IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-760

DIETER RIECHMANN

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT FOR DADE COUNTY,
STATE OF FLORIDA

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Mr. Riechmann appeals the circuit court's denial of guilt phase relief of his Rule 3.850 motion following an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R.___." -Record on direct appeal to this Court;

"PC-R__." -Record on 1996 post-conviction hearing;

"PC-R2__." -Record on 2002 post-conviction hearing;

"Supp. PC-R2.__."-Supplemental Record on 2002 post-conviction hearing.

"D-Ex.__." -Defense exhibits entered at the evidentiary hearing and made a part of the post-conviction record on appeal. A designation will be made as to which post-conviction proceeding the exhibit was received.

"S-Ex.__" -State exhibits entered at evidentiary hearing with a designation as to which post-conviction proceeding the exhibit was received.

REQUEST FOR ORAL ARGUMENT

Mr. Riechmann, through counsel, respectfully requests that the Court permit oral argument.

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INTRODUCTION

Dieter Riechmann, a German citizen vacationing in the United States, flagged down a Miami Beach police officer on October 25, 1987, in order to seek help -- his companion of many years, Kirsten Kischnick, lay lifeless in the front passenger seat of a rental car with a bullet hole in the right side of her head. Mr. Riechmann explained that the two tourists had gotten lost in Miami and stopped to ask a black man for directions. The man had approached the passenger side of the car with something in his hand. Mr. Riechmann got scared and had started to hit the accelerator when an explosion rang out. Driving frantically away, he touched Ms. Kischnick's head and discovered that she was bleeding profusely. In a panic, he drove wildly until he found himself in Miami Beach where he saw a police officer who he flagged down.

The State charged Mr. Riechmann with the murder of Ms. Kischnick. The case against Mr. Riechmann was premised entirely upon establishing that Mr. Riechmann's version of the events was a lie, and therefore, he must be guilty of murder.[1]

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[1]The State's theory was something along the lines of *res ipsa loquitur*; if Mr. Riechmann lied, he must be guilty of murder. However, this overlooked the possibility that Mr. Riechmann may have had reason to be less than forthcoming even though he had not murdered Ms. Kischnick. According to the

The State's case had three components. First, the State engaged in simple character assassination in labeling Mr. Riechmann as Ms. Kischnick's "pimp." In Germany where prostitution is legal, Ms. Kischnick worked as a prostitute. The State sought to and did denigrate Mr. Riechmann's relationship with Ms. Kischnick in order to cast their interlocking insurance policies in a negative light.[2] This was then used to provide Mr. Riechmann with a motive for

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testimony of a witness discovered in 2002 who claimed to have witnessed the shooting, Ms. Kischnick was shot when a drug deal went awry (PC-R2. 1644-47).

[2]A whole life policy for "20,000 deutschmarks" was written on Ms. Kischnick in 1980 (R. 3099). A second term policy for "200,000 deutschmarks" was written in 1984 (R. 3100). Whole life policies carried bigger premiums in comparison to the cheaper risk or term policy (R. 3096). In 1985, Diner's Club offered its members accident insurance, covering death and disability (R. 3108-09). Mr. Riechmann accepted the offered insurance, and a policy for "five hundred thousand marks" was issued on Ms. Kischnick on November 21, 1985 (R. 3110).

Ernest Steffan was a friend of Mr. Riechmann and an insurance agent who had sold Mr. Riechmann insurance policies, including two of the policies on Ms. Kischnick. In the motion to vacate at issue in 2002, Mr. Riechmann alleged that Mr. Steffan was prepared to testify to favors given by the prosecution to secure favorable testimony from witnesses from Germany, and the application of pressure to influence their testimony (Supp. PC-R2. 60-61). According to Mr. Steffan, the policies purchased by Mr. Riechmann on Ms. Kischnick's life were "an investment, like a retirement plan" (Supp. PC-R2. 61). Cheaper insurance was available with larger payouts in case of death.

murder.[3]

Second, the State relied upon forensic experts to provide opinion testimony that the physical evidence was inconsistent with Mr. Riechmann's version of the events. In this regard, Williams Rhodes was called as blood-spatter expert. He testified that the location of blood inside on the driver's door was inconsistent with Mr. Riechmann's account.[4] He testified that given the narrowness of the opening of the passenger window, the amount of gunpowder residue on Mr. Riechmann's hands belied his story.[5] He testified that he

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[3]In a letter dated January 12, 1988, written by an attorney with the U.S. Justice Department on behalf of the State of Florida to the German Foreign Ministry, the weakness of the State's case was underscored. As a result, German assistance was sought to assist in discovering motive evidence that could be used against Mr. Riechmann:

> No one saw him fire the gun, and the physical evidence fails to show conclusively that he committed the murder. The State Attorney, who is responsible for the prosecution of this case, must determine the motive for the murder because he does not believe that Riechmann will be convicted on the basis of circumstantial evidence alone.

(PC-R2. Def. Ex. LL -- January 12, 1988 letter to Federal Ministry of Justice, Bonn, Germany from U.S. Department of Justice Trial Attorney, Robert J. Boylan).

[4]Rhodes's conclusions in this regard were impeached by undisclosed Brady material presented in 1996.

[5]Rhodes's assumptions about the how high the passenger window was rolled up was impeached in 1996 by the undisclosed Brady material presented in 1996.

found blood on a plaid blanket that purportedly Mr. Riechmann sat upon while driving.[6] According to Rhodes, the blood established that Mr. Riechmann could not have been sitting upon the blanket at the moment that Ms. Kischnick was shot and her blood splattered.

Finally, for the third component of its case, the State relied upon a jailhouse informant, Walter Smykowski, to testify to Mr. Riechmann's statements and conduct while incarcerated on federal gun charges.[7] According to Smykowski, Mr. Riechmann had implied in statements to him that police had overlooked a fourth gun. Mr. Riechmann was described as jubilant at the expectation of becoming a millionaire (in deutschmarks) when he received the proceeds from Ms. Kischnick's life insurance policies. When Smykowski asked Mr. Riechmann if he had killed his girlfriend, Mr. Riechmann turned "white as the wall" (R.4112).

In collateral proceedings in 1996, Mr. Riechmann established that the State withheld evidence that revealed

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[6]The plaid blanket was delivered to Rhodes on June 29, 1987, by Detective Hanlon (R. 3278). On the third attempt to find blood on the plaid blanket, affirmative results were obtained. These results were not disclosed to the defense until after trial had commenced.

[7]The State was able to obtain an indictment only after obtaining a statement from Smykowski.

weaknesses in the forensic analysis. Some police reports had been doctored or redacted before disclosure to trial counsel; others were withheld altogether. Despite the discovery breaches, the trial court did not find sufficient prejudice under Brady in light of Smykowski's incriminating trial testimony. Thus, Mr. Riechmann's conviction was left in place because the forensic evidence, though tattered, was sufficient when coupled with the undamaged Smykowski testimony to leave the judge's confidence in the verdict intact.

Following the denial of a new trial in 1996 and while an appeal was pending in this Court, Mr. Riechmann's counsel located a former Miami Beach police officer who provided new information. Hilliard Veski had been the officer who conducted the inventory of the rental car after the shooting. Veski revealed that after his work on the Riechmann case in October of 1987, he ran into unrelated trouble at the police department that jeopardized his employment--it was alleged he used illegal drugs. At that time, one of the prosecutors on Mr. Riechmann's case, Beth Sreenan, approached Veski and told him that if his testimony regarding the location of evidence within the rental car matched where she suggested he found the evidence, the disciplinary proceedings would have a better

outcome.[8] When he refused to go along, he was not called as a witness, and he subsequently did lose his job.[9] During the

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[8]On July 11, 2002, collateral counsel attempted to call Veski as a witness testifying telephonically (PC-R2. 533). In response to the State's objection, counsel orally proffered Veski's expected testimony (Supp. PC-R2. 144-46). Counsel specifically noted that "Officer Veski indicates in fact when he seized the shawl [blanket] from the car it was in the passenger seat along with a lot of other items. He also indicated that the car was still, this is two days after the homicide, wet with blood. That there was blood virtually everywhere and it was still very wet and sticky" (Supp. PC-R2. 145). Counsel noted that Veski reported that the items in the passenger seat with the plaid blanket/shawl "were already covered with blood" (Supp. PC-R2. 146). Counsel proffered that Veski would testify "that he was pressured to provide the testimony at the deposition indicating that the flashlight was in the trunk and that he was also being pressured by Beth Sreenan to testify in the fashion that he did and also say the shawl [blanket] was in the passenger seat because he had a pending - - he was on administrative leave with a pending criminal charge against him and the indication things would go easier for you if you testify in this fashion" (Supp. PC-R2. 146).

[9]Immediately before trial on July 7th, Veski was deposed by the defense. During the deposition, Veski testified that he found a flashlight in the trunk. The significance of the flashlight was that blood was found on it. If it was found in the trunk of the car, the presence of the blood would have permitted the State to argue that Mr. Riechmann shined the flashlight in Ms. Kischnick's eyes, blinding her while he shot her with blood blowing back on the flashlight. Thereafter, this argument goes, Mr. Riechmann placed the flashlight in the trunk. However, to make this argument, it was necessary for Veski to report that he found the flashlight in the trunk; otherwise the presence of the blood could be explained by its location inside the car when Ms. Kischnick's blood splattered throughout.

After his deposition, Veski advised Mr. Riechmann's counsel that his testimony had been false. He had been pressured into saying that the flashlight had been found in the trunk, although he did not indicate at that time who had

subsequent trial, counsel learned that Veski had, when he inventoried the car, collected the plaid blanket that was later tested by Rhodes (R. 3278). However, counsel was not advised that Veski had found the plaid blanket piled with other items still wet with blood in the blood-drenched front passenger seat.[10] Thus, the assumption made by Rhodes that the plaid blanket could only have come in contact with blood at the moment of the shooting was not true. Yet, the defense was never advised of Mr. Veski's observations nor provided with his handwritten notes which clearly reflect the location of the plaid blanket at the time of the inventory. The defense was also not told of the prosecutor's attempt to get Veski to testify falsely. In 1997, Mr. Riechmann sought to present Veski's testimony, asking this Court to relinquish jurisdiction to permit its presentation before resolution of

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applied the pressure (PC-R. 5662). He advised counsel that in fact the flashlight was found in the car's backseat. Veski's disclosure rendered the presence of blood on the flashlight insignificant. The flashlight scenario was abandoned by the State, and Veski was not called as a witness. At the 1996 evidentiary hearing, Ms. Sreenan specifically denied that she applied any pressure to Veski in order to get him to say that the flashlight had been found in the trunk (PC-R. 4771).

[10]In fact, at Veski's deposition on July 7, 1987, Mr. Riechmann's counsel was advised that Veski's notebook with details regarding the location of the evidence collected from the car was missing, according to Ms. Sreenan, and for that reason could not be turned over to the defense (PC-R2. 682).

the appeal. The motion was denied. When the appeal was over, Mr. Riechmann included the information provided by Mr. Veski in conjunction with a Brady/Giglio claim in his new Rule 3.850 motion. Even though an evidentiary hearing was held on the motion, the circuit court refused to permit Mr. Riechmann to present Mr. Veski's testimony regarding what he found when he inventoried the car and the subsequent pressure Ms. Sreenan placed upon him to alter his testimony regarding where items were found within the car.

Also included in the new Rule 3.850 motion was information gleaned from the 2000 broadcast in Germany of an interview of Walter Smykowski. In the interview, Smykowski stated that his testimony at Mr. Riechmann's trial was false. He claimed that he had been promised money for his testimony. Smykowski said police had taken him out of jail before Mr. Riechmann's trial on several occasions to see his eight-year-old daughter and to go drinking. Counsel learned from the journalist who conducted the interview that Smykowski was located in Dubai, United Arab Emirates (hereinafter referred to as UAE), hiding from U.S. officials who wanted him because of a parole violation. Smykowski had signed an affidavit for the journalist, attesting to his claims in the interview (PC-

R2. 463-468).[11] With this information, counsel met with Smykowski, who verified the published account.[12]

In April of 2002, the State disclosed for the first time that Smykowski had in fact been taken from federal custody by the Miami Beach police on at least one occasion prior to Mr. Riechmann's trial in order to visit his daughter (PC-R2. 1345-1346). This disclosure corroborated Smykowski's claim in 2000.

At the subsequent evidentiary hearing, a detective testified that Smykowski was taken out of custody to conduct further "investigation" on more than one occasion. He

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[11]In the affidavit, Smykowski attested, "[w]hen I testified during the trial that Dieter Riechmann was *happily dancing in our cell because he was a millionaire now*, it is not true. [ ]Beth Sreenan asked me to use these words. [ ]Also I never asked Dieter Riechmann why he killed his girlfriend. So the testimony that I asked him and he turned '*pale like a white wall*' is also not true. It was Sreenan who put those words into my mouth and asked me to say this in court." (PC-R2. 252-53)(emphasis in original). Smykowski further attested, "[f]or my testimony against Dieter Riechmann, the police and the prosecutors not only promised me help in my federal case, but they offered me money to the extent of US$30,000 (thirty thousand dollars) once the case was over and Dieter Riechmann convicted and sentenced." (Id.). Smykowski further claimed, "[t]he month before trial I was able to leave the prison and nearly every day I was taken to my home by Bobby Hanlon and/or Sergeant Matthews. They invited me for dinner many times and I could have any quantity of alcohol." (Id.).

[12]Mr. Riechmann sought permission to perpetuate Smykowski's testimony under Rule 3.190(j). However, the circuit court denied the request.

described the trip to see Smykowski's daughter as a "favor."

The tardy disclosure established that Smykowski had made uncorrected false statements at Mr. Riechmann's trial. Smykowski had testified that he had not seen the prosecutors or any law enforcement personnel in the three months prior to trial (R. 4143). He also had testified that he asked for no benefit; if the prosecutor wrote a letter to federal parole officials, that was the prosecutor's choice (R. 4097, 4135).

Despite the fact that the State confirmed that aspect of Smykowski's affidavit about police taking him out of prison to visit his home, Mr. Riechmann was not permitted to depose him to perpetuate his testimony given that he was an unavailable witness. Nor was Mr. Riechmann allowed to introduce Smykowski's signed affidavit or submit his oral statements into evidence.

The allegations made by Veski and Smykowski indicate that Mr. Riechmann's conviction was obtained by prosecutorial tactics that violated the core values of United States Constitution. Yet, Mr. Riechmann was deprived of the opportunity to present the testimony of these two witnesses to prove his claims. The exclusion of this testimony from a proceeding designed to permit an adjudication of Mr. Riechmann's constitutional claims must be as unacceptable

under due process principles as is the prosecutorial misconduct alleged by these witnesses. A reversal is mandated.

STATEMENT OF THE CASE AND FACTS

At 10:32 p.m., October 25, 1987, Mr. Riechmann "flagged down" Miami Beach Police Officer Kelley Reid on Indian Creek Boulevard at 67th Street. He exited his car, heading south, and approached the officer, saying, "Help me! Oh my God! My Girl! My Girl!" Within two minutes, fire rescue medics were at the scene, and tried unsuccessfully to revive the woman strapped in the passenger seat with a bullet hole in the right side of her head. The victim was Kersten Kischnick, Mr. Riechmann's companion of thirteen years.

For the next hour, Mr. Riechmann explained to Miami Beach Police Department ("MBPD") detectives, in broken English, what had happened. He asked several times to go to the car and see Kersten, but was kept away. At approximately 11:00 p.m., Mr. Riechmann's hands were swabbed for gunshot residue. His account of the shooting was related with marginal assistance from MBPD Officer Jason Psaltides, who had two years of high school German.

Mr. Riechmann said he and Ms. Kischnick had just come from having dinner at Jardin Brasilian at Bayside. They got

lost on their way back to Miami Beach, pulled over on a dark street and asked a stranger for directions. The stranger turned away momentarily and returned with something in his hand. As Mr. Riechmann started to accelerate the car, he heard an explosion,
and sped off. He could not say where it had happened or how he had ended up where he was. He smelled of alcohol.[13] He told the officers that he and Ms. Kischnick were staying in a Miami Beach hotel. He was asked whether he had any firearms in his hotel room, and he replied that he did.

At approximately 11:30 p.m., Mr. Riechmann was taken to the police station and locked in a "holding cell" for several hours. He was eventually released, and Detective Matthews apologized and called it a big mistake. Mr. Riechmann then went to his hotel room with the detective, who took three guns, shoes, passport, travel documents and Mr. Riechmann's blood-stained clothes.

Over the next four days, Mr. Riechmann told the same account over and over again to police. They spent many hours together driving around looking for the spot where the murder occurred. Mr. Riechmann also attempted on his own to locate

[13]Records obtained by police from the waiter at the Bayside restaurant reflected that Mr. Riechmann and Ms. Kischnick had twelve mixed drinks between them.

the area. On October 28th a one-hour taped interview was conducted. In it, Mr. Riechmann related the same version of events previously given. Subsequently, this tape was introduced at trial.

On October 29, a four-to-five hour taped interview was secretly recorded in the MBPD Detective Bureau that was equipped with a hidden recording device. This taped interview was not introduced by the State at trial.

At the conclusion of this interview, Mr. Riechmann was arrested by Alcohol, Tobacco and Firearms agents (hereinafter referred to as ATF) on a charge that he had provided an incorrect address when purchasing the guns seized from his room several days earlier. He was held at the Metropolitan Correctional Center (MCC), a federal detention facility in Miami. Bond for this relatively minor charge was set at $150,000.00.

While he was jailed on the federal charges, the police and State prosecutors were investigating his background and relationship with Ms. Kischnick. They obtained the assistance of German police in searching his Rheinfelden apartment in Germany on November 4, 1987, and “four or five more times

after that" (R. 2886, 3129).[14] Dozens of acquaintances were questioned. Bank accounts and safe deposit boxes were examined. Life insurance policies, in existence from the 1970's, were obtained. During November and December of 1987, while Mr. Riechmann awaited federal trial, the State rushed to obtain enough probable cause to charge him for Ms. Kischnick's murder the moment he was acquitted in federal court. However, German authorities were falsely told that Mr. Riechmann was already charged with murder; this falsehood was necessary to obtain search warrants in Germany (PC-R. Appendix 85, 11-12. Appendix 83).[15]

Mr. Riechmann remained in federal pretrial custody until December 29, 1987, when his two-day federal trial began. Two of the three counts were dismissed by Judge James W. Kehoe because gun shop witnesses were unable to identify that any crime had been committed. A federal jury acquitted Mr. Riechmann of the third charge, seemingly for the same reason.

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[14]Searches in Germany were also conducted on January 14, 1988 with prosecutor DiGregory present, and on February 2nd, 14th and April, 1988 with prosecutor Sreenan present (R. 2887).

[15]German courts subsequently determined that most of the searches conducted in Germany had been conducted illegally. However, Judge Gold concluded that the prosecutors were unaware that a German court had ordered the evidence suppressed (PC-R. 6067).

When Mr. Riechmann left federal court on December 30, 1987, he was arrested by MBPD detectives for the murder of Ms. Kischnick. The State at that point had 21 days to indict him.

On January 11, 1988, Detectives Matthews and Hanlon met with Walter Smykowski who had been incarcerated with Mr. Riechmann during his federal pre-trial incarceration at MCC (PC-R2. 1667). Smykowski told Matthews and Hanlon of incriminating statements that he claimed Mr. Riechmann had made to him at MCC. Smykowski had been convicted on 17 counts of fraud in federal court (R. 3984). He had commenced serving a ten-year sentence on September 30, 1987; yet, he continued to be held at MCC until the day after giving his statement to Matthews and Hanlon (R. 3971). Another federal inmate, Robert Stitzer, an informant for a prosecutor he refused to name and who had testified before a grand jury regarding a secret investigation, had contacted authorities on Smykowski's behalf (Stitzer 4/15/88 deposition at 14).[16]

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[16]During Stitzer's deposition, Ms. Sreenan objected to questions designed to elicit information regarding Stitzer's activities as an informant and instructed Stitzer that he could refuse to answer the questions (Stitzer 4/15/88 deposition at 14-15, 26-27, 79). When Stitzer indicated that he had been incarcerated at MCC for 37 months because he had been brought there on a "writ" to "testify," Ms. Sreenan indicated that she objected to further questioning because "I believe it's a pending investigation, I'm not sure" (Stitzer 4/15/88 deposition at 14).

Only after Matthews and Hanlon had spoken to Smykowski was the State able to obtain an indictment against Mr. Riechmann for murder. Mr. Riechmann was indicted on January 20, 1988, on one count of first-degree murder and one count of unlawfully displaying a firearm (R. 1). The next day, Mr. Riechmann was arraigned for murder. He entered a plea of not guilty (R. 624). A new indictment was filed on January 27, 1988 (R. 1A). Mr. Riechmann was initially represented by the Public Defender's Office, but then retained private counsel, Edward Carhart.

Judge Sepe entered a pre-trial order directing the State to provide the defense "carte blanche discovery -– Total. No ifs ands or buts, no conditions. Whatever the State has, he gets" (R. 634). However, the order was ignored, and significant pieces of evidence were withheld. Mr. Carhart repeatedly had difficulty obtaining exculpatory information from the State (R.741-42; 1090-91; 1148-50; 1315-16; 1318; 1326-27; 3325;3434; 3632-33).[17] Mr. Carhart deposed the state's witnesses, but at times, was forced to re-depose them.

[17]During the 1996 collateral proceedings, the prosecutors admitted that they "whited-out" relevant exculpatory portions of discovery materials(PC-R. 5482-5489) and failed to disclose evidence favorable to the defense gathered in Germany. However, prosecutors could not remember a reason why the materials were not disclosed (PC-R. 5505, 5508, 5513).

Mr. Carhart testified, "if you had a grid in a discovery procedure with open file being on one end and no discovery being on the other end, we were close to the no discovery end" (PC-R2. 212). The State repeatedly gave its expert witnesses "new information," causing their opinions to shift in favor of the prosecution. For example, Rhodes, the state's serologist, who tested the blanket that Mr. Riechmann said he was sitting on at the time of the shooting, had on two occasions obtained negative results for the presence of blood. Only during his third try did he find 21 spots of presumptive blood (R. 1090-91;1326-27;3325-27;3434;3632-33).[18]

Mr. Carhart also deposed Smykowski, the jailhouse informant. During the deposition, Mr. Carhart repeatedly tried to elicit Smykowski's motivation for testifying, but the State thwarted his attempts at every turn (PC-R2. 212-13, 216).[19] Mr. Carhart sought to discover Smykowski's motivation

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[18]Rhodes was first deposed on May 24, 1988. He did not receive the plaid blanket for testing until June 29, 1988. (R. 3280). Even then, it took three tries before he obtained a positive result that was reported to the defense during trial.

[19]For example, during Robert Stitzer's deposition on April 15, 1988, he mentioned making phone calls and speaking to Smykowski's eight-year-old daughter (Stitzer 4/15/88 deposition at 81). Mr. Carhart tried to explore this further. But, the State objected to any of Mr. Carhart's efforts to discover the nature of the relationship between Stitzer and Debbie Schaefer (Stitzer 4/15/88 deposition at 82-83). Ms.

because the State had presented him as a "good citizen who came forward without any real reward" (PC-R2. 214-215).

At his jury trial, Mr. Riechmann testified in his own defense. The trial lasted from July 13 to August 12, 1988 and he was convicted of both counts (R. 533-34). Judgments of conviction were entered on August 30, 1988 (R. 566-67). The jury voted nine to three (9-3) to recommend a death sentence (R. 553). A death sentence was imposed on November 4, 1988 (R. 589-601). The conviction was affirmed on appeal. Riechmann v. State, 581 So. 2d 133 (Fla. 1991), cert. denied, 113 S. Ct. 405 (1992).

On September 30, 1994, Mr. Riechmann filed for post-conviction relief. Judge Solomon, the trial judge, recused himself. Judge Gold was specially appointed by this Court's

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Sreenan said, "Walter has a problem with who is going to take care of his daughter while he is serving time. And I know that that has been a concern of Walter's. Certainly this witness has not been housing his daughter for him" (Stitzer deposition at 83).

In 2002, Ms. Sreenan testified that "we didn't think that her whereabouts or who she was staying with was really relevant. A man in prison is concerned about his son or daughter and bringing her into this case." (PC-R2. 1358-59). Ms. Sreenan precluded the defense from learning that Smykowski's daughter was in fact living with Robert Stitzer's wife, Loretta. Sreenan did this because she was "trying to protect the location and identity of the daughter." (PC-R2. 1359). Several weeks before the deposition, Sreenan had received an undisclosed letter from Smykowski dated March 27, 1988, specifically asking for her help in finding an arrangement for his daughter (PC-R2. 1355).

Chief Justice to preside over the case. An evidentiary hearing was held on May 13-17, June 11-12, and July 18-19, 1996.

At the evidentiary hearing before Judge Gold, Mr. Riechmann presented evidence that the Miami Beach Police Department and the prosecutors inexplicably withheld significant exculpatory evidence. Trial counsel was not provided with the following:

1. An October 27, 1987, police report which corroborated Mr. Riechmann's story was never provided to defense counsel. The report indicated that the couple dined and drank for several hours at the "Jardin Brazilian" restaurant where Officers Aprile and Marcus interviewed the waiter (PC-R., Def. Ex. DDD). The withheld report indicated that the couple appeared to be vacationing tourists "in a good mood" and in "good spirits" (PC-R. 104). The couple drank "six drinks each" of rum, vodka, gin and Amaretto." They appeared "intoxicated."
2. Police reports describing Mr. Riechmann's conduct after he flagged down a police officer were withheld. These reports indicated that Mr. Riechmann, in broken English, had frantically tried to describe to police what had happened to his girlfriend. According to these police reports, Mr. Riechmann was visibly "distraught," "upset," "sobbing," "dejected," "emotionally upset," "hysterical," "crying and holding his face," "with tears coming out of his eyes," "smelling of alcohol." "He obviously had been through a terrible experience." (PC-R. 4565, 4575).

3. A myriad of photographs taken by crime scene technicians of the rental car were not disclosed. However, most of the critical photographs of the driver's seat, interior of the trunk and interior roof of the car have gone missing and have never

been given to the defense.[20] (R.1661-63; 2614-16; 3433-35).

4. Police reports that contradicted the testimony of the State's expert serologist, Dr. Rhodes, were not disclosed. Three police reports of Detective Hanlon showed that Rhodes, upon his examination of the rental car, said that "the passenger window was no more than six inches from being fully closed at the time of the shooting," (PC-R.,Def. Ex. HHH), not the 3 to 3 and a half inches Rhodes testified to at trial. The complete 11/2/87 police report of Detective Trujillo concerning the window height was not disclosed; a paragraph was redacted and never provided to defense counsel. The withheld paragraph stated that the crime lab indicated that the "window had to be all the way down." The prosecutors testified that there was no explanation for why this paragraph was not disclosed to the defense except that "somebody made a mistake...I would say that report is wrong"(PC-R. 4718). "The author of that report didn't always have all the facts straight" (PC-R. 4737).[21] If that were true, it was impeachment evidence that also should have been disclosed.

5. Also undisclosed was the 10/28/87 report of Officer Psaltides, three days after the crime, indicating that Ms. Kischnick's father had reported that the couple had known each other for about "15 years and that their relationship was good. He had no harsh comments about Mr. Riechmann" (PC-R., Def. Ex. KK).

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[20]Mr. Riechmann catalogued the missing photographs from the proof sheets provided at trial. The photos were never turned over to the defense and are still "missing." (PC-R. 247).

[21]Det. Trujillo has since been convicted of charges associated with racketeering, conspiracy to commit racketeering and bribery and is currently serving a prison sentence. Cf. Trujillo v. State, 764 So. 2d 852 (Fla. 3rd DCA 2000).

6. Also undisclosed were 37 statements from fact witnesses gathered in Germany (PC-R. 5478). DiGregory testified at the evidentiary hearing that he provided Judge Solomon with the German witness statements, but failed to give them to the defense. He said he did not know why he failed to turn the statements over to the defense. No evidence concerning the 37 German witnesses was presented to the jury (R. 600). The German witness statements have now been lost by the Miami court.

Prosecutors testified that they "whited-out" relevant exculpatory portions of discovery materials(PC-R. 5482-5489) and failed to provide favorable information they had to the defense, including the favorable statements gathered in Germany. However, the prosecutors could not recall why the non-disclosures occurred (PC-R. 5505, 5508, 5513).[22]

Prosecutor DiGregory testified that he actively advocated for sentencing consideration in federal court for Smykowski after Mr. Riechmann was convicted. DiGregory testified that he did not advise the defense of his intent to move for a reduced sentence for Smykowski (PC-R. 5490).[23]

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[22]Prosecutor DiGregory admitted that the withheld information would have been favorable to the defense, and that he did not recall who actually made the deletions from the police reports. He did not know whether he, "Ms. Sreenan or someone at his direction" deleted the exculpatory information. He agreed that the police reports contradicted the State's case (PC-R. 5477, 5482, 5483).

[23]At the evidentiary hearing, a letter dated three weeks after trial but before sentencing was admitted into evidence from DiGregory to the U.S. Parole Commission on Smykowski's behalf. When questioned about his intent, DiGregory said that

In 1996, Mr. Riechmann presented evidence that many of the facts presented by the State at trial and relied on by this Court in its opinion were simply not true.

1. In his deposition and at trial, the State's ballistics expert, Thomas Quirk, testified that the only weapons that could have fired the fatal bullet, a .38 caliber, were an Astra revolver, a Taurus revolver, and an FIE Derringer (R. 2968-72). This Court relied on this testimony when affirming Mr. Riechmann's conviction because he had two such guns in his hotel room. Riechmann v. State, 581 So. 2d at 141. Although both guns had been ruled out as the murder weapon (R. 2970), Mr. Riechmann's connection to these weapons was significant to this Court. At the 1996 evidentiary hearing, Quirk conceded that there were numerous other guns that could have fired the fatal bullet, based on their rifling characteristics–-guns that he failed to mention in his pretrial or trial testimony (PC-R.5567-5568). Quirk also conceded that the database he used for his trial testimony was limited to guns that had passed through the Metro-Dade Crime Lab as opposed to the "clearly more inclusive" FBI database (PC-R.5584).

2. The State's theory for the killing was that Ms. Kischnick had a "serious gynecological problem" that made it impossible for her to continue as a prostitute, and Mr. Riechmann, reliant on her income, killed her for insurance money (R. 2402-04, 4977-78, 4982-84, 5082-84). At the 1996 hearing, Ms. Kischnick's medical records were introduced and showed that 30 days before her death she did not have a serious gynecological condition, but a "very common malady" that was treated successfully with antibiotics (PC-R. 3598-3599, 3507-3608).

On November 4, 1996, Judge Gold denied Mr. Riechmann's

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he had contemplated writing the letter during trial(PC-R. 5490).

Rule 3.850 motion as to his conviction, but granted sentencing relief and ordered a new penalty phase proceeding before a new judge and jury (PC-R. 6078). Judge Gold found that Mr. Riechmann had been denied effective assistance of counsel at the penalty phase and that the State had withheld favorable information from the defense in the penalty phase. Judge Gold also found that the State had improperly written the order sentencing Mr. Riechmann to death after *ex parte* communication with the trial judge.

In denying guilt phase relief, Judge Gold held that the missing photographs were a mistake in the counting of the exposures; that there was "no undisclosed deal with Walter Smykowski"; and that the failure to disclose the various police reports did not undermine the confidence in the outcome of the trial in light of Smykowski's testimony (PC-R. 6066-67). Judge Gold concluded that Smykowski had testified without a deal from the State or that DiGregory's decision to write a letter did not induce Smykowski to testify (PC-R. 6067).

The State filed a Notice of Appeal and Mr. Riechmann timely filed a Notice of Appeal and Cross-Appeal. While the appeal was pending in this Court, Mr. Riechmann's counsel located a former Miami Beach police officer, Hilliard Veski.

He revealed new, previously undisclosed exculpatory information. The blanket used by the State at trial to assert that Mr. Riechmann was not in the driver's seat at the time of the shooting was collected by Veski. He found the blanket in the front passenger seat of the rental car when he inventoried the car's contents after the shooting.[24] Its location in the bloody passenger seat at the time of the inventory belied the State's contention regarding the blanket's significance at trial. Veski said he was pressured by Ms. Sreenan to change his story about the location of items in the car during the inventory. When he refused, he was not called as a witness. Based upon Veski's account, Mr. Riechmann asked this Court to relinquish jurisdiction to permit the presentation of the new information. The motion was denied.

Oral argument was held before this Court on April 6, 1999. Afterwards, counsel for Mr. Riechmann received new information from a radio documentary by a German journalist that someone else had confessed to the murder of Kersten

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[24]Attached to the affidavit that Veski signed were pages from his notebook containing his handwritten notes from his inventory of the rental car. These notes corroborated his claim that the blue and red plaid blanket was discovered in the right front passenger seat where Kersten Kischnick was shot. However, trial counsel was advised during Veski's 7/7/88 deposition that Veski's spiral notebook was missing, and thus could not be provided to the defense (PC-R2. 682).

Kischnick. Counsel hired an investigator to try to locate witnesses to corroborate the German radio story. Based on the ensuing investigation, Mr. Riechmann filed another motion to relinquish jurisdiction with this Court on November 26, 1999, seeking to give the circuit court jurisdiction to consider a Rule 3.850 motion that Mr. Riechmann had filed based on the new information (PC-R2. 121). The State objected, and this Court denied the request.

On February 24, 2000, this Court affirmed and remanded the case for a new penalty phase. Riechmann v. State, 777 So. 2d 342 (Fla. 2000). This Court ordered the State to disclose the 37 German witness statements previously withheld.

Mr. Riechmann filed a motion for rehearing on March 27, 2000. This Court requested a response to the rehearing motion. The motion had been under consideration for nearly a year when it was denied on January 31, 2001.[25] The mandate

[25]During the pendency of the motion for rehearing, counsel again received new information on the case. On June 5, 2000, the State sent a letter to counsel stating that it had received a letter from Deborah Schaefer, the daughter of Walter Smykowski. She wrote that her father had been told that he could collect part of the insurance money of the victim if Mr. Riechmann was convicted (PC-R2. 153). Counsel immediately requested a copy of Ms. Schaefer's letter pursuant to the procedure suggested by the State (PC-R2. Def. Ex. I).

then issued and jurisdiction reverted to the circuit court.[26]

Meanwhile, Mr. Riechmann learned of a German broadcast in which Smykowski was interviewed. In the interview, Smykowski said his trial testimony was false and he had been promised money for his testimony. He also said Miami police had taken him out of jail before Mr. Riechmann's trial on several occasions to see his eight-year-old daughter and to go drinking.

After the mandate issued, the case was reassigned to Judge Bagley. At a first status hearing on April 4, 2001, prosecutor Rubin and Assistant Attorney General Jaggard agreed that the issues raised in the Rule 3.850 motion filed on November 26, 1999, must be resolved first since the motion dealt with guilt phase issues that could result in a new trial (PC-R2. 1237). Mr. Riechmann then renewed a request for a copy of the letter the State had received from Smykowski's daughter seeking information on promised reward money (PC-R2. 1239). The judge ruled that Mr. Riechmann was entitled to the actual letters that were sent to the State from Smykowski's daughter instead of merely a summary of the letter's contents (PC-R2. 1239-1240).

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[26]At that time, collateral counsel had still not received the Schaefer letter (PC-R2. 1239).

On May 7, 2001, prosecutor Rubin wrote counsel again to disclose that the State had "lost" the original Schaefer letter, but another copy had been obtained from Ms. Schaefer, albeit with redactions.[27] In this letter, Ms. Schaefer wrote "[m]y father was told that, if the defendant in this case is convicted, the key witness collects part of the insurance money of the victim. He told us that he signed papers to transfer the money to his wife and daughter." (PC-R2. 160). In a subsequent conversation with prosecutors, Smykowski's wife, Halina, indicated that her

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[27]Oddly, Rubin's letter of May 7th contradicted portions of the accompanying copy of Ms. Schaeffer's letter of April 21, 2000. According to the cover letter, prosecutor Rubin had conversed with Ms. Schaeffer and reported that Ms. Schaeffer had said she had been "too young at the time of the events to recall the conversation between her mother and her father about money." Yet in Ms. Schaeffer's letter, she specifically stated that her father told "us" about the money.

In his cover letter, Rubin did reveal that he had also spoken with Halina Smykowska, Walter's wife and Ms. Schaefer's mother. According to Rubin, Halina confirmed that Smykowski had been told of "some kind of monetary benefit due to his testimony" (PC-R2. 157). However, Rubin said that Halina advised him that she was "not certain who it was that Smykowski had said mentioned money to him, but it may have been an officer or a guard" (PC-R2. 157). Rubin asserted that the talk of money occurred after the Riechmann trial when she said Smykowski first learned of the "possibility of money." (PC-R2. 157). Of course by that time, Halina had stood trial on federal fraud charges, been convicted, and was incarcerated in federal prison in Kentucky (PC-R2. 294). Rubin did not explain in the cover letter how Smykowski and his federally incarcerated wife could have conversed after his testimony at the Riechmann trial.

husband told her that he was eligible for “some kind of monetary benefit due to his testimony” (PC-R2. 157).

Upon learning this information, Mr. Riechmann moved to depose Ms. Schaefer, Mrs. Smykowska, assistant state attorney Vogel and records custodian Charles Rosales (PC-R2 145). The circuit court only granted leave to depose Ms. Schaefer (PC-R2. 1249). After Ms. Schaefer was deposed, Mr. Riechmann amended his post-conviction motion on September 14, 2001, to include claims of Brady and Giglio violations, newly-discovered evidence of innocence, and violations of due process (PC-R2. 22-124).

While investigating the Schaeffer letter, Mr. Riechmann continued to look for Walter Smykowski, who had absconded from federal parole shortly after Mr. Riechmann’s trial in 1988. Previous counsel and the U.S. Marshall Service had been unable to locate Smykowski, who was wanted on a federal parole violation in the United States. Counsel learned that the German journalist had found Smykowski in Dubai, United Arab Emirates (UAE), and that he had granted an interview and signed an affidavit about his testimony in Mr. Riechmann’s case (PC-R2. 463-468).

Counsel traveled to Dubai to personally interview Smykowski. She verified that he was the same person who had

been the jailhouse informant at trial and that he had executed an affidavit in which he revealed that he had been promised and received previously undisclosed benefits in exchange for his testimony against Mr. Riechmann. Counsel sought to perpetuate the testimony of Mr. Smykowski by deposing him in Dubai and introducing the deposition at the evidentiary hearing (PC-R2. 463). However, the State objected (PC-R2. 466), and the motion was denied (PC-R2. 15).[28]

A Huff hearing was held on October 19, 2001 (PC-R2. 1271-1313). Judge Bagley denied the motion in part, and granted an evidentiary hearing on the newly-discovered evidence of innocence and the Brady/Giglio claims.

On November 1, 2001, Mr. Riechmann filed a Motion for DNA Testing of the blanket on which the State purportedly found blood (PC-R2. 379-424, 1293, 1299). On November 20, 2001, the state opposed any DNA testing stating that testing would not exonerate Mr. Riechmann (PC-R2. 439-444). The judge granted the DNA motion on April 9, 2002 (PC-R2. 520-521).

On April 18, 2002, the State provided the defense with an amended witness list. After listing the names of ten

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[28]Subsequently, other witnesses were permitted to testify by telephone: prosecutor Catherine Vogel, former Miami Beach Police detective Robert Hanlon, and Deborah Schaefer, daughter of Smykowski. (PC-R2. 1695, 1684, 1579).

witnesses, the document provided: “11. Mr. Smykowski was taken to visit his family by Detectives Hanlon and Matthews and one of them paid for chicken” (PC-R2. 1324-25). Thus, the State conceded that Smykowski had been granted favors by the Miami Beach Police Department detectives before trial (PC-R2. 1345-1346). The State admitted that this information had not been disclosed to Mr. Riechmann before April 18, 2002.

The evidentiary hearing was conducted on May 23, May 31, and July 11-12, 2002 (PC-R2. 17-20). At the hearing, Detectives Hanlon and Matthews confirmed that Smykowski, while housed in the Dade County Stockade waiting to testify, had been taken out of jail to see his eight-year-old daughter at her residence (PC-R2. 1674, 1687). Hanlon testified that they had received a message from Smykowski that he wanted to talk to them (PC-R. 1686). Smykowski “wanted to see his daughter who lived in North Miami and we took him out and brought him to his house. His mother-in-law was there. His daughter was there and we spent a few hours with him and then returned to Dade County Stockade” (PC-R2. 1686). Hanlon explained why he granted this request: “We thought it would be a good gesture. We took him out. We bought a bucket of Kentucky Fried Chicken, brought it to his house. Him, his mother-in-law and daughter ate it” (PC-R2. 1687). The trip was “a favor for

[Smykowski]" (PC-R2. 1691). Hanlon knew that at the time Smykowski was serving a federal sentence (PC-R2. 1688). Hanlon testified that he might have told prosecutors what they were doing, but he did not recall (PC-R2. 1687).

Detective Matthews testified that after receiving a message that Smykowski wanted to speak with him, he and Hanlon signed Smykowski out of jail and took him to the police station "to conduct an interview" (PC-R2. 1669-70) because "the atmosphere of that detention center is not conducive for interviewing" (PC-R2. 1670). Matthews testified, "I know we had talked at the police station. If more than once or twice or three times, whatever it was, I personally think it was twice, but I'm not sure" (PC-R2. 1671).[29] Matthews said, "the interview would have been at the Miami Beach police station." However, Matthews had no recollection of what was discussed. "I mean, I really don't recall" (PC-R2. 1672). Matthews testified that afterwards, "[w]e ended up at a house that was occupied by a woman, I believe he identified as his mother-in-law and a child he identified as his daughter" (PC-R2. 1672). This was at Smykowski's request (PC-R2 1673). Smykowski was not handcuffed (PC-R2. 1673, 1688). Matthews testified that

[29]Hanlon testified that he thought "we went right from the detention center where he was housed to the house in North Miami" (PC-R2. 1689).

Smykowski was grateful and thanked him (PC-R2. 1675). Matthews "d[id]n't recall the other two trips. I am just, for some reason, I believe we signed him out more than once" (PC-R2. 1677).[30]

A friend of Smykowski, John Skladnik, testified that he was visiting Smykowski's mother-in-law and Deborah Smykowski (Schaeffer) when he saw Smykowski and two men walking up the sidewalk toward the house (PC-R2. 1603-04). "They looked like they did not want me around and I left" (PC-R2. 1603).

Ms. Schaeffer testified that when she was eight years old, she saw her father on one occasion while she was staying with her grandmother (PC-R2. 1581). Her father was accompanied by two or three men (PC-R2. 1581). She testified that she did not believe her father was handcuffed (PC-R2. 1581). From what she was told, her mother placed a collect call to the house while her father was there (PC-R2. 1582).

Ms. Schaeffer also testified about her letter to the State Attorney's Office inquiring about reward money for her father's testimony against Mr. Riechmann (PC-R2. 1585-86).

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[30]At trial, Smykowski testified that he had asked for no benefit in exchange for his testimony. He testified that he had no contact with either the prosecution or law enforcement from the time they saw him at the federal facility at Eglin Air Force Base in March, 1988, until meeting with DiGregory the day before he took the stand to testify (R. 4142-43).

The letter had been written at her mother's request and was premised upon information she gathered exclusively from her mother (PC-R2. 1586). Ms. Schaeffer testified that her mother had remembered that Smykowski had told her about getting "insurance money" as a result of his testimony against Mr. Riechmann (PC-R2. 1587).

Mr. Carhart testified that he discovered during Robert Stitzer's deposition in April, 1988 that Stitzer had been talking on the phone with Smykowski's eight-year-old daughter. When Smykowski first contacted the State to give evidence against Mr. Riechmann the communications had been through Stitzer (PC-R2. 1679). Mr. Carhart wanted to learn more about this phone contact, but prosecutor Sreenan objected to any of Mr. Carhart's efforts to discover the nature of the relationship between Stitzer and Debbie Schaeffer and instructed Stitzer not to answer the questions.

In 2002, Sreenan testified that she did not feel the inquiry was relevant, and she was trying to protect the location of Smykowski's daughter (PC-R2. 1358-1359).[31] Sreenan testified that she had received a letter from Smykowski dated March 27, 1988, in which he asked her for assistance in

[31]Yet, Smykowski showed no such hesitation in his May, 1988, deposition when he testified that his daughter was then living with his mother-in-law (PC-R2. 1363-64).

providing care for his daughter (PC-R2. 1353-55).[32] In response to the letter, Sreenan testified, “My recollection is that we did nothing.” Sreenan explained, “I have a recollection of doing nothing. It would seem to me I would remember if we did something, and this isn’t the type of thing that you normally get involved in” (PC-R2. 1355).[33] Sreenan did not notify Mr. Carhart that she had received Smykowski’s letter requesting assistance in finding new arrangements for his daughter. She explained that “Mr. Carhart is entitled to know about favors that might be given in regard to the daughter, but I felt personal conversations were beyond the scope of discovery” (PC-R2. 1360-61).[34]

Sreenan testified that she was unaware that detectives had signed Smykowski out of jail and taken him to visit his daughter. She acknowledged that had she known about Mr.

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[32]Smykowski’s daughter, Deborah, had been living with Loretta Stitzer, Robert Stitzer’s wife, and it was not working out.

[33]Sreenan said that she felt no obligation to protect Smykowski’s daughter when she learned the child did not have a place to stay because both of her parents were incarcerated. Ms. Sreenan said she did not contact the Division of Children or Families or any outside agency regarding the welfare of the child (PC-R2. 1355).

[34]In fact, Sreenan had disclosed during the May, 1988, deposition of Smykowski that the State had purchased some clothes for Smykowski and Stitzer because they got transferred back to Miami without clothes (PC-R2. 1362).

Smykowski's trip with Matthews and Hanlon to see his daughter, she "probably" would have disclosed it to the defense (PC-R2. 1365). Sreenan said she was obligated to disclose any "benefit they [Smykowski] received, and the defense was entitled to know" (PC-R2. 1362).

In the 2002 evidentiary hearing, Mr. Carhart testified that he did not know Smykowski had written a letter to Ms. Sreenan in March, 1988, asking for assistance for his daughter (Supp. PC-R2. 214). Mr. Carhart had no indication that Smykowski had been taken out of custody to visit his daughter. He considered that a benefit that should have been disclosed to the defense (Supp. PC-R2. 217, 220). Mr. Carhart said he would have used that information to impeach Smykowski at trial (Supp. PC-R2. 215). He also said that had he known this information, he would have investigated the false testimony of Smykowski (Supp. PC-R2. 217,220; See also, R. 4142-43).

Terri Backhus, Mr. Riechmann's collateral counsel, testified about her interview of Smykowski in March of 2002 (PC-R2. 1714-57). Ms. Backhus showed Smykowski a copy of the affidavit reflecting his signature that had been attached to the Amended Motion to Vacate. Smykowski confirmed that the affidavit was executed by him and that it was true and correct (PC-R2. 1713-14). The State objected to Ms. Backhus

testifying regarding the specific contents of the affidavit and Smykowski's comments made to Ms. Backhus (PC-R2. 1714). The circuit court sustained the objection and precluded further representations of Smykowski's statements to Ms. Backhus. Judge Bagley indicated that he would treat the affidavit appearing in the motion as a proffer (PC-R2. 1714-15). In the affidavit, Smykowski admitted that he lied at the 1988 trial. He said that he had been taken out of custody on a number of occasions for social visits, dinner and drinks by Miami Police detectives.[35] He was told by Sreenan the words to use in his testimony. He said he was promised money and help on his federal case. He said that DiGregory had given permission for him to be taken out of custody. Because the U.S. government had an outstanding warrant for his arrest on a parole violation, Smykowski refused to travel to Miami to testify in 2002.

Mr. Riechmann also presented the testimony of two new witnesses who were discovered shortly before the evidentiary hearing in 2002 (PC-R2. 1711-12). Doreen Bezner testified

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[35]After the affidavit was filed and on the eve of the 2002 evidentiary hearing, the State disclosed for the first time that Smykowski had been taken out of jail for a social visit with his daughter. Mr. Riechmann argued that the disclosure provided corroboration of the truthfulness of the affidavit that had first revealed a previously unknown fact and that the affidavit should be admitted into evidence (PC-R2. 664).

that she was homeless (PC-R2. 1639). She recalled that she was on the street the night that the crime occurred in 1987 (PC-R2. 1641). She remembered that the shooting occurred the same year she moved to South Florida (PC-R2. 1640, 1652). Doreen was working as a prostitute, and was still working as a prostitute at the time of testimony (PC-R2. 1651). Mark Gray, a drug dealer who was her pimp/boyfriend at the time of the shooting, ran his drug operations on Biscayne Boulevard (PC-R2. 1651).

Doreen testified that she had seen Mr. Riechmann and Ms. Kischnick earlier that day at a Denny's restaurant on Biscayne Boulevard (PC-R2. 1643). She remembered "[t]he lady was blond. A lot of gold. That's all I can say about the lady. A lot of gold and nice ass" (PC-R2. 1643). Despite her work as a prostitute, Doreen preferred women sexually and paid attention to the blond lady (PC-R2. 1660). At the hearing, Doreen identified a magazine photograph of Ms. Kischnick as the blond lady, "[t]hat's her" (PC-R2. 378). Doreen saw the woman speaking with Mark Gray, but she was not privy to the conversation because she was not allowed to be involved with Mark's business associates (PC-R2. 1659-60). She assumed they were discussing a heroin transaction because "that's what he did" (PC-R2. 1654). After the conversation, Mark told Doreen

that she “didn’t have to work no more” (PC-R2. 1654). “Mark said he was going to have a lot of money. We didn’t have to work anymore” (PC-R2. 1647).

On that evening, Doreen was “in a dope hole shooting in a bush” when the car drove up (PC-R2. 1641). The dope hole “was right off 62nd” near Biscayne (PC-R2. 1646). The bushes were behind where Mark stood waiting for customers. She saw the car drive up. She identified a magazine photograph of Mr. Riechmann as the car’s driver (PC-R2. 1644).[36] Mark held up his hands indicating for the car to stop (PC-R2. 1658). When the car stopped, two “gits” (a term for two young black males) ran up to the car on both sides and shot into the car (PC-R2. 1646, 1658). “As soon as they pulled up it happened. It was like a set up gone wrong” (PC-R2. 1647).[37]

Doreen testified that after the shooting Mark “was scared for some reason” (PC-R2. 1647). So he locked Doreen in a hotel room; “[h]e wouldn’t let me back out” (PC-R2. 1647). Doreen remained in the hotel room for a week, so she did not

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[36]Doreen was not able to identify Mr. Riechmann in the courtroom (PC-R2. 1643-44).

[37]A police report, not disclosed to trial counsel, indicated that three days after the crime, police learned that two drug dealers, one named “Kool,” were overheard by an informant bragging about ripping off and wasting someone. These drug dealers were selling drugs out of a brown Impala (PC-R. 684).

know whether police officers were around investigating (PC-R2. 1647-48). She finally ran away because Mark "was abusive. He got crazy. He just snapped" (PC-R2. 1648). To Doreen's knowledge, Mark did not return to "the dope hole," his place of business, after the shooting (PC-R2. 1649).

Doreen was contacted by Frank Clay, an investigator working for Mr. Riechmann's lawyer, a couple of months before her testimony (PC-R2. 1655). She met with him five or six times (PC-R2. 1655). At one of the meetings, she was introduced to Mr. Riechmann's lawyer, Ms. Backhus (PC-R2. 1657).

Doreen admitted to being a crack addict (PC-R2. 1657). She also acknowledged that she had over 10 convictions (PC-R2. 1658). When asked about felonies and misdemeanors, she indicated "I don't know how many times I was arrested for what" (PC-R2. 1659).[38]

Donald Williams testified that he was homeless and had lived in the area of Biscayne and 63rd Street for many years (PC-R2. 1626-27). He knew Mark Dugan and an individual named "Twin" (PC-R2. 1630, 1637). Williams knew Doreen Bezner and that Doreen was a girlfriend of the man he knew as Mark Dugan

[38]The State successfully objected to the introduction of Doreen's rap sheet to clarify the number of convictions and what they were for (PC-R2. 1663).

(PC-R. 1631).[39] Williams remembered "people in the bar were talking about" the shooting that took place at 63rd and Biscayne (PC-R2. 1633).

Mr. Riechmann's investigator located Williams, a homeless man, in January or February of 2002 (PC-R2. 1711). Through Williams, Mr. Riechmann's investigator was able to locate Doreen Bezner, who was also homeless, and learn of her account of the shooting (PC-R2. 1712).

The State presented no rebuttal witnesses.

Judge Bagley issued an order denying all relief on February 28, 2003, although the DNA testing had still not been completed (PC-R2 1120-1141). On that same date, Mr. Riechmann filed a motion to compel DNA testing and a motion for the circuit court to retain jurisdiction over the DNA motion (PC-R2. 1142-1146). The motion was granted and another order for DNA testing was entered (PC-R2. 1147-1148).[40]

On March 2, 2003, counsel received a letter dated February 27th from the State Attorney's Office. In this letter, the State noticed Mr. Riechmann that Judge Bagley had

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[39]Williams knew Doreen's boyfriend as Mark Dugan, while she testified that she knew him as Mark Gray. Donald Williams and Doreen Bezner knew each other and knew Doreen's boyfriend, Mark, who had been in a wheelchair for a number of years at the time of their testimony (PC-R2. 1630, 1649).

[40]As of this date, no DNA testing has been done.

asked the State to provide him the depositions of several defense witnesses who had testified at the evidentiary hearing. These depositions had not been introduced into evidence and were not part of the record before Judge Bagley (Supp. PC-R2. 75-82).

The letter revealed *ex parte* contact between the judge and the prosecution while the order denying relief was being prepared. In light of the letter, counsel further investigated and learned that Judge Bagley had worked in the Dade County State Attorney's Office in 1988 with prosecutors Beth Sreenan and Kevin DiGregory during the time of Mr. Riechmann's trial. In fact in the order denying relief, Judge Bagley relied upon internal state attorney policies from 1988 that no one had testified regarding. As a result of the State's letter, Mr. Riechmann filed a Motion to Get the Facts on March 10, 2003 and a Motion to Disqualify on March 11, 2003 (Supp. PC-R2. 75-82; 83-88). A motion for rehearing was filed on March 17, 2003 (Supp. PC-R2. 119-134).

The motions were all denied on April 15, 2003 (PC-R2. 1178, 1179, 1180, 1181). Mr. Riechmann immediately filed a notice of appeal and a motion to stay the resentencing until an appeal could be taken to this Court (PC-R2. 1182). Judge Bagley denied the stay and ordered the resentencing to occur

in 60 days.

On April 29, 2003, Mr. Riechmann filed a motion to stay the resentencing with this Court. This Court granted the motion for stay on May 30, 2003.

SUMMARY OF ARGUMENT

1. The lower court erred in denying an evidentiary hearing on Mr. Riechmann's allegations concerning Hilliard Veski. Accepting the proffered facts as true--as is required when no evidence is allowed--these allegations establish that Veski found the plaid blanket on the blood-drenched passenger seat of the rental car. Its contact with blood there belied the significance of the positive presumptive blood test. Prosecutor Sreenan pressured Veski to testify falsely in his deposition. Accepting these allegations as true, the State cannot establish beyond a reasonable doubt that this deception had "no effect" on the outcome. An evidentiary hearing is required.

2. The lower court erred in denying Mr. Riechmann's motion to perpetuate the testimony of Walter Smykowski and Mr. Riechmann's subsequent requests to introduce Smykowski's affidavit and oral statements. Mr. Riechmann filed a motion to perpetuate testimony which complied with the requirements

of Fla. R. Crim. P. 3.190(j), but the court denied the motion and refused to admit Smykowski's affidavit and oral statements. The court denied Mr. Riechmann access to the courts and the right to compel the attendance of witnesses, the most basic components of due process. Accepting the facts contained in Mr. Smykowski's affidavit as true, these allegations entitle Mr. Riechmann to relief and an evidentiary hearing.

3. Mr. Riechmann was denied due process when Judge Bagley engaged in *ex parte* contact with the State during preparation of the order denying relief, conducted his own independent investigation, and relied upon matters not presented in evidence at the evidentiary hearing in his order denying relief. Judge Bagley compounded these improprieties by denying Mr. Riechmann's motion to get the facts regarding the judge's activities and by denying Mr. Riechmann's motion to disqualify the judge. These actions violated the Code of Judicial Conduct, and also denied Mr. Riechmann a full and fair consideration of his claims. This Court should vacate the order denying relief and remand for new proceedings before a different judge.

4. Mr. Riechmann was denied due process by the State's withholding of material exculpatory evidence and by the

State's knowing presentation of false evidence. The evidence presented in 1996 and in 2002 must be evaluated cumulatively, but the circuit court failed to conduct this analysis. This Court should order a new trial.

5. Newly discovered evidence establishes that Mr. Riechmann would probably be acquitted. Doreen Bezner testified that she witnessed the shooting, which was committed by two black men and not by Mr. Riechmann. Donald Williams testified that for about a week after the murder, he heard people talking about someone being killed during a failed robbery. The circuit court erroneously concluded that this testimony would not probably lead to an acquittal and failed to conduct a cumulative analysis. This Court should order a new trial.

ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN REFUSING TO PERMIT MR. RIECHMANN TO PRESENT THE TESTIMONY OF HILLIARD VESKI IN SUPPORT OF HIS BRADY/GIGLIO CLAIMS. THE CIRCUIT COURT'S ACTION WAS TANTAMOUNT TO A SUMMARY DENIAL OF ANY CLAIMS PREMISED UPON VESKI'S TESTIMONY.

Former Miami Beach police officer Hilliard Veski swore in an affidavit that he was pressured by the State to testify falsely regarding his inventory of Mr. Riechmann's rental car and the location of evidence within the car. A month after

conducting the inventory of the rental car, Officer Veski was accused of usage of illegal drugs and placed upon administrative leave. According to Veski, prosecutor-Sreenan made it very clear that things would go better in his own case if he would testify at Mr. Riechmann's trial in the manner she directed.[41]

Based upon the information provided by Officer Veski, Mr. Riechmann argued that his due process rights were violated by the State's knowing efforts to present false or misleading evidence, to intentionally deceive the defense, and to withhold favorable evidence from the defense (Supp. PC-R2. 62-

[41]Veski's claim has support in the record. After his July 7, 1987, deposition, he advised Mr. Riechmann's counsel that his testimony regarding the location of a flashlight in the trunk of the rental car was false. He had been pressured to provide the false testimony because it made the flashlight a significant piece of evidence against Mr. Riechmann. Veski did not advise counsel who had pressured him (PC-R. 5662).

After Veski's confession to trial counsel, the State did not call him as a witness at Mr. Riechmann's trial. The flashlight lost its significance as evidence. The State then turned to Rhodes and his examination of the plaid blanket. It was only after Veski exploded the flashlight evidence that Rhodes suddenly concluded that there were invisible specks of blood on the plaid blanket. But in introducing the blanket, the State decided that it was unnecessary to call Veski as witness even though he was the officer who had collected the blanket from the car. The State was permitted over the defense's objection to introduce the blanket into evidence without calling Veski to identify the location of the blanket when it was collected as evidence (R. 3282). Moreover, Mr. Carhart was not provided with Veski's handwritten notes of the location of all the evidence that he had collected from the rental car.

64). Constitutional law is well-established that a prosecutor may not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957)(due process violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993). See Giglio v. United States, 405 U.S. 150, 153 (1972)(the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice"); Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)(due process "forbade the prosecution to engage in 'a deliberate deception of court and jury'").[42] The prosecutor as the State's representative has "a duty to learn of any favorable evidence known to the others acting on the government's behalf" and is responsible "for failing to disclose known, favorable evidence rising to a

[42]This Court has stated "[t]ruth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).

material level of importance." Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Accepting Veski's proffered testimony as true, a clearer case of prosecutorial misconduct is hard to imagine.[43] In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989)("Accepting the allegations concerning Chavers and Carson at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation"). "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). *Accord* Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). Factual allegations as to the merits of a constitutional claim as well as issues of diligence must be accepted as true, and an evidentiary hearing is warranted if

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[43]These factual allegations were included in the motion to vacate Mr. Riechmann filed in circuit court (Supp. PC-R2. 62-64), and proffered during the evidentiary hearing (Supp. PC-R2. 144).

the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

In Mr. Riechmann's case, the lower court erroneously failed to grant an evidentiary hearing on the information provided by Officer Veski despite Mr. Riechmann's proffer of his testimony.[44] As explained by Mr. Riechmann, Officer Veski did not provide the information regarding the actions of Sreenan until after the conclusion of the 1996 evidentiary hearing. During the 1996 proceedings, Sreenan testified specifically that she had not pressured Officer Veski to

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[44]The postconviction court precluded Officer Veski's testimony at the State's urging. The State argued that Veski's proffered testimony "has absolutely positively no relevance to the claims that Your Honor has granted an evidentiary hearing on" (Supp. PC-R2. 144). However, this Court's opinion in Mordenti v. State, 29 Fla. L. Weekly S809 (Fla. December 16, 2004), made clear that Brady/Giglio claims must be evaluated cumulatively. Courts must give cumulative consideration to each alleged Brady/Giglio violation in determining whether the overall pattern warrants post-conviction relief.

Officer Veski's statement that Sreenan pressured him to testify falsely is highly relevant to every aspect of the Brady/Giglio claim made by Mr. Riechmann. How much of the State's case against Mr. Riechmann was the product of an overzealous prosecutor seeking to win a conviction at any cost? Officer Veski's statement was consistent with Smykowski's affidavit. A jury confronted with such prosecutorial misconduct would view the State's circumstantial case in a different light.

Moreover, Officer Veski's statements reveal that Sreenan was less than truthful in her 1996 postconviction testimony that she did not pressure Officer Veski. Veski's testimony is absolutely essential to any evaluation of Sreenan's credibility.

change his testimony (PC-R. 4771).

In Banks v. Dretke, 124 S. Ct. 1256 (2004), the Supreme Court held:

> When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

Banks v. Dretke, 124 S. Ct. 1256 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Given the State's deception, Mr. Riechmann was entitled to assume the truthfulness of Sreenan's testimony, at least until Veski revealed that she had indeed pressure him to testify to something other than the truth.[45] As a result, Mr. Riechmann was entitled to an evidentiary hearing on Officer Veski's serious and significant allegations.[46] Mr. Riechmann was also entitled to present Veski's testimony to properly evaluate the cumulative effect

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[45]Again, because Mr. Riechmann was deprived of an opportunity to present evidence on this claim, i.e. call Veski as a witness, his statements must be accepted as true. Lightbourne v. Dugger.

[46]Moreover, as this Court recently explained, Mr. Riechmann was entitled to cumulative consideration of all his Brady/Giglio claims. Mordenti v. State, 29 Fla. L. Weekly S809 (Fla. December 16, 2004). The refusal to permit the presentation of Veski's testimony precluded the requisite cumulative consideration.

of the prosecutorial misconduct. The exclusion of Officer Veski's testimony on grounds that it was of "absolutely positively no relevance" to Mr. Riechmann's Brady/Giglio claims constitutes reversible error. The denial of Rule 3.850 relief must be reversed and remanded.

ARGUMENT II

MR. RIECHMANN WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AND DENIED ACCESS TO THE COURTS WHEN THE CIRCUIT COURT REFUSED TO PERMIT A DEPOSITION TO PERPETUATE TESTIMONY TO BE CONDUCTED IN ORDER TO ALLOW MR. RIECHMANN THE OPPORTUNITY TO PRESENT THE TESTIMONY OF WALTER SMYKOWSKI, AN UNAVAILABLE WITNESS, OR ALTERNATIVELY TO ALLOW THE INTRODUCTION OF SMYKOWSKI'S AFFIDAVIT IN WHICH HE ASSERTED THAT IN EXCHANGE FOR THE PROMISE OF CONSIDERATION HE PROVIDED FALSE TESTIMONY AT MR. RIECHMANN'S TRIAL.

On November 12, 2000, Mr. Smykowski executed an affidavit in which he stated:

> 1. I am Walter Smykowski, Florida Driver's License Number S647-346-38-247-2, issued in the name of Waldemar Smykowsky, expiry date 09.08.04. I was contacted in January, 1988 to testify against a fellow inmate named Dieter Riechmann. I met Dieter Riechmann in November 1987 whilst incarcerated in the Federal prison, MCC, in Miami.
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> 2. For about two months, I shared a cell with Dieter Riechmann.
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> 3. At that time, Dieter Riechmann was in MCC on gun charges. Later, I learned that he had was acquitted on those charges, but was again arrested. This time on charges that he had killed his girlfriend in Miami in October 1987.

4. Dieter and I spent a lot of time together. Most of the time we played chess as Dieter was a good chess player.

5. Dieter once told me that his girl friend was shot when he was driving a car, got lost and wanted to ask some black guy for directions.

6. Besides that, Dieter never talked about this incident, not to me, nor to anyone else.

7. Around January 1988, a fellow inmate, Bob Stitzer, approached me and talked to me about the possibility of being a witness against Dieter Riechmann.

8. Bob Stitzer offered me his contacts with law enforcement agencies and told me that he would help me cut down my ten-year sentence.

9. A few days later, still in January, I was contacted at the MCC by Sergeant Joe Matthews and Bob Hanlon of the Miami Beach Police Department.

10. Matthews and Hanlon asked me to help them in the case against Dieter Riechmann and promised to help me in my federal case.

11. I agreed to cooperate and one day later was sent to the prison in Eglin Air Force Base.

12. There, about three weeks later, I had another visit, this time from Joe Matthews accompanied by a prosecutor called “Betty”, her real name being Beth Sreenan.

13. For several hours, she talked to me in order to prepare me for my testimony against Dieter Riechmann.

14. Around April 1988 I was brought back to Miami and stayed some weeks in a low security prison, the Sheriff’s Department correctional center.

15. There I met Bob Stitzer again.

16. We lived together in a trailer.

17. Although I had nothing to accuse Dieter Riechmann of the policemen and Beth Sreenan asked me to give false testimony.

18. On many occasions Kevin Di Gregory, the main prosecutor, and Beth Sreenan prepared me for testimony.

19. When I testified during the trial that Dieter Riechmann was *happily dancing in our cell because he was a millionaire now*, it is not true.

20. Beth Sreenan asked me to use these words.

21. Also I never asked Dieter Riechmann why he killed his girlfriend. So the testimony that I asked him and that he turned “pale like a white wall” is also not true. It was Mrs. Sreenan who put those words into my mouth and asked me to say this in court.

22. For my testimony against Dieter Riechmann, the police and the prosecutors not only promised me help in my federal case, but they offered me money to the extent of US$30,000 (thirty thousand dollars) once the case was over and Dieter Riechmann was convicted and sentenced.

23. The month before trial I was able to leave the prison and nearly every day I was taken to my home by Bobby Hanlon and/or Sergeant Matthews. They invited me for dinner many times and I could have any quantity of alcohol. At this time I went home drunk to our trailer nearly every day.

24. As I understand, prosecutor Kevin Di Gregory always gave a special permission for me to leave the prison.

25. After I had testified against Dieter Riechmann the police and state attorneys did not keep any of their promises towards me. I was only

released from prison after five years.

26. Although promised, I never received any money for my help.

27. Early November 2000, I was contacted by telephone by German journalist Peter F. Mueller who told me that he was investigating the case of Dieter Riechmann.

28. Mr. Mueller explained to me that he wanted to talk with me about my testimony in the Riechmann case and I agreed to talk to him when he offered to visit me in the United Arab Emirates.

29. Mr. Mueller has never offered me any inducement whatsoever for talking to him.

30. On November 12, 2000 I agreed to a video and audio taped interview about my involvement in the Riechmann case.

31. I told Mr. Mueller the truth about my false testimony against Dieter Riechmann.

32. I am coming forward now with the truth because I feel guilty towards Mr. Riechmann.

Signed Walter Smykowski

(Supp. PC-R2. 46-48). Accepting these statements presented in Mr. Riechmann's Rule 3.850 motion as true, Smykowski received consideration for his trial testimony. He was promised additional consideration in exchange for testifying falsely at trial when he denied either receiving a benefit or the expectation of a reward. He also testified falsely that Mr. Riechmann had made incriminating statements or engaged in incriminating conduct. According to Smykowski, his testimony

was coached by prosecutor Sreenan.[47]

Smykowski's affidavit indicated that Mr. Riechmann's trial was more than unconstitutional; it was a farce in which evidence was fabricated to obtain a conviction. Mr. Riechmann argued that this affidavit alone or in conjunction with a previously presented Brady claim warranted a new trial under Gunsby and Kyles. It established a Giglio violation, a Brady violation, and a basis for relief under Jones v. State, 591 So. 2d 911 (Fla. 1991).

The postconviction court ordered an evidentiary hearing on the claim premised upon Smykowski's affidavit. However, Smykowski was located in Dubai, U.A.E., a city on the Arabian Peninsula. Because he was wanted by the U.S. Marshall's Office, Smykowski was unwilling to travel to the United States. Mr. Riechmann sought to depose Smykowski under Fla. R. Crim. P. 3.190(j), so that his testimony could be presented (PC-R2. 464).

Rule 3.190(j) permits a deposition to perpetuate upon the filing of a verified motion to take the deposition, if the

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[47]Like Officer Veski, Smykowski indicated that Sreenan was responsible for telling him what to say in his testimony. Thus, Veski's testimony is corroborative of Smykowski's affidavit. Yet the State successfully argued that Veski's proffered testimony "has absolutely positively no relevance to the claims that Your Honor has granted an evidentiary hearing on" (Supp. PC-R2. 144).

verified motion asserts that the "prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness' testimony is material, and it is necessary to take the deposition to prevent a failure of justice." When presented with such a verified motion, "the court shall order a commission to be issued to take the deposition of the witness[ ] to be used in the trial." Despite the clear requirements of the rule, on January 29, 2002, the circuit court denied the motion to perpetuate Smykowski's testimony (PC-R2. 15).[48] The motion was orally renewed during the evidentiary hearing (Supp. PC-R2. 262), and again was denied (Supp. PC-R2. 265).

The question now is whether Mr. Riechmann was afforded his due process rights when he was denied the means necessary to obtain Smykowski's testimony and was precluded from

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[48]The State had opposed the motion to perpetuate relying on Harrell v. State, 709 So. 2d 1364 (Fla. 1998)(PC-R2. 466). At issue in Harrell was "whether or not testimony via satellite in a criminal case violates the Confrontation Clause, and, if so, whether the satellite procedure constitutes a permissible exception." Id. at 1367. However, the Confrontation Clause was not implicated in the circumstances here since it speaks only to the criminal defendant's right to confront; the State does not have a constitutional right of confrontation. Nor did the State's written opposition demonstrate a connection between the discussion in Harrell of satellite testimony and Rule 3.190(j).

introducing Smykowski's affidavit or evidence of his oral statements that his testimony against Mr. Riechmann was false. See Provenzano v. State, 750 So.2d 597, 601 (Fla. 1999)("Because Dr. Fleming never testified, the purpose of our previous remand was never realized."). Rule 3.850 proceedings must conducted in accordance with due process. Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996). Under due process, Mr. Riechmann must be allowed to compel the attendance of an out of state witness in order to prove his claims. Rule 3.850 was adopted by this Court in order to provide those convicted in a criminal prosecution with a means of vindicating their trial rights. To deny a post-conviction petitioner of the only means available to present the testimony of favorable witnesses is a denial of the petitioner's right to a full and fair post-conviction hearing and the opportunity to vindicate his trial rights through collateral proceedings.

Rule 3.850 proceedings in Florida are governed by due process just as trial or sentencing proceedings are. This court has long recognized that a 3.850 petitioner is entitled to due process. State v. Reynolds, 238 So. 2d 598, 600 (Fla. 1970)("due process requires that [pro se] petitioner be produced so that he may confront all of the witnesses, interrogate his own witnesses and cross-examine those of the

State")(emphasis added); Eby v. State, 306 So. 2d 602, 603 (Fla. 1975)("the presence of the petitioner is not always required, nevertheless it is a matter within the discretion of the trial court which must be exercised in the light of other applicable principles of law including the requirements of due process")(emphasis added); Clark v. State, 491 So. 2d 545, 546 (Fla. 1986)(in a capital case arising from a pro se 3.850 this Court noted there must be "a judicious regard for the constitutional rights of criminal defendants" when dealing with pro se motions because prisoners in 3.850 proceedings were entitled to due process)(emphasis added); Rose v. State, 601 So. 2d 1181, 1182 (Fla. 1992)(order denying 3.850 vacated on petitioner's claim "he was denied due process of law because the trial court without a hearing and as a result of ex parte communication adopted the State's proposed order denying relief")(emphasis added); Huff v. State, 622 So. 2d 982, 983 (Fla. 1993)("we agree with Huff that his due process rights were violated")(emphasis added); Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996)("While it is within the trial court's discretion to determine whether or not a prisoner should be present at a postconviction relief hearing, this discretion must be exercised with regard to the prisoner's right to due process")(emphasis added); Smith v. State, 708

So. 2d 253, 255 (Fla. 1998)("We reject the State's argument that Smith's due process rights were not violated by the ex parte communications because he had ample opportunity to object to the substance of the proposed order.")(emphasis added); Jones v. State, 740 So.2d 520 (Fla. 1999)("We conclude that the twelve-year delay undisputedly not due to appellant, the lack of psychological testing contemporaneous to trial, and the State's own evidence that a retroactive competency determination is not possible establish the inability to provide appellant a meaningful retrospective competency determination that complies with due process.")(emphasis added).

In Johnson v. Singletary, 647 So. 2d 106, 111 n. 3 (Fla. 1994), the defendant appealed the denial of his motion to vacate. This Court reversed and remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits stating that another prisoner had confessed to the crime for which Mr. Johnson was convicted. This Court reversed because the circuit court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description of the perpetrator given at the trial; however, the circuit court refused to consider evidence Mr. Johnson

offered to corroborate the affidavits. This Court ruled that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits, violated his due process rights. This Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n.3.[49]

In Roberts v. State, 840 So. 2d 962 (Fla. 2002), this Court explained that in Johnson and Provenzano:

> we determined that **the postconviction defendants had been deprived of due process because they were not given an opportunity to present evidence or witnesses**. * * * Thus, on remand, Roberts must be afforded an opportunity to compel Haines' testimony at the evidentiary hearing so that the court can hear from her directly about the recantation and the

[49]Justice Overton in his concurring opinion noted that Mr. Johnson must be given an opportunity to present evidence corroborating the affidavits. Justice Overton explained, "This is especially true given that the trial court allowed the State to present evidence that the affidavits were unreliable but did not afford Johnson the same evidentiary hearing opportunity." Id. at 111. Justice Kogan concurred, stating, "[s]ince the trial court effectively had commenced an evidentiary hearing, it was obligated to grant Johnson's request to present evidence of his own in rebuttal." Id. at 112. See also Jones v. Butterworth, 695 So. 2d 679, 681 (Fla. 1997)(ordering the circuit court to reopen the evidentiary hearing after denying the petitioner the opportunity to present his expert witnesses); Ramirez v. State, 651 So. 2d 1164 (Fla. 1995)(reversing conviction because defendant's due process rights were violated when he was deprived opportunity to rebut State's scientific evidence).

> circumstances surrounding her original trial testimony.

Roberts, 840 So. 2d at 971 (emphasis added).

Certainly, the most basic principles of due process are notice and opportunity to be heard. The opportunity to be heard must include the right to compel the presence of those witnesses necessary to support the claim upon which this Court ordered the evidentiary hearing.[50]

To deny Mr. Riechmann a right that has been extended to other identically situated 3.850 petitioners would constitute an equal protection violation, as well as a violation of due process. Judge Bagley erred in denying Mr. Riechmann's motion to depose Smykowski, and then subsequently in precluding the introduction of Smykowski's affidavit and oral statements that his testimony at Mr. Riechmann's was false.[51] This Court must reverse and remand for evidentiary hearing at which Mr.

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[50] In Garcia v. State, 816 So. 2d 554, 565 (Fla. 2002), Judge Bagley demonstrated a similar failure to appreciate a criminal defendant's right to present favorable evidence. There, this Court reversed the conviction because Judge Bagley refused to admit the prior sworn testimony of a former co-defendant that was "critical in assessing Garcia's guilt."

[51] Because Mr. Riechmann was left with no means of presenting Smykowski as a witness, Judge Bagley sustained the State's objection to Loretta Stitzer's testimony because of a failure to establish relevancy (Supp. PC-R2. 246-48). Likewise, the circuit court refused to reopen the evidentiary hearing to allow oral statements given by Smykowski to German police which corroborated his affidavit.

Riechmann is provided the tools necessary to obtain a material witness's testimony who is outside the jurisdiction of a Florida court.

ARGUMENT III

THE CIRCUIT COURT JUDGE ENGAGED IN EX PARTE COMMUNICATION WITH THE STATE WHILE PREPARING HIS ORDER DENYING MR. RIECHMANN'S MOTION TO VACATE, SOUGHT TO OBTAIN EVIDENCE NOT INTRODUCED INTO EVIDENCE, AND DID IN FACT RELY UPON KNOWLEDGE OF INTERNAL OFFICE PROCEDURE NOT OBTAINED THROUGH ANY EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING. THE CIRCUIT COURT'S ACTIONS DEPRIVED MR. RIECHMANN OF DUE PROCESS AND A FULL AND FAIR PROCEEDING.

A. Ex Parte

On February 27, 2003, one of the prosecutors handling the collateral proceedings, Joel Rosenblatt, sent a letter to Judge Bagley, the presiding judge, and copied Mr. Riechmann's counsel. In this letter, Mr. Rosenblatt indicated that the secretary for the lead prosecutor, Reid Rubin, had advised Mr. Rosenblatt that Judge Bagley's judicial assistant had "contacted her in an effort to obtain copies of the depositions of Doreen Bezner, Donald Williams and Det. Hanlon and Matthews." Because Mr. Rubin was out of town, Mr. Rosenblatt was notified and responded to the request by writing the letter and declining to provide the requested material (Supp PC-R2. 75-76).

On February 28, 2003, Judge Bagley entered his order

denying Rule 3.850 relief in open court. It was not until the next day that collateral counsel received her copy of Mr. Rosenblatt's letter. Counsel immediately filed a "motion to get the facts" as had been done by the State in Smith v. State, 708 So. 2d 253 (Fla. 1998), when collateral counsel there objected to *ex parte* contact between the State and the presiding judge (Supp. PC-R2. 75). Counsel also filed a motion to disqualify Judge Bagley in light of the *ex parte* contact in which he sought materials that had not been introduced into evidence (Supp. PC-R2. 83).

The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Fla. Bar Code Jud. Conduct, Canon 3 A(4). As Justice Overton once explained for this Court:

> [C]anon [3 A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communication except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987).

The trier of fact cannot have ex parte communications

with a party. Love v. State, 569 So. 2d 807 (1st DCA 1990); Rose v. State, 601 So. 1181 (Fla. 1992); Rollins v. Baker, 683 So. 2d 1138 (5th DCA 1996); McKenzie v. Risley, 915 F.2d 1396 (9th Cir. 1990). This prohibition of *ex parte* proceedings applies in the Rule 3.850 process. This Court has specifically denounced *ex parte* communications in the course of 3.850 proceedings:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.
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> * * *
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> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect of the appearance of the impartiality of the tribunal The impartiality of the trial judge must be beyond question.

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). Thus, this Court specifically rejected any notion that proof of prejudice was prerequisite to establishing a due process violation arising from *ex parte* contact.

In circumstances nearly identical to those found here, this Court found that a Rule 3.850 litigant's due process rights were violated by *ex parte* contact between the prosecutor and the judge during the pendency of the Rule 3.850 motion. Smith v. State, 708 So. 2d at 255. There, as here,

Mr. Smith's counsel was advised by the State of *ex parte* communication with the presiding judge in connection with the preparation of an order denying Rule 3.850 relief. Mr. Smith's counsel objected to the *ex parte* contact as soon as he learned of it and moved for judicial disqualification. On appeal, this Court "conclude[d] that the 'impartiality of the tribunal' was compromised and the ex parte communications were improper." Smith v. State, 708 So. 2d at 255. As a result, the matter was remanded for new proceedings before a new judge.

Thus, this Court has presumed judicial partiality where the record establishes *ex parte* contact on the merits of an issue before the circuit court. The *ex parte* contact compromised the impartiality of the tribunal, rendering its decision unconstitutional. In light of this Court's precedent denouncing *ex parte* communications regarding the merits pending before a judge, the order entered by Judge Bagley denying relief must be vacated and the matter remanded before a new judge.

B. Judicial Investigation Outside the Record

Apart from the *ex parte* contact, Mr. Rosenblatt's letter revealed that Judge Bagley was conducting an independent investigation seeking access to documents that had not been

introduced into evidence.[52] Such judicial conduct has been strongly condemned by this Court. In Vining v. State, 827 So. 2d 201, 210 (Fla. 2002), this Court stated:

> The judge overstepped his boundaries by conducting an independent investigation and by reviewing information that was not presented during the trial. We caution that such behavior does not promote public confidence in the integrity and impartiality of the judiciary.

Thus, the fact that the judge was conducting such an investigation was itself improper. What is not known is what other steps Judge Bagley took in his independent investigation and what information he obtained and used in denying post-conviction relief.[53] Mr. Riechmann filed a motion to get the

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[52]What is perplexing about Judge Bagley's efforts to obtain depositions that had not been introduced into evidence is the fact that Judge Bagley had sustained the State's objection Mr. Riechmann's efforts to introduce statements made outside the courtroom. For example, Mr. Riechmann could not introduce Smykowski's affidavit, let alone depose Smykowski. Mr. Riechmann was also precluded from introducing the 2/25/88 deposition of Det. Matthews (PC-R2. 1349).

[53]An examination of the record on appeal put together by the circuit clerk's office contains a suspicious anomaly. The documents appearing the record, not including the supplemental record, appear in the chronological order in which the documents were filed. In volume 5 of the record, a notice of supplemental authority shows up as being filed on December 17, 2002. The next document in the record is the deposition of Jacqueline Williams, a witness deposed in Brussels, Belgium, by the State. The transcript indicates that the transcription was completed on April 18, 2002, but the clerk's office does not note anywhere the date it received the transcript. Ms. Williams was not called as a witness at the evidentiary hearing. The deposition was not entered into evidence by

facts regarding Judge Bagley's independent investigation.[54] At the State's urging, the motion to get facts was denied and Judge Bagley did not divulge what actions he had taken in his

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either party and neither party filed a pleading to which the document was attached.

The next document in the record is the deposition of Peter Mueller, the German journalist who located Smykowski in 2000. Mueller was also deposed in Brussels by the State. The transcript also shows that the transcription was completed April 18, 2002, but the clerk's office does not note anywhere the date it received the transcript. Mr. Mueller was not called as a witness at the evidentiary hearing, nor was his affidavit introduced. And neither party filed a pleading to which the deposition was attached.

After the Mueller deposition, the next document appearing in the record is the February 28, 2003, order denying relief. This sequence suggests that the documents were mysteriously provided to the clerk's office between December 17th and February 28th. One possible inference is that Judge Bagley obtained the transcriptions of those depositions in the course of his independent investigation and provided them to the clerk's office when providing the February 28th order. There is no explicit citation to the depositions in the order, although there are findings that may have been influenced by the content of the depositions.

[54]At this point, there is no record of what occurred beyond Joel Rosenblatt's self-serving letter refusing to provide the requested depositions to Judge Bagley. The letter indicated that Mr. Rosenblatt learned of the request only because the lead prosecutor, Reid Rubin, was out of town. Thus, it is unknown what contact with Mr. Rubin pre-dated the request for depositions discussed in Mr. Rosenblatt's letter. Obviously, Judge Bagley either did not know that *ex parte* requests for non-record evidence were improper (troubling enough in itself), or he had prior contacts with Mr Rubin which had become routine enough that he did not believe the *ex parte* contact would be revealed. Interestingly, the record on appeal filed in this Court included documentation of one instance of *ex parte* contact between Mr. Rubin and Judge Bagley of which Mr. Riechmann had not previously been advised (PC-R2. 162).

independent investigation, what materials not introduced into evidence were obtained, and why he felt compelled to seek materials that were not introduced into evidence.

In opposing the motion to get the facts, the State said:

> It appears that what Defendant truly wants to discover is not what the alleged *ex parte* contact or the alleged *ex parte* investigation was but why this Court wanted the depositions. However, Defendant is not allowed to inquire into this Court's thought processes.

(PC-R2. 1158). While citing State v. Lewis, 656 So. 2d 1248 (Fla. 1994), the State failed to accurately represent this Court's position in Lewis. There, in authorizing depositions of a judge, this Court said that depositions were for discovering "factual matters that are outside the record." Id. at 1249. This Court did indicate that an authorized deposition could not violate "the judge's thought process." Id. However, for this proposition, this Court cited United States v. Morgan, 313 U.S. 409 (1941), and noted that the holding of that case was "a judge's thought process relevant to judicial decisions is not within the purview of an examination." Id. Certainly, actions taken in violation of the Code of Judicial Conduct and in violation of the principle enunciated in Vining v. State should not be exempt from an examination as part of the "thought process relevant to

judicial decisions."

In fact, in a subsequent decision where an examination of one of the judges at issue in Lewis was permitted, this Court noted no impropriety when the judge was asked why he had engaged in *ex parte* contact with the State and responded, "I think I called him up to have something deleted. He changed my mind. I left it in, I think." Smith v. State, 708 So. 2d at 255. This Court reversed the denial of Rule 3.850 that was at issue and was the subject of the *ex parte* contact, "[b]ased upon our review of the record, and especially the foregoing testimony." Id.

Mr. Riechmann was and is entitled to ascertain the nature and the scope of Judge Bagley's efforts to collect evidence outside the judicial process. The fact that such investigation happened at all should warrant disqualification of Judge Bagley and the reversal of his order denying relief. However, to the extent that this Court in Smith required the parties "to get the facts" before the order denying relief was vacated, Mr. Riechmann alternatively followed the procedure set forth in Smith and requested an evidentiary hearing to develop the facts.

C. Reliance on Matters on Which No Evidence Was Presented

Following receipt of Mr. Rosenblatt's letter, Mr.

Riechmann's counsel learned that Judge Bagley had been a prosecutor in the State Attorney's Office at the time of Mr. Riechmann's trial. Either because of his personal knowledge about matters at issue or because of his independent investigation, Judge Bagley relied upon facts not in evidence in denying Mr. Riechmann's motion to vacate.

In his order, Judge Bagley relied on the markings on an envelope containing Smykowski's letter to Beth Sreenan. The postmark was March 27, 1988. Without any evidence from either party explaining the meaning of a stamp that stated, "RECEIVED, Oct. 4, 1988, Sexual Battery Unit, State Attorney, 11th Circuit," Judge Bagley stated that this stamp established that the letter was not received by the State Attorney's Office until October 4, 1988. No evidence was presented about when the "RECEIVED" stamp was placed on the envelope by the Sexual Battery Unit in relationship to when the letter was received by Beth Sreenan. There was no evidence about the procedure within the State Attorney's Office for how the mail was processed in 1988 or about whether this was a regular or irregular practice or why the Sexual Battery Unit stamp would be on a homicide case. Judge Bagley's conclusion that the date stamp was significant was premised upon information not presented at the evidentiary hearing and not subject to an

adversarial testing.[55]

Given that the receipt of the March 27, 1988, letter shortly after it was postmarked was never contested by the State or by witness Sreenan, further pursuit of the matter at the evidentiary hearing would have been cumulative and redundant. Yet for reasons that are not apparent (but are consistent with Judge Bagley's efforts to obtain extra-record depositions), Judge Bagley relied upon non-record information regarding the internal procedure within the State Attorney's Office for incoming mail.[56]

Clearly, Mr. Riechmann was denied due process when Judge Bagley went outside the record to consider information that had not been submitted to the crucible of an adversarial testing. The order denying relief must be vacated and remanded for new proceedings consistent with due process

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[55]In fact, prosecutor Sreenan in her testimony acknowledged receipt of the letter before trial (PC-R2. 1353-56). She recalled receiving the letter. She testified that in light of the letter, "My recollection is that we did nothing" (PC-R2. 1355). She also testified that she did not advise Mr. Riechmann's counsel that "Smykowski had made inquiries of [her] whether [she] could provide assistance in making arrangements for his daughter" (PC-R2. 1359).

[56]Had the State showed any effort to argue that its internal procedure for date stamping documents established that the document was not received until six months after it was postmarked, Mr. Riechmann could have developed and presented facts regarding the regularity of the internal procedure and its propensity for breakdown.

before a different judge.

ARGUMENT IV

MR. RIECHMANN WAS DEPRIVED OF HIS RIGHT TO A CONSTITUTIONALLY ADEQUATE ADVERSARIAL TESTING WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR ARGUMENT AT HIS CAPITAL TRIAL.

A. Introduction

The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). In Hoffman v. State, 800 So. 2d 174 (Fla. 2001), this Court stated:

> This argument [that the defense should have figured out that exculpatory evidence existed] is flawed in light of **Strickler and Kyles**, which squarely **place the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.
>
> However, in order to be entitled to relief based on this nondisclosure, Hoffman must demonstrate that the defense was prejudiced by the State's suppression of evidence.

Id. at 179 (emphasis added).[57] A due process violation is established when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

However, where it is demonstrated that the State intentionally misled the defense and/or the trier of fact, the due process violation warrants a reversal unless the State proves that the due process violation was harmless beyond a

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[57] "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

reasonable doubt.[58] Guzman v. State, 868 So. 2d 498 (Fla. 2003); Mordenti v. State, 29 Fla. L. Weekly at S809. In Guzman, this Court explained, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. at 507.[59] This Court explained that this is a "more defense friendly standard" than the standard applied in those cases where it is not established that the prosecutor deliberately misled the defense and/or the trier of fact.[60] See Giglio v. United States, 405 U.S. 150, 153

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[58]The Supreme Court has recognized that a dispute has arisen as to whether an intentional deception claim (Giglio) made under the due process clause is separate and distinct from a failure to disclose claim (Brady) also made under the due process clause. Banks v. Dretke, 124 S.Ct. at 1271 n. 11. Having recognized the unresolved issue, the Court left the question unanswered. Id.("we need not decide whether a Giglio claim, to warrant adjudication, must be separately pleaded"). However, here, Mr. Riechmann pled both Brady and Giglio violations occurred.

[59]This standard is from the United States Supreme Court holding that in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 473 U.S. 667, 678-79 n. 9 (1985).

[60]A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957)(principles of Mooney violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction

(1972)(the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice"); Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)(due process "forbade the prosecution to engage in 'a deliberate deception of court and jury'").[61]

In denying Mr. Riechmann's due process claim, the circuit court made numerous legal errors that are subject to *de novo* review by this Court. Rogers v. State, 782 So.2d 373, 377 (Fla. 2001). The circuit court found Mr. Riechmann's entire motion time-barred because he failed to show diligence, erroneously ruling that it was Mr. Riechmann's duty to discover the withheld information (PC-R2. 1126).[62] Even though Judge Gold in 1996 found that post-conviction counsel had been

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or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

[61]This Court has stated "[t]ruth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).

[62]Inexplicably, in the same order finding Mr. Riechmann's entire motion time-barred, Judge Bagley found "the evidence is indisputable that detectives Hanlon and Matthews failed to reveal to the State an arranged visit by Mr. Smykowski with his daughter and the purchase of chicken for that visit" (PC-R. 1137). Since the State did not disclose this information to Mr. Riechmann until April 18, 2002, a month before the evidentiary hearing commenced, it is hard to fathom the claim being time-barred.

diligent and could not have found the newly-discovered witnesses, Judge Bagley found a lack of diligence without hearing testimony from Hilliard Veski or Walter Smykowski regarding their disclosure of evidence withheld by the State.[63] Having time-barred the motion in its entirety, Judge Bagley proceeded to alternatively address the merits of Mr. Riechmann's claims. In so doing, Judge Bagley never considered the facts asserted by Veski and Smykowski. He precluded Veski's testimony, and he denied Mr. Riechmann the means to obtain Smykowski's testimony. Without their testimony, Mr. Riechmann's claims could not be evaluated cumulatively. See Mordenti v. State.[64]

B. Failure to disclose favorable evidence and/or false

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[63]Judge Bagley also overlooked Supreme Court precedent imposing the burden to disclose withheld evidence upon the State. Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004)("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight"). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

[64]Judge Bagley's order makes the conclusory statement on the last page of the order that "the Court reaches this conclusion after having evaluated and weighed each claim cumulatively to one another" (PC-R2. 1140). Despite the lip service paid in this one sentence, the order contains no evidence of the kind of cumulative analysis that this Court employed in Mordenti.

testimony.

1. The Undisclosed Contact With Smykowski

At trial, Walter Smykowski testified that after being interviewed by Sreenan in March of 1988 at the prison at Eglin Air Force Base, he did not talk to "the police or the State about this case" (R. 4143). He was asked in cross, "tell us the next time you talked to somebody." He responded, "I not talk only March. I come in this yesterday and today talked to Mr. DiGregory" (Id.).[65] According to Smykowski, his discussions with DiGregory were his only contact with "someone from the State or the police since March" (Id.).[66]

In 2002, Detectives Hanlon and Matthews testified that after Smykowski was transported back to Miami in May, they signed Smykowski out of jail and took him to the police station "to conduct an interview" (PC-R2. 1669-70). According to Matthews, "the atmosphere of that detention center is not conducive for interviewing" (PC-R2. 1670). Matthews testified, "I know we had talked at the police station. If more than once or twice or three times, whatever it was, I personally think it was twice, but I'm not sure" (PC-R2.

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[65]Smykowski testified at Mr. Riechmann's trial on Friday, July 29, 1988 (R. 3991).

[66]Smykowski testified that he was returned to Miami and had been incarcerated in the county jail since May (R. 4153).

1671).[67] Matthews did state, "the interview would have been at the Miami Beach police station." However, Matthews had no recollection of what was discussed: "I mean, I really don't recall" (PC-R2. 1672).

Clearly, Smykowski's representation in 1988 was false (and equally clearly his disclosure in his affidavit that he in fact had contact with Matthews and Hanlon in the months before his testimony was true). Yet, no one from the State stood up and corrected Smykowski's false testimony in order to disclose that Smykowski in fact had contact with the police and was taken to the police station for interviews.

2. The Undisclosed "Favor"

At Mr. Riechmann's trial, Smykowski testified that he wanted nothing from the State for his testimony, "Nothing. I am not ask nothing because I plead guilty, Mr. Lawyer. I did crime, I pay for crime. I not ask any help me." (R. 4135). Smykowski testified that he would not ask Mr. Riechmann's prosecutor for even a letter: "I not ask. Voluntary give me, okay. I am not give me, I not ask." (R. 4136). Mr. Riechmann's counsel inquired, "You have trouble taking care of your daughter, haven't you, while you are in jail and your

[67]Det. Hanon testified that he thought "we went right from the detention center where he was housed to the house in North Miami" (PC-R2. 1689).

wife is in jail?" (R. 4144). Smykowski responded, "Please, Mr. Lawyer, don't worry my daughter. My daughter stay in mother-in-law." (Id.).[68]

In 2002, Detective Hanlon testified that he and Matthews picked up Smykowski at the Dade County Sheriff's Stockade where he was housed when he was returned to Miami because he "wanted to see his daughter" (PC-R2. 1682). The detectives knew that Smykowski was worried about his daughter because he and his wife were both in federal prison at the same time (PC-R2. 1687-88).[69] Hanlon testified that he thought the visit with his eight-year-old daughter would be a "good gesture." The detectives bought fried chicken to eat at the family reunion (PC-R2. 1686-87). He described Smykowski as grateful and thankful for the visit (PC-R2. 1987).[70]

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[68]Smykowski did acknowledge that "I arrest and my wife, Stitzer wife pick up my daughter and stay three weeks home in Stitzer." (R. 4144). My mother-law coming and now safety, everything got okay for my mother-in-law." (Id.).

[69]A friend of Smykowski, John Skladnik, testified in 2002 and recalled seeing Smykowski with two men walking to Smykowski's house when he was supposed to be in jail. Smykowski's daughter, Deborah, was living with Smykowski's mother-in-law in the North Miami house at the time. Skladnik said that Smykowski was not in handcuffs, and the men with him were not in uniform. He spoke with them briefly and then left (PC-R2. 1603-04).

[70]Smykowski, in his affidavit executed nearly eighteen months before the State revealed that he had been taken to visit his daughter at his home, attested that before Mr.

Detective Matthews testified that on one of the occasions that he and Hanlon took Smykowski out of custody to "interview" him in Mr. Riechmann's case, they took Smykowski to visit his daughter (PC-R2. 1669-72). He explained that when they were on the way back to the Stockade, Smykowski asked Matthews and Hanlon to stop so he could see his daughter (PC-R2. 1673). Matthews testified, "[w]e ended up at a house that was occupied by a woman, I believe he identified as his mother-in-law and a child he identified as his daughter" (PC-R2. 1672). Matthews paid for a bucket of Kentucky Fried Chicken so that everyone could have something to eat during the visit (PC-R2. 1674). Smykowski was not handcuffed (PC-R2. 1673, 1688). Smykowski spoke to his mother-in-law in a foreign language. Neither detective understood the conversation or knew what information he was communicating to the woman (PC-R2. 1674). Afterwards, Matthews testified that Smykowski was grateful and thanked Matthews (PC-R2. 1675).

Matthews "vividly" remembered that a little girl came home and they stayed for about 20 minutes and then left (PC-R2. 1673). He described the girl as happy to see her father

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Riechmann's trial he had been taken out of the prison by Matthews and Hanlon in order to visit his home.

and they hugged and kissed.[71] He said Smykowski thanked him "before, during and after" the visit (PC-R2. 1675). Unlike Matthews, Hanlon recalled that they spent a "few hours" at the house with Smykowski's mother-in-law and his daughter (PC-R2. 1686). He specifically remembered that the trip was at Smykowski's request; "it was a favor to him." (PC-R2. 1691).[72]

When Smykowski falsely testified at Mr . Riechmann's trial that he had never asked for favors, no one from the State stood up and corrected the false testimony.

3. The Undisclosed Letter Requesting Assistance

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[71]Deborah Smykowski, now known as Schaefer, testified in 2002 that when she was eight, she saw her father on one occasion while she was staying with her grandmother. Her father was accompanied by two men (PC-R2. 1581).

In her deposition, Deborah Schaefer provided more details of the visit with her father. She said her mother, Halina Smykowska, called the house while Smykowski was there and spoke to him ("he was home, so she called. That was the only way we could communicate. She called us collect, and she called when he was there" PC-R2. 294). According to Ms. Schaeffer, her mother learned about the Riechmann reward money that day when her father came to visit her with the two "people." (PC-R2. 294).

[72]Mr. Carhart testified in 2002 that he had no indication that Smykowski had been taken out of custody to visit his daughter (Supp. PC-R2. 214). Mr. Carhart considered that a benefit to Smykowski that should have been disclosed to the defense (Supp. PC-R2. 219-20). Had he had that information at trial, he would have used it to impeach Smykowski (Supp. PC-R2. 243).

Despite Smykowski's testimony at trial "I not ask any help me" (R. 4135), Ms. Sreenan testified in 2002 that she recalled receiving a letter from Smykowski requesting assistance with ensuring his daughter's welfare. Sreenan said she felt no obligation to protect her. Ms. Sreenan did not contact the Division of Children and Family Services (DCF) or any other state agency when she learned that little Deborah had no place to live since both her parents were in federal prison (PC-R2. 1355).

Ms. Sreenan admitted she received a letter from Smykowski dated March 27, 1988, in which Smykowski asked her for assistance in obtaining care for his daughter (PC-R2. 1353-55). The letter read in part:

> ...**as you know**, my daughter is staying with friends. However, it appears that his arrangement may not be acceptable for much longer, as this particular friend is experiencing difficulty in coping with her job, and looking after children.

(PC-R2. Def. Ex. C)(emphasis added). Sreenan testified that "[h]e is asking if we can or if I can make a suggestion or if I can suggest someone, is what he is asking" (PC-R2. 1355). Smykowski asked Sreenan to suggest a place to send his daughter, and to "give me an indication when approximately do you invisage [sic] me being sent to Miami." See, (PC-R2. Def.

Ex. C).[73]

Ms. Sreenan testified that she did nothing to help Smykowski with his daughter. "My recollection is that we did nothing" (PC-R2. 1355). "It would seem to me I would remember if we did something, and this isn't the type of thing that you normally get involved in" (PC-R2. 1355).[74] Ms. Sreenan did not notify Mr. Carhart that she had received this letter from Smykowski concerned about his daughter because she felt "Mr. Carhart is entitled to know about favors that might be given in regard to the daughter, but I felt personal conversations were beyond the scope of discovery" (PC-R2. 1360-61).[75] According to Ms. Sreenan, she was only obligated to disclose any "benefit they [the Smykowski's] received, and the defense was entitled to know" (PC-R2. 1362). Apparently in Sreenan's view, letters or personal conversations requesting benefit were not discoverable.

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[73]In 2002, Mr. Carhart testified that he did not know Smykowski had written a letter to Ms. Sreenan in March, 1988 looking for assistance in obtaining care for his daughter (Supp PC-R2. 214).

[74]However, in a little over a month after the letter was sent, Smykowski was back in Miami, at the Dade County Stockade. His was given a visit with his daughter and provided a fried chicken dinner.

[75]Ms. Sreenan claimed that she did not know about Smykowski's trip to see his daughter, but she "probably" would have disclosed it to the defense had she known(PC-R2. 1365).

Ms. Sreenan testified that she did nothing to facilitate this "arrangement." She knew the difficulty that Smyknowski was having with his daughter from an early March meeting with Smykowski at Eglin AFB. The letter to Sreenan said, "as you know." Yet, Ms. Sreenan blocked the defense's efforts to inquire after Smykowski's daughter (PC-R2. Def. Ex. A).

Sreenan actively sought to mislead the defense in this regard. At Stitzer's deposition, she shut down Carhart's efforts and she implicitly suggested that Smykowski's daughter was not being provided for by Stitzer. This intentional obfuscation violated due process. Gray v. Netherland, 518 U.S. at 165.

4. The Reward Money

Smykowski testified that in return for his testimony, he sought "Nothing. I am not ask nothing because I plead guilty, Mr. Lawyer. I did crime, I pay for crime. I not ask any help me." (R. 4135).

In 2000, Deborah Schaefer, Smykowski's daughter, contacted the State Attorney's Office regarding Mr. Riechmann's case. In a letter, she stated "[m]y father was told that, if the defendant in this case is convicted, the key witness collects part of the insurance money of the victim. He told us that he signed papers to transfer the money to his

wife and daughter." (PC-R2. 160). In a subsequent conversation with prosecutors, Smykowski's wife, Halina, indicated that her husband had told her that he was eligible for "some kind of monetary benefit due to his testimony" (PC-R2. 157).[76]

Deborah Schaefer (Smykowski) later testified that in September or October, 2000, her mother thought about "getting in touch again with the prosecutors in Miami." (PC-R2. 270). Halina Smykowski asked her daughter to write a letter to prosecutors asking about reward money her husband told her about (PC-R2. 271). Halina had been told that some of the proceeds from a $1 million insurance policy of Ms. Kischnick would be turned over Smykowski for his testimony against Mr. Riechmann. Smykowski told Halina that he signed that money over to her, his daughter, and her grandmother (PC-R2. 271). Halina had learned of the reward when she called collect from a federal prison in Kentucky to her mother's house in North Miami, the same day when Smykowski visited his daughter with

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[76]Smykowski's affidavit corroborates this evidence. In the affidavit, Smykowski attested that "the prosecutors not only promised me help in my federal case, but they offered me money to the extent of US$30,000 (thirty thousand dollars) once the case was over and Dieter Riechmann was convicted and sentenced." Supp. PC-R2. 47). However, Mr. Riechmann was not permitted to depose Smykowski in order to perpetuate his testimony, nor was Mr. Riechmann permitted to introduce this affidavit.

the “two men” (PC-R2. 294).

This evidence demonstrates that Smykowski’s testimony was false, and that no one from the State stood up and corrected it.

5. Hilliard Veski

Hilliard Veski signed an affidavit stating that Beth Sreenan pressured him to testify falsely regarding the location he found certain pieces of evidence when he collected them from Mr. Riechmann’s rental car at the time of his inventory. Shortly after the inventory of the rental car, Veski was accused of illegal drugs useage and placed upon administrative leave. According to Veski, Sreenan indicated that there he would have a better outcome in his own case if he would testify in the manner she directed. Pursuant to that pressure, Veski testified falsely at his July 7, 1988, deposition. However, immediately thereafter he contacted Carhart and advised him that his testimony regarding the location of a flashlight had not been truthful. As Carhart testified, Veski indicated that he had been pressured to make the false statement, but he had declined in 1988 to reveal who had pressured him (PC-R. 5662).

At the 2002 evidentiary hearing, Mr. Riechmann proffered that “Officer Veski indicates in fact when he seized the shawl

[blanket] from the car it was in the passenger seat along with a lot of other items. He also indicated that the car was still, this is two days after the homicide, wet with blood. That there was blood virtually everywhere and it was still very wet and sticky" (Supp. PC-R2. 145). According to the proffer, Veski reported that the items in the passenger seat with the plaid blanket/shawl "were already covered with blood" (Supp. PC-R2. 146). Veski further indicated "that he was pressured to provide the testimony at the deposition indicating that the flashlight was in the trunk and that he was also being pressured by Beth Sreenan to testify in the fashion that he did and also say the shawl [blanket] was in the passenger seat because he had a pending - - he was on administrative leave with a pending criminal charge against him and the indication things would go easier for you if you testify in this fashion" (Supp. PC-R2. 146).

Yet, the circuit court refused to permit Mr. Riechmann to call Veski as a witness in order to present his testimony as to these matters (Supp. PC-R2. 144). As a result, the prosecutorial misconduct reported by Veski could not be evaluated cumulatively with the wealth of evidence of other

Brady/Giglio violations.[77]

6. Walter Smykowski

On November 12, 2000, Mr. Smykowski executed an affidavit in which he attested:

> 7. Around January 1988, a fellow inmate, Bob Stitzer, approached me and talked to me about the possibility of being a witness against Dieter Riechmann.
>
> 8. **Bob Stitzer** offered me his contacts with law enforcement agencies and **told me that he would help me cut down my ten-year sentence**.
>
> 9. A few days later, still in January, I was contacted at the MCC by Sergeant Joe Matthews and Bob Hanlon of the Miami Beach Police Department.
>
> 10. **Matthews and Hanlon asked me to help them in the case against Dieter Riechmann and promised to help me in my federal case**.
>
> 11. I agreed to cooperate and one day later was sent to the prison in Eglin Air Force Base.
>
> 12. There, about three weeks later, I had another visit, this time from Joe Matthews accompanied by a prosecutor called "Betty", her real name being Beth Sreenan.
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> 13. For several hours, she talked to me in order to prepare me for my testimony against Dieter Riechmann.

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[77]Certainly, Veski's information corroborates that provided by Smykowski, and is consistent with a general pattern of extreme prosecutorial misconduct. Quite simply, the evidence of the Brady/Giglio violations cannot be adequately evaluated piecemeal; yet, that is precisely what happened.

14. Around April 1988 I was brought back to Miami and stayed some weeks in a low security prison, the Sheriff's Department correctional center.

15. There I met Bob Stitzer again.

16. We lived together in a trailer.

17. **Although I had nothing to accuse Dieter Riechmann of the policemen and Beth Sreenan asked me to give false testimony**.

18. On many occasions Kevin Di Gregory, the main prosecutor, and Beth Sreenan prepared me for testimony.

19. When **I testified during the trial that Dieter Riechmann was *happily dancing in our cell because he was a millionaire now*, it is not true**.

20. **Beth Sreenan asked me to use these words.**

21. Also I never asked Dieter Riechmann why he killed his girlfriend. So the testimony that I asked him and that he turned "pale like a white wall" is also not true. **It was Mrs. Sreenan who put those words into my mouth and asked me to say this in court**.

22. **For my testimony against Dieter Riechmann, the police and the prosecutors not only promised me help in my federal case, but they offered me money to the extent of US$30,000 (thirty thousand dollars) once the case was over and Dieter Riechmann was convicted and sentenced**.

* * *

32. I am coming forward now with the truth because I feel guilty towards Mr. Riechmann.

(Supp. PC-R2. 46-48).[78] The information contained in Smykowski's affidavit not only revealed undisclosed inducements offered to Smykowski by the State in exchange for his testimony, but also demonstrated that his trial testimony was false and that the testimony he provided was suggested by prosecutor Sreenan.

Despite the bombshell nature of Smykowski's affidavit, Mr. Riechmann was precluded from presenting his testimony when the circuit court refused to permit Smykowski to be deposed to perpetuate his testimony. Accordingly, no cumulative analysis could be given to his statements in the required evaluation of the cumulative effect of the numerous Brady/Giglio violations.[79]

7. *"Kool" and the Brown Impala*

Judge Bagley also failed to consider evidence not disclosed to the defense that another suspect provided

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[78]The State acknowledged in 1996 that Smykowski was a "crucial" witness who had been essential in obtaining a conviction against Mr. Riechmann (PC-R 5490-91).

[79]As with Veski, the information revealed by Smykowski not only independently establishes Brady/Giglio violations, but corroborates and is corroborated by Veski, by Debbie Schaeffer's efforts to collect the reward, by the testimony of Hanlon and Matthews regarding their contact with Smykowski after his return to Miami in May of 1988, and by the undisclosed March, 1987, letter to Sreenan. These evidence cannot be properly evaluated piecemeal, as Judge Bagley did here.

exculpatory information three days after the crime.[80] Mr. Riechmann did not learn the significance of the undisclosed information until the eve of the evidentiary hearing when Hilton "Pookie" Williams first indicated that in 1987 he dealt drugs from a brown Impala. After Ms. Kischnick's murder, the police were advised that two drug dealers, one named "Kool," were overheard by an informant bragging about ripping off and wasting someone. These drug dealers were selling drugs from a brown Impala. This information appeared in a police report that was withheld from the defense.[81] When this police report was disclosed in post-conviction, collateral counsel had no basis for demonstrating any prejudice from the seemingly dead-end lead until "Pookie" revealed that he dealt drugs from a brown Impala and was an associate of "Kool."

In 2002, "Pookie" testified that in October, 1987, he owned and drove a brown Impala that he used to deal drugs. "Pookie" also indicated Kool was an associate of his (PC-R2. 683-84). "Pookie" swore that he had committed a robbery on Biscayne Boulevard on October 25, 1987, the night Ms.

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[80]Judge Bagley refused to admit into evidence the police reports "mentioning the name Cool" (PC-R2. 1719).

[81]Also withheld from the defense was a portion of Det. Hanlon's to-do list that included inquiring of a Metro-Dade policeman named Gonzalez for information regarding "Kool."

Kischnick was shot.

Mr. Carhart did not have this information at trial, although he attempted to obtain this type of information when he deposed Detective Hanlon (PC-R2. Def. Ex. A). Mr. Carhart testified that he did not receive this report nor had Detective Hanlon disclosed this exculpatory information when he was deposed on April 14, 1988 (PC-R2. Def. Ex. A, 64-74). In his deposition, Hanlon read every item on the to-do list **except** item #21, which said the police were investigating this information regarding "Kool"(PC-R2. Def. Ex. A, 64-74).

"Pookie's" revelations in 2002 gave significance to the failure to disclose to trial counsel the information regarding "Kool" and his bragging about ripping off and wasting someone the day after Ms. Kischnick was shot, and that these drug dealers were selling drugs from a brown Impala.[82] Judge Bagley failed to admit this evidence and thus could not consider this nondisclosure when evaluating the cumulative effect of all of the withheld Brady/Giglio material.

8. Evidence Previously Presented in 1996

In 1996, Judge Gold found that the State withheld

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[82]The police report's relevance is also increased by the testimony of Doreen Bezner, who claimed she observed the shooting and reported that it happened in the course of a busted drug deal.

portions of favorable police reports from the trial (PC-R. 6067). Judge Gold also found that the State withheld German witness statements from the defense (PC-R. 6077-78). A new trial was not ordered because those nondisclosures "without more" did not undermine Judge Gold's confidence in the reliability of the jury's guilty verdict. **I**n light of the new disclosures, cumulative consideration must be given to those nondisclosures presented in the 1996 proceeding.

a. Statements from 37 German witnesses

At the 1996 evidentiary hearing, the State admitted to withholding numerous witness statements taken in Germany prior to trial (PC-R. 5505, 5508, 5513).[83] Judge Solomon was provided the statements *in camera* at the time of trial. Judge Solomon said he considered the documents to be good mitigation because they dealt with the relationship between Mr. Riechmann and the victim. But this "relationship" information was also significant because it was precisely the evidence Mr. Carhart needed to rebut the State's evidence of motive at the guilt

[83]This Court concluded that prejudice was established at the penalty phase, and ordered that the statements be turned over to Mr. Riechmann for use at his new sentencing proceeding. However, these witness statements are now "lost."

phase. Motive was a guilt phase issue.[84]

In 1996, Judge Gold found that the statements were wrongfully withheld from the defense, but he did not find confidence in the guilt phase verdict undermined by the Brady violation (PC-R. 6069). However, in 2002, Judge Bagley failed to consider the nondisclosure of these statements and conduct an evaluation of the cumulative effect of all of the nondisclosures.

b. Police report from Detective Trujillo

Portions of Detective Trujillo's police report containing statements that were favorable to the defense were redacted from the report provided to trial counsel (PC-R. 5482-5489). The redactions were relevant to the blood-spatter analysis presented by the State at trial. The complete 11/2/87 police report of Detective Trujillo detailing the height of the window opening through which the fatal bullet passed was introduced at the 1996 hearing (Def. Ex. AA). The redacted paragraph said:

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[84]The State repeatedly argued that the names of the witnesses and a summary of their statements was disclosed in the deposition of Benard Schleith from the German Police. This argument is contrary to the record (R. 755). Based on correspondence from the U.S. Attorney on behalf of the prosecutor's office, the statements were provided to the prosecution team because of their probative value as to Mr. Riechmann's motivation, an issue at the **guilt** phase (PC-R. Def. Ex. LL).

> Crime lab stated that the window had to be all down but subject claimed window was half down for security.

The State could not explain its failure to disclose this information that was inconsistent with the assumption made by the blood-spatter expert and the gun-powder residue expert that the window was down three inches. Ms. Sreenan argued that "somebody made a mistake...I would say that report is wrong" (PC-R. 4718). "The author of that report didn't always have all the facts straight" (PC-R. 4737).[85] The State admitted at the 1996 evidentiary hearing that the reports would have been favorable to the defense.[86]

Judge Gold held that the redacted portions of Detective Trujillo's report were improperly withheld by the State (PC-R. 6067). But he failed to find that the nondisclosure undermined confidence in the reliability of the jury's verdict, in light of Smykowski's trial testimony.

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[85]Under Kyles, evidence impeaching the law enforcement's techniques is exculpatory. Ms. Sreenan's statement impeaching the reliability of the law enforcement investigation and the techniques of the police officers involved constituted evidence favorable to the defense. Either way, the undisclosed information impeached the State's case.

[86]Even the lead prosecutor at trial acknowledged in his testimony that defense counsel could have used the undisclosed information to rebut the State's contention that the lead particle gun residue on Mr. Riechmann came from reaching his hand protectively at the muzzle of the gun instead of the breach.

Judge Bagley failed to mention the nondisclosure in his order denying relief. Without mentioning this Brady violation, Judge Bagley did not conduct the requisite evaluation of the cumulative effect of withheld favorable evidence.

c. Police reports of Detective Hanlon

Three police reports of Detective Hanlon were not disclosed to the defense. These reports showed that the State's expert, upon his examination of the rental car, found that "the passenger window was no more than six inches from being fully closed at the time of the shooting," not the 3 to 3 and a half inches he testified to at deposition and trial (PC-R. Def. Ex. HHH).[87] Thus, these reports contained potential impeachment.

DiGregory acknowledged at the 1996 evidentiary hearing that there were deletions from the police reports, but he did not know who made them -- himself, Ms. Sreenan or someone at his direction. He agreed that the police reports contradicted each other (PC-R. 5477, 5482, 5483). The redactions kept defense counsel from knowing about the internal inconsistencies in the forensic blood work and the faulty

[87]The same six-inch measurement taken by the state serologist was repeated in two other withheld police reports.

conclusions testified to by state's witnesses.

While Judge Gold did not find that the nondisclosures undermined confidence in the outcome in 1996, an evaluation of the cumulative effect of all the nondisclosures in 2002 should have included consideration of the undisclosed police reports authored by Hanlon. However, Judge Bagley failed to mention, let alone consider, these undisclosed police reports in his order denying relief.

d. 1996 evidence regarding Smykowski

At the 1996 evidentiary hearing, DiGregory was confronted with a letter he wrote to the U.S. Parole Commission noting that Smykowski was "instrumental" in achieving Mr. Riechmann's "guilty verdict and recommendation of death in the electric chair." He wrote that Smykowski's "testimony was crucial because the case against Mr. Riechmann was circumstantial." The letter concluded:

> I urge you in the strongest possible terms to give him the utmost consideration at his next parole review.

(PC-R. Defense Exhibit CC).

In 1996, DiGregory testified:

> A. ...What I'm saying is that I don't know when I wrote - - when I got the notion to write the letter. It is clear that I wrote it after the trial was over.

Q. Well, is it equally clear that you contemplated writing it during the course of the trial?

A. Sure.

(PC-R. 5490).

DiGregory identified his handwritten notes of his meeting with Robert Stitzer, the man who introduced Smykowski to the prosecution (PC-R. Def. Ex. DD). The notes contained a mysterious entry. Collateral counsel opined that the notes said, “Reno to communicate with magistrate to have him reward.” The prosecutors at the 1996 evidentiary hearing suggested the notes said, “magistrate to have him remand.” DiGregory testified that the notes were his and said, “Reno to communicate with magistrate to have him remain” (PC-R. 5461).[88] DiGregory said the note referred to Stitzer, but Stitzer did not have a problem with being transported, while Smykowski did. Smyknowski wanted to stay close to his young daughter.

The notation directly above the sentence referring to “Reno” said:

–Walter may be hostile because he’s been shipped to

[88]DiGregory gave this testimony despite the obvious “d” written on the end of the word “reward.” Even to the untrained eye comparing DiGregory’s handwriting with the note he acknowledged writing, the “d” is written the same every time (PC-R. Def. Ex. DD).

Eglin.[89]

–Fraud charges are what brought Walter here.

(PC-R. Def. Ex. DD).

DiGregory insisted that he "never spoke to Janet Reno about anybody remaining anywhere." However, the notes were not disclosed to trial counsel. Certainly, the information is evidence that is favorable to Mr. Riechmann, whether it is a recording of a promised reward, or a reminder to arrange for a witness to be remanded or remain in Miami. The note reflected the power that DiGregory wielded that could be used to dole out favors to witnesses.[90]

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[89]The significance of Mr. Smykowski's hostility about being sent to Eglin does not become apparent until Mr. Riechmann learned that he had been taken out of custody to visit his daughter and that he was worried about her welfare. Mr. Smykowski was upset at being taken away from his daughter.

[90]While denying relief in 1996, Judge Gold stated:

> Regarding the Smykowski matter, there is express testimony at trial regarding the possibility of the prosecutor writing a letter to the federal parole authorities on his behalf (R. 4097, 4135-36) as well as defense counsel's argument to the jury about it (R. 5170). At the post conviction hearing, both prosecutors testified that there was no deal with Mr. Smykowski. Given that the newly discovered evidence with respect to Mr. Smykowski is only of an impeaching nature, and **not evidence of any false statement**, it presents no basis for relief. Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994), cert. denied, 116 S. Ct. 146; Lighbourne [sic] v. State, 644 So. 2d 54 (Fla. 1994), cert denied, 115

Judge Bagley did not consider this undisclosed note nor evaluate the cumulative effect of the notes with the other favorable information withheld from Mr. Riechmann's attorneys.

e. Other undisclosed evidence presented in 1996

At the 1996 hearing, Mr. Riechmann presented evidence that the Miami Beach Police Department and the prosecutors withheld significant exculpatory evidence. At that hearing, it was established that trial counsel did not receive the following:

1. An October 27, 1987 police report which corroborated Mr. Riechmann's story was never provided to defense counsel. The report indicated that the couple dined and drank for several hours at the "Jardin Brazilian" restaurant where Officers Aprile and Marcus interviewed the waiter. (PC-R., Def. Ex. DDD). The withheld report indicated that the couple

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S. Ct. 1406. Finally, it would probably not produce an acquittal or retrial.

(PC-R. 6064)(emphasis added). However, the evidence presented in 2002 renders Judge Gold's analysis erroneous because the State had yet to disclose all of the favorable information in its possession.

The State is under a continuing obligation to disclose any exculpatory evidence, even in post-conviction. Johnson v. Butterworth, 713 So. 2d 985, 987 (Fla. 1998); see also Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996)(finding that Brady obligation continues in post-conviction). In Ventura v. State, 673 So. 2d 479, 486 (Fla. 1996), this Court said, "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act."

appeared to be vacationing tourists “in a good mood” and in “good spirits” (PC-R. 104). The couple drank “six drinks each” of rum, vodka, gin and Amaretto.” They appeared “intoxicated.”

2. Police reports describing Mr. Riechmann’s conduct after he flagged down a police officer were withheld. These reports indicated that Mr. Riechmann, in broken English had frantically tried to describe to police what had happened to his girlfriend. According to these police reports, Mr. Riechmann was visibly “distraught,” “upset,” “sobbing,” “dejected,” “emotionally upset,” “hysterical,” “crying and holding his face,” “with tears coming out of his eyes,” “smelling of alcohol.” “He obviously had been through a terrible experience.” (PC-R. 4565, 4575).

3. A myriad of photographs taken by crime scene technicians of the rental car were not disclosed. However, most of the critical photographs of the driver’s seat, interior of the trunk and interior roof of the car have gone missing and have never been given to the defense. (R.1661-63; 2614-16; 3433-35).

4. Also undisclosed was the 10/28/87 report of Officer Psaltides, three days after the crime, indicating that Ms. Kischnick’s father had reported that the couple had known each other for about “15 years and that their relationship was good. He had no harsh comments about Mr. Riechmann” (PC-R., Def. Ex. KK).

Judge Bagley in denying relief failed to consider these failures to disclose and to evaluate the cumulative effect of all of the Brady/Giglio violations.

C. The Circuit Court Misstated and Misapplied the Law

Given that there is favorable evidence that was in the State’s possession and that was not provided to the defense,

and given that uncorrected false and misleading testimony was presented before the jury, the only issue is whether Judge Bagley properly evaluated the various identified due process violations. It is clear that he did not: he conducted no cumulative analysis of the Brady violations established in 1996, he conducted no real cumulative analysis of the Brady violations established in 2002,[91] and he could not consider cumulatively those matters that he excluded from presentation through his rulings. The circuit court entirely failed to conduct any cumulative analysis of the prejudice prong of the Brady standard. When cumulative consideration is given to all of the State's due process violations, confidence is undermined in the outcome of Mr. Riechmann's trial.[92] The State's case was weak to begin with; the evidence against Mr.

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[91]The one sentence at the end of the order providing lip service to cumulative analysis is not adequate as a matter of law. Judge Bagley's acceptance of the State's argument that Veski's testimony "has absolutely positively no relevance to the claims that Your Honor has granted an evidentiary hearing on" (Supp. PC-R2. 144) could not more clearly demonstrate that neither Judge Bagley nor the State understood what a cumulative analysis entails.

[92]The requisite cumulative analysis requires that consideration be given to newly discovered evidence of innocence, along with the Brady/Giglio material. Here, that entails considering the testimony of Doreen Bezner in 2002. She testified that she observed the shooting and that it occurred in the course of a drug deal gone bad.

Riechmann was not strong.[93] An indictment could not be obtained without Smykowski, and the State has conceded that Smykowski was crucial to the conviction. For a case to rest on the testimony of a confidence man, convicted of 17 counts of federal fraud, speaks loudly. Given the nature of the withheld evidence and the uncorrected false testimony, due process demands that Mr. Riechmann be granted a new trial.

ARGUMENT V

NEWLY-DISCOVERED EVIDENCE SHOWS THAT MR. RIECHMANN IS INNOCENT

Newly-discovered evidence of innocence warrants a new trial where it establishes that had the jury known of the new evidence it probably would have found a reasonable doubt as to the defendant's guilt and thus acquitted. Jones v. State, 591 So. 2d 911 (Fla. 1991). Here, the new evidence of innocence evaluated cumulatively with the other evidence presented at the 1996 and 2002 evidentiary hearing establishes that confidence is undermined in the guilty verdict. State v. Gunsby, 670 So. 2d 923 (Fla. 1995). Mr. Riechmann's conviction cannot stand.

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[93]Even Ms. Sreenan admitted on a national television program that "Kevin [DiGregory] and I pretty much felt we had lost the case" (PC-R. 238).

A. Doreen Bezner

Doreen Bezner was not located by defense counsel until early 2002 (PC-R2. 1745). Ms. Bezner lived with a pimp and drug dealer, Mark Gray, in October of 1987, at the time the crime (PC-R2. 1640). Mark Gray sold drugs on Biscayne Boulevard in Miami. She remembered it was October, 1987, because it was shortly after she had left her kids and moved to Miami (PC-R2. 1641, 1652).

Ms. Bezner testified that she saw Mr. Riechmann and Ms. Kischnick on the day of the incident at a Denny's Restaurant at 79th and the expressway. They were meeting Mark Gray (PC-R2. 1643). She described Ms. Kischnick as "blond" with a "lot of gold" [jewelry] and a "nice ass."(PC-R2. 1643). Mr. Riechmann's hair was a "bleach kind of job" (PC-R2. 1653). Ms. Bezner saw the woman get out of the car and talk to Gray, but she was not privy to the conversation because she was not allowed to be involved with Gray's business (PC-R2. 1649). She assumed they were discussing a heroin deal because Gray sold heroin, but she did not know what was said (PC-R2. 1646). After the meeting, Gray told her that they, Mark and Doreen, "didn't have to work no more." (PC-R2. 1654).

On the evening of the murder, Ms. Bezner saw the same two people she had seen earlier. They drove a car to 62nd and

Biscayne Blvd; Gray was expecting them (PC-R2. 1654). Ms. Bezner and Gray had gone to the "dope hole" to met the two people. When the two people arrived, Gray and Ms. Bezner were waiting for them (PC-R2. 1655). Ms. Bezner was doing crack cocaine near the bushes as they waited (PC-R2. 1657). Mr. Riechmann was driving. Ms. Bezner was 10-15 feet away (PC-R2. 1642). She saw that Ms. Kischnick had "a lot of gold on her neck" (PC-R2. 1645).

Gray held up his hands indicating for the car to stop (PC-R2. 1646). As the car stopped, two "gits" (a term for two young black males) ran up to each side of the car and shot into it (PC-R2. 1641). The driver immediately "took off" (PC-R2. 1641). Gray did not shoot into the car and just stood still like he was in "shock" (PC-R2. 1658). Ms. Bezner said she did not know the "gits" who shot into the car (PC-R2. 1647).

> Q. [By Ms. Backhus] When you saw this car drive up, was there enough time for anyone to get out of the car, fire a shot, and get back into the car?
>
> A. **I don't even think they can even put it in park. As soon as they pulled up it happened. It was like they were expecting it. It was like a set up gone wrong.**

(PC-R2. 1647)[emphasis added].

Ms. Bezner described the "gits" as "all the same" coming

into the area to do robberies (PC-R2. 1646). She identified pictures of Mr. Riechmann and Ms. Kischnick as they appeared on the night of the crime (PC-R2. 1644-1645; Def. Ex. F).

Ms. Bezner testified that after witnessing the shooting, she was quickly taken to a motel room by Gray (PC-R2. 1648). She said Gray "just snapped." He became abusive and crazy because something had happened at his "dope hole." (PC-R2. 1649). He acted "scared for some reason" as if something else went wrong (PC-R2. 1647). She remained in the motel room for a week, and was told not to leave. Gray brought tricks to her in the motel room (PC-R2. 1649). When she found an opportunity, Ms. Bezner ran back to the streets and away from Gray's abuse (PC-R2. 1648). She was afraid of Gray and repercussions from him if she told her story (PC-R2. 1649). Every time she left him, Gray would find her (PC-R2. 1650). He did not allow her to speak with his business associates, who were other people involved in the robbery and murder (PC-R2. 1650). She and Gray did not return to the dope hole after the incident (PC-R. 1649).

Ms. Bezner described Gray as 5'9" tall with black hair and brown eyes (PC-R2. 1649). Four or five years ago in 1998, a "deal went wrong" and his knee cap was "shot out." (PC-R2. 1649). She had known Gray for eight or nine years and he has

been her pimp on Biscayne Boulevard, but not ever again in the "dope hole"(PC-R2. 1651). Gray is now in a wheelchair (PC-R2.1649).

Ms. Bezner admitted to being a crack addict, but she said that did not affect her ability to observe. She acknowledged that she had 10 or 11 prior convictions, mostly for solicitation of prostitution (PC-R2.1661). At first, she testified that the convictions were felonies and then when presented with a copy of her criminal history, she had difficulty reading the printout, said they were misdemeanors. She then changed her testimony again and said they were felonies (PC-R2. 1658-59; 1661). The judge accepted her answer (PC-R2. 1662). Mr. Riechmann attempted to move the printout of Ms. Bezner's criminal history into evidence because she misunderstood the printout. The State, however, objected to admitting it into evidence. The court refused to allow Ms. Bezner's criminal record to be admitted into evidence, though it clearly reflected that Ms. Bezner's convictions were non-violent misdemeanors for prostitution and trespass (PC-R. 1662-63).

Even though Ms. Bezner could not give a precise date or time that the crime occurred, she said it was something that "sticks in the head. It's not like an everyday event" (PC-R2.

1648).

B. Donald Hugh Williams

Donald Williams lived in the area of Biscayne Blvd. and 63rd Street in October, 1987 (PC-R2. 1627). He frequented various bars in the neighborhood. He knew Mark Dugan in 1987 and the areas he frequented (PC-R2. 1630). He described Dugan as a “black male, about 5'9", about 165 pounds (PC-R2. 1630).

Williams heard that “something had happened” near Biscayne and 63rd street area (PC-R2. 1627-28). The State objected to the hearsay response. As a result, Mr. Riechmann proffered that Williams overheard customers at the bar joking and talking about a failed robbery in which someone was killed without getting anything for it. Everybody talked about the failed robbery for about a week after it occurred (PC-R2. 1628).

On cross examination, the prosecution asked Williams about what he had overheard at the bar (PC-R2. 1632). Williams said the people in the bar did not say who had committed the murder.

Williams knew that Dugan is no longer in the area (PC-R2. 1630). He did not know him by any other name besides Mark. He knew that Dugan was in a wheelchair because one of his knees was shot off (PC-R2. 1630). He knew Doreen Bezner and

knew that she had been Mark Dugen's girlfriend (PC-R2. 1631).[94]

Williams testified that he had not been contacted before 2002 (PC-R2. 1629). Williams admitted to having a substance-abuse problem and had undergone in-patient treatment for substance abuse (PC-R2. 1634).

C. Circuit Court's Faulty Analysis

At the end of Williams' testimony, defense counsel attempted to proffer Williams' deposition taken by the prosecution two days earlier (PC-R2. 1638). The State objected and the court refused to permit a proffer:

> MS. BACKHUS: So I can't proffer it?
>
> THE COURT: I think I already heard the questions I need to hear from the testimony that's been elicited, and your cross examination, redirect. I made my notes. I don't need it. Thank you.

(PC-R2. 1638).[95]

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[94]Williams knew Doreen's boyfriend as Mark Dugen, while she testified that she knew him as Mark Gray. It is hardly surprising that a drug dealer/pimp would use different names in order to elude law enforcement.

[95]After Judge Bagley rendered his opinion denying relief, Mr. Riechmann received information from the prosecution that Judge Bagley had attempted to get the depositions of Ms. Bezner and Mr. Williams by calling the State Attorney's Office, even though the depositions were not admitted into evidence (Supp. PC-R2.75-82). Mr. Riechmann immediately filed a Motion to Get the Facts in order to determine whether *ex parte* contact had occurred between the prosecution and the judge (Supp. PC-R2. 75-82). Mr. Riechmann then filed a Motion

In his order, Judge Bagley found that had the jury heard the testimony of Doreen Bezner and Donald Williams it probably would not have acquitted Mr. Riechmann at trial (PC-R2. 1132).[96] However, he never engaged in the cumulative analysis that is required for a newly discovered evidence claim. Gunsby.[97]

Judge Bagley did say that Ms. Bezner's testimony was inconsistent with the descriptions of Ms. Kischnick and Mr. Riechmann, the trial testimony of Mr. Riechmann and the evidence presented at the two evidentiary hearings (PC-R2. 1132). These statements are wrong.

Ms. Bezner identified in open court the actual photographs of both Ms. Kiscnick and Mr. Reichmann (PC-R2. Def. Ex. F). She could not identify Mr. Riechmann in open court which is not unusual in that fourteen years have passed

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to Disqualify the Judge which was denied (Supp. PC-R2.83-88).

[96]Judge Bagley referred to the fact that Ms. Bezner and Mr. Williams were drug users who had been convicted of non-violent crimes to discount the veracity of their statements (PC-R2. 1130-32). At trial, however, jurors were urged by prosecutors to believe Walter Smykowski, a federal inmate who had been convicted of seventeen (17) counts of fraud (which is a crime involving dishonesty) and had a clear motive to lie (R. 5083-5088).

[97]Judge Bagley did find that counsel had been diligent and could not have previously found Doreen Bezner and Donald Williams (PC-R2. 1131).

since the crime. The photograph of Mr. Riechmann that Ms. Bezner identified as being the man she saw on the night of the crime shows Mr. Riechmann with long hair and is a photograph from shortly before the crime; now Mr. Riechmann has short hair and is older (PC-R2. Def. Ex. F). Mr. Riechmann's hair in the photograph was a "bleach job" (R. 269, State's Ex. 11). His hair is not bleached now. The photograph of Ms. Kischnick that Ms. Bezner identified as being the woman she saw shows a woman with blond hair just as she described (PC-R2. Def. Ex. F). Further, the crime scene photographs admitted at trial show Ms. Kischnick with blond hair and gold jewelry as Ms. Bezner stated in her testimony (R.279-278). Thus, the judge's fact finding that Ms. Bezner's descriptions of Ms. Kischnick and Mr. Riechmann are empirically inaccurate is simply wrong.

As to Ms. Bezner's testimony being inconsistent with Mr. Riechmann's testimony, the judge overlooked the fact the jury rejected Mr. Riechmann's testimony as false. Moreover, Jones v. State contains no requirement that newly discovered evidence must be consistent with all of the defendant's statements and testimony. The issue is whether her testimony, along with a cumulative analysis of the other evidence presented by Mr. Riechmann, would "probably" cause a jury to have enough reasonable doubt to acquit. See, Jones; Gunsby.

Proper evaluation of the evidence shows that Ms. Bezner's testimony is consistent with the discussion in a police report regarding "Kool" and his being overheard bragging about ripping off and wasting someone.

D. Conclusion

Ms. Bezner testified about what really happened that night. She was there as a prostitute with her pimp and a drug addict. Her testimony was straight-forward and honest about herself and the life she led. Her testimony illuminated the case and the unexplained made sense. Had the jury heard her testify in conjunction with the undisclosed Brady material, disclosure of Sreenan's efforts to pressure witnesses into giving false testimony, and the acknowledgment and correction of the false testimony of Smykowski, it undoubtedly would have acquitted Mr. Riechmann; at the very least confidence is undermined in the guilty verdict.

The issue is not whether this Court believes the witnesses, but whether the jury probably would have acquitted when considering the cumulative effect of the testimony from the witnesses presented in these collateral proceedings. Light v. State, 796 So. 2d 610, 617 (Fla. 2nd DCA 2001).

CONCLUSION

The foregoing authorities, the trial record, evidentiary

hearing testimony in 1996 and 2002, in conjunction with the allegations on which Mr. Riechmann did not get a full and fair hearing, show that a new trial is warranted. Accordingly, Mr. Riechmann requests that his conviction be vacated and/or any other relief which this Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid to the Florida Supreme Court 500 S. Duval Street, Tallahassee, FL 32399-1925; Ms. Sandra Jaggard, Assistant Attorney General, 444 Brickell Ave., Ste.950, Miami, FL 33131-2407 on March 15, 2005.

CERTIFICATE OF FONT

I hereby certify that this Initial brief was typed in New Courier font, 12 pt. type.

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