IN THE SUPREME COURT OF FLORIDA

WILLIAM SWEET,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1987
L.T. NO. 1994-CF-002899
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Facts of the Direct Appeal Case

The relevant facts concerning the June 26/27, 1990, murder of Felicia Bryant are recited in the Florida Supreme Court's opinion in the direct appeal:

> On June 6, 1990, Marcene Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.
>
> At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
>
> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the

> other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.
>
> Sweet was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed this recommendation.

Sweet v. State, 624 So. 2d 1138, 1139 (Fla. 1993) (Sweet I). In imposing the death sentence, the trial judge found the following aggravating factors: (1) Sweet had previously been convicted of several violent felonies, including armed robbery, possession of a firearm by a convicted felon, riot, resisting arrest with violence, and the contemporaneous attempted murders and burglary; (2) the murder was committed to avoid arrest; (3) the murder was committed during a burglary; and (4) the murder was cold, calculated, and premeditated. The court found no statutory mitigating circumstances, but found as nonstaturory mitigation that Appellant lacked true parental guidance as a teenager, which was given slight weight. Appellant's conviction and sentence were affirmed on direct appeal. Id. The United States Supreme Court denied certiorari on February 28, 1994. Sweet v. Florida, 510 U.S. 1170 (1994) (Sweet II).

Postconviction Proceedings

Appellant filed his initial motion for postconviction relief on August 1, 1995. The collateral court denied the motion. On January 31, 2002, the Florida Supreme Court affirmed. Sweet v.

State, 810 So. 2d 854 (Fla. 2002) (Sweet III). While the appeal of the postconviction motion was pending, Appellant filed a petition for writ of habeas corpus in the Florida Supreme Court. His petition was denied on June 13, 2002. Sweet v. Moore, 822 So. 2d 1269 (Fla. 2002) (Sweet IV).

On May 8, 2003, Appellant filed a successive motion for postconviction relief in the state trial court, raising a claim under Ring v. Arizona, 536 U.S. 584 (2002). The trial court denied the motion, finding the motion was "untimely and facially insufficient. Fla. R. Crim. P. 3.851(d)(1); 3.851(e)(1)(E); 3.851(e)(2)(A); 3.851(e)(2)(B) (2000)." Sweet IV, at 1313. Furthermore, the state trial court held, "even assuming, *arguendo*, that Appellant's motion was timely and sufficient, on the merits the motion had to be denied because the Supreme Court of Florida had already rejected this claim in other cases." Id. (internal page numbers omitted). The Florida Supreme Court affirmed. Sweet v. State, 900 So. 2d 555 (Fla. 2004) (Sweet V).

Appellant then filed a petition for habeas relief in the United States District Court for the Middle District of Florida on January 18, 2005. The district court concluded the petition was barred by the statute of limitations under 28 U.S.C. § 2244 (d). The Eleventh Circuit Court of Appeals affirmed the denial. Sweet

v. Sec'y, Dept. of Corr., 467 F.3d 1311 (11th Cir. 2006) (Sweet VI).

On March 8, 2005, Appellant filed a third motion for post-conviction relief. This time, Appellant claimed he was entitled to relief pursuant to the United States Supreme Court decision in Crawford v. Washington, 541 U.S. 36 (2004). On July 14, 2005, the trial court denied the motion. On June 16, 2006, the Florida Supreme Court affirmed. Sweet v. State, 934 So. 2d 450 (Fla. 2006) (Sweet VII)

On April 30, 2008, Appellant filed a fourth successive motion. The collateral court denied the motion. Appellant did not appeal the denial of the motion.

On March 19, 2013, Appellant filed his fifth successive motion, raising a claim under Martinez v. Ryan, 132 S. Ct. 1309 (2012). On September 20, 2013, the postconviction court denied that motion. Once again, Appellant did not appeal the denial of his motion.[1]

On October 28, 2016, Appellant filed Defendant's Sixth Successive Motion to Vacate Judgments of Conviction and Sentence (hereinafter "Motion"), raising a claim of newly discovered

[1] In addition to this sixth motion for postconviction relief, Sweet filed a seventh motion for postconviction relief raising a Hurst claim. Sweet is not in the Hurst window. The collateral court denied the motion and Sweet appealed. His appeal is still pending, but based on Florida Supreme Court precedent, Sweet is not eligible for Hurst relief.

evidence. The allegedly newly discovered evidence was an unsworn statement from an inmate serving life in prison in the Department of Corrections alleging he was present at the time of the murder and that Appellant was not the shooter (based on build and skin color). Wilridge came forward nearly 26 years after the murder.[2]

The State filed its answer to Appellant's Motion (hereinafter "Answer" or "State's Answer") on November 17, 2016. An evidentiary hearing was held on July 13, 2017, where Appellant presented testimony and exhibits to support his Motion. Likewise, the State presented documents in opposition to the motion. At the conclusion of the hearing, the parties submitted written closing arguments. The trial court, on October 30, 2017, issued its written order, denying Appellant's Motion.

Summary of the Testimony at the Evidentiary Hearing

Frank Tassone

Frank Tassone testified at the evidentiary hearing apparently to establish the successive motion was timely filed. He was the

[2] Sweet also presented the testimony of Marcene Cofer at the evidentiary hearing. Ms. Cofer was one of the shooting victims in this case. Sweet acknowledged that Ms. Cofer's testimony was not presented in support of a separate claim of newly discovered evidence. Indeed, Sweet's successive motion raised only one claim; newly discovered evidence in the form of Eric Wilridge's unsworn affidavit. In offering Ms. Cofer's testimony, Sweet claimed the court should consider Ms. Cofer's testimony in the context of what a new trial would look like if both Ms. Cofer and Mr. Wilridge testified for the defense. Nonetheless, the only claim properly before this Court is a claim regarding newly discovered testimony from Eric Wilridge.

defense counsel for Appellant around the time that Wilridge wrote the affidavit. Tassone testified to receiving a phone call from someone who represented herself to be Marcene Cofer. (Evid. Hrg. Trans. 38-39). He further stated that he was unable to get a sworn affidavit from the person who claimed to be Cofer and was unable to get in touch with her again. (Evid. Hrg. Trans. 44-45). After receiving the phone call, Tassone did not file a motion for postconviction, feeling that he needed more information to file a motion. (Evid. Hrg. Trans. 45).

Tassone also received a non-sworn affidavit from Eric Wilridge. Tassone testified that after receiving the affidavit, he sent a letter to Wilridge advising that he was no longer representing Appellant and had forwarded the documents to the new attorney. (Evid. Hrg. Trans. 30). Tassone testified to receiving the affidavit about a week after it was signed on October 28, 2015. (Evid. Hrg. Trans. 29).

Marcene Cofer

Marcene Cofer, one of the State's witnesses at the trial, also testified at the evidentiary hearing for the defense. She testified that the murder has caused her to live with a lot of stress. (Evid. Hrg. Trans. 61). Cofer testified that she deals with the stress by smoking marijuana. (Evid. Hrg. Trans. 62). During cross-examination, she testified that she smokes an average of 15 times per day and that she had smoked 5 times the day of the

evidentiary hearing. (Evid. Hrg. Trans. 70). She also admitted to having smoked marijuana on the day of her deposition on June 27, 2017. (Evid. Hrg. Trans. 70). Cofer admitted that during the trial, she was incarcerated and had not smoked when she testified. (Evid. Hrg. Trans. 86). She also admitted to being a 5-time convicted felon. (Evid. Hrg. Trans. 69).

Cofer testified that she had contact with Appellant's defense attorney to tell him that she was no longer sure who had shot her the night of the murder. She was unsure if she had called him or if he had called her. (Evid. Hrg. Trans. 68-69). Cofer only got in contact with the defense attorney after Appellant's sister contacted her. (Evid. Hrg. Trans. 71).

Cofer admitted to no longer being sure about who committed the murder. She stated that her sister had informed her that Appellant was not the shooter that night. (Evid. Hrg. Trans. 66-67). Cofer offered no explanation as to how her sister got her information but it is undisputed her sister was not present at the time of the shooting. Additionally, Cofer testified that she received a call from Appellant's sister, who gave her a list of what to say. (Evid. Hrg. Trans. 71-73). Cofer testified that she wrote the list down, but could not find it in time for the evidentiary hearing. (Evid. Hrg. Trans. 73). When questioned by the State about whether she was pressured by Appellant's sister to testify about no longer being sure, Cofer was evasive and tried to

say she was not; however, she ultimately admitted that during her deposition, she stated that she felt pressured by Appellant's sister. (Evid. Hrg. Trans. 78). Cofer testified at the evidentiary hearing that Appellant's sister was pressuring her to tell the truth; however, that was contradictory to what she stated at her deposition, where she testified that Appellant's sister asked her to lie. (Evid. Hrg. Trans. 77). Despite claiming that she was always unsure of who had shot her, Cofer did not come forward until after her conversation with Appellant's sister. (Evid. Hrg. Trans. 81).

When confronted with a copy of the trial transcript of her testimony, Cofer admitted she testified truthfully at trial when she identified Appellant as the person who shot her. (Evid. Hrg. Trans. 82-83). She also stated that she was sure about the identification in trial, but that she was not sure now, nearly 30 years later. (Evid. Hrg. Trans. 83).

This Court also asked questions of Cofer after the examination by the attorneys. Cofer claimed that Appellant was a stranger to her, yet she smiled at him when she entered the courtroom for the evidentiary hearing. (Evid. Hrg. Trans. 90). She stated that she did not personally know him. (Evid. Hrg. Trans. 91).

Eric Wilridge

Eric Wilridge is a seven-time convicted felon. He is currently serving a life sentence for an attempted murder on a law

enforcement officer. Wilridge was prosecuted by the State Attorney for the Fourth Judicial Circuit.

Wilridge testified that, on the night of the murder, while he was on a payphone at a local laundromat, he saw three individuals at Cofer's apartment. (Evid. Hrg. Trans. 103-05). Because of the distance, he could not tell the gender or ethnicity of the individuals. (Evid. Hrg. Trans. 104). Wilridge initially described the lighting as dim from a streetlight that was across the street from Cofer's apartment. (Evid. Hrg. Trans. 104-05); however, he later claimed there were streetlights in front of Cofer's apartment, as well as one in the alleyway right in front of the apartment. (Evid. Hrg. Trans. 114).

Wilridge told the court he was on a bicycle. After riding around and stopping again, an individual he knew from the neighborhood approached him and they had a conversation. (Evid. Hrg. Trans. 108). Wilridge then moved to about 25 yards away from Cofer's apartment to see if something was happening at the apartment. (Evid. Hrg. Trans. 111).

Wilridge testified that he saw a man standing in the doorway with his hand extended. (Evid. Hrg. Trans. 112). He could not tell if it had been one of the three individuals he saw earlier. (Evid. Hrg. Trans. 112). Wilridge described the man as wearing dark clothing with something on his head that covered the face. (Evid. Hrg. Trans. 112-13). He estimated the man's height to be 5 feet,

9 inches with light brown skin. (Evid. Hrg. Trans. 114). Wilridge claimed that he knew Appellant well enough that he could tell the man was not Appellant, who is taller and darker. (Evid. Hrg. Trans. 126).

Wilridge stated that he did not hear the person speak and that the person did not really move at all, other than holding his arm out. (Evid. Hrg. Trans. 114). He also stated that he did not know the person. (Evid. Hrg. Trans. 115). Wilridge testified that he stayed about 2 to 3 minutes before riding off on his bicycle. (Evid. Hrg. Trans. 115). He never saw the person enter the apartment and he only heard a shot after he left the area. (Evid. Hrg. Trans. 115).

Wilridge testified to hearing about the shooting the following day. (Evid. Hrg. Trans. 118). However, he did not report anything to the police about what he saw. (Evid. Hrg. Trans. 118).

Wilridge claimed he came forward more than 25 years after the murder because it was on his mind; but nothing had happened to bring it to the forefront of his mind. (Evid. Hrg. Trans. 122-23). Wilridge's affidavit was not sworn because he chose to not have the affidavit notarized. (Evid. Hrg. Trans. 131). The affidavit states that Wilridge saw the person in the doorway shooting into the apartment. At the evidentiary hearing, Wilridge asserted he did not see the man shooting as the person did not move at all while he was watching. (Evid. Hrg. Trans. 132). Wilridge confirmed

that the area where the murder happened was dark and he was up to 50 yards away from Cofer's apartment. (Evid. Hrg. Trans. 133-34).

Wilridge wrote letters to this Court, as well as the State, claiming that the unsworn affidavit he had sent to Tassone was a lie. (Evid. Hrg. Trans. 124, 137-38). Wilridge claimed during cross-examination that the letters written to this Court and the State were lies. (Evid. Hrg. Trans. 139).

Wilridge admitted to being arrested 5 days prior to the murder for a possession of cocaine charge. (Evid. Hrg. Trans. 143). Wilridge claimed to have been released a few days later on his own recognizance. (Evid. Hrg. Trans. 141-43).

Record Citations

Citations to the record shall be designated as follows: The direct appeal record shall be referred to by "TR" and followed by the volume and page number; references to Appellant's Motion shall be referred to by "Motion" followed by the page number; references to the evidentiary hearing transcripts shall be referred to by the date, followed by "Evid. Hrg. Trans." and the page number. Any other references will be self-evident.

SUMMARY OF THE ARGUMENT

ISSUE I: The postconviction court correctly found Marcene Cofer to not be credible. The postconviction court is in a superior position to evaluate and weigh the testimony of witnesses based on its observation of the bearing, demeanor, and credibility of witnesses. During the evidentiary hearing, Cofer admitted that her memory is now "blurry," and "goes in and out." She also admitted that she smokes about fifteen marijuana blunts a day, including five before the evidentiary hearing, as a way to cope with the effects of the trauma from the night of the murder. At the trial, Cofer stated that she was absolutely certain that Appellant was the one who shot her. At the evidentiary hearing, Cofer was unable to specify any facts as to why she was no longer certain and admitted that what she testified at trial was true. Appellant's sister, who reached out to Cofer well after the trial, confronted Cofer about recanting her trial testimony. As such, Cofer's "recantation" is entirely unreliable and the postconviction court was correct in finding her to not be credible.

ISSUE II: The postconviction court was also correct in finding Eric Wilridge to not be a credible witness. Wilridge, a seven-time convicted felon who is currently serving a life sentence in prison, waited over 26 years to come forward with his story of what he claimed he saw the night of the murder. He was unable to provide

an adequate reason as to why he waited so long to come forward, other than he did not want to be involved with law enforcement.

Wilridge provided an unsworn affidavit, claiming he saw three men standing around Cofer's apartment. However, at the evidentiary hearing, he claimed he would not see if the individuals were male or female and he could not see any identifying features. In his affidavit, Wilridge claimed he saw a man shooting into Cofer's apartment, but then contradicted himself at the evidentiary hearing, stating he saw a man standing in the doorway with his hand extended, but did not see a gun or shots being fired into the apartment.

Wilridge was likely incarcerated at the time of the murder. At the evidentiary hearing, the State provided documents showing that Wilridge was arrested a few days prior to the murder. The bond amount was set at $25,003. The case was eventually dropped a few days after the murder. Wilridge claimed to have been released on his own recognizance, but this was clearly refuted by the documents entered into evidence. No paperwork was found showing that Wilridge had bonded out prior to the case being dropped. The postconviction court stated that, even though there is no record of Wilridge bonding out of jail, the discrepancy in the facts surrounding his arrest suggest that his memories are inaccurate.

As such, the postconviction court was correct in finding Wilridge to not be a credible witness.

ISSUE III: Because the postconviction court made findings that neither Wilridge nor Cofer were credible at the evidentiary hearing, the postconviction court was correct in holding that Appellant cannot prove a claim of newly discovered evidence. The only evidence that Appellant relied upon was the testimony of Wilridge and Cofer. Cofer testified at trial that she was certain that Appellant is the one who committed the murder. She testified that he called her by name and told her to open the door. Cofer also identified Appellant immediately after the shooting to an officer on scene. There is no indication in the trial record that Cofer doubted her identification of Appellant. It is only now, after more than twenty years, that Cofer has doubts. Her admitted drug use, as well as Appellant's sister urging her to recant, it is clear that Cofer's memory has faded.

Wilridge contradicted himself several times since writing the affidavit. He wrote two letters, one to the postconviction court and one to the State Attorney, claiming that his affidavit was false. At the evidentiary hearing, he contradicted his original affidavit by stating he did not see the shooting and he could not identify the shooter. As such, even if he were credible, Wilridge's testimony would not produce an acquittal at trial. He cannot state with any degree of certainty who the shooter was because he did not see the shooting, by his own admission.

The postconviction court was correct in finding that Appellant cannot prove a claim of newly discovered evidence and in denying Appellant's Sixth Successive Motion to Vacate.

As such, this Court should affirm the postconviction court's ruling.

ARGUMENT

ISSUE I: THE POSTCONVICTION COURT WAS CORRECT IN FINDING MARCENE COFER TO NOT BE A CREDIBLE WITNESS BASED ON THE INCONSISTENCIES BETWEEN HER TRIAL TESTIMONY AND HER EVIDENTIARY HEARING TESTIMONY, AS WELL AS HER ADMISSION THAT HER MEMORY HAS FADED.

The postconviction court correctly found Marcene Cofer to not be credible. Appellant presented Cofer's testimony as recantation evidence.

This Court has recognized that a trial court has the "superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review." Cox v. State, 966 So. 2d 937, 357 (Fla. 2007) (citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)). "In many instances, the trial court is in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" Id. at 357-58 (citing Stephens).

Recantation evidence is often offered as newly discovered evidence.[3] The Florida Supreme Court has consistently ruled that recantation evidence is exceedingly unreliable. Armstrong v. State, 642 So. 2d 730 (Fla. 1994). See also Spann v. State, 91 So. 3d 812, 816 (Fla. 2012). This Court has noted that it is the duty of a trial court to deny a new trial when it is not satisfied that such testimony is true. Id. at 735.

At trial, Cofer testified multiple times that Appellant was the person who committed the murder. She testified that she looked through the peephole of her door and saw Appellant standing there. (TR II: 509-10). Cofer testified that after she saw him, Appellant called her by name and told her to open the door. (TR II: 511-13). She stated that when the door to the apartment was opened Appellant entered and began shooting. (TR II: 518). Cofer identified Appellant in court as the person she saw outside her door the night of the murder. (TR II: 510-11). She also identified Appellant as the shooter in a photo line-up conducted shortly after the murder. Immediately after the shooting, Cofer told Officer Potter who shot her. Officer Potter testified that Cofer identified Appellant as her shooter. (TR IV: 798-99).[4]

[3] Sweet appears to suggest that Ms. Cofer's testimony is a type of "recantation" evidence. While the State disagrees, the law on recantation evidence is offered for the Court's consideration.
[4] Admitted as an excited utterance.

In court, the trial court had Cofer step down, move in front of Appellant's table, and identify him in court. (TR II: 510). Cofer testified that she could see the face of the person at the door and that she recognized him to be Appellant. (TR II:517-18). When asked if she was ***absolutely sure*** that William Earl Sweet was the person who shot her, Cofer answered, "[y]es, I am." (TR II: 550).

Cofer contradicted her trial testimony multiple times at the evidentiary hearing. She tried to claim that at trial, she was also unsure of who shot her. (Evid. Hrg. Trans. 63). However, this is clearly refuted by the trial transcript. At the evidentiary hearing, Cofer testified that she had not smoked any marijuana prior to the trial, (Evid. Hrg. Trans. 86), but smoked 5 marijuana blunts prior to the evidentiary hearing. (Evid. Hrg. Trans. 70). By her own admission, Cofer described her memory now as blurry and not that good. (Evid. Hrg. Trans. 71). She also admitted that the marijuana she has consumed "over the last 30 years, 15 blunts a day" has impacted her memory. (Evid. Hrg. Trans. 71).

Additionally, when testifying about her conversation with her sister about the murder, Cofer offered no basis upon which her sister believed that Appellant was not the murderer or why her sister did not bring up the issue prior to 2013. Around the time of the conversation with her sister, Appellant's sister contacted Cofer. Cofer testified at the evidentiary hearing that Appellant's

sister was pressuring her to tell the truth. During the evidentiary hearing, Cofer admitted she testified in her deposition that Appellant's sister asked her to lie. (Evid. Hrg. Trans. 77). Despite claiming that she was always unsure of who had shot her, Cofer did not come forward until after her conversation with Appellant's sister. (Evid. Hrg. Trans. 81). Cofer never explained why she did not come forward until over 20 years after the trial, despite knowing that Appellant is on death row.

When asked by the postconviction court if she knew Appellant, Cofer claimed that she did not know him personally. (Evid. Hrg. Trans. 89-90). However, at trial, Cofer testified that she had a conversation with him the day before the shooting, where he acted rude towards her. (TR II: 545-46). In fact, Cofer knew Appellant well enough that she told police who had shot her, despite Appellant's face being partially covered. (TR II: 525-26). Moreover, at the evidentiary hearing, Cofer smiled at Appellant as if she knew him.

The postconviction court correctly found Cofer's testimony not credible. The postconviction court did not need to conclude that Cofer is intentionally lying to find her testimony is not credible. There are several objective reasons for doing so. Over 26 years have passed, a time during which the memory of any person would be distorted by the passage of time. Cofer admitted that in the years since the murder, she has been a heavy drug user; smoking

about 15 blunts a day. Indeed, Cofer could not even control her drug use before her testimony, smoking about five blunts before her testimony. Next, Cofer told the court that at least two people have influenced her recollection; her sister who told her that Appellant was not the shooter and Appellant's sister who wanted her to write things down about the murder. Finally, Cofer's demeanor at the evidentiary hearing convinced the postconviction court that Cofer's semi-recantation is not credible.

ISSUE II: THE POSTCONVICTION COURT WAS CORRECT IN FINDING ERIC WILRIDGE'S TESTIMONY TO NOT BE CREDIBLE.

The postconviction court likewise correctly found Wilridge's testimony not to be credible.

This Court has recognized that a trial court has the "superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review." Cox v. State, 966 So. 2d at 357 (citing Stephens, 748 So. 2d at 1034). "In many instances, the trial court is in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" Id. at 357-58 (citing Stephens).

The evidence supports a reasonable conclusion that Wilridge was in custody at the time of the murder. Before the postconviction

court was an Arrest and Booking Report showing that Eric Wilridge was arrested on June 22, 1990. The Report showed that bond was set as $25,003. At the evidentiary hearing, Wilridge admitted that he had been arrested on June 22, 1990, but claimed he was "ROR'd" a couple of days later. He did not dispute that charges were dropped on June 29, 1990, as reflected by the State's notice of dropping the charges.

Section 90.803(7), Florida Statutes is a hearsay exception that governs information that normally would be, but is not, contained in memoranda, reports, or data compilations in any form of a regularly conducted activity. This provision provides a hearsay exception for:

> [e]vidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

This hearsay exception allowed a reasonable inference from the absence of an entry on the A & B of ROR (the bond amount of $25,003 is there) that, contrary to his testimony at the evidentiary hearing, Wilridge was not released on his own recognizance. Logically, it would also allow the postconviction court to infer that Wilridge was likely incarcerated during the time he claims he

was outside Cofer's apartment because his possession charge was not "DN'd" until June 29, 1990.

Wilridge confirmed that he was arrested a few days prior to the murder. While he claims he was released on his own recognizance a couple days after his arrest, the State presented an A & B report showing Wilridge's bond was set at $25,003. (Exhibit 1). Additionally, Wilridge was deemed indigent for that case. (Exhibit 2). The State declined to prosecute on June 29, 1990, two days after the murder. (Exhibit 3). As such, the postconviction court could reasonably find that Wilridge was likely in custody at the time of the murder and therefore, unable to witness what happened.

Additionally, "the discrepancy in the facts surrounding his arrest suggests Mr. Wilridge's memories of events from around the time of the offense are inaccurate." (Order at 10). Wilridge's testimony is not credible. This is so for several reasons. First, it is telling that Wilridge failed to execute a sworn affidavit to claim that he was a witness to the shooting. At the evidentiary hearing, Wilridge admitted that a notary was available to inmates but he chose not to get his "affidavit" notarized.

Second, it is reasonable to conclude that when a person is making up a story, it is difficult to keep one's story straight. It is clear Wilridge was struggling to keep his story straight. For instance, Wilridge was not even able to keep his story straight

between his "affidavit" and his testimony at the evidentiary hearing.

In his "affidavit," Wilridge claimed to see the person shoot into Cofer's apartment. At the evidentiary hearing, Wilridge testified that he did not actually see the shooting. Instead, Wilridge told the court that the person he saw standing in Cofer's door just stood there with his arm out and that he did not hear a shot until after he left the area. When confronted with these inconsistencies, Wilridge asserted that both statements were the "same." (Evid. Hrg. Trans. 132).

Wilridge's description of events also lacks veracity.[5] At trial, Sharon Bryant testified that right before the shooting, the porch light went out. (TR III: 626).[6] Wilridge's testimony that he was up to 25-50 yards way, coupled with the fact the porchlight was out and it was the middle of the night, makes it unlikely that Wilridge would be able to determine who was standing at Cofer's door; let alone see the skin color of the assailant.

Even more compelling is the fact that after executing the unsworn affidavit, Wilridge wrote two letters; one to the

[5] Many of the facts about the shooting were set forth in the Florida Supreme Court's decision on direct appeal. Accordingly, Wilridge, who admitted he had access to the law library, would clearly have access to facts set forth in the opinion.

[6] It is reasonable to conclude that Sweet disabled the light by unscrewing the bulb.

postconviction court and one to the State Attorney. In these letters, Wilridge advised that his "affidavit" was invalid or inaccurate. At the evidentiary hearing, Wilridge claimed he was lying to the Court and to the State in those letters. (Evid. Hrg. Trans. 137). Wilridge's ready willingness to lie when it suits him is additional competent substantial evidence upon which the postconviction court could reasonably rely to reject Wilridge's testimony as not worthy of belief.

Finally, Wilridge's testimony did not sufficiently address his failure to come forward with this information years ago. Wilridge merely stated that he did not come forward because he did not want to become involved, despite knowing Appellant was on death row. (Evid. Hrg. Trans. 122-23). This does not sufficiently explain his failure and delay in bringing this information forward. Some 26 years passed before Wilridge came forward to say what he allegedly saw the night of the crime. Archer v. State, 934 So. 2d 1187, 1198 (Fla. 2006) (trial court skeptical regarding the length of delay and rejecting witness's explanation for his failure to recant trial testimony until 12 years after trial). Wilridge's failure to come forward until nearly three decades after the murder is additional evidence that Wilridge's testimony is not worthy of belief.

ISSUE III: THE POSTCONVICTION COURT WAS CORRECT IN FINDING THAT ERIC WILRIDGE'S TESTIMONY DOES NOT MEET THE STANDARD OF NEWLY DISCOVERED EVIDENCE.

In order to grant Appellant's motion and order a new trial, the postconviction court must have concluded that Wilridge's testimony weakens the State's case to the extent there is a reasonable doubt about the defendant's culpability. However, the postconviction court found that, even if Wilridge was credible, he was unable to testify to any identifying features of the individuals he claimed to see the night of the murder. (Order at 15).

> Mr. Wilridge's testimony identifying the man standing in Ms. Cofer's doorway also does not case doubt on [Appellant's] culpability because he did not see or hear this man fire any gunshots. It was not until Mr. Wilridge had ridden away from his viewing spot, out of sight of Ms. Cofer's apartment, that he heard gunshots.

(Order at 15). Even when Wilridge was not denying he saw anything, his story was not consistent about what he saw. (Order at 15-16). Based on his lack of credibility, as well as the lack of credibility in Cofer's "recantation," the postconviction court was correct in finding that Wilridge's testimony does not create a reasonable probability of a different outcome.

In order to set aside his conviction based on newly discovered evidence, Appellant must show (1) the evidence was unknown by the trial court, by the party, or by counsel at the time of trial and the defendant or his counsel could not have known of it by the use

of due diligence; and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); see also Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004). In analyzing the second prong, once it is determined that there are no evidentiary bars to the evidence being admitted, the trial court should consider whether the evidence goes to the merits, is impeachment evidence, or whether the evidence is cumulative to other evidence in the case. See Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994); Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994). Further, when the evidence is from a witness to the events that occurred at the time of the crime, the trial court should also consider the length of the delay and the reason the witness failed to come forward sooner. Jones, 709 So. 2d at 521-22.

Newly discovered evidence satisfies the second prong of the Jones test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Jones, 709 So. 2d at 526 (quoting Jones v. State, 678 So. 2d 309, 315 (Fla. 1996)). In determining whether the newly discovered evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

The postconviction court made a determination of whether the "newly discovered" testimony is credible. If testimony that allegedly constitutes "newly discovered evidence" is not credible, the court should deny a new trial. See Archer, 934 So. 2d at 1199 (noting that newly discovered evidence in the form of testimony that is not credible would not produce an acquittal or a life sentence on retrial).

Testimony that is not credible cannot meet the Jones standard. See Archer, 934 So. 2d at 1199 (noting that newly discovered evidence in the form of testimony that is not credible would not produce an acquittal or a life sentence on retrial).

Even the addition of Marcene Cofer's evidentiary hearing testimony does not weaken the State's case to the extent there is a reasonable doubt about Appellant's culpability. Cofer did not recant her trial testimony. Rather, Cofer, after 26 years of heavy drug use and attempted influence by others, is now simply not sure that Appellant was the shooter. Additionally, Cofer's prior identification of Appellant at the trial is reliable because it would qualify as acquaintance identification. See Haliym v. Mitchell, 492 F.3d 680, 706 (6th Cir. 2007) (noting that prior acquaintance with another person substantially increases the likelihood of an accurate identification over that of stranger identification). Cofer's testimony that she had a conversation with Appellant on the day before the murder and her naming

Appellant to police during the investigation supports her identification not qualifying as a stranger identification.

Even so, Marcene Cofer was not the only person who identified Appellant as the person who murdered Felicia Bryant. In addition to the trial testimony of Marcene Cofer positively identifying Appellant as the shooter, Sharon Bryant provided compelling evidence pointing to Appellant as the shooter.

At trial, Sharon testified that she was 13 years old. (TR III: 609). Felicia Bryant, the victim, was her sister. Sharon told the jury that about 1:00 in the morning, June 27, 1990, while she was watching television, someone kicked the door real hard. It sounded like someone was trying to break it down. (TR III: 613). Sharon reported it to Marcene who told her not to worry about it. (TR III: 614). Sharon went back downstairs and then heard someone pulling on the screen. Sharon went back upstairs and told Marcene. Marcene told Sharon to get her gun from under the television. Sharon did so and they both went downstairs and sat on the couch. (TR III: 615). Next someone knocked on the door. Marcene and Sharon looked out the peephole. Sharon looked at the man at the door for about 7-8 seconds. (TR III: 622). She got a good look at him. The light was bright over the door. (TR III: 622). Sharon described the man as built, dark skinned with a low haircut. He was wearing rings on his fingers and beaded jewelry. (TR III: 622). He was wearing a white T shirt and jeans. The man had lots of rings on

his fingers. (TR III: 623). One of the rings had red, turquoise, and blue in it. (TR III: 623). He was also wearing a necklace that had a cross on the end, had black beads, and some little chains between them. (TR III: 674). Sharon identified the ring, seized when Appellant was arrested, as the ring she saw the shooter wearing on the night of the murder. (TR III: 655; IV: 852, 866-867, 893).

Sharon got a good look at the man's face. (TR III: 624). Sharon identified the man she saw through the peephole as the Appellant. (TR III: 624). After a while, the man left. After that, Sharon then saw the porch light go out. (TR III: 626). Sharon got scared. Marcene was getting scared. (TR III: 626). Sharon's sister opened the door and a man walked in shooting. (TR III: 626). The man was wearing the same clothing as the man who had come earlier and knocked on the door. Sharon recognized the while shirt and blue jeans a flash of the ring with the red, turquoise and blue on it. (TR III: 630). Felicia was shot and Sharon was too. (TR III: 631).

Finally, this Court should conclude that Wilridge's testimony would not likely produce an acquittal because his testimony would only serve to impeach Cofer's and Bryant's testimony at trial. Such testimony would not negate the ample evidence implicating Appellant of the murder.

Wilridge asserted in his affidavit that he could not see the face of the person while he was riding by on his bike. See Affidavit. He asserts that he could not see who it was because the person was wearing a ski mask, but he knew it was not Appellant. Therefore, Wilridge's testimony would not go to the merits of the crime as he cannot identify who it was he allegedly saw or provide any information that would clearly exonerate Appellant of the murder. Rather his testimony would have merely been used to impeach the testimony of the other two eyewitnesses. Further, there is an inherent credibility issue surrounding an affidavit produced by an incarcerated person who is serving a life sentence. See Reed v. State, 116 So. 3d 260, 265 (Fla. 2013); see also Clark v. State, 35 So. 3d 880, 891 (Fla. 2010) (finding the second prong of Jones was not satisfied because witness was serving multiple life sentences and would not be a credible witness at a new trial).

Wilridge's failure to actually see the identity of the perpetrator, the clear identification of Appellant by the victims, and in addition Wilridge's credibility issues, mandates that his testimony would not produce an acquittal on retrial.

Therefore, the postconviction court was correct in denying Appellant's successive postconviction motion.

Conclusion

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Appellant's Sixth Successive Motion to Vacate Judgments of Conviction and Sentence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response Brief of Appellee has been furnished via e-portal to Julie Morley, Counsel for William Sweet at Julie.Morley@ccrc-north.org, this 19th day of January, 2018.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
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