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 REPLY 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 the 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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REPLY ARGUMENT I

In his first argument in his Initial Brief, Mr. Riechmann argued that the circuit court committed reversible error at the evidentiary hearing when it excluded the proffered testimony of Hilliard Veski.[1] Thus, the issue raised concerned the admissibility of Mr. Veski's proffered testimony in support of the Brady/Giglio claim on which the evidentiary hearing had been granted.[1] On April 2, 2002, Mr. Riechmann served a motion requesting that Hilliard Veski be permitted to appear as a witness by telephone (PC-R2. 533). The motion was heard and granted on April 9, 2002 (PC-R2. 1507). The State said it did not believe that Veski "would have any relevant testimony," but it did not object to the motion (Id.).

Rather than address the issue raised by Mr. Riechmann, the State resorts to fabricating a different issue that it alleges "the lower court denied . . . as procedurally barred because it either was or should have been raised on direct appeal or in the prior post conviction proceedings (R. 1140)." (Answer Brief at 39).[1] Overlooked by the State is the fact that the order on which it relies as denying "the claim" was not entered until February 23, 2003, after the evidentiary hearing (PC-R2. 1140). This order had not been entered when Mr. Riechmann sought to call Officer Veski as a witness to prove his entitlement to relief.

The State's Argument I is punctuated by the phrase "[t]o the extent that Defendant is attempting to assert". Answer Brief at 41, 42, 43, 44, 45.[1] This phraseology is used to

hypothesize arguments that Mr. Riechmann did not make, and thereby camouflage the State's steadfast refusal to defend the evidentiary ruling at issue.

At the evidentiary hearing, Mr. Riechmann sought to call Hilliard Veski as a witness. Thereupon, the following occurred:

MS. JAGGARD: The State's objection is Your Honor has granted an evidentiary hearing on two claims. Those being newly discovered evidence regarding the alleged confession of the alleged Mark Dugan and alleged Brady claim with regard to Walter Smykowski, of Officer Veski, the police officer who conducted the inventory search of the car in which the murder occurred two days after the crime. And his prior affidavit has been proffered to show that the blanket that was on the driver's seat and the crime scene photographs and by the defendant's admission at trial was not in fact there and to testify about a flashlight that was never admitted at trial, and **it has absolutely positively no relevance to the claims** that Your Honor has granted an evidentiary hearing on.

MR. MCCLAIN: In response, Your Honor, what's been pending before Your Honor is a Brady claim. This goes to the Brady claim which is U.S. Supreme Court in [K]yles v. [Whitley] said you have to analyze cumulative - -. Mr. Veski's testimony was presented in affidavit after the close of the last hearing. It was after the close of the last hearing that he first informed Mr. Lohman, prior counsel for Mr. Riechmann, regarding these matters. What happened at trial and during that deposition he indicated that the flashlight had been found in the trunk. After the deposition he contacted trial counselor, Mr. Carhart, and told Mr. Carhart actually his testimony at the deposition was false, the flashlight had been found in the back seat of the car, after that the State chose not to call him. But Mr. Veski, Officer Veski was the police officer who conducted the inventory search of the car on October 27th and retrieved in excess of 20 items from the car, one of which was the shawl. The shawl became very important in the course of the case because it's the shawl that supposedly was on the driver's seat and the testimony that was presented from experts was that they found something tested presumptive for blood specks on that shawl and that, that proved that Mr. Riechmann could not have been in the driver's seat at the time of the shooting. Officer Veski indicates that in fact when he seized the shawl 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 two days after homicide, wet with blood. That there was blood virtually everywhere and it was still very wet and sticky. It becomes very important and **it wasn't presented at trial because it wasn't disclosed to Mr. Carhart that the shawl was in the passenger seat when it was seized by Officer Veski**. Certainly, whether it got put in the passenger seat by other police officers earlier in the course of working inside the car working on the victim, or whether it was there all along, to some extent doesn't matter because the

important point is that it was with items that were already covered with blood and so the presence of any type of presumptive blood and so the presence of any type of presumptive blood loss is significant in light of the fact this was located in the passenger seat when the police officer who seized it, seized it.

THE COURT: Anything further, State?

MS. JAGGARD: Your honor, you denied the evidentiary hearing on this claim.

THE COURT: Thank you. The motion to strike Officer Veski is granted. Does not go to the issues that I have granted an evidentiary hearing on or for the proceeding.
Next witness, please.

MR. MCCLAIN: Your Honor, I forgot one thing to proffer. His [Veski's] testimony was also that he had, he indicated that he was pressured to provide the testimony at the deposition indicating 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 was [not] 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.

THE COURT: I limited the hearing to two specific issues. Anything else, please?

MR. MCCLAIN: Nothing further on that, Your Honor.

(Supp. PC-R2. 144-47)(emphasis added).

Thus, the State in seeking to exclude the evidence argued that Veski's testimony "has absolutely positively no relevance to the claims that Your Honor has granted an evidentiary hearing on" (Supp. PC-R. 144). The circuit court sustained the objection because Veski's testimony "[d]oes not go to the issues that I have granted an evidentiary hearing on" (Supp. PC-R2. 146). Contrary to the State's assertions in its Answer Brief, the evidence was excluded as irrelevant. Moreover, the State did not argue in circuit court as it does now that Veski's testimony was somehow time barred.[1] At the Huff hearing, the State argued:

As far as Officer Veski goes, regardless of whether he was untruthful in any way intimidated or not, he never testified. He never testified. We never put in any evidence about that flash light because we could not assure where the flashlight was. His testimony with regard to the location of the blanket is refuted because he didn’t see the car until two days later when he conducted an inventory search and we have photographs of the blanket sitting on the seat of the car.

(PC-R2. 1298-99). Had the State argued a time bar in circuit court, Mr. Riechmann could have and would have explained that Mr. Veski did not tell Mr. Riechmann's counsel what actually happened until the spring of 1997 when he signed an affidavit which counsel filed with this Court in support of a motion to relinquish (PC-R2. 682). Of course, the State had a copy of the affidavit, was aware of the factual assertions therein, and chose instead to argue the merits, that Mr. Veski's testimony was not relevant to Mr. Riechmann's Brady/Giglio claim. It should not be permitted to change arguments before this Court.[1] Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993)("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State").

Beside making a new procedural bar argument that it did not present in circuit court, the State now argues as to the merits that "the record conclusively shows that Defendant was aware of the alleged pressure and alleged false testimony" (Answer Brief at 41).[1] Clearly, the State hid the information that the blanket was found by Veski on the passenger seat covered with wet blood two days after the shooting. This undisclosed information would have armed the defense with evidence that any blood on the blanket got there when it was draped over the bloody passenger seat. This would have completely undermined the State's claim that the presence of presumptive blood on the blanket proved that Mr. Riechmann was lying when he claimed that he was sitting on it at the time of the shooting. However, this is not an accurate recitation of the proffered testimony.

Officer Veski had been conducting an inventory of the vehicle two days after the shooting. The blood inside the car was still wet. The blanket/shawl had been placed on the passenger seat where the victim was shot and was still wet with her blood. The presence of any blood on the blanket/shawl could have been readily explained as blood transferred to the shawl while the car was being processed. Moreover, the fact that there was wet blood two days after the shooting also explains how blood may have been transferred to the ledge under the driver's side window.

Not only did the State keep the defense from knowing of the favorable evidence of which Officer Veski was aware, the State kept his investigator notebook from the defense. At Officer Veski's July 7, 1987 deposition, trial counsel was advised that Officer Veski's notebook with details regarding the location of the evidence collected from the car was missing, according to Ms. Sreenan. For that reason, it could not be turned over to the defense (PC-R2. 682). In fact, the transcript of Officer Veski's deposition on July 7, 1988, shows a discussion ensued about the location of Officer Veski's spiral notebook. After Officer Veski indicated that he had given his notebook to Detective Hanlon, the following occurred:

MR. CARHART: State, is there some reason I have not been provided with his notes.

MS. SREENAN: We don’t have them.

MR. CARHART: Was that because Hanlon won’t give them to you?

MS. SREENAN: This is the first I have heard of them. I do not know that Hanlon has them.

(PC-R2. 682). The record clearly shows that the notes were not turned over to Mr. Riechmann's trial attorney.

Regarding these undisclosed notes, Mr. Veski explained in his 1997 affidavit:

1. My name is Hilliard Veski. I live in Live Oak, Florida.

2. I am retired from the Miami Beach Police Department where I was employed for approximately eighteen years.

3. In October, 1987, I conducted an inventory of a red Ford Thunderbird that was allegedly driven by Dieter Riechmann at the time his girlfriend was shot and murdered inside the vehicle. The inventory was conducted at the police station approximately one and one-half days after the shooting incident at the direction of my supervisor.

4. In conducting my inventory of the vehicle, I recorded all items on a spiral-bound steno pad as well as on printed inventory sheets provided by the department. My two pages of handwritten notes of the inventory recorded on approximately October 27, 1987, are attached to this affidavit and bear my signature.

5. As reflected in the attached notes of my inventory, item #2, I found a blue and red plaid shawl draped over the right front seat, that is, the passenger seat, of the vehicle.

6. At some point, an issue arose with regard to the location of the shawl. Although the shawl was definitely on the front seat when I examined the vehicle, this was disputed by one of the assistant state attorneys handling the case. I was pressured to say that I had found the blanket in a different location, although I frankly do not recall where they wanted me to say it was found, whether it was the front seat or backset. In any event, I was not supposed to say that I had found the blanket draped over the front right seat.

(PC-R2. 680-81).

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[1]Argument I in the Initial Brief was captioned as follows:

> 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.

Amended Initial Brief at 40. In the Answer Brief, a different caption appears - "THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM REGARDING OFFICER VESKI." Answer Brief at 38.

[2]Claim III of the Amended Motion to Vacate filed on September 14, 2001, pled violations of both Brady and Giglio arising in connection with Walter Smykowski (Supp. PC-R2. 41). The first paragraph of Claim III stated, "All other allegations in this motion are incorporated into this claim by specific reference. Claim III included a section on the need for cumulative analysis of the claim (Supp. PC-R2. 54).

Claim IV of the Amended Motion to Vacate raised a due process claim based upon misconduct by law enforcement (Supp. PC-R2. 58). Specific allegations with regard to Hilliard Veski were included within Claim IV (Supp. PC-R2. 62-64).

At the Huff hearing, Mr. Riechmann's counsel explained that the claim was premised upon "Brady versus Maryland as well by the, what I call, an outrageous state conduct claim." (PC-R2. 1288). The State argued, "As far as Officer Veski goes, regardless of whether he was untruthful in any way intimidated or not, he never testified" (PC-R2. 1298). The State elaborated, "His testimony with regard to the location of the blanket is refuted because he didn't see the car until two days later when he conducted an inventory search and we have photographs of the blanket sitting on the seat of the car" (PC-R2. 1299).

At the end of the Huff hearing, the circuit court took the matter under advisement setting another hearing on November 1, 2001, to announce its ruling (PC-R2. 1310-11). Unfortunately, no transcript can be located of the hearing at which the judge issued his ruling granting the evidentiary hearing (PC-R2. 1315).

At a hearing held on November 30, 2001, a discussion occurs on Mr. Riechmann's witness list for the evidentiary hearing that the court had ordered. The State had filed a motion to compel production of addresses for the witnesses listed by Mr.

Riechmann and a proffer of the expected testimony from each witness (PC-R2. 445). In the motion, the State represented that the evidentiary hearing had been granted "on two limited issues related to an alleged recantation by Walter Smykowski and an alleged admission of guilt by 'Mark Dugan'." (PC-R2. 445).

During the November 30th hearing, Mr. Riechmann's counsel identifies "Veski," "one of the crime scene technicians that collected the blankets" as an expected witness (PC-R2. 1490).

[3]Of course, the information that Veski disclosed to Mr. Riechmann's counsel in the spring of 1997 had not been disclosed by the State at the time of the 1988 trial or the 1996 proceedings on the prior post conviction motion. So there is absolutely nothing in the record showing how any claim based upon the proffer of Veski's testimony could have been presented during the direct appeal or the prior post conviction proceedings.

[4]On pages 43 and 44, the State uses the word "claim" in lieu of the word "assert". On page 45, the phraseology varies a bit more - "[t]o the extent that the Defendant is claiming".

[5]In Hilliard Veski's affidavit, he explained that he did not come clean with Mr. Riechmann's counsel until in the spring of 1997 (PC-R2. 681). Immediately after Veski advised Mr. Riechmann's counsel what he knew, the affidavit was prepared and motion to relinquish jurisdiction was filed with this Court while the 3.850 appeal was pending. The motion to relinquish was filed on June 3, 1997. The motion was denied by this Court on September 16, 1997. Once the appeal was final, and the mandate issued returning jurisdiction to the circuit court in March of 2001, Mr. Riechmann filed a motion to vacate containing allegations based on Mr. Veski's affidavit on September 14, 2001. The circuit court did not have jurisdiction to entertain Mr. Riechmann's claim based upon the Veski affidavit until **after** the mandate issued. See Tompkins v. State, 894 So. 2d 897 (Fla. 2005). Thus, the one year clock was tolled while Mr. Riechmann lacked access to the courts to raise any claim based upon Veski's affidavit.

[6]In circuit court, the State did at one point in its Response to the 3.850 motion indicate that after this Court refused to relinquish jurisdiction to permit Mr. Riechmann to present a Brady/Giglio claim based upon Veski's affidavit, it "rejected the habeas claim" premised upon the affidavit (PC-R2. 361). But, the State's assertion was false and constituted an effort

to deceive the circuit court. This Court denied the state habeas claim premised upon Veski's affidavit as not cognizable in original habeas petitions. State v. Riechmann, 777 So. 2d 342, 364 n. 22 (Fla. 2000).

[7]At the time of Mr. Veski's deposition, the State had not yet disclosed the results of any testing on the plaid blanket/shawl. Rhodes, who conducted the testing, 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. This was well after Officer Veski's July 7, 1988, deposition.

After Mr. Veski advised trial counsel that his testimony regarding the location of the flashlight was false, the State did not call Officer Veski as a witness at trial. It was only after Officer Veski exploded the flashlight evidence that Rhodes suddenly concluded that there were invisible specks of

At no time in its Answer Brief does the State address why the proffered testimony of Veski was in fact irrelevant to Mr. Riechmann's Brady/Giglio claim. The State offers no explanation for why Veski's notebook was not turned over to the defense. It advances no argument in its brief as to the irrelevance of the actual proffer of Mr. Veski's testimony:

> Officer Veski indicates that in fact when he seized the shawl 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 two days after homicide, wet with blood. That there was blood virtually everywhere and it was still very wet and sticky.

(Supp. PC-R2. 145).

The State's only direct response to Mr. Riechmann's actual assertions regarding the significance of the Veski proffer in relationship to the Brady/Giglio claim raised by Mr. Riechmann is the following brief statement:

> To the extent that Defendant is claiming that the fact

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presumptive blood on the plaid blanket/shawl. But in introducing the blanket/shawl, the State did not call Officer Veski as a witness even though he was the officer who had collected the item from the car. The State was permitted, over the defense's objection, to introduce the blanket into evidence without calling Officer Veski to identify the location of the blanket when it was collected as evidence (R. 3282). Moreover, Mr. Carhart was not provided with Officer Veski's handwritten notes of the location of all the evidence that he had collected from the rental car.

> that the blanket was moved was important because the blood was transferred, Defendant did not raise this claim in his motion for post conviction relief. As such, it is not properly before this Court.

(Answer Brief at 46). But Mr. Riechmann **did** make his same arguments in circuit court. In the motion to vacate filed on September 14, 2001, Mr. Riechmann asserted:

> Officer Veski's notes indicate "shawl right front seat," and "Flashlight right rear seat." Veski wrote these notes before he opened the trunk of the car to inventory it.
>
> * * *
>
> The position of the black flashlight and the blanket/shawl became significant issues for the jury because these items were the only pieces of physical evidence that the State argued could prove Mr. Riechmann's guilt. Any deception as to where these items were found was integral to the case.

(Supp. PC-R2. 63).

During the Veski proffer, Mr. Riechmann's counsel asserted:

> Certainly, whether it [blanket/shawl] got put in the passenger seat by other police officers earlier in the course of working inside the car working on the victim, or whether it was there all along, to some extent doesn't matter because the important point is that it was with items that were already covered with blood and so the presence of any type of presumptive blood and so the presence of any type of presumptive blood loss is significant in light of the fact this was located in the passenger seat when the police officer who seized it, seized it.

(PC-R2. 145).

In his closing argument in circuit court, Mr. Riechmann argued:

> The handwritten notes attached to Veski's affidavit contained the following notation, "2. Shawl, blue & red plaid (R/F seat)". Thus, the notebook clearly reflects that the shawl, contrary to the State's

> representation at trial, was discovered in the right front seat, i.e. the passenger seat where Kersten Kischnick was shot. This evidence renders the expert testimony that the shawl tested positive for the presence of blood, absolutely meaningless. Veski's descriptions of his actions in the course of his inventory provides, from the defense point of view, a benign explanation for the process of blood spots along the bottom of the driver's side window; Veski's gloves were contaminated with blood and were moving around inside the car before the blood spots were found.

(PC-R2. 632).

The State's contention that Mr. Riechmann did not advance his current arguments in the circuit court when he sought to introduce Mr. Veski's testimony is simply a fabrication.[8]

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[8]In his closing argument, Mr. Riechman did move to amend his 3.850 motion to conform to the evidence and argument made during the evidentiary hearing:

> Between the time this Court ordered the evidentiary hearing and the time that the hearing commenced, there were new discoveries and new disclosures. As a result, the evidence presented does not directly correspond to the pending Rule 3.850 motion. This is not an unusual development in Rule 3.850 proceedings. In Jones v. State, 709 So.2d 512, 518 (Fla. 1998), evidence of Brady violation was discovered on the eve an evidentiary hearing. There, the defendant was permitted to present the evidence and allowed to subsequently orally amend his successor Rule 3.850 motion to include a previously unpled Brady violation. Cf. Way v. State, 760 So.2d 903, 916 (Fla. 2000)(no error where testimony was excluded by the judge at the evidentiary hearing as outside the scope of the 3.850 motion because "Way never attempted to amend his postconviction motion," not even during the appeal). Accordingly within this closing memorandum, Mr. Riechmann moves to amend his Rule 3.850 to conform with evidence that he presented at the hearing, some without objection, some over

In its efforts to ignore the actual arguments that the circuit court erred in excluding Mr. Veski's testimony, the State completely fails to address Mr. Riechmann's claim that Mr. Veski's testimony constitutes impeachment of prosecutor Sreenan, a State witness.[9] In his Initial Brief, Mr. Riechmann argued that Mr. Veski's testimony was admissible because:

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 change his testimony (PC-R. 4771). (Initial Brief at 43-44).

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objection.

(PC-R2. 666).

[9]While Ms. Sreenan was testifying on May 23, 2002, Mr. Riechmann's counsel sought to ask her about her 1996 testimony "regarding Hilliard Veski" (PC-R2. 1366). When the State objected, counsel explained that the questioning was being pursued for purposed of "resolving any issues of credibility" (PC-R2. 1367). The State's relevance objection was sustained (PC-R2. 1368).

> 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.

(Initial Brief at 43 n. 44).

In fact, Mr. Riechmann had advanced this argument in circuit court as well:

> Officer Veski would testify to Ms. Sreenan's efforts to obtain false testimony from him at the time of his deposition in 1987 because of a pending investigation of Officer Veski regarding evidence that he had used illegal drugs in November of 1987. See 7/7/88 depo. of Veski at 33-34. According to Officer Veski, Ms. Sreenan assured Officer Veski that his case would go better if he testified the way she wanted him to. In fact after Officer Veski advised Mr. Riechmann's trial counsel that his statement in the deposition regarding the location of the flashlight was false, his pending case was resolved with his termination. Given that Ms. Sreenan had previously denied applying such pressure to Officer Veski, Mr. Riechmann's counsel also proffered the evidence as impeachment of Ms. Sreenan [PC-R2. 1366-67](May 23, 2002, transcript at 35-36).

(PC-R2. 688).

Given that Mr. Veski's proffered testimony specifically contradicts the sworn testimony of a state witness, his testimony should have been admissible as impeachment of prosecutor Sreenan. The State makes no effort to argue against the admissibility of Veski's testimony as impeachment evidence. It simply restates the issue as if by changing it, the State does not have to answer Mr. Riechmann's argument.

REPLY ARGUMENT II

MOTION TO PERPETUATE

The State's main contention as to Argument II is that in circuit court Mr. Riechmann filed a motion to perpetuate Walter Smykowski's testimony citing "Fla. R. Civ. P. 1.330(a)(3)(C), and

not Fla. R. Crim. P. 3.190(j)" (Answer Brief at 46). Though the State is correct on this point, it is a distinction without meaning.[10] In circuit court, the prosecutor treated the motion as having been filed under Rule 3.190(j) (Supp. PC-R2. 280).[11] The State never argued in circuit court that the written motion erroneously invoked Rule 1.330(a)(3)(c). Instead, the prosecutor argued:

> They want to take a statement under oath of Walter Smykowski in a foreign country that has no extradition treaty with the United States. There is no penalty for giving a false statement. So it's in fact no different than the affidavit that they're already offered from Duba[i]. Now if they thought that affidavit were

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[10]To be clear, Mr. Riechmann acknowledges that in his Initial Brief he erroneously asserted that the motion to perpetuate was based upon Rule 3.190(j), when in fact the written motion set forth that it was based upon Rule 1.330(a)(3)(C). But of course, this Court has held that the rules of criminal procedure that concern trial proceedings and conducting depositions do not apply in post conviction proceedings. State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994)(the granting of discovery depositions in collateral proceedings within the presiding judge's discretion).

[11]The transcript of the January 29, 2002, was not available and not included in the record on appeal before this Court when Mr. Riechmann filed his Initial Brief. However, the State was subsequently able to locate the court reporter and supplement the record with a transcript of that hearing.

> adequate, we wouldn't be here today and in fact it isn't any different. **So to me it's pointless**. Now, if you look at the case law, and I supplied Harold, Simms and another case, I presently handed up Robinson and Lightbourne, they all say pretty much the same thing. They say, I'll start with Harold, Harold in particular says there is no guarantee of trustworthiness in the person who's giving a deposition in a foreign country, isn't under oath that has a consequence of perjury.

(Supp. PC-R2. 280)(emphasis added).[12] Thus, the State's argument was that a deposition conducted in Dubai, United Arab Emirates would not be admissible, so there was no reason to bother to permit such a deposition in the first place.

Mr. Riechmann first filed a motion to perpetuate Walter Smykowski's testimony on

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[12]The transcript is in error as to the case name "Harold" - in fact, the State relied upon Harrell v. State, 709 So. 2d 1364 (Fla. 1998)(PC-R2. 466). However, Harrell concerns a criminal defendant's right of confrontation. Harrell, 702 So. 2d at 1369 ("Therefore, the satellite procedure can only be approved as an exception to the Confrontation Clause. In order to qualify as an exception, the procedure must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation--oath, cross-examination, and observation of the witness's demeanor."). The State does not possess the right of confrontation. Thus, Harrell was of questionable to no relevance on the issue presented by Mr. Riechmann in his effort to depose Smykowski to perpetuate his testimony. Nevertheless, Mr. Riechmann satisfied the requirements set forth in Harrell, 702 So. 2d at 1371 ("Thus, in all future criminal cases where one of the parties makes a motion to present testimony via satellite transmission, it is incumbent upon the party bringing the motion to (1) verify or support by the affidavits of credible persons that a 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 and (2) establish that the witness's testimony is material and necessary to prevent a failure of justice. Upon such a showing, the trial judge shall allow for the satellite procedure."). On July 11th, the State conceded that Mr. Smykowski was in Dubai and beyond the territorial jurisdiction of the court. No one contested that Smykowski's testimony was material to the Brady/Giglio claim based on his affidavit.

January 25, 2002 (PC-R2. 463). At that point in time, opposing counsel (Ms. Jaggard) was arguing before this Court in another case:

> The State asserts that postconviction proceedings are civil and thus not covered by section 942.03(1), which only specifies that a material witness in another state may be summoned in a pending prosecution or grand jury investigation.

Roberts v. State, 840 So. 2d 962, 971 (Fla. 2002). The oral argument in the Roberts case was on March of 2002. This court issued its opinion in Roberts in December of 2002, stating:

> [A]s this Court explained in *State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 409-10 (Fla.1998),* while habeas corpus and other postconviction proceedings are technically classified as civil proceedings, they are "unlike a general civil action . . . wherein parties seek to remedy a private wrong [because] a habeas corpus or other postconviction relief proceeding is used to challenge the validity of a conviction and sentence. Consequently, postconviction relief proceedings, while technically classified as civil actions, are actually quasi-criminal in nature because they are heard and disposed of by courts with criminal jurisdiction." (Citations omitted.) Thus, while criminal postconviction proceedings may be designated civil, "they involve interests and considerations that are more closely aligned with those traditionally and fundamentally protected in criminal proceedings." *Miami-Dade County v. Jones, 793 So. 2d 902, 905 (Fla. 2001).*
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> Furthermore, this Court has recognized that postconviction proceedings must comport with due process. See, e.g., *Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996)* (finding that postconviction hearing was procedurally flawed and violated the appellants' right to due process where court excluded the appellants from the courtroom while much of the evidence was presented and prevented appellants' counsel from cross-examining many of the witnesses). In *Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994),* and *Provenzano v. State, 750 So. 2d 597 (Fla. 1999),* we determined that the postconviction defendants had been deprived of due process because they were not given an opportunity to present evidence or witnesses. Furthermore, as in Provenzano, "the purpose of our previous remand was never realized" in Roberts' case because the court never heard from Roberts' recanting witness even though he repeatedly requested a means to compel her attendance. *750 So. 2d at 597.*

Roberts v. State, 840 So. 2d at 971-72 (footnote omitted). Thus, it was the State's position in 2002, during Mr. Riechmann's efforts to depose Mr. Smykowski in order to perpetuate his testimony, that post conviction proceedings were civil in nature.

The argument advanced by the State in circuit court in opposition to the motion to perpetuate was that there was no enforceable oath in Dubai because there was no extradition

treaty. The circuit court denied the motion saying:

> I think you need to have the witness at this point. I think you need to have the witness for me to even consider granting such a motion. Secondly, I find it to be legally insufficient.
>
> **Now, if for some reason or somehow an investigator is able to discover this witness, I will allow you leave to come back before the Court and readdress the matter but at this time it's denied.**

(Supp. PC-R2. 284)(emphasis added).

On July 11, 2004, Mr. Riechmann accepted the circuit court's invitation. Mr. Riechmann's counsel advised the circuit court:

> I received from the state attorney's office, I think it was last week, a memo from them stating that they had spoken with Mr. Smykowski over the telephone and I believe that was one of the issues that the Court left open for me, was to renew my motion in the event that his location and his phone number was available to the state attorney. And obviously, they have the phone number which I have never been able to get, so it's my position that I'd like to renew my request to get Mr. Smykowski's deposition from wherever he is now that the State has had an opportunity to talk with him.

(Supp. PC-R2. 262).

The prosecutor objected to the renewed request:

> MR. RUBIN: I would object to him giving a telephone deposition in this case and arrangement has not been made. I have not gone to depose him. **I don't know if there's no enforceable oath in Duba[i]. That's the argument that I raised previously**. I'm taken aback that we're having this discussion here and now. In as much as I disclosed to Miss Backhus a week or two ago the fact that Smykowski had called me and called had been made back and documented by police officers as the Court understands the entirety of it, he's denied signing the affidavit saying it's, pardon me, bull shit and for those reasons I don't agree it.

(Supp. PC-R2. 264)(emphasis added).[13] However, the prosecutor's

[13]In its brief, the State finds fault with Mr. Riechmann's failure to assert in the motion where Smykowski was living ("Defendant admitted that he did not have even an address or phone number for Smykowski." Answer Brief at 47). Yet, the hearing transcript reflects that the prosecutor claimed to have talked with Smykowski on the phone. Clearly, the State's current effort to assert that the lack of a phone number or

assertion that when he spoke with Smykowski, Smykowski repudiated the affidavit indicating that he received undisclosed consideration for his testimony. If the prosecutor's assertion was in fact true, it is baffling why the prosecutor still opposed perpetuating Smykowski's testimony.

The circuit court denied the motion cryptically saying, "Given your motion is denied." (Supp. PC-R2. 265).

The State's current argument that formal compliance with Rule 3.190(j) did not occur was never made to the circuit court. Certainly, had the objection concerned technical requirements of the criminal rule that at the time the State contended did not apply, those objections could have been easily satisfied.[14] For that reason, the State cannot advance the argument for the first time on appeal when it did not make that argument below. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State").

An essential component of due process is "notice and opportunity for hearing appropriate." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). At no time during the proceedings in circuit court was Mr. Riechmann given notice that the State was demanding compliance with any technical rules

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address somehow prejudiced the State and was a basis for the denial of the motion is a fabrication.

[14]To be sure, the technical requirements contained in Rule 3.190(j), are not present in Rule 1.330(a)(3).

before a deposition to perpetuate testimony would be acceptable. There was no demand for affidavits as to Smykowski's residence in Dubai that would have been readily available.[15]

Nor did the State assert in the circuit court that the motion should be denied because it was "made within 10 days of the proceeding" (Answer Brief at 48). In fact, the record shows that the motion was initially made in January, months before the evidentiary hearing.[16] The motion was denied with leave to renew if "for some reason or somehow an investigator is able to discover this witness, I will allow you leave to come back before the Court and readdress the matter but at this time it's denied" (Supp. PC-R2. 284). When the State revealed that it had located Mr. Smykowski and spoken with him telephonically, Mr. Riechmann renewed his request.[17] The timing of the renewal was

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[15]The prosecutor during the hearing on the motion claimed to have spoken with Smykowski who he acknowledged was in Dubai (Supp. PC-R2. 264). The State's assertion in its brief that "Defendant continually claimed not to know where Smykowski was" is simply false (Answer Brief at 50). Counsel represented that Smykowski was in Dubai (Supp. PC-R2. 282)("We found out he was in Duba[i] in the United Arab Emirates"); however, she had neither a specific phone number or address for him (PC-R2. 1713).

[16]The evidentiary hearing had been scheduled to begin in April. However when the State made new disclosures on the eve of the evidentiary hearing, it was continued. The evidentiary hearing was conducted over two months. Evidence was taken on May 23rd, May 31st, June 4th, July 11th and July 12th. Written closing arguments were not completed until October 31, 2002. The order denying post conviction relief was not entered until February 28, 2003.

[17]The State's assertion in its brief that "none of Defendant's requests gave the State adequate notice" is simply ridiculous (Answer Brief at 48-49). The State had enough notice to locate

as a result of the timing of the **State's** disclosure that it had located and spoken with Smykowski.

ADMISSIBILITY OF SMYKOWSKI AFFIDAVIT

The State opposes Mr. Riechmann's argument that Mr. Smykowski's affidavit and/or statements to Ms. Backhus should have been permitted into evidence by simply asserting, "This Court has held hearsay is not admissible in post conviction proceedings." (Answer Brief at 51). However, this oversimplified analysis fails to accurately reflect the circumstance present here, Mr. Riechmann's argument, or this Court's case law.

This Court has often granted post conviction relief or affirmed the grant of post conviction relief on the basis of evidence that constituted "hearsay" under the State's oversimplified analysis. In Floyd v. State, 902 So. 2d 775 (Fla. 2005), this Court found that a new trial was warranted on the basis of statements contained in a written police report that was admitted into evidence at the post conviction evidentiary hearing. Under the State's analysis, a police report setting forth the statement of a witness would be inadmissible hearsay. In Mordenti v. State, 894 So. 2d 161 (Fla. 2004), this Court granted a new trial on the basis of a daily calendar that contained handwritten notations of events that impeached the State's primary witness, and on the basis of the prosecutor's handwritten notes of witness interviews. Under

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Mr. Smykowski in Dubai and speak with him.

the State's analysis, the daily calendar and handwritten notes would be inadmissible hearsay. In Cardona v. State, 826 So.2d 968 (Fla. 2002), this Court granted a new trial on the basis of written reports of statements made by the State's primary witness that impeached her trial testimony. Under the State's analysis, these reports setting forth the statement of a witness would be inadmissible hearsay. In State v. Mills, 788 So. 2d 249 (Fla. 2001), this Court affirmed the grant of post conviction relief on the basis of the testimony regarding a statement made by the State's primary witness that was inconsistent with his trial testimony. Under the State's analysis, the post conviction testimony of what a trial witness had stated outside the courtroom would be inadmissible hearsay. See also Hoffman v. State, 800 So.2d 174 (Fla. 2001); Roman v. State, 528 So.2d 1169 (Fla. 1988). Clearly, the State's position that evidence of out-of-court statements made by a witness may not be introduced in post conviction proceedings is simply wrong.[18]

Evidence that impeaches a State's witness' trial testimony

[18]The cases cited by the State are inapposite. In Randolph v. State, 853 So. 2d 1051 (Fla. 2003), the inadmissible affidavit was of a witness who did not testify at the trial and concerned unpresented mitigation. Since the witness had not testified at the trial, the affidavit did not contradict the witness' prior sworn testimony. In Routly v. State, 590 So. 2d 397, 401 n.5 (Fla. 1991), the affidavits at issue were from family members regarding the defendant's childhood. There, the State had not argued that the affidavits were inadmissible. This Court in a footnote did not strike the affidavits, but merely questioned on what legal basis the affidavits had been admitted.

is admissible. This includes evidence that a trial witness' out-of-court statements are inconsistent with his trial testimony. Mordenti v. State; Cardona v. State; State v. Mills; Roman v. State. Here, Mr. Smykowski signed an affidavit detailing that, contrary to his trial testimony, he received consideration for his testimony from the State.[19] He confirmed the accuracy of the affidavit to Ms. Backhus when she discussed the affidavit with him. Mr. Smykowski's affidavit and statement to Ms. Backhus that he received undisclosed consideration from the State was admissible in support of Mr. Riechmann's post conviction motion. Floyd v. State; Mordenti v. State; Cardona v. State; State v. Mills; Hoffman v. State; Roman v. State. To apply different rules as to the admissibility of evidence that has served as a basis for a new trial in numerous cases where it was admitted would be arbitrary and capricious. Given the circumstances here where Mr. Riechmann sought to depose Mr. Smykowski and provide the State with the opportunity to cross-examine him and where the State opposed such a deposition and such an opportunity to cross-examine Mr. Smykowski, the witness was unavailable. His affidavit and his statements to Ms. Backhus should have been permitted. The circuit court erred in

[19]After Mr. Riechmann filed Mr. Smykowski's affidavit in which he swore that police officers Hanlon and Matthews (in the month before Mr. Riechmann's trial) had taken him out of the jail to visit with his family and have dinner, the State for the first time revealed that Hanlon and Matthews had taken Mr. Smykowski out of the jail to visit his family and have dinner. This certainly provides significant corroboration to Mr. Smykowski's affidavit.

excluding the proffered affidavit and statements that contradicted and impeached Mr. Smykowski's trial testimony.

REPLY ARGUMENT III

In its Answer Brief, the State asserts that "Defendant never asked the lower court to recuse itself because it had engaged in *ex parte* communications with the State" (Answer Brief at 55). Mr. Riechmann stated in his motion to disqualify:

> 3. The Rosenblatt letter raises questions regarding the nature and the scope of the contact between Judge Bagley and the Office of the State Attorney. Undersigned counsel was never advised that Judge Bagley was attempting to obtain copies of depositions that had not been admitted into evidence. The efforts to obtain the depositions were *ex parte* in nature. Undersigned counsel has no idea when the *ex parte* inquiry was made. Given that the Rosenblatt letter reveals this contact was unsuccessful because Mr. Rubin was out of town, it also raises the question as to whether there had been prior contact. It is clear that the effort to secure access to non-record material was made in conjunction with the preparation of the order denying the Rule 3.850 motion.
>
> 4. Besides raising questions regarding the *ex parte* contact between the State and Judge Bagley, the Rosenblatt letter also reveals an effort by Judge Bagley to conduct an independent investigation and review information not presented into evidence at the evidentiary hearing.

(Supp. PC-R2. 84). Subsequently, the motion stated, "WHEREFORE, for the forgoing reasons, **Mr. Riechmann respectfully requests that Judge Bagley recuse himself**. The State's assertion that Mr. Riechmann had not sought recusal on the basis of *ex parte* communication is baseless.

Next, the State argues that the motion to disqualify was

not “filed within 10 days of when grounds for the recusal are disclosed” (Answer Brief at 55). For this proposition, the State maintains that the 10-day clock began when it “faxed its response to the call from the Judicial Assistant to the prosecutor’s secretary on February 27, 2003" (Answer Brief at 55-56).[20] Unfortunately, the State overlooked the factual averments set forth in the motion to disqualify explaining exactly when Mr. Riechmann’s counsel received the FAX and learned of the *ex parte* contact. In the motion to disqualify, Mr. Riechmann stated:

> The copy of the letter was sent to undersigned counsel’s office in Tampa via facsimile transmission at 4:32 p.m. on the afternoon of February 27, 2003. However, undersigned counsel had departed for Miami during the morning hours of February 27, 2003 for an 8:15 a.m. Riechmann hearing in Miami the next day. Undersigned counsel did not discover the letter until her return to the office in Tampa on Sunday, March 2, 2003.

[20]Nowhere in its Response to Motion to Disqualify that it filed April 14, 2003, did the State assert that the motion was untimely (PC-R2. 1171).

(Supp. PC-R2. 83).[21] Therefore the motion to disqualify was filed within 10 days of when counsel learned the letter's contents.[22] The motion was timely filed.

Moreover, the order denying the motion to disqualify was filed on April 15, 2003, the day after the State filed its response. The order indicated that the motion was "legally insufficient" (PC-R2. 1180).[23] Clearly, the circuit court did not find the motion to have been untimely. Thus, the State's argument that the motion was untimely is specious.

Next, the State argues that the *ex parte* contact "concern[ed] purely administrative matters" (Answer Brief at 56). The is simply not true. The judge was attempting to obtain from the State evidence that had not been admitted at the evidentiary hearing, even though Mr. Riechmann had sought to

[21]The factual averments in a motion to disqualify are to be accepted as true. Suarez v. Dugger, 527 So. 2d 191 (Fla. 1988).

[22]At no point during the hearing on the morning of February 28, 2003, did the State reference the letter it had FAXed to Mr. Riechmann's counsel at 4:32 PM on February 27, 2003 (PC-R2. 1452-62).

[23]The order denying was entered more than 30 days after the motion to disqualify was filed. However, the 5th DCA had ruled in Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999), that a circuit court was required to immediately rule upon a motion to disqualify. The 5th DCA found that failing to rule on a motion to disqualify within 30 days of its filing require the removal of the judge for the failure to immediately rule on the motion. On May 22, 2003, this Court found the analysis employed by the 5th DCA was correct. Tableau Fine Art Group, Inc. V. Jacoboni, 853 So. 2d 299, 302 (Fla. 2003)("When a trial court fails to act in accord with the statute and procedural rule on a motion to disqualify, an appellate court will vacate a trial court judgment that flows from that error.").

introduce it.[24] As to Judge Bagley's analysis of the received stamp on Smykowski's letter to Sreenan, the State argues that since the letter was introduced into evidence the judge was entitled to "draw a logical inference from the admitted evidence" (Answer Brief at 63). However, that is not what occurred. Here, there was no evidence presented regarding when the letter was received in relationship to when "the Sexual Battery Unit" stamped it received. The letter did not concern a "sexual battery." No explanation was presented as to why the letter went to "the Sexual Battery Unit." Judge Bagley's inference as to the meaning of that receipt stamp was clearly based upon his knowledge from having worked in the State Attorney's Office at the time of the Riechmann prosecution. Contrary to the State's contention, this is about "more than a request for documents" (Answer Brief at 57).[25] A finder of fact

[24]The State tries feebly to pass off record anomalies that suggest that Judge Bagley considered other matters that had not been introduced into evidence. For example, the State tries to explain away the placement into the record of the depositions that had not been introduced into evidence by Judge Bagley immediately before the entry of the order denying relief. The State indicates that these depositions had been provided to the judge in connection with a pre-hearing issue. Indeed at the end of a hearing conducted on April 9, 2002, the judge indicated to Peter Mueller's counsel that if she wanted him to rule on her motion seeking to invoke the journalist's privilege, she needed to provide him with Mr. Mueller's deposition (PC-R2. 1532). The depositions were provided by April 17, 2002 (PC-R2. 1555). But that does not explain why the judge kept the depositions until February of 2003 when he denied the motion to vacate, long after the privilege had been resolved.

[25]The cases generally relied upon by the State are wholly distinguishable. They do not involve *ex parte* requests by a

is not permitted to consider information that was not formally introduced into evidence.[26]

In responding to Mr. Riechmann's argument that a hearing should have been granted at which Mr. Riechmann's counsel could ascertain the complete facts as to what transpired, the State argues that Mr. Riechmann is not entitled to obtain sworn testimony regarding what transpired and why. It would seem the basic due process would entitle Mr. Riechmann to go beyond Mr. Rosenblatt's self-serving letter disclosing *ex parte* communication with the judge who was deliberating on Mr. Riechmann's motion to vacate following the close of an evidentiary hearing.[27] What was the purpose of disclosing the *ex*

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judge to obtain information that was not introduced into evidence while the judge is deliberating on a case following the close of evidence.

[26]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.

[27]An essential component of due process is "notice and opportunity for hearing appropriate." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment).

parte contact if Mr. Riechmann is not entitled to discover the actual scope of *ex parte* communication, and seek the disqualification of a judge who has ignored the ethical prohibitions against *ex parte* contact and independent judicial investigations of facts that were beyond the evidence introduced on the record? According to the State, the Rosenblatt letter is in essence wallpaper that can be used to cover up an unsightly mess and insure that the mess will not see the light of day.[28]

The State does point out that this Court in Vining "did not grant relief based upon an improper independent investigation" (Answer Brief at 59). It is correct that relief was not granted, but that was because the error was viewed through the prism of ineffective assistance of counsel, and the defendant in that case failed to make the requisite showing that he was prejudiced by the his attorney's deficient performance in failing to object. Vining, 827 So. 2d at 210. However, here counsel did object and has raised this issue on appeal. Thus, this Court's admonishment is directly applicable. Id. ("The judge overstepped his boundaries by conducting an independent investigation and by reviewing information that was not

[28]In a telling footnote, the State expresses puzzlement at Mr. Riechmann's concern that the judge was attempting to obtain a copy of depositions that Mr. Riechmann sought unsuccessfully to have admitted (Answer Brief at 60 n. 13). Clearly, the concept that a party is entitled to know what evidence is actually being considered by a finder of fact is beyond the State. Due process, if it means anything, surely means that secret consideration of evidence in some sort of star chamber will not be permitted. See Vining.

presented during the trial. We caution that such behavior does not promote public confidence in the integrity and impartiality of the judiciary. See Fla. Code Jud. Conduct, Canons 1, 2A").

REPLY ARGUMENT IV

The State also argues that Judge Bagley's statement that Mr. Riechmann did not exercise due diligence and that his claims were time barred "is supported by competent, substantial evidence" (Answer Brief at 75). The State's argument is ridiculous, as was Judge Bagley's assertion in his order denying relief.

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). In fact, on April 18, 2002, days before the scheduled evidentiary hearing, the prosecution disclosed for the first time that Walter Smykowski was taken out of federal custody by state law enforcement officers to visit his then eight-year-old daughter, Deborah Schaefer, at her residence, a non-custodial setting. In an amended witness list, the State the set forth, "11. Mr. Smykowski was taken to visit his family by Detectives Hanlon and Matthews and one of them paid for fried chicken" (PC-R2. 1324-25). This disclosure occurred fourteen years after Mr. Smykowski testified that, between March of 1988 and July 27, 1988 (two days before his testimony), he had no contact with law enforcement or anyone from the State Attorney's office (R.

4143). The disclosure that contradicted this testimony occurred fourteen years after Mr. Smykowski had testified that he received no benefit for his testimony, other than the possibility that at some point in the future the prosecutor might write a letter on his behalf.

At a hearing on May 9, 2002, counsel for Mr. Riechmann argued that the April 18, 2002 disclosure warranted discovery depositions of Hanlon and Matthews regarding federal-prisoner Smykowski's state-arranged visit with his daughter. Proscutor Rubin reported that he had disclosed the visit as soon as he learned that it had occurred.[29] In light of the April 18, 2002 disclosure, the circuit court permitted discovery depositions of the detectives, but limited to only to federal prisoner Smykowski's state-arranged visit with his daughter (PC-R2. 1325).

During the proceedings on May 23, 2002, Mr. Riechmann's counsel questioned Mr. Riechmann's trial prosecutor, Beth Sreenan, regarding Smykowski's state-arranged visit with his

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[29]The prosecutor stated during the May 9th hearing:

> I filed a Discovery pleading. It came to my attention through my discussion with the officers on or about the date I suppose that I will [sic] filed the pleading - -
>
> * * *
>
> - - whatever it was you know within a week or so of that date that they told me that they had taken Mr. Smykowski out of jail and bought chicken. So I disclosed it.

(PC-R2. 1325).

daughter. During the proceedings, counsel for Mr. Riechmann offered Detective Hanlon's trial deposition as an exhibit. When the State objected on relevancy grounds, the following occurred:

> MR. MCCLAIN: Your Honor, as was indicated last week or two weeks ago, the State has recently disclosed - - it's item number eleven on the witness list - - that Detective Hanlon and Matthews took Walter Smykowski to visit his family and bought chicken.
>
> I'm alleging a Brady claim based upon that and I think the foundation of that requires sort of the whole history, the chronology of the information that was provided or not provided to the defense attorney, Mr. Carhart.
>
> This is something that shows information that was provided to Mr. Carhart.
>
> In determining whether or not there is a Brady violation, I think Your Honor has to know what was disclosed and what wasn't.
>
> THE COURT: Anything further?
>
> MR. RUBIN: My position is that it's non sequitur. It does not flow from whatever is stated in that deposition that the information was or was not provided. **I provided it. Apparently, it was not provided before. I don't think that is an issue**[.] [W]hether Mr. Smykowski was taken out on one occasion and fried chicken was supplied[,] [t]hat is one thing.
>
> The other thing is, my understanding, although I don't have a complete history of the procedure, is that this matter was covered previously as to giving or given in that particular police report.

(PC-R2. 1345-46)(emphasis added).

Any argument that Mr. Riechmann failed to exercise due diligence regarding this matter when it was not disclosed until the eve of the evidentiary hearing is simply preposterous. 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. At 1264. Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

At trial, Mr. Smykowski testified that after being interviewed by prosecutor 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.).[30] According to Mr. Smykowski, his discussions with DiGregory were his only contact with "someone from the State or the police since March" (Id.).[31]

In 2002, it was revealed by the State that after Smykowski was transported back to Miami in May, Matthews and Hanlon signed him 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,

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

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

but I'm not sure" (PC-R2. 1671).[32] 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, Mr. 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 Mr. Smykowski's false testimony in order to disclose that Mr. Smykowski had contact with the police and was taken to the police station for interviews. The State did not comply with its obligation under Banks to set the record straight.

The State also argues that Mr. Riechmann's one year clock for filing his motion started to run when he received a copy of Smykowski's daughter, Deborah Schaefer's letter on or about June 5, 2000. However at that time, Mr. Riechmann's appeal was pending before this Court. Mr. Riechmann had filed 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. The State seems unaware of this Court's ruling in Tompkins v. State, 894 So. 2d 897 (Fla. 2005), which

[32]Det. 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).

held in essence, the one-year clock is tolled while a defendant lacks access to the circuit court to raise any newly discovered claims. Once this Court issued its mandate and jurisdiction returned to the circuit court, Mr. Riechmann filed an amendment to his previously filed 3.850 to include all matters that had arisen while the appeal was pending. As to the merits of Mr. Riechmann's Brady/Giglio claim, the State's argument that *de novo* review warrants an affirmance is simply unavailing. At the outset, the State's case was admittedly weak.[33] When cumulative consideration is given to all of the State's due process violations, confidence is undermined in the outcome.

CONCLUSION

For all of the foregoing reasons and those stated in Mr. Riechmann's Initial Brief, this Court should vacate the circuit court's order denying Rule 3.850 relief and order a new trial.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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. 650, Miami, FL 33131-2407 on October 20, 2005.

CERTIFICATE OF FONT

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

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