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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 REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

RULES

STATEMENT OF THE CASE AND FACTS

At the outset of the Statement Of The Case And Facts portion of his Answer Brief, Respondent appears to argue that the Statement Of The Case And Facts must be restricted to the version of the facts which are set forth in Respondent's 3.850 motion and the attachments thereto, unless conclusively refuted by the record. Although such a view of the facts applies in connection with the actual analysis portion of an appellate court's review of a trial court's summary denial of a motion for post conviction relief, any facts contained in the record relating to whether the evidence is newly discovered and whether Perez has proven manifest injustice are relevant to this Court's consideration of the subject matter.

SUMMARY OF THE ARGUMENT

The Petitioner relies on the Summary of Argument set forth in its Initial Brief of Petitioner on the Merits.

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.

No case law from this Court has provided a definition of manifest injustice in general, much less in connection with a claim of newly discovered evidence in the aftermath of a guilty plea. In *Williams v. State*, 316 So.2d 267(Fla. 1975), the defendant sought to withdraw his guilty plea based on an allegation that the trial court failed to establish, on the record, the existence of a factual basis for the plea. At the time, there was no criminal rule in existence that set forth requirements for the withdrawal of a plea after sentencing. Accordingly, the Court adopted the standards set forth by the American Bar Association for withdrawing a plea after sentencing and held that the a defendant should be allowed to withdraw a plea of guilty or nolo contendere after sentencing if the defendant proves the withdrawal is necessary to prevent a manifest injustice. *Id. at 273.* However, the Court did not provide a definition of manifest injustice.

Despite this lack of a definition, Perez represents *Williams* as *defining* manifest injustice as clear prejudice and consistently refers to such alleged *well settled definitions of manifest injustice and prejudice* as set forth in *Williams*. (Brief of Respondent pp. 10, 34, 38). The only reference to "clear prejudice" was when the Court cited to specific deficiencies in the plea process, which were set forth by the American Bar Association, which a defendant must prove in order to withdraw a plea after sentencing. The Court then stated "[t]he quoted American Bar Association Standard clearly puts the burden on the defendant to 'prove' a 'manifest injustice' has occurred. In other words, *clear prejudice* must be shown." *Id.* at 274. (Emphasis added). This summation by the Court can hardly be considered a definition, much less one that can be relied upon to provide clarity and guidance to courts and litigants. Furthermore, the comment is a reference to the enumerated deficiencies in connection with the plea process itself, and does not address manifest injustice in connection with newly discovered evidence, as in the case at bar.

Perez argues that the Court's opinions in *Campbell v. State*, 125 So.3d 733, 735 (Fla. 2013); *LeDuc v. State*, 415 So.2d 721, 722 (Fla. 1982) and *Robinson v. State*, 373 So.2d 898, 902 – 903 (Fla. 1979) "reaffirmed the *Williams* standard equating manifest injustice with clear prejudice…" (Brief of Respondent p. 12). Once again, the State maintains that *Williams* did not set forth a definition of

manifest injustice, nor did it set a standard by which manifest injustice is equated with clear prejudice.

Campbell involved a certified question from the Second District as to whether a defendant may withdraw a plea of guilty or nolo contendere after sentencing based on a trial court's failure to formally accept the plea without showing that the failure to accept the plea caused manifest injustice or clear prejudice? *Id*. at 734 - 735. The Court ultimately held that the plea was formally accepted and, thus, never addressed the certified question, but did refer to the Court's requirement that a defendant demonstrate manifest injustice or prejudice in order to withdraw a plea of guilty or nolo contendere after sentencing. *Id*. at 736. *Robinson*, which addressed the constitutionality of statutorily precluding the right to appeal from a guilty plea, referred to *Williams* and the "obligation to show a manifest injustice *or prejudice* as grounds for such a plea withdrawal after sentence." *Robinson* at 903. (emphasis added) .

LeDuc, which involves a claim that defendant's guilty plea was not knowingly and voluntarily entered into due to coercion from trial counsel, does not contain a single reference to "prejudice". Instead, the opinion held that the defendant's claims of ineffective assistance of trial counsel and involuntariness of the guilty plea required an evidentiary hearing. In evaluating the claim that the plea was involuntary, the Court instructed the trial court to follow its decision in

Robinson, which referred to *Williams*, in explaining that a defendant seeking to withdraw a plea after sentencing must prove that a manifest injustice has occurred. *LeDuc* at 722 – 723.

Like *Williams*, the cases of *Campbell*, *LeDuc* and *Robinson*, are all distinguishable from the case at bar because they do not address manifest injustice in connection with newly discovered evidence in the aftermath of a guilty plea. Instead, they involve claims involving deficiencies in the formal and technical entry into the plea.

Perez goes on to argue that newly discovered evidence of actual innocence is the greatest example of a manifest injustice and cites to *Hernandez v. State*, 20 So.3d 417 (Fla. 3d DCA 2009); *Deck v. State*, 985 So.2d 1234 (Fla. 2d DCA 2008); *Mason v. State*, 976 So.2d 80 (Fla. 3d DCA 2008); *Johnson v. State*, 936 So.2d 1196 (Fla. 1st DCA 2006); *Taylor v. State*, 662 So.2d 1031 (Fla. 1st DCA 1995) and *Malcom v. State*, 605 So.2d 945 (Fla. 3d DCA 1992). (Brief of Respondent p. 13 – 14).

Significantly, these cases, which all deal with claims of newly discovered evidence, do not make a single mention of prejudice, much less clear prejudice. Instead, the newly discovered evidence cases only refer to the defendant's burden to prove manifest injustice, which remains an undefined and amorphous term. Clearly, the American Bar Association Standards addressed in *Williams* and its

progeny do not apply to claims of newly discovered evidence in the aftermath of a guilty plea, as such cases are in a class unto themselves. Thus, for the reasons set forth in the State's initial brief on the merits, it is necessary to define the term "manifest injustice" in connection with claims in which a defendant is seeking to withdraw a guilty plea based on newly discovered evidence and that such definition must be objective and capable of application in a consistent manner in different cases, and 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.

These sentiments have been acknowledged by the Court. In *Williams*, the Court specifically noted the magnitude of and implications of a defendant's entry of a guilty plea when it stated "[a] plea of guilty is both a confession and a conviction. By entering a plea of guilty, the defendant is consenting to the judgment of conviction. *Boykin v. Alabama*, *supra*. Clearly, it is an extremely important step in the criminal process and should not be hurried or treated summarily." *Williams* at 270-271.

In *Campbell and Witt v. State*, 387 So.2d *922, 925 (Fla.1980*), the court acknowledged the need for finality of judgments. "The importance of finality in

any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases." *Witt* at 925. In *Campbell*, the Court stated:

> Lastly, this Court's long-standing interest in the finality of criminal proceedings must not be overlooked:
>
> > The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.
>
> *Witt v. State*, 387 So.2d *922, 925 (Fla.1980*) (footnote omitted). To allow the defendant to reverse the entire process that he knowingly and voluntarily agreed to eleven years earlier solely based on the trial judge's inadvertent failure to utter a simple phrase would seem to "casts a cloud of tentativeness over the criminal justice system." Id. It also appears that reversing the Second District's holding would possibly cause substantial prejudice to the State in the consequent trial of the defendant, due to the expected decaying of evidence over time, along with the possible memory lapse of potential witnesses.

Campell at 742.

Allowing Perez to withdraw the plea based on the allegations of newly discovered evidence, which were raised nine years after he knowingly and

voluntarily entered into his plea, would likewise thwart the need for finality of criminal proceedings.

Perez's claims do not constitute newly discovered evidence and are refuted by the record. The Answer Brief of Respondent asserts that the State does not challenge the Third District's ruling that the letters of Delarosa and Montanez were newly discovered. (Brief of Respondent pp. 9, 29). The State vehemently denies any such position. As is evidenced in its pleadings in the trial court as well as the lower court, the State consistently alleged that the letters of Delarosa and Montanez were not newly discovered, as the allegation that someone else (i.e. Fat Steve) committed the murder would always have been personally known to Perez. (R. 82 – 94, 267 – 287, 323 - 328). The State in no way disavows or waives its original position that the letters were not newly discovered evidence, and therefore did not qualify as an exception to the two year limitation for bringing claims pursuant to Fla.R.Crim. P. 3.850(b), thus, the claim was legally insufficient and could be summarily denied. The State further argued, in the alternative and for the sake of argument, that even if the claim was not legally insufficient, and the evidence was considered to be newly discovered, it could still be summarily denied because there was no manifest injustice and that the claim was conclusively refuted by the record.

The State requested that the lower court's opinion be reversed and the matter remanded to the lower court with instructions to affirm the trial court's order summarily denying the motion. However, as the certified question to this Court is based on establishing a clear definition of manifest injustice, the State focused its argument in its initial brief on the merits on the alternative portion of its argument which assumed, for the sake of argument, that even if the Court disagrees with the trial court's findings that the letters did not constitute newly discovered evidence, Perez is still not entitled to an evidentiary hearing as the letters do not establish manifest injustice and the allegations contained therein are refuted by the record. (Brief at page 28, 33).

Nevertheless, in brief response to Perez's argument that Delarosa's and Montanez's letter constitute newly discovered evidence and are not refuted by the record, the State will explain why the letters are not newly discovered and point out the following salient portions of the record which refute Perez's claim. First, the letters allege the manner in which the murder was committed, i.e., drive-by shooting by "Fat Steve." This alleged drive-by was known to Perez, as Delarosa claims in his affidavit that after the victim was shot and fell, Perez took off running. Perez now claims he was at the scene of the crime and if he is to be believed, he also saw Fat Steve shoot the victim. Furthermore, both Delarosa and Montanez claim they saw Fat Steve force Perez into a car at gun point. These are

facts Perez would know himself, as he was there. They do not constitute newly discovered evidence.

In addition to not being newly discovered evidence, the letters and allegations in support of Perez's claims are also conclusively refuted by the following record evidence:

1) Perez's April 16, 1999, confession to the police in which he admits to shooting the victim, but claims it was in self defense. Perez also admits that he shaved his head after the shooting in order to avoid being identified by his distinctive long hair. He also, told police where he disposed of the gun and assisted them in retrieving the gun from the Miami River. (R. 12 – 41). Despite the fact that his confession was deemed to be voluntary by virtue of the trial court denying Perez's motion to suppress on December 11, 2000, Perez persists in attempting to argue that the confession was coerced. At the time in which Perez entered his plea, he did not reserve the right to appeal any issue in connection with his confession.

2) Perez's confession to Dr. Jacobson, over a year after confessing to the police, as evidenced in the doctor's December 11, 2000, written report, which Perez relies on extensively in order to claim that he had borderline intellectual functioning and a history of seizures.

This same report states that over a year after the murder, Perez confessed again, this time to Dr. Jacobson, asserting that he shot the victim in self defense.

(R. 43-45). In the report, Perez acknowledges that his statement surrounding his shooting of Ramirez is accurate. (R. 43-44). This report states that although Perez seems to have borderline intellectual functioning, he was viewed as not meeting the requirements for assistance by Developmental Services and was viewed as not being retarded or psychotic. (R. 43-46). The State maintains that the report should be considered by the Court in order to rebut and refute Perez's claims that his confession was not voluntary and that the evidence is not newly discovered. *See Kansas v. Cheever, 134 S.Ct. 596 (2013); Buchanan v. Kentucky*, 483 U.S. 402 (1987).

3) Perez's December 11, 2000, guilty plea, which was entered after his motion to suppress was denied. This Court has held that guilty pleas are a confession. *Robinson* at 902 (the law is clear that a plea of guilty is an in-court confession and an agreement for the court to enter a judgment of conviction). *Robinson* also cited to *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), for the proposition that "*[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment*."

At the time he entered his guilty plea, Perez did not reserve the right to appeal any allegedly dispositive issues. After he entered his guilty plea, he did not file a motion to withdraw his plea after sentencing, which would have had to be

filed within 30 days after sentencing. Fla. R. Crim. P. Rule 3.170. Nor did he ever file a most for post conviction relief claiming his plea was involuntary, pursuant to Fla. R. Crim. P. 3.850(a)(5). Such a motion would have failed as the allegations of voluntariness involve actions in connection with the plea process, such as misadvice or coercion from counsel, lack of a factual basis, etcetera. Instead, in an attempt to circumvent rule 3.850(b)'s two year time limitation, Perez is now claiming that the proffered newly discovered testimony of two individuals who were at the scene at the time of the offense can now somehow form the basis to withdraw a guilty plea. However, none of the alleged newly discovered evidence goes to the voluntariness of the plea.

4) The April 21, 1999, sworn statement and the November 30, 2000, deposition under oath of witness Carlos Hernandez that the victim previously shot at Perez and that Hernandez saw Perez shoot the victim on April 15, 1999. (R. 47 – 54).

This record evidence clearly refuted the allegation that Perez took the rap for Fat Steve, and went so far as to bring the police to retrieve the gun, when the allegedly newly discovered evidence is that Fat Steve only told Perez to keep quiet. The facts 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.

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 additional confession to Dr. Jacobson, 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.

In all other respects, Petitioner relies on its Initial Brief.

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 Amended Reply 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 29th day of April 2014.

s/ Joanne Diez
JOANNE DIEZ
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

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

s/ Joanne Diez
JOANNE DIEZ
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