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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1958

THE STATE OF FLORIDA,

Petitioner,

Vs.

MICHAEL PEREZ,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

AMENDED BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS .....ii-vii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 9

STANDARD OF REVIEW 11

ARGUMENT:

A POST CONVICTION CLAIM OF NEWLY DISCOVERED EVIDENCE IS NOT COGNIZABLE IN THE AFTERMATH OF A GULTY PLEA, BUT IF THE COURT REJECTS THE STATE'S ARGUMENT THAT DEFENDANT WAIVED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BY ENTERING A GUILTY PLEA, THEN DEFENDANT SHOULD BE REQUIRED TO ESTABLISH MANIFEST INJUSTICE PURSUANT TO THE DEFINITION UNDER FEDERAL LAW, WHICH REQUIRES A DEMONSTRATION OF ACTUAL INNOCENCE BASED ON NEW, RELIABLE EVIDENCE……11

A.General Principles of Law……11

B. Survey of Federal and Other State Court Jurisdictions……18

C. Application of Manifest Injustice Test in the Instant Case……28

CONCLUSION 35

CERTIFICATE OF SERVICE 37

CERTIFICATE REGARDING FONT SIZE AND TYPE..... 37

TABLE OF CITATIONS

FLORIDA STATE CASES

Adams v. State,
957 So.2d 1183 (Fla. 3d DCA 2007) 26

Caraballo v. State,
39 So.3d 1234 (Fla. 2010) 14

Daniel v. State,
740 So.2d 1174 (Fla. 2d DCA 1999) 13

Davis v. State,
26 So.3d 519 (Fla. 2009)..... 4

De la Hoz v. Crews,
123 So.3d 101 (Fla. 3d DCA 2013)..... 26

Hallman v. State,
371 So.2d 482 (Fla. 1979). 12

Haygood v. State,
109 So.3d 735 (Fla. 2013). 26

Hough v. State,
679 So.2d 1300 (Fla. 5th DCA 1996)..... 33

Hunter v. State,
29 So.3d 256 (Fla. 2008)..... 11, 33

Johnson v. Singletary,
647 So.2d 106 (Fla. 1994)..... 33

Johnson v. State,
936 So.2d 1196 (Fla. 1st DCA 2006) 15

Jones v. State,
591 So.2d 911 (Fla. 1991) 9, 12

McFarland v. State,
929 So.2d 549 (Fla. 5th DCA 2006) 13

McLin v. State,
827 So.2d 948 (Fla. 2002) 34

Miller v. State,
814 So.2d 1131 (Fla. 5th DCA 2002) 13

Perez v. State,
40 So.3d 822 (Fla. 3d DCA 2010) 5

Perez v. State,
118 So.3d 298 (Fla. 3d DCA 2013) 8, 13

Poff v. State,
41 So.3d 1062 (Fla. 3d DCA 2010) 33

Roy v. Wainwright,
151 So.2d 825 (Fla. 1963) 15

Rutherford v. State,
926 So.2d 1100 (Fla. 2006) 34

Scott v. State,
629 So.2d 888 (Fla. 4th DCA 1993) 12

State v. Montgomery,
39 So.3d 252 (Fla. 2010) 26

Tompkins v. State,
994 So.2d 1072 (Fla. 2008) 27

Whitsett v. State,
993 So.2d 1115 (Fla. 4th DCA 2008) 29

Williams v. State,
316 So.2d 267 (Fla. 1975) 13

FEDERAL CASES

Bousley v. United States,
523 U.S. 614 (1998).....16, 23

Calderon v. Thompson,
523 U.S. 538 (1998).....17

Caldwell v. United States,
992 F. Supp 363 (S.D. N.Y. 1998) 20

Carriger v. Stewart,
132 F.3d 463 (9th Cir. 1997).....22

House v. Bell,
126 S.Ct. 2064 (2006).....16, 23

Herrera v. Collins,
506 U.S. 390 (1993).....21, 22, 30

In re Davis,
565 F.3d 810 (11th Cir. 2009).....31

Jackson v. Virginia,
443 U.S. 307 (1979).....30

Lott v. Stegall,
77 Fed. Appx. 801 (6th Cir. 2003).....23

Melson v. Allen,
548 F.3d 993 (11th Cir. 2008).....32

Milton v. Secretary, Department of Corrections,
347 Fed. Appx. 528 (11th Cir. 2009).....30

Noltie v. Peterson,
9 F.3d 802 (9th Cir. 1993).....23

Rozzelle v. Secretary, Florida Department of Corrections,
672 F. 3d 1000 (11th Cir. 2012).....22, 31

Schlup v. Delo,
513 U.S. 298 (1995).....16, 23

Townsend v. Sain,
372 U.S. 293 (1963).....21

United States v. Berry,
624 F.3d 1031 (9th Cir. 2010).....23

United States v. Collins,
898 F. 2d 103 (9th Cir. 1990).....20

United States v. Evans,
224 F. 3d 670 (7th Cir 2000).....21

United States v. Forrest,
356 F. Supp. 343 (D.C. Mich. 1973) 20

United States v. Graciani,
61 F.3d 70 (1st Cir. 1995).....20

United States v. Quintana,
300 F.3d 1227 (11th Cir. 2002).....7

OTHER STATE CASES

Ex parte Benavides,
S.W. 3d, 2010 WL 2110173 (Tex. Crim. App. May 26, 2010).....24

Ex parte Brown,
205 S.W. 3d 538 (Tex. Crim. App. 2006) 24

Heaton v. State,
542 So.2d 931 (Ala. 1989).....23

People v. Killingbeck,
212 N.W. 2d 256 (Mich.App. 1973).....19

People v. Lahon,
17 A.D. 3d 778 (N.Y. App. 2005) 18

Polz v. State,
N.W. 2d, 2008 WL 5335019 (Minn. App. 2008) 19

State v. Deskins,
2011 WL 2120072 (Ohio App. 9 Dist. 2011) 24

State v. Dickerson,
632 A.2d 843 (N.J. Super A.D. 1993) 24

State v. Honaker,
N.E. 2d, 2004 WL 2674624 (Ohio App. 10 Dist. 2004).....24

State v. Nobles,
A.3d, 2012 WL 632396 (N.J. Super. A.D. 2012) 24

State ex rel. Schneider v. Kreiner,
699 N.E.2d 83 (Ohio 1998)) 24

State v. Smith,
361 N.E. 2d 1324 (Ohio 1977).....24

RULES

3.851(e)(2)(c) 6

UNITED STATES CODE

28 U.S.C. § 2254 (2011) 15

28 U.S.C. § 2255 (2011) 15

INTRODUCTION

This is an initial brief on the merits. The Petitioner, THE STATE OF FLORIDA, was the Appellee in the court below, and the prosecution in the trial court. The Respondent, MICHAEL PEREZ, was the Appellant in the court below and the Defendant in the trial court. References to the Index are designated by the symbol "I.", followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Perez was convicted of second degree murder with a firearm and unlawful possession of a firearm (counts one and two). On April 15, 1999, Perez shot and killed Jimmy Ramirez. Ramirez was unarmed and riding a bicycle in the area of Northwest 34th Street in Miami, Florida. On April 16, 1999, Perez met with the City of Miami Police to discuss the incident. He provided a sworn statement to the detectives. In his sworn statement, Perez admitted that he shot Ramirez.

Perez stated that he saw the victim on a bicycle as he walked toward 27th Avenue. Ramirez was approximately five feet away from him at the time. Perez initially denied shooting the victim. Ultimately, Perez claimed he shot him in self defense. Perez also admitted that he threw the gun away and that after the shooting he shaved his head so that his hair style was altered from the original style of braids to having a shaved head. Additionally, there was an independent eyewitness to the shooting, Carlos Hernandez. Hernandez, who was a friend of Perez, had

known him for about five years. Hernandez gave a sworn statement to the police testifying that he saw Perez shoot Ramirez. Hernandez stated that he did not see the victim with any kind of firearm or weapon when he was killed. Perez was subsequently arrested.

A motion to suppress Perez's confession to the police was filed on September 18, 2000. Perez argued that his statements had not been voluntary and that his Fifth Amendment rights had been violated. (State Response to Motion to Suppress was filed December 8, 2000. (I. 194). Subsequent to an evidentiary hearing on the motion to suppress, the motion was denied. On December 8, 2000, Perez was evaluated by Dr. Sanford Jacobson to determine his competency to waive his Miranda rights. On December 11, 2000, Dr. Jacobson submitted his results to Judge Peter Lopez in a leter dated December 11, 2000 (I. 43). Perez told Dr. Jacobson that he shot the victim because he thought the victim was going to shoot him. (I. 44). On December 12, 2000, Perez pled guilty to the lesser charge of second degree murder with a firearm, having originally been indicted for first degree murder.

On September 1, 2009, Perez filed a motion for post-conviction relief pursuant to Florida Rules of Criminal Procedure 3.850 (b)(1).(I. 55). In his motion, the Perez argued that he had newly discovered evidence that exonerated him and that he did not murder the victim. Perez claimed that he suffered a

manifest injustice because he entered a guilty plea without "*knowing that Delarosa and Montanez*" were witnesses. Perez argued that the newly discovered evidence was in the form of sworn affidavits from witnesses Javier Delarosa and Albert Montanez. (The affidavits are actually letters). As part of his manifest injustice claim, Perez argued that the State proceeded under "*circumstantial assumption that he alone shot and killed Ramirez."*

Perez claimed that he should be allowed to withdraw his guilty plea based on this newly discovered evidence. According to Perez's argument, these were previously unknown witnesses to the murder. According to Delarosa's letter, he saw Ramirez killed in a drive by shooting and he claims to have seen an individual known as "Fat Steve" driving the car in the shooting. (I. 77). Delarosa claimed that he saw the entire shooting. He states in his letter that he witnessed a gray/off-white four door car drive up slowly and then when the driver's side and driver's side back-seat windows went down, guns came out and the victim was shot several times. Delarosa stated that he saw "Fat Steve" behind the wheel driving the car. Delarosa alleges that he saw Albert, Jose, Gonzalo, Perez, and Carlos run in different directions when the shooting occurred. Additionally, he notes that he heard Carlos Hernandez tell the police that a grey car had shot the victim. Delarosa claims that he found out that Hernandez later changed his story after Fat Steve had threatened him if he did not blame the murder on Perez. Finally, Delarosa notes

that he is writing the letter now, years later, because he learned that Fat Steve is dead.

Montanez provided a letter on August 10, 2009. (I. 74). Montanez stated that he was with Carlos, Gonzalo, and Jose the day of the shooting. He saw an off-white car drive by and shoot Jimmy. Montanez also stated that the day after the Ramirez shooting, he witnessed "Fat Steve" drive up to Perez on the street, point a gun at Perez, and order him inside the car. (page 1).

Perez goes on to state that had he gone to a jury trial, he would have testified truthfully in his own behalf that he was present at the home of Carlos Hernandez when "he heard gunshots" the day of the incident. Perez claimed that after he looked up, he observed Fat Steve's car and the victim, Ramirez, on a bicycle. Perez argued that he would have testified that he saw the occupants of Fat Steve's car shoot Ramirez again. On April 20, 2010, the post-conviction motion from September 1, 2009, was denied, without prejudice, as facially insufficient.(I. 228) In his order denying the subject motion, Judge David Miller noted that the motion was facially insufficient because the defendant failed to meet the requirements of Rule 3.851(e)(2)(C), and cited to *Davis v. State*, 26 So.3d 519 (Fla. 2009).

The order denying the motion was then appealed to the Third District Court of Appeal, Case No.3D10-1370. On July 7, 2010, the Third District issued an opinion reversing the order of denial. The opinion noted that the trial court denied

the motion as facially insufficient for failure to meet the requirements of Florida Rule of Criminal Procedure 3.851(e)(2)(C). The opinion pointed out that Rule 3.851 applies to capital cases in which the defendant has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. As Perez was sentenced to forty years, and not sentenced to death, his post-conviction motion filed pursuant to rule 3.850 was proper. Thus, the Third District reversed the trial court's order and remanded the matter for the trial court to determine the merits of the appellant's motion under rule 3.850. *Perez v. State* 40 So.3d 822 (Fla. 3d DCA 2010).

On August 16, 2011, the State filed a response to the Motion for Post Conviction Relief. (I. 110). On September 20, 2011, Perez, via his private attorney, filed a reply to the State's Response. (I.95). On September 28, 2011, the State filed a Supplemental Response to the Defendant's motion. (I. 88). On October 12, 2011, the State filed a second Supplemental Response to Defendant's motion, and stated that the second response "addressed questions that "arose during the oral argument." (I.82).

On November 15, 2011, the trial court entered an order denying Perez's motion for post conviction relief. (I.380). In the order, Judge Arzola stated that Rule 3.850 is very explicit and specific in its definition of what constitutes newly discovered evidence stating that "the facts on which the claim is predicated were

unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." The trial court pointed out that what Perez was submitting as newly discovered evidence, i.e., Mr. Delarosa and Mr. Montanez's claims regarding the facts surrounding Ramirez's shooting, merely corroborated facts that Perez claimed he already knew. Furthermore, as Perez's sworn allegations in his motion attest that prior to his plea he personally knew of the information he now claims as newly discovered evidence, such cannot, in fact, constitute newly discovered evidence.

Judge Arzola's order went on to explain that, even if the information submitted did qualify as newly discovered evidence, Perez was still not entitled to relief because he had failed to meet his burden of establishing that vacating his guilty plea was necessary to prevent a manifest injustice. The trial court noted that Perez had confessed to the police that he shot Ramirez. (Attached to Judge Arzola's order was the sworn statement given by Perez to the Miami Police on April 16, 1999. (I.12). Additionally, Perez again confessed to killing Ramirez during his evaluation with Dr. Sanford Jacobson. (Attached to Judge Arzola's order was Dr. Jacobson's letter to the court. (I.43). The trial court noted that the independent witness, Carlos Hernandez, swore in his statement that he saw Perez shoot the victim. Judge Arzola's order found that as the motion, court file, and records conclusively refuted the claimed basis for relief, no evidentiary hearing

was warranted. (Documents including Carlos Hernandez's sworn statement, given on April 21, 1999, were attached to the order. (I.206). This order was then the basis for the appeal in case no. 3D11-3250, the subject case. (I.269).

The Office of the Attorney General, on behalf of the State of Florida, filed a Response below. The Third District issued an opinion on November 21, 2012. (I.294). The lower court reversed the trial court's order and remanded for an evidentiary hearing to determine if Perez was entitled to withdraw his plea due to manifest injustice. The lower court's opinion cited to the Eleventh Circuit Court of Appeal case of *United States v. Quintana*, 300 F.3d 1227, 1232 (11th Cir. 2002) to explain that, in order to demonstrate manifest injustice, a petitioner must demonstrate (1) that there was error; (2) that was plain; (3) that affected his substantial rights; and (4) that affected the fundamental fairness of the proceedings." The opinion went on to remand for an evidentiary hearing on the issue of manifest injustice.

On December 12, 2012, the State filed a Motion for Rehearing and a Motion for Rehearing En Banc and certified question arguing that the lower court's opinion, when analyzing whether or not manifest injustice existed in the case at bar, borrowed from *Quintana's* definition of manifest injustice. (I. 304). However, that definition is not the correct definition to apply to a collateral review claim of newly discovered evidence after a guilty or nolo contendere plea. As opposed to

the subject case, which involved a collateral attack on a guilty plea, *Quintana* involved a direct appeal test and not a plain error test for newly discovered evidence after a guilty plea without trial. *Quintana* addressed the concept of manifest injustice for the purpose of determining whether an error could be raised on direct appeal when it had not been preserved; it does not apply to post-conviction collateral review challenges, let alone after a guilty plea.

On July 31, 2013, the lower court issued an opinion held on rehearing. *Perez v. State*, 118 So.3d 298 (Fla. 3d DCA 2013). (I. 460). The lower court held that Perez was entitled to an evidentiary hearing in order to make a credibility determination on the newly discovered testimonial evidence of Delarosa and Montanez and Perez's ability to prove that a manifest injustice occurred. *Id*. Accordingly, the lower court held that the trial court erred in summarily denying the subject motion, reversed the denial, and remanded the matter for an evidentiary hearing on manifest injustice. In its opinion, the lower court acknowledged that the standard in Florida for a newly discovered evidence claim was more liberal than the standard for raising an actual innocence claim in federal court as per *Tompkins v. State*, 994 So.2d 1072 (Fla. 2008).

On August 12, 2013, the State filed a Motion for certification of a question of great public importance, namely: "*How should manifest injustice be defined for purposes of a claim of newly discovered evidence after a guilty plea*?" (I. 467). On

September 18, 2013, the Third District granted the certification of the question. (I. 476). On October 3, 2013, the State filed a notice to invoke discretionary review to the Florida Supreme Court. On November 12, 2013, the Court accepted jurisdiction of this matter.

SUMMARY OF THE ARGUMENT

While this Court has enunciated the test for claims of newly discovered evidence in the aftermath of a trial, *Jones v. State*, 591 So.2d 911 (Fla. 1991), Florida's district courts of appeal have consistently recognized that the test is inappropriate in the aftermath of either a guilty plea or a plea of nolo contendere. Rather, the district courts of appeal have required that a defendant, in the aftermath of a guilty or nolo contendere plea, establish "manifest injustice." That test recognizes that there should be a higher burden on defendants after having pled guilty or nolo contendere. That result ensues for at least two reasons: first, the absence of a trial transcript precludes the type of analysis that courts would engage in under *Jones*. Second, when there are guilty pleas, the defendant has actually admitted guilt through a knowing, voluntary and intelligent plea. It is therefore both proper and necessary to impose a higher burden for claims of newly discovered evidence after guilty pleas.

While the manifest injustice standard relied upon in the district courts of appeal purports to implement such a higher standard, the district courts of appeal

have never attempted to define what constitutes a "manifest injustice." In the absence of a definition, the manifest injustice standard remains highly subjective, and will likely result in differential treatment by different courts and judges throughout the State.

The instant case certifies the question of how "manifest injustice" should be defined for the purpose of a claim of newly discovered after a guilty plea. It is the position of the State that a definition is needed, that it must be objective and capable of application in a consistent manner in different cases, that it must succeed in eliminating the subjectivity that is inherent in the use of the phrase without such a definition, and that it must impose a high burden on a defendant, in light of the fact that the guilty plea carries with it an admission of guilt, and in light of the problems that will otherwise ensue when such claims are raised many years after the offenses and pleas, where records of evidence do not exist, and where witnesses and evidence become increasingly difficult to obtain.

The State argued in the lower court, and argues herein, that the concept of "manifest injustice," which is also referred to as "actual innocence," in federal court post-conviction proceedings, satisfies all of the purposes outlined above, and

that the standard should be utilized in claims of newly discovered evidence in the aftermath of guilty pleas.[1]

STANDARD OF REVIEW

As a trial court's decision on whether or not to grant an evidentiary hearing on a motion for postconviction relief is based on written materials before the court, its ruling is treated as a pure question of law, which is subject to de novo review. *Hunter v. State*, 29 So.3d 256, 261 (Fla. 2008).

ARGUMENT

A POST CONVICTION CLAIM OF NEWLY DISCOVERED EVIDENCE IS NOT COGNIZABLE IN THE AFTERMATH OF A GULTY PLEA, BUT IF THE COURT REJECTS THE STATE'S ARGUMENT THAT DEFENDANT WAIVED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BY ENTERING A GUILTY PLEA, THEN DEFENDANT SHOULD BE REQUIRED TO ESTABLISH MANIFEST INJUSTICE PURSUANT TO THE DEFINITION UNDER FEDERAL LAW, WHICH REQUIRES A DEMONSTRATION OF ACTUAL INNOCENCE BASED ON NEW, RELIABLE EVIDENCE.

A. General Principles of Florida Law.

[1] This Court has never addressed whether a claim of newly discovered evidence can be raised in a 3.850 motion after a guilty plea. As will be discussed in the ensuing argument, several jurisdictions will not even permit such claims to be raised after a knowing, voluntary and intelligent guilty plea.

The standard test for newly discovered evidence was enunciated by this Court, in *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991), in the context of a case where the defendant had gone to trial and been found guilty. In that context, this Court held:

> That henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.

591 So.2d at 915. In so holding, this Court rejected the standard that had been used when evaluating petitions for writs of error coram nobis, where the petitioner had the burden of demonstrating that "the alleged facts must be of such a vital nature that had they been known to the trial court, they *conclusively* would have prevented the entry of the judgment." *Jones*, 591 So.2d at 915, quoting *Hallman v. State*, 371 So.2d 482, 485 (Fla. 1979).

The Fourth District Court of Appeal, in *Scott v. State*, 629 So.2d 888 (Fla. 4th DCA 1993), recognized that the test enunciated in *Jones* could not be applied where a defendant entered a plea of nolo contendere:

> Application of this standard involves examining the evidence produced at trial and comparing it with the "newly discovered evidence" to determine whether the "newly discovered evidence" would "probably produce an acquittal on retrial." *Id*. at 916. Because appellant pled nolo contendere in this case, there was no trial and no evidence introduced. Consequently, it is problematic to apply the *Jones* standard here.

> A more appropriate standard in this case would be the standard for withdrawal of pleas *after* sentencing. In *Williams v. State*, 316 So.2d 267 (Fla. 1975), the supreme court recognized that while the Florida Rules of Criminal Procedure provide guidelines for withdrawing a plea *before* sentencing, there is no rule setting forth requirements for the withdrawal of a plea *after* sentencing. The supreme court in *Williams* adopted the standards enunciated by the American Bar Association for a plea withdrawal after sentence, holding that a defendant should be allowed to withdraw a guilty or nolo contendere plea when the defendant proves the withdrawal is necessary to correct a manifest injustice. *Id*. at 273. The burden to prove a manifest injustice is placed on the defendant.

629 So.2d at 890. The Fourth District, however, did not undertake to define "manifest injustice."

Subsequently, Florida's other district courts of appeal have consistently relied upon the manifest injustice standard of *Scott* when dealing with claims of newly discovered evidence where the defendant entered a plea instead of going to trial. *See Miller v. State*, 814 So.2d 1131 (Fla. 5th DCA 2002), *McFarland v. State*, 929 So. 2d 549 (Fla. 5th DCA 2006); *Perez v. State*, 118 So.3d 298 (Fla. 3d DCA 2013); *Johnson v. State*, 936 So.2d 1196 (Fla. 1st DCA 2006); *Daniel v. State*, 740 So.2d 1179 (Fla. 2d DCA 1999).

Scott relied upon the manifest injustice standard from this Court's prior opinion in *Williams v. State*, 316 So.2d 267 (Fla. 1975), where this Court held that after a guilty plea and sentence, the standard for withdrawing the plea was "manifest injustice." However, *Williams* did not involve a claim of newly

discovered evidence; the claim was that the trial court did not comply with the rules for establishing a factual basis for the guilty plea on the record. While finding that no such manifest injustice existed, this Court, in *Williams*, similarly did not attempt to provide a general definition of "manifest injustice." While *Scott* first applied the test to a newly discovered evidence claim after a nolo contendere plea, the instant case involves a guilty plea. The existence of a guilty plea, where there has been a knowing, voluntary and intelligent guilty plea, provides even more compelling justifications for the need for a stringent, well-definable burden on the defendant. As this Court noted in *Williams*, "[a] plea of guilty is both a confession and a conviction. " 316 So.2d at 270-271. [2]

[2] It should be noted that there was another separate confession, aside from the confession to the police, and the guilty plea. Perez confessed to Dr. Jacobson, who had been appointed by the court to perform a psychiatric evaluation regarding Perez's competency to waive his Miranda rights. Dr. Jacobson determined that Perez was able to exercise a knowing and intelligent waiver of his Miranda rights. (page 4 of Dr. Jacobson's report). Under the Florida Rules of Criminal Procedure 3.211(e), a court appointed evaluation will not be allowed for any purpose other than the determination of the defendant's competency, as it would violate the confidentiality protection extended by 3.211(e). *Caraballo v. State*, 39 So.3d 1234, 1250 (Fla. 2010). The State of Florida recognizes that the confession made to Dr. Jacobson raises questions as to the scope and permissibility of using such confession as it would violate the confidentiality protection under the rule. The confession is mentioned here as an acknowledgement of what was in the record.

Although the State firmly believes that there was no manifest injustice present in the case at bar, and that there is no authority to allow manifest injustice to be considered as a basis to withdraw a guilty plea after sentencing, should the Court disagree, then it is necessary to provide a precise definition of manifest injustice, which reflects the extremely limited situation to which it could potentially apply. Rule 1, the predecessor to Rule 3.850, was copied from its federal counterpart, 28 U.S.C. § 2255. As such, it would reasonably appear to be the case that any rule 3.850 relief based on manifest injustice would be no greater than that which exists under the federal rule which Florida adopted. In *Roy v. Wainwright*, 151 So. 2d 825, 828 (Fla. 1963), the Supreme Court noted that Criminal Procedure Rule 1, the predecessor to Rule 3.850, was promulgated in 1963 and was "copied almost verbatim after a federal statute which has been in effect since June 25, 1948. The language of the rule is identical with the language of the federal act except where changes were necessary to adapt the statute to the Florida courts. The federal act is cited as 28 U.S.C.A. § 2255." The rule was "intended to provide a complete and efficacious post-conviction remedy. . . ." Id. at 828.

The "actual innocence" test is used by federal courts in determining whether federal or state prisoners, under sections 2254 or 2255, can raise claims which are otherwise procedurally barred for reasons other than the federal statute of

limitations. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *House v. Bell*, 126 S.Ct. 2064 (2006). The test imposed an extremely high burden on the prisoner; it refers to actual, factual innocence of the crimes for which the prisoner was convicted and for crimes which the government dismissed (if of equal or greater severity) as part of a plea agreement. *Bousley v. U.S.*, 523 U.S. 614 (1998). In order to satisfy the extremely high burden, the prisoner must set forth new, reliable evidence of actual innocence - to the degree that no rational juror could find the prisoner guilty. *House*; *Schlup*. It is an exception which is intended to apply to the extraordinarily rare case in which such actual innocence is pled and established. It is an exception which recognizes the compelling and important interests of finality in convictions and sentences.

The actual innocence test requires that a moving party seeking to invoke the exception support the claim "with new reliable evidence - that was not presented at trial." *Schlup*, at 324. The court entertaining the actual innocence claim must then determine whether the new evidence is trustworthy, by considering it on its own merits and in light of the pre-existing evidence in the record. Id. at 327-28. After determining that the new evidence is reliable, the reviewing court must consider the claim in light of the evidence in the record as a whole, including evidence that might have been inadmissible at trial. Id. Based upon a review of all of the evidence, an actual innocence claim will have merit and permit a procedural bar to

be circumvented only if it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S. at 326.

Accordingly, if the Court should find that Perez's 3.850 claim of newly discovered evidence after entering a guilty plea is viable, insofar as Florida's Rule 3.850 was originally drafted on the basis of its federal counterpart, the decisions of federal appellate courts should be highly persuasive, and should compel the conclusion that the manifest injustice exception requires allegations and demonstrations of actual innocence in accordance with the standards set forth by the Supreme Court of the United States in *Bousley*; *Schlup*; *House*; *Calderon v. Thompson*, 523 U.S. 538 (1998), and other cases applying the actual innocence test.

It appears that the Fifth District Court of Appeal did in fact apply such a definition when it decided *Miller* and *McFarland.* In *Miller*, which is procedurally most on point with the subject case, the defendant sought to withdraw his guilty plea based on newly discovered evidence. The Fifth District found that the defendant did not meet the manifest injustice standard to withdraw his plea where, inter alia, he did not claim that he was *innocent*, and instead merely claimed that he was guilty of a lesser crime. Similarly, in *McFarland*, the defendant sought to withdraw his nolo contendere plea based on newly discovered evidence. The Fifth District denied the claim because, inter alia, the newly discovered evidence did not

absolve the defendant of all criminal liability. Instead, it absolved him of the crime for which he received the longest sentence, which was the only sentence on which he was still incarcerated.

Absent this Court's delineation of a clear definition of manifest injustice, which is based on proof of actual innocence, post-conviction movants will haphazardly assert claims of manifest injustice and the appellate courts throughout the State will decide them in an inconsistent manner.

B. Survey of Federal and Other State Court Jurisdictions.

A review of the manner in which courts of other jurisdictions treat claims of newly discovered evidence in the aftermath of guilty pleas is beneficial, as it shows the strong reasons for either precluding such claims or for holding defendants to the most stringent burdens after guilty pleas.

The fact that a guilty plea constitutes a confession and an admission of guilt is a fact of such great magnitude that several jurisdictions, including federal courts, will not even permit a defendant to raise a claim of newly discovered evidence in any post-conviction collateral review proceeding after such a guilty plea. *See e.g.*, *People v. Lahon*, 17 A.D. 3d 778, 780, 793 N.Y.S. 2d 238, 241 (N.Y. App. 2005) ("As for defendant's claim of newly discovered evidence, inasmuch as 'vacatur of a judgment of conviction on this ground is expressly conditioned upon the existence of a verdict of guilt after trial,' defendant's guilty plea precludes relief on

this ground."); *People v. Killingbeck*, 212 N.W. 2d 256, 49 Mich. App. 380 (Mich. App. 1973) ("Defendant's attempt to vacate his plea of guilty on the basis of newly discovered evidence involves a nonjurisdictional defect and is deemed to be waived."); *Polz v. State*, 2008 WL 5335019 (Minn. App. 2008) (unpublished) (guilty plea could not be withdrawn on the basis of newly discovered evidence where the guilty plea was voluntary and intelligent).

Federal courts are essentially in accord with the principle that a guilty plea precludes a subsequent freestanding challenge to a federal criminal conviction. The essence of the federal cases, as will be developed here, is that freestanding claims of newly discovered evidence in the aftermath of a guilty plea are generally believed to be precluded by controlling precedent from the United States Supreme Court. To the extent that federal appellate courts recognize that the Supreme Court may not have expressly ruled on the issue, they provide that the standard that the defendants must meet is the "actual innocence" standard –which requires proof of newly discovered evidence that could not be discovered with due diligence and which conclusively demonstrates that the defendant is, in fact, innocent of the offenses to which the defendant pled as well as to those which may have been nolle prossed.

There are two possible ways in which a post-conviction claim of newly discovered evidence might be asserted in federal court to challenge federal

convictions. First, Fed. R. Crim. P. 33 permits post-conviction claims of newly discovered evidence, *but several federal courts have held that the rule applies only when there has been a trial. Caldwell v. United States*, 992 F. Supp. 363 (S.D. N.Y. 1998); *United States v. Collins*, 898 F. 2d 103 (9th Cir. 1990) (as to claim of newly discovered evidence under Rule 33, the court held that Rule 33 applies only when a trial has occurred and a remedy, if any, would be through 28 U.S.C. § 2255); *United States v. Graciani*, 61 F.3d 70, 78 (1st Cir. 1995) ("by its express terms, Rule 33 is confined to those situations in which a trial has been had. In the court below, appellant *admitted* his guilt, abjuring a trial. A defendant who enters a guilty plea cannot thereafter use Rule 33 as a wedge to undo his acknowledgement that he committed the offense. [citations omitted].'); *United States v. Forrest*, 356 F. Supp. 343 (D.C. Mich. 1973) (same).

As 28 U.S.C. § 2255 also permits post-conviction challenges to a federal criminal conviction or sentence, the manner in which federal courts have treated claims of newly discovered evidence under that statute is also instructive. Addressing the scope of § 2255 motions, the Ninth Circuit Court of Appeals summarized federal law:

> Because a § 2255 motion is "commensurate" with habeas relief, it may only be used to collaterally attack a conviction and sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States"

> The Supreme Court has repeatedly stressed the limits of a § 2255 motion…Rather, a motion under § 2255 must be based upon an independent constitutional violation. *See Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993) ("[N]ewly discovered evidence…alleged in a habeas application..must bear upon the constitutionality of the applicant's detention; *the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus*." (emphasis in original) (quoting *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963))); *Turner*, 281 F.3d at 872 (rejecting habeas claim based upon newly discovered evidence because the petitioner "neither allege[d] an independent constitutional violation nor present[ed] affirmative proof of his innocence").

United States v. Berry, 624 F. 3d 1031, 1038 (9th Cir. 2010).

In a similar analysis, the Seventh Circuit Court of Appeals stated:

> …A bona fide motion for a new trial on the basis of newly discovered evidence falls outside § 2255 because it does not contend that the conviction or sentence violates the Constitution or any statute. We know from *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993), that a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent.
>
> …A defendant whose argument is not that newly discovered evidence supports a claim of innocence, but instead that he has new evidence of a constitutional violation or other ground of collateral attack, is making a motion under § 2255…

United States v. Evans, 224 F.3d 670, 673-74 (7th Cir. 2000).

To the extent that some federal courts have recognized a possible exception for utilizing § 2255 motions to raise pure claims of newly discovered evidence in the aftermath of a trial, as opposed to a guilty plea, an extremely stringent burden

was imposed on the convicted offender. *See e.g., Carriger v. Stewart*, 132 F. 3d 463, 476-77 (9th Cir. 1997) (finding the threshold for a "freestanding claim of innocence" to be "extraordinarily high," and further requiring a demonstration of "affirmative proof of innocence."). The typical federal appellate court approach has been to say that the Court does not believe a freestanding claim of actual innocence based on newly discovered evidence exists, but that if it does, the standard of *Schlup* and *House*, which are addressed in the following argument, would control. *See e.g. Rozzelle v. Secretary, Florida Department of Corrections*, 672 F.3d 1000 (11 Cir. 2012),.

The above discussion of § 2255 emanates primarily from the Supreme Court's decision in *Herrera v. Collins*, 506 U.S. 390, 400 (1993), where the Court stated that "claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Due to the unique nature of the death sentence in capital cases, the Court "assume[d] for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional…" 506 U.S. at 417.

Not only was that potential exception limited to the death sentence in capital cases, but it was linked to the federal test for "actual innocence." The "actual

innocence" test to which *Herrera* refers is defined in *Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006); and *Bousley v. United States*, 523 U.S. 614 (1998). Under that test, a moving party seeking to invoke the exception must support the claim "with new reliable evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324. The court entertaining the actual innocence claim must then determine whether the new evidence is trustworthy, by considering it on its own merits and in light of the pre-existing evidence in the record. 513 U.S. at 327-28. After determining that the new evidence is reliable, the reviewing court must consider the claim in light of the evidence in the record as a whole, including evidence that might have been inadmissible at trial. *Id*. Based upon a review of all of the evidence, an actual innocence claim, if it is even cognizable, will have merit only if it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S. at 326.

In a variety of contexts, federal courts have equated the concepts of actual innocence and manifest injustice. *Schlup,* 513 U.S. at 327; *Noltie v. Peterson,* 9 F. 3d 802, 806 (9th Cir. 1993); *Lott v. Stegall*, 77 Fed. Appx. 801 (6th Cir. 2003). However, other state court jurisdictions have not provided much clarity on the issue of the applicable standard for newly discovered evidence claims after a guilty plea. Some have used the concept of manifest injustice, much as Florida courts do, without defining it. *See e.g.*, *Heaton v. State*, 542 So.2d 931 (Ala. 1989) . Others

have used language comparable to that used by this Court in *Jones*. *See e.g.*, *State v. Nobles*, 2012 WL 632396 (N.J. App. 2012) (unpublished) ("[n]ewly discovered evidence is a valid reason entitling a defendant to withdraw a guilty plea only if the evidence permits a court to find that it would probably change the outcome of the case."); *State v. Dickerson*, 632 A. 2d 843 (N.J. App. 1993) (same). Some have applied the federal court "actual innocence" standard set forth above. *See e.g.*, *Ex parte Benavides*, 2010 WL 2110173 (Tex. App. 2010) (unpublished); *Ex parte Brown*, 205 S.W. 3d 538, 544-46 (Tex. App. 2006). Some appear to modify the federal actual innocence standard. *See e.g.*, *State v. Deskins*, 2011 WL 2120072 (Ohio App. 2011) (unpublished) (considering whether the defendant may have *a complete defense* to the charges; the length of time between the guilty plea and the motion to withdraw; and due diligence in discovering the evidence). Other Ohio opinions refer to correcting a manifest injustice and defining that as a "'clear or openly unjust act.'" *State v. Honaker*, 2004 WL 2674624 (Ohio App. 2004) (unpublished) (citing *State ex rel. Schneider v. Kreiner*, 699 N.E. 2d 83 (Ohio 1998). The Ohio manifest injustice standard is referred to as one allowed "only in extraordinary cases." *Honaker*, *supra*; *State v. Smith*, 361 N.E. 2d 1324 (Ohio 1977). Still others, as noted above, will not even permit such claims as they are waived by the guilty plea.

What the foregoing survey of case law from Florida and other jurisdictions reveals is that a claim of newly discovered evidence after a guilty plea is an extraordinary claim, which several jurisdictions will not even entertain, and for which others will impose an extremely high burden on the defendant. That high burden is justified by the following factors: first, the guilty plea is a confession and admission of guilt, and when voluntary should remain presumptively valid. Second, as the factual record accompanying a guilty or nolo contendere plea is typically sparse, there is often little basis upon which to compare the allegedly new evidence with the previously existing record. Third, as newly discovered evidence claims may circumvent the time bars for 3.850 motions, and may, indeed, be raised many years after the offenses or guilty pleas, the ability of the State to obtain and present evidence, whether for a post-conviction hearing or any possible trial, may be seriously impaired. Fourth, the mere reference to "manifest injustice" without an objective, easy-to-apply definition, leaves the adjudication of this issue in the trial court subject to high levels of subjectivity and inconsistent applications throughout the State.

The need for a clear, objective definition of the criteria for manifest injustice in such a claim is highlighted by the confusion which can be seen when considering the Third District's own opinions on the subject. First, in the instant case, the lower court's original opinion relied on a federal definition of manifest

injustice which arose from an issue on direct appeal, not post-conviction collateral review. Second, in *Adams v. State*, 957 So. 2d 1183 (Fla. 3d DCA 2007), the Third District concluded that a claim raised in a 3.800(a) motion was beyond the scope of that motion. Instead, the Third District entertained the claim as a claim of manifest injustice, through a habeas corpus petition, as a 3.850 motion would otherwise have been untimely. The lower court concluded that it was a manifest injustice where probation was violated as a result of a short curfew violation, in light of the defendant's mental health issues, matters which were all fully known many years prior to the pleading which the Third District treated as a habeas corpus petition. In yet another recent case, *De la Hoz v. Crews*, 123 So. 3d 101 (Fla. 3d DCA 2013), the lower court used the concept of manifest injustice to grant relief where appellate counsel on direct appeal had sought a certified question of great public importance based on the *State v. Montgomery*, 39 So.3d 252 (Fla. 2010) line of cases and the Court denied the certified question. In the aftermath of this Court's decision in *Haygood v. State*, 109 So. 3d 735 (Fla. 2013), the Third District concluded that even though *De la Hoz* was not a pipeline case, he should still get the benefit of the decision as it would be a manifest injustice to deny *De la Hoz* relief when other litigants had been granted the same certified question that would have kept the issue alive for review in this Court. The use of the concept of manifest injustice in *De la Hoz* does not in any way focus on the concept of either

actual innocence or the probability that the defendant would have obtained a different result at a trial. A consideration of these and other decisions in Florida compels the conclusion that the concept of manifest injustice, as it currently exists, is nebulous, amorphous and in need of objective structure to serve the legitimate concerns that flow from a guilty plea.

It is for the foregoing reasons that the State submits that if such claims are even viable in 3.850 motions after a guilty plea, the "actual innocence test" enunciated by the federal courts is best suited to serve the legitimate concerns that exist. While the Third District in the instant case recognized the State's argument that the federal actual innocence standard should apply when defining manifest injustice, the Third District rejected the State's argument based on its belief that this Court, in *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008), had already rejected the federal actual innocence standard for such claims. The problem with the Third District's analysis and conclusion is that *Tompkins* did not involve a guilty plea. *Tompkins* was a death penalty case, in which the defendant was convicted and sentenced *after a trial and jury verdict*. Furthermore, Tompkins was attempting to present a pure claim of actual innocence, divorced from his claim of newly discovered evidence. 994 So. 2d at 1088-90. This Court noted that it rejected the viability of any such pure claim of actual innocence. 994 So. 2d at 1089. To bolster this Court's assertion that a pure claim of actual innocence was

not viable in Florida post-conviction proceedings, this Court noted that the *Jones* test for newly discovered evidence was more "liberal" than the federal "actual innocence test." None of that analysis or discussion had anything to do with the newly discovered evidence standard that should be applied after a guilty plea.

C. Application of Manifest Injustice Test in the Instant Case.

Perez's allegations of newly discovered evidence, in the form of Delarosa and Montanez's statements, even if true, would not rise to the level of manifest injustice whether it be under an actual innocence test or any other manifest injustice test that this Court might utilize. In applying the "actual innocence" test to Delarosa and Montanez's statements, the manifest injustice standard fails to be reached. The situation in the subject matter here is a case of "he said, she said" in which two alleged witnesses have now come forward with facts that Perez would have already known, i.e. that Fat Steve shot the victim. Delarosa claims that he saw the shooting and saw Perez running from the scene with other people. Additionally, there was an independent witness, Carlos Hernandez, who gave a sworn statement detailing how he saw Perez kill the victim. Taking the facts of this case into consideration, instead of manifest injustice, there is a sort of credibility contest between Perez's confessions and Hernandez's testimony, versus Delarosa and Montanez's alleged claims. This should not be the focus of manifest injustice. The manifest injustice standard should instead focus on the impossibility of a

defendant being *guilty*. The actual innocence exception is a narrow exception that requires factual, not merely legal innocence and that is just not the case herein.

The Third District's opinion below is problematic for various reasons. The cases the court cites to in its opinion are distinguishable from the facts of the case against Perez. First, in its opinion, the court failed to establish a solid definition of manifest injustice in Florida law. Furthermore, it cites to *Whitsett v. State*, 993 So.2d 1115 (Fla. 4th DCA 2008) as justification for granting Perez an evidentiary hearing based on newly discovered evidence. *Whitsett* was a case in which the defendant entered a "guilty in best interest plea" in which he did not admit guilt, but admitted there was sufficient evidence to convict him. *Id.* Perez, in contrast, entered a guilty plea and admitted to killing the victim. *Whitsett* addressed and explained at length the difference between a guilty plea and a nolo plea, i.e. that a guilty plea is a confession. Furthermore, *Whitsett* maintained at his plea hearing that he was innocent, Perez did not. In the subject opinion, the Third District notes that Perez pled knowing he was innocent, but there was nothing in the record in which Perez professed that he was innocent and that he never killed the victim. The closest thing to his professing innocence was his claim that he killed the victim in self defense, which was entirely contrary to what his two "new" witnesses are claiming.

If the actual innocence test, using the federal standard, is applied here in considering whether Perez has suffered a manifest injustice and thus is entitled to an evidentiary hearing, Perez fails because the burden is so extraordinarily high. In other words, Perez cannot meet the burden of establishing that it was impossible that he was the killer. *See e.g. Herrera v. Collins*, 506 U.S. 390 (1993) and *Jackson v. Virginia*, 443 U.S. 307 (1979). That is the standard that should be used and Perez cannot meet it.

Several examples of the manner in which federal appellate courts have applied the actual innocence test and found allegedly new evidence insufficient under that test clearly demonstrate why the defendant, in the instant case, would not satisfy that standard if it were applied in this case. In *Milton v. Secretary, Department of Corrections*, 2009 WL 3150246 (11th Cir. 2009) (unpublished), the Court found:

> Even if any of the affidavits presented new, reliable evidence of actual innocence, the evidence presented in the affidavits is not sufficient to show that "more likely than not that no reasonable juror would have convicted" Milton in light of the evidence. *Schlup*, 513 U.S. at 327, 115 S.Ct. at 867. The evidence is insufficient because, despite the fact that several of the affidavits corroborate a portion of Milton's version of events and others implicate the victims' mother in the crime or undermine her trial testimony, none of the evidence negates Milton's confession or his taped conversation with the victim's mother wherein he implicates another individual in the murder. . . .

In I*n re Davis*, 565 F. 3d 810 (11th Cir. 2009), one government witness, who testified at trial, substantially changed his version of events afterwards. Originally, witness Gordon described two shootings he observed and the State then introduced evidence suggesting that the shooters at both locations were the same person. At trial, Gordon claimed he did not see the shooter at one of the incidents. In a subsequent affidavit, he said that Davis had not been at the party which was the scene of one of the two shootings. The Eleventh Circuit, addressing this affidavit under the actual innocence standard, found that it did not negate the rest of the State's evidence at trial, which included other eyewitnesses to the shooting who unambiguously identified Davis as the shooter. Moreover, the defendant, Davis, had confessed to the murder to two other individuals. Under such circumstances, the new affidavit from witness Gordon did not rise to the point "where no reasonable factfinder would have credited the State's witnesses." Likewise, in the instant case, the new affidavits from the prison inmates would not preclude a reasonable juror from finding the defendant guilty on the basis of his own confession plus the testimony of an independent eyewitness who has not recanted.

In *Rozzelle v. Secretary, Florida Department of Corrections*, 672 F. 3d 1000 (11th Cir. 2012), the defendant, after trial, proffered evidence which went to his state of mind, and, at most, would possibly reduce the conviction from second

degree murder to a lesser degree of homicide. The Eleventh Circuit concluded that such evidence, even if credited, did not constitute evidence of actual innocence. In *Melson v. Allen*, 548 F. 3d 993, 1002-03 (11th Cir. 2008), judgment vacated and remanded for further proceedings, 130 S.Ct. 3491 (2010) (the remand was on grounds unrelated to whether the alleged newly discovered evidence satisfied the actual innocence standards) Melson proffered: (1) two statements from his codefendant that Melson was not his accomplice; (2) the affidavit of a state witness recanting trial testimony that Melson asked her to provide a false alibi; (3) an affidavit from a private investigator recounting the descriptions of the perpetrator from the 911 caller; and (4) affidavits from other individuals implicating a third person as the accomplice, and not Melson. All of these fell short of the actual innocence standard. The Eleventh Circuit emphasized, in its detailed analysis, that some of these were circumspect due to the passage of time. Others conflicted with the defendant's own alibi defense at trial, much as the affidavits in the instant case which assert that Perez was not the shooter, conflict with Perez's own statement and guilty plea in which he effectively confessed to the shooting.

The facts of the case at bar include: 1) a confession, which the trial court has already been deemed to be voluntary, 2) a guilty plea, as opposed to a nolo plea, and 3) an independent eyewitness naming Perez as the shooter and negating any

claim of self defense. Just as the facts of the above cases precluded a finding of actual innocence, the fact herein clearly do not rise to the federal level of actual innocence. Moreover, even if the Court applies a standard or definition of manifest injustice which imposes a lesser burden than the actual innocence requirement set forth in federal case law, the facts alleged by Perez herein would not rise to the level of any conceivable definition of manifest injustice.

Even if the Court disagrees with the trial court's finding that the affidavits did not constitute newly discovered evidence, the State maintains that Perez still is not entitled to an evidentiary hearing as the affidavits do not establish manifest injustice and the allegations contained therein are refuted by the record. A defendant is not automatically entitled to an evidentiary hearing upon filing an affidavit stating that someone else committed the crime for which the defendant was convicted. Instead, such a determination must be made on a case-by-case basis. *Johnson v. Singletary*, 647 So.2d 106 (Fla.1994), *Poff v. State*, 41 So.3d 1062 (Fla. 3d DCA 2010); *Hunter v. State*, 29 So.3d 256 (Fla.2008) (the Court held that the trial court properly denied the defendant an evidentiary hearing upon considering that even if defendant sufficiently alleged his claim and that the evidence properly qualified as newly discovered evidence, the evidence was not of such a nature that it would probably produce an acquittal on retrial, where other witnesses testified as to the same matters); *Hough v. State*, 679 So.2d 1300 (Fla.

5th DCA 1996) (the Fifth District held that an evidentiary hearing was unnecessary based on an affidavit which stated that someone else committed the crime, where the defendant had been identified as the perpetrator by the victim as well as by the other codefendant).

In reviewing a trial court's summary denial of a motion for postconviction relief, an appellate court must accept the defendant's allegations as true *to the extent that they are not conclusively refuted by the record*. *Rutherford v. State*, 926 So.2d 1100, 1108 (Fla.2006). The allegations in Perez's motion and the affidavits of Delarosa and Montanez were conclusively refuted by the record in the form of Perez's confession, which was deemed to be voluntary, his guilty plea, which is deemed to be an additional confession, and the statement of eyewitness Hernandez. The summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient *or* its allegations are conclusively refuted by the record. *McLin v. State*, 827 So.2d 948, 954 (Fla.2002). As the allegations were undoubtedly refuted by the record, the State requests that the lower court's opinion be reversed and that the Court remand the matter to the lower court with instructions to affirm the trial court's order summarily denying the motion.

CONCLUSION

Based on the foregoing, the Court should set forth a definition of manifest injustice which requires actual innocence and the Third District's opinion should be reversed and that matter remanded to the lower court with instructions to affirm the trial court's order summarily denying the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief was mailed to Steven M. Blickensderfer, Esq. Carlton Fields Jordan Burt, P.A., 100 S.E. Second St. Ste. 4200 Miami, Florida 33131-2113 SBlickensderfer@cfjblaw.com, this 14th day of January 2014.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

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

s/ Joanne Diez
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