authority that says a guilty plea in Florida waives the right to challenge collaterally the material impact of newly discovered evidence on the integrity of a plea. This is because Florida courts uniformly recognize that a manifest injustice can be shown by newly discovered evidence of actual innocence (*Taylor*, *Johnson*, *Hernandez*, etc.). The fact that some of these cases involved nolo contendere or best interest pleas is of no moment. As discussed *supra* at footnote 4 on page 13, these plea forms have the same effect for purposes of plea withdrawal motions as guilty pleas.

C. Even Under the Federal Standards, Perez Is Entitled to an Evidentiary Hearing to Show a Manifest Injustice

Assuming, *arguendo*, that one or both federal standards apply, Perez remains entitled to an evidentiary hearing to prove he meets the "extraordinarily high" showing required by *Herrera*, or that no reasonable juror would find him guilty beyond a reasonable doubt, a la *Schulp*. As explained *supra* at pages 30-33, the allegations in Perez's motion and Delarosa's and Montanez's affidavits are not conclusively refuted by the record. Rather, Hernandez's initial statement to police and the circumstances surrounding his change-of-heart corroborate Perez's actual innocence. The record also fails to refute Perez's allegation that he falsely confessed. The questionable circumstances surrounding the confession, including the prolonged interrogation, initial protestations of innocence and coercive tactics,

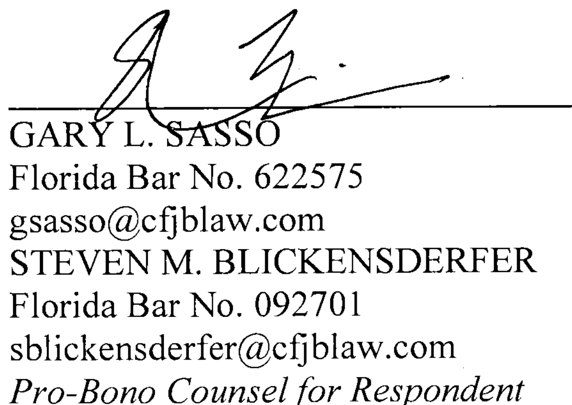
coupled with the ever-present threat of violence by the actual perpetrator, only strengthen Perez's innocence claim.

Indeed, even the State concedes that the motion has raised credibility concerns. (I.B. at 28). Yet at the same time the State boldly claims that an evidentiary hearing is unnecessary. That is not the law where the allegations are not conclusively refuted by the record—an evidentiary hearing is required. *See McLin v. State*, 827 So. 2d 948, 955 (Fla. 2002).

CONCLUSION

For the foregoing reasons, Respondent, Michael Perez, respectfully requests that this Court answer the certified question by holding that a defendant may obtain relief from a guilty plea by showing that a manifest injustice has occurred, and this may be established by showing that the defendant has suffered "clear prejudice" at the time he or she entered the plea. This standard may be satisfied, where, as here, the defendant adduces either (1) newly discovered evidence of actual innocence that would have had a material bearing on his or her prospect for acquittal had the defendant gone to trial, and therefore, upon the defendant's decision to plead guilty in the first place, or (2) newly available evidence that the plea was involuntary. As this standard is satisfied in this case, this Court should affirm the Third District's decision and remand this case to the trial court for an evidentiary hearing so that Perez can demonstrate that a manifest injustice requires the lower court to grant relief from his plea.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal and is being served on this 10th day of March, 2014, on Counsel for Petitioner listed below via transmission of notices of electronic filing generated by the Florida Courts eFiling Portal and via e-mail to:

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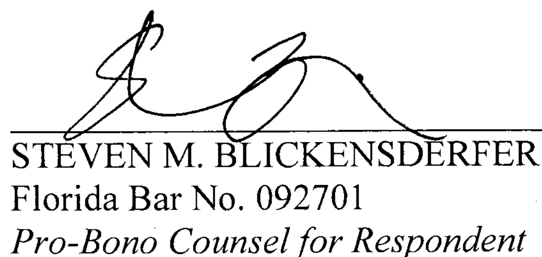

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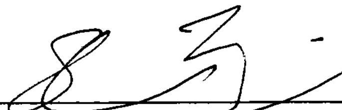
The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.



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