IN THE SUPREME COURT OF FLORIDA

CASE NO. 05-1873

MICHAEL RIVERA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No. 0754773
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

NEAL DUPREE
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a post-conviction motion without an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

“1PC-R.” -- record on appeal of denial of first Rule 3.850 motion;

"2PC-R." -- record on appeal of denial of first Rule 3.850 motion after remand;

“3PC-R., [Volume Title]” -- record on appeal of denial of this second Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Rivera has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. Moore, 786 So. 2d 532 (Fla. 2001) Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003). A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Rivera, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

On January 30, 1986, at about 6:15 PM, eleven year old Staci Jazvac set off from her home for a nearby strip mall to get paper at a store (R. 702-03). She was last seen by a store clerk at "[a]bout 6:30, 7 o'clock" (R. 797). According to the State's theory of the case, Michael Rivera, while using a blue van owned by his friend Mark Peters, abducted Staci as she walked home following her purchase of paper, and that he killed her in the blue van and dumped her body in an empty field where it was found on February 14, 1986.[1] When discovered, her body was clad in jeans, a white nylon jacket and a white top (R. 897-98, 913).

During the trial, the State focused on linking Staci to the blue van and arguing that based upon his various statements that Mr. Rivera was in possession of the blue van on the evening of

[1]In making these arguments, the State relied upon an obscene phone call that a sexually-troubled Mr. Rivera made on February 7th to Starr Peck in which he claimed that his name was "Tony" and that he had grabbed Staci, put her in the blue van, and dumped her body in Lake Okeechobee (R. 1087-90).

The defense argued that the details in the obscene phone call that Starr Pack received from "Tony" (Michael Rivera's alter ego) did not match the facts of the case - only the information that was common knowledge from the newspaper coverage (R. 1831-34). The defense argued that a troubled Michael Rivera made statements based on "fantasy" (R. 1837). "Tony" made obscene phone calls and made outrageous claims to get attention (R. 1839-40). This was not unlike recent events in the nationally known Jon Benet Ramsey case.

January 30, 1986. In this regard in his opening statement, the prosecutor explained:

> They also checked Mark Peters' van, and you'll hear from Howard Seiden, who is with the Crime Lab, and he's an expert in hair examination.
>
> He'll tell you he found a hair in Mark Peter's van, a long hair, I think it was like six or seven inches, and he compared that with the known hair of Staci Jazvac and that they are similar.
>
> He will not come in and say they are exactly the same and they are Staci's. You can't do that in hair. It's not like fingerprints. He'll say it is similar to Staci Jazvac's hair in the van.

(R. 715).[2] The prosecutor also noted in his opening that there would be evidence showing that a fingerprint found in the van "is Michael Rivera's (R. 716).[3]

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[2]Similarly in his initial closing, the prosecutor argued:

> What's important about Detective Edel is that he did some vacuuming for the van. He did some vacuuming and he told you where he did vacuuming.
>
> He did vacuuming where? In back of this van. As a result what does he find? He finds hair.
>
> Now they have the standards of Staci. So he sends those standards to Howard Seiden. You heard Howard Seiden. It just so happens that hair was consistent with Staci's. He can't say and he didn't say it's a positive identification, but he says it's consistent with Staci Jazvac's hair standard.

(R. 1793). In his rebuttal closing argument to the jury, the prosecutor again argues: "And it just so happens that a hair similar to Staci's is found in the van"(R. 1866).

However, DNA testing conducted in 2003 has now conclusively established that Staci was not the source of the hair found in Mark Peters' van.[4] Thus, the slender reed relied upon by the prosecutor to repeatedly link Staci to the blue van has been destroyed.[5]

In addition to the startling DNA results, Mr. Rivera's collateral counsel discovered in mid-2002 that the State had

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[3]The State also presented the testimony of a jailhouse informant, Frank Zuccarello, who claimed Mr. Rivera made statements acknowledging that "he was riding around looking for a young girl" when he spotted Staci (R. 1422).

[4]When Mr. Rivera requested DNA testing of the hair from the blue van, the State did in fact "agree to the DNA testing, we did acknowledge its relevancy." (3PC-R., "Supplemental Transcript," 109). However after the results came back totally in Mr. Rivera's favor, the State argued the results did not warrant relief, nor even evidentiary development. According to the State, the DNA testing that it agreed to was merely a waste of time and money.

[5]At Mr. Rivera's trial, his lawyer in his closing asked: "But where is Mark Peters?" (R. 1841). The State did not call Peters as a witness or introduce any statements from him regarding the blue van.

In Mr. Rivera's first Rule 3.850 proceedings, his collateral counsel had located Mr. Peters and presented his testimony. Mr. Peters indicated that on the evening of January 30, 1986, Rivera picked him up at work between 5 and 6 PM. Peters then drove Mr. Rivera home and reached his own home by 7 PM. Rivera v. State, 717 So. 2d 477, 482 (Fla. 1998). Thus, by 6 PM, Peters was in possession of his van and remained so thereafter. After considering this testimony on appeal from the denial of collateral relief, this Court found that Mr. Rivera had not shown sufficient prejudice to warrant a new trial. However, in conjunction with the DNA results, the significance of Peters' testimony is enhanced.

withheld a written plea agreement that the State had with Frank Zuccarello, and which Zuccarello had denied.[6] According to the undisclosed written plea offer with Zuccarello:

[6]Zuccarello appeared at Mr. Rivera's trial pursuant to a State issued subpoena (R. 1402). He testified that he first told law enforcement that Mr. Rivera had made a statement simply because he thought what Mr. Rivera "did was a sick act" (R. 1406). On cross, Zuccarello testified the State had "not made any deals with you regarding [his] testimony" (R. 1410).

> III. **In return for the considerations shown above, the defendant will continue to cooperate with**: Florida Department of Law Enforcement (lead agant: Steve Emerson); **Broward Sheriff's Office (detectives Presley, Argentine, Sgt. Carney)**; Ft. Lauderdale Police Department (detective Potts); **ASA's Lazarus** and Pyers, and their investigators; and other law enforcement offices.
>
> The defendant will, in his cooperation, be giving statements, which will be tested by polygraph as to their veracity; **the defendant will further agree to testify at all proceedings in which he is subpoenaed** and the defendant will testify honestly.

(3PC-R., "Supplemental Record," 63)(emphasis added).[7]

This plea offer not only constituted undisclosed impeachment evidence within the meaning of Brady, it also demonstrated that the State at the time of trial did not correct Zuccarello's false testimony denying the existence of an agreement obligating him "to testify at all proceedings in which he is subpoenaed" and that the State presented false testimony and presented false argument during Mr. Rivera' prior collateral proceedings.

At a post-conviction evidentiary hearing in 1995 on Mr. Rivera's claim that the State had withheld Brady evidence, the State called Mr. Rivera's trial prosecutor, Kelly Hancock, to testify. During the direct examination of Mr. Hancock by

[7]At the time of Zuccarello's plea agreement, Mr. Rivera was being prosecuted by "ASA Lazarus" and detective Argentine was the deputy that Zuccarello testified he contacted regarding Mr. Rivera (R. 1406).

Assistant State Attorney Susan Bailey, the following testimony was presented:

> Q. Okay. Mr. Hancock, I would like to ask you about the testimony of Frank Zuccarello on the witness stand. If you need to refresh your recollection, I'll be more than happy - -
>
> A. Okay.
>
> Q. But do you recall asking Frank Zuccarello in your direct examination if the state had made any promises to him whatsoever regarding his testimony on behalf of the state against Michael Rivera?
>
> A. Absolutely, I asked him that question.
>
> Q. And do you recall what his response was?
>
> A. He said that we had offered him nothing to testify.
>
> Q. Okay. In fact, did you offer Mr. Zuccarello any promises or anything in return for his testimony?
>
> A. Offered him nothing.

(PC-R. 686). During cross examination, Mr. Hancock testified:

> Q. You never made him any promises?
>
> A. I never made him any promises. In fact, he was - - my recollection, he was more than willing to come and testify against Mr. Rivera.
>
> * * *
>
> Q. Are you aware of anyone else on the prosecutor's team or the police or involved with the state in Mr. Rivera's case promising these individuals anything?
>
> A. No, and I think I asked everyone that testified in court if they were promised anything when they - when they testified, if we had promised them

> anything, and my recollection is everyone said no, that the state had not promised them anything.
>
> I cannot tell you with the detectives because I wasn't there. But my understanding from talking to the detectives was that they were not promised anything either.
>
> Q. And no one on the prosecutor's team promised them anything?
>
> No. I was on the prosecution's team, I mean, I was the one that tried the case, I don't recall that there was another prosecutor there to assist me. So, the answer's no, I didn't promise them anything.

(PC-R. 686, 694-95). In the State's closing memorandum, the State sought to have the Brady/Giglio claim denied upon the basis of Hancock's testimony; "Hancock testified that Zuccarello did not receive any deal for his testimony." State's Memorandum dated 6/1/95 at 11. And on the basis of Hancock's testimony and the representations made by the State that there was no deal for Zuccarello's testimony, Mr. Rivera's claim was denied.[8]

However, pursuant to an undisclosed plea agreement, Zuccarello in return for a reduction in his criminal liability

[8]The United States Supreme Court recently explained: "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.

agreed **“to testify at all proceedings in which he is subpoenaed”** (3PC-R., “Supplemental Record,” 63).[9]

Despite the new DNA evidence refuting the only physical evidence offered by the State to link Staci Jazvac to the blue van, and despite the new evidence showing that the State not only failed to disclose favorable evidence to the defense, but also showing that the State presented uncorrected false testimony at Mr. Rivera’s trial and at his prior collateral proceedings, the circuit court summarily denied Mr. Rivera’s successive motion to vacate his conviction and sentence of death. In refusing to conduct an evidentiary hearing in light of the significant new evidence, the circuit court erred.

STATEMENT OF THE CASE

On August 6, 1986, Mr. Rivera was charged by indictment in the Seventeenth Judicial Circuit Court with first degree murder (R. 2164). Mr. Rivera was found guilty on April 16, 1987, and on April 17, 1987, the jury recommended a death

[9]Additional newly discovered evidence was pled in the Rule 3.850 motion as warranting post-conviction relief. This new evidence included the involvement of Detectives Scheff and Ambile in the case of Frank Lee Smith wherein they claimed that he made incriminating admissions to them, and statements made by the trial judge in a newspaper article acknowledging his difficulty in overcoming his prejudice against Mr. Rivera during the trial. This evidence also warranted evidentiary development as explained herein and must be evaluated cumulatively with the particularly startling new evidence discussed in this introduction.

sentence (R. 2296, 2307). On May 1, 1987, the trial court imposed a death sentence (R. 2308-13). On direct appeal, this Court affirmed Mr. Rivera's conviction and sentence of death, while overturning the finding of the cold, calculated and premeditated aggravating circumstance. Rivera v. State, 561 So. 2d 536 (Fla. 1990).

On October 31, 1991, Mr. Rivera filed a Rule 3.850 motion, along with a motion to disqualify the trial court judge (PC-R. 739-49). Mr. Rivera subsequently filed two additional motions to disqualify the judge (PC-R. 1024-40, 1604-18). The disqualification motions were all denied (PC-R. 783, 1143).

The circuit court ordered a limited evidentiary hearing, summarily denying most of the claims for relief (1PC-R. 1205-06). After the evidentiary hearing in 1995, the court denied all relief (1PC-R. 1717-21). On appeal, this Court reversed the summary denial of the penalty phase ineffective assistance of counsel claim, but affirmed the denial of relief on all other claims. Rivera v. State, 717 So. 2d 477 (Fla. 1998).

On remand, the circuit court held an evidentiary hearing on April 26-28, 2001. Following the hearing, the circuit court denied relief, and Mr. Rivera again appealed the denial. On September 11, 2003, this Court affirmed the denial

of Mr. Rivera's penalty phase ineffective assistance of counsel claim. Rivera v. State, 859 So. 2d 495 (Fla. 2003).

Meanwhile, on September 29, 1999, Mr. Rivera had filed a second Rule 3.850 motion in circuit court based upon previously undisclosed information. He filed an amendment to the Rule 3.850 motion on September 27, 2001, in light of the discovery of additional information that the State had previously failed to disclose. When denying relief on the penalty phase ineffective assistance claim, the circuit court failed to rule on the second Rule 3.850 or its amendment. On July 22, 2002, while Mr. Rivera's appeal of the denial of his penalty phase ineffective assistance of counsel claim was pending, this Court relinquished jurisdiction to the circuit court so that it could consider Mr. Rivera's second Rule 3.850 motion and its amendment.

During the ensuing proceedings, additional public records were disclosed, and DNA testing of evidence was ordered and conducted. The circuit court granted Mr. Rivera leave to file one new amendment of his Rule 3.850 motion containing all of the new information disclosed and/or discovered in the course of the proceedings following this Court's remand. The amended motion was filed on January 20, 2004, and it included the results of the DNA testing (3PC-R., "Supplemental Record," 1-

58). The State filed a response to the motion on June 3, 2004 (3PC-R., "Supplemental Record," 117-40). The circuit court held a Huff hearing on July 27, 2004 (3PC-R., "Supplemental Record Transcript," 87-125). On May 10, 2005, the circuit court issued an order denying an evidentiary hearing and denying relief (3PC-R., "Supplemental Record," 171-80). Mr. Rivera moved for rehearing (3PC-R., "Supplemental Record," 181-90), which the circuit court denied on August 30, 2005 (3PC-R., "Supplemental Record Vol 2," 224). Mr. Rivera timely filed a notice of appeal (3PC-R., "Supplemental Record," 198-99). This appeal follows.

STATEMENT OF THE FACTS

A. THE NEW AND PREVIOUSLY UNDISCLOSED FACTS PRESENTED IN THE SECOND RULE 3.850 MOTION.

At Mr. Rivera's trial, the State presented evidence that a hair found in the van in which the State contended the crime occurred was consistent with the victim's hair (R. 1293, 1305). The State told the jury about this hair in opening statement: "They found a hair in Mark Peter's van, a long hair, I think it was like six or eight inches, and he compared that with the known hair of Staci Jazvac and that they are similar" (R. 1305). The State also relied upon the testimony about the hair in its closing argument (R. 1793). DNA testing conducted in 2003 has now conclusively established that this hair did not

come from the victim (3PC-R., "Supplemental Record Transcript," 39-41, 67).

In investigating the case, sheriff's deputies collected dark hairs found on the victim's white knit top and left shoe. In an affidavit dated February 24, 1986, Detective Amabile discussed these hairs to support issuance of a search warrant to obtain hair from Mr. Rivera. DNA testing conducted in 2003 on eight of these hairs has established that Mr. Rivera is definitely not the source of seven of these hairs, while the analysis of the eighth hair was inconclusive (3PC-R., "Supplemental Record Vol 1, Etc.," 42-44).

At trial, the State called jailhouse informant Frank Zuccarello, who testified that Mr. Rivera confessed to the murder of the victim, Staci Jazvac, and to the prior assault of another girl, Jennifer Goetz (R. 1402-06). Zuccarello testified that he had recently pled guilty to twenty-three felonies in Broward and Dade Counties, receiving a seven-year sentence in Broward and a five-year sentence in Dade (R. 1409, 1410, 1419). Zuccarello categorically denied that his guilty pleas involved any *quid pro quo* regarding his testimony in Mr. Rivera's case--no promises, no deals (R. 1406, 1410, 1420). Zuccarello did admit that he had filed a motion to mitigate his sentence on his current conviction, but testified that his testimony in Mr.

Rivera's case would have no bearing on whether or not his sentence would be reduced (R. 1419).

In 1995, Mr. Rivera amended his first Rule 3.850 motion to include a Claim XXI, which pled:

> 6. At trial, one of the State's key witnesses was Frank Zuccarello, a professional informant. Mr. Zuccarello testified many times previously in exchange for lenient or favorable treatment.
>
> 7. Despite Mr. Zuccarello's history of making deals with the State, he testified that the State had made no promises to him and there was no deal (R. 1407, 1410).
>
> 8. However, the State had written several letters in an effort to secure lenient treatment for Mr. Zuccarello. (See Appendix B). Further, the State made no attempt to correct Mr. Zuccarello's apparently misleading testimony.

(2PC-R. 1553). At a hearing on that motion, Kelly Hancock, the trial prosecutor, testified that neither he nor any members of the prosecution team had made Zuccarello any promises or offered him anything in exchange for his testimony in Mr. Rivera's case (1PC-R. 686, 694-95). The State's closing memorandum urged that Mr. Rivera's claim be denied based upon Hancock's testimony: "Hancock testified that Zuccarello did not receive any deal for his testimony" (State's Memorandum dated 6/1/95 at 11).

In the most recent Rule 3.850 proceedings, Mr. Rivera's counsel learned that Zuccarello received a deal from the State, a deal that the State did not disclose at trial or during the initial post-conviction proceedings. When Mr.

Zuccarello pled to the numerous pending charges against him on June 12, 1986, it was pursuant to an undisclosed plea offer from the Broward County State Attorney's Office. The "Plea Offer: Frank Zuccarello" provided:

> I. The Defendant will enter an [sic] plea to the following charges:
>
> Case 85-4911CF, Aggravated Assault, violation of Community Control
>
> Case 86-3288CF, Kidnapping while Armed (Life Felony), one count; Burglary while Armed (First Degree PBL Felony), one count; Armed Robbery (First Degree BPL Felony), three Counts.
>
> Case 86-3602CF, Forgery (Third Degree Felony), two counts; the two Misdemeanor Theft charges will be dropped.
>
> Case 86-3841CF, Possession of Cocaine (Third Degree Felony), one count.
>
> The pleas will be with a CAP, or maximum period of incarceration of Fifteen (15) Years in prison. The State does reserve the right to request a period of PROBATION to run consecutive to the incarceration; there will be a CAP, or maximum period of probation requested, of TEN (10) years.
>
> II. The Broward County cases, as outlined above, will run CONCURRENT with the charge(s) the defendant will be pleading to in Dade County.
>
> III. **In return for the considerations show above, the defendant will continue to cooperate with**: Florida Department of Law Enforcement (lead agant: Steve Emerson); **Broward Sheriff's Office (detectives Presley, Argentine, Sgt. Carney)**; Ft. Lauderdale Police Department (detective Potts); **ASA's Lazarus** and Pyers, and their investigators; and other law enforcement offices.
>
> The defendant will, in his cooperation, be giving statements, which will be tested by polygraph as to

their veracity; **the defendant will further agree to testify at all proceedings in which he is subpoenaed** and the defendant will testify honestly.

IV. **In return for the above consideration, the defendant will not be charged with any additional cases in Broward county in which he may have participated**, EXCEPT: any cases in which injuries to any person resulted will be examined on a case-by-case basis, and a filing decision made accordingly. Any participation in any HOMICIDE case will be handled separate and apart from this agreement, by Assistant State Attorneys in the Homicide division.

V. Frank Zuccarello will forfeit and surrender all proceeds from his criminal activity to Florida Department of Law Enforcement. While the exact amount is undetermined at this time, it is believed that such sum will be in excess of Two Hundred and Fifty Thousand Dollars ($250,000). The dollar amount will be submitted to the State by the defendant, and a polygraph will be run to determine the truthfullness of the amount. This forfeiture will be made prior to any sentence imposed by the Court. Victim restitution, in those situations where vicitms are identified, will receive first priority.

VI. **At time of sentencing, it will be requested by the State such proceedings be held in chambers, at which time the State will bring forward all law enforcement personnel familiar with the cases and the efforts of the defendant for the Court's consideration in sentencing.**

(3PC-R., "Supplemental Record," 63-64)(emphasis added).[10]

[10]According to Mr. Zuccarello's trial testimony, he contacted Deputy Argentine regarding Michael Rivera in April of 1986, nearly two months before the plea. Further, at the time of the plea in June of 1986, Assistant State Attorney Joel Lazarus was the prosecutor assigned to prosecute Michael Rivera. Mr. Lazarus was later called as a State witnesses at the penalty phase of Mr. Rivera's capital trial (R. 1922). Mr. Zuccarello's attorney at the time of the plea in June of 1986 was Bruce Raticoff. Mr. Raticoff was also called as a State witness at

Mr. Rivera's instant Rule 3.850 motion pled that this plea agreement was not disclosed at the time of trial or in the prior collateral proceedings in Mr. Rivera's case. Counsel discovered the undisclosed plea agreement through his work on an unrelated case in Miami-Dade County. Counsel was hired to work on behalf of a capital defendant who was convicted and sentenced to death in Miami. In mid-2002, counsel participated in an evidentiary hearing in that case. In preparation for the examination of the trial prosecutor, counsel had a discussion with a Miami criminal defense attorney and learned that she had collected a file regarding the same Miami prosecutor in connection with a capital case that she had handled. She gave the file to Mr. Rivera's counsel to use to prepare for his examination of the prosecutor at the mid-2002 evidentiary hearing. When reviewing the materials, Mr. Rivera's counsel noticed that the file contained many documents concerning Frank Zuccarello's testimony at a Miami murder trial. Since those materials did not relate to the case for which counsel was preparing, he set those documents aside to be reviewed at another time. While preparing for Mr. Rivera's oral argument in this Court in April of 2003, counsel went through those

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Mr. Rivera's capital trial; he testified regarding his successful prosecution of Michael Rivera in 1980.

materials concerning Mr. Zuccarello and his testimony in the Miami murder trial. In those materials, counsel discovered among other items a copy of the "Plea Offer: Frank Zuccarello." Mr. Rivera's counsel had never seen this "Plea Offer" before. Nor has his subsequent review found any evidence of its previous disclosure.

Further examination of the materials obtained from the Miami criminal defense attorney revealed a number of "Prisoner Receipts" from the Broward County Jail.[11] These "Prisoner Receipts" included one dated April 17, 1986, showing that "Dep. Nick Argentine" received custody of "Frank Zuccarello" "at 1010 hrs" and returned him to the jail "at 1530 hrs" (3PC-R., "Supplemental Record," 67).[12] Another receipt showed that "Det. Phil Amabile" received "Frank Zuccarello" on July 17, 1986 at "1020" and returned him at "1425" (Id. at 68).[13] Another of the "Prisoner Receipts" indicated that "G. Nelson with Metro Dade" along with "agents from BSO," including "Chris Presley,"

[11]Mr. Rivera's collateral counsel was advised by the Broward County Sheriff's Office that the incarceration records for Frank Zuccarello were destroyed pursuant to a destruction schedule in the early 90's.

[12]Zuccarello's testimony was that he notified Nick Argentine with the Sheriff's Office regarding Michael Rivera (R. 1406).

[13]Recorded statements taken from Zuccarello by Amabile on July 1st and July 16th were disclosed.

received custody of “Frank Zuccarello” on April 1, 1986, at “1425" and returned him at “2210" (Id. at 65). A fourth receipt showed that Detective Potts with the Fort Lauderdale Police Department received custody of Frank Zuccarello on April 4, 1986 at “1200" and returned him at “2155" (Id. at 66).

Mr. Rivera’s counsel also discovered in the materials received from the Miami criminal defense attorney a document entitled “Synopsis of conversation with FRANK ZUCCARELLO on Friday, April 4, 1986” (3PC-R., “Supplemental Record,” 69-75).[14] The body of this “Synopsis” included:

[14]Undersigned counsel has learned from his work in another case that was recently heard by this Court, that prosecutor’s use the word “Synopsis” to describe sworn statements taken from a witness that appears before the prosecutor pursuant to a state attorney subpoena. The trial prosecutors in that case testified that they believed statements taken pursuant to a state attorney subpoena were absolutely privileged, and thus were not disclosed as a matter of policy to defense counsel. See Smith v. State, 931 So. 2d 790, 799 (Fla. 2006).

> On Friday, April 4, 1986, one FRANK ZUCCARELLO (**hereinafter referred to as the CI for the sake of brevity**) was interviewed by this writer, Det. Joseph Gross, and Sgt. J. Wander, Det. W.R. Baker, and Det. J. Mcdermott about an organized group that has committed a large number of home invasion robberies (HIR hereinafter).
>
> The first portion of the conversation was held in the robbery office and the second portion of the conversation was held on locations as the CI pointed out various locations involved in the activity. Parts of the conversation while on location were recorded without the knowledge of the CI. Specifically, approximately the first forty-five minutes of the conversation and the forty-five minutes beginning at about 7:20 PM are recorded.
>
> The CI is currently incarcerated in the Broward County jail on charges stemming from a HIR. He has no arrangement regarding those charges at this time.
>
> The CI states that in about September of 1985 he became involved in committing HIR with the herein detailed group of individuals. He had personal knowledge of the crimes described either as a participant or from conversations with group members.
>
> **The CI candidly admits he has not told investigators everything he knows and is holding back some information until he sees how events are shaping up. In addition to the crimes herein detailed the CI is compiling a list of other crimes committed and states that he already has a list of of about 25 HIR in the Hollywood area compiled.** He is also working on a Dade County list.
>
> The CI is also speaking to BSO Det. Chris Presley regarding his Broward County activities but claims that he is only giving general information and not specifics. Det. George Nelson of this Unit has been in contact with Det. Presley regarding this group.

(3PC-R., "Supplemental Record," 69 (emphasis added). This "Synopsis" also detailed 28 "Home Invasion robberies" that "the CI" had discussed in Dade and Broward Counties. Under the heading "Possible Homicide Related Information," the synopsis

listed four incidents described by Zuccarello, and under “Misc. Criminal Activity,” the synopsis listed six crimes described by Zuccarello (3PC-R., “Supplemental Record, 72-73). According to this “Synopsis,” Mr. Zuccarello was working as a confidential informant for Dade and Broward law enforcement by April 4, 1986, before he met Mr. Rivera and before he reported any alleged statements by Mr. Rivera to “Nick Argentine.”[15]

Another document, entitled “April 18, 1986, Interview with Frank Zuccarello” and written by “Det. Joseph Gross” of the Metro Dade Police Department, was also found in the materials received from the Miami criminal defense attorney (3PC-R., “Supplemental Record,” 76-79). This report contained a paragraph stating:

CI [Zuccarello] states that he has given a statement and passed a polygraph on an unsolved BSO homicide. The case occurred years ago. The victim was found in a car on Hallendale Beach Blvd between Sweeney’s Pub and the Casey’s Nickelodeon. Tommy Lamberti/Joslin and his father were responsible for it. The victim had caused some problems to them by making mistakes in a credit card scam they were all involved in together. The polygraph also contained a question about the Cohen homicide.

[15]Mr. Rivera had invoked his right to counsel shortly after his arrest in February of 1986.

(Id. at 76).

Another recently discovered document is a confidential memo dated June 24, 1986, from Robert Rios to Sgt. Steve Vinson of the Miami Police Department (3PC-R., "Supplemental Record," 80-83). This memo reports that on June 21, 1986, a polygraph examination was administered to Frank Zuccarello regarding his version of a Miami homicide (Id. at 80). In the course of the examination, Rios found repeated attempts at deception (Id. at 81, 83).

Another recently discovered document is a portion of a Miami Police Department Report indicating that on June 7, 1986, Frank Zuccarello was interviewed and polygraphed about the Miami homicide (3PC-R., "Supplemental Record," 84-86). The polygraph was conducted by Detective Ilhardt who concluded that Zuccarello "showed deception in all areas regarding the information he gave us regarding the Cohen homicide" (Id. at 85). The police advised Bruce Raticoff, Zuccarello's attorney who was present when the interview and polygraph examination occurred, that Zuccarello had shown deception. The police asked Mr. Raticoff for an opportunity to speak to Mr. Zuccarello to try to obtain all the information that Zuccarello knew about the Cohen homicide. "Mr. Raticoff said he would also talk to his client

and attempt to iron out any inconsistencies that might arise" (Id. at 86).

Another recently discovered document is a July 28, 1987, memorandum from Cpl. Iglesias of the Dade County Jail regarding whether Zuccarello should receive gain time (3PC-R., "Supplemental Record," 87). Attached to the memo were four incident reports concerning Zuccarello's conduct in jail Id. at 88-101). Cpl. Iglesias stated:

> To put it simply Zuccarello is completely immature, a person who throws temper tantrums when he doesn't get his way. He is one of the most disrespectful inmates I have ever had contact with, to both officers and other inmates. He is always sarcastic, constantly cusses at officers and is always threatening to call the state attorney handling his case whenever he doesn't get his way. Unfortunately he seems to be right for on many occasions the state attorney calls up asking that nothing happen to Zuccarello, the man seems to be above the inside as well as outside the jail. Armed with this knowledge Zuccarello becomes so obnoxious that on several occasions Zuccarello has had to be placed in isolation to protect him from the other special inmates.
>
> It is my sincere opinion that Zuccarello does not deserve one single minute of gain time. The man has no regard nor remorse whatsoever for his actions. He has no respect of any kind for the people around him.

(Id. at 87).

The incident reports attached to this memo described incidents which occurred before Mr. Rivera's 1987 trial. One incident occurred in February of 1987 when Zuccarello announced

he was on a hunger strike until the jail moved him from "a safety cell by himself" back to a cell nearby housing a number of individuals. Zuccarello "was moved from there per Sgt. Smith in an effort to regain better control of the East Wing safety cell inmates which Zuccarello continually incites" (3PC-R., "Supplemental Record," 89, 91).

Also attached to the July, 1987, memo was a six-page incident report from October of 1986 (3PC-R., "Supplemental Record," 93-98). This incident arose over a visitor's effort to leave Zuccarello a radio. When informed that no approval for this could be found:

> Zuccarello exploded into what best can be described as a temper-tantrum. He began cussing out loud at all the officers around him, calling everybody "assholes," "motherfuckers," and numerous other cusswords, saying he was tired of being "fucked with," that he would see to it that this would be "taken care of." This was in the presence of this reporter [Iglesias], Off's Rosales, Pollard and O'Neal, and other inmates.

(Id. at 94).

As of October 1, 1998, other new evidence was discovered by counsel for Mr. Rivera regarding Frank Zuccarello and pled in the Rule 3.850 in September of 1999.[16] Based on an

[16]At trial, Zuccarello testified that Mr. Rivera had picked Staci while driving around looking for a young girl (R. 1422). According to Zuccarello, he had discussed with Mr. Rivera the fact that they had shared the same investigator, Detective Tom Eastwood (R. at 1402); that Mr. Rivera told Zuccarello he had choked Jazvac to death (R. at 1404); that Mr. Rivera told

article printed in the Miami Herald on Thursday, October 1, 1998, and subsequent investigation stemming from the discovery of that article, it was learned that not only was Frank Zuccarello used as a snitch in numerous cases in Dade and Broward County, but that his testimony in at least two cases was untruthful. (3PC-R., "Supplemental Record," 30-31). (See Amy Driscoll, 12-year-old murder case may go back to court, Miami Herald, Oct. 1, 1998, §B at 4; Art Harris, The Imperfect Murder, The New Times (Miami), Dec. 17-23, 1998 at 28; Art Harris, Ending may still be rewritten in 1986 Cohen murder case, Miami Herald, May 16, 1999, §L at 1.)

One case in which Frank Zuccarello was untruthful was the 1986 murder of Stanley Cohen in Dade County. According to the Miami Herald, Channel 10 news reporter Gail Bright, who was covering the Cohen murder in the late 1980's, came forward and stated that Metro-Dade Police Detective Jon Spears told her that "the star witness in the case lied to convict Cohen's wife, Joyce, of hiring three hit men to kill her millionaire husband." Amy Driscoll, 12-year-old murder case may go back to court, Miami Herald, Oct. 1, 1998, §B at 4. The star witness for the

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Zuccarello he planned to fondle and molest Jazvac (R. at 1404, 1405); that Mr. Rivera told Zuccarello that he liked little girls (R. at 1404); and, that Mr. Rivera placed the body in a rock pit two miles from his home in Coral Springs (R. at 1405).

State in the Cohen case was Frank Zuccarello (3PC-R., "Supplemental Record," 31).

Stanley Cohen was murdered on March 7, 1986. Zuccarello was arrested by Fort Lauderdale Police just four days after the Cohen murder, for an unrelated string of home invasion robberies in Broward County. By April 4th, Zuccarello began cooperating with the State, giving up the names of numerous individuals responsible for at least 29 home-invasion robberies in Dade and Broward County. Two of the names given up by Zuccarello were Anthony Caracciolo and Tommy Joslin. In addition to this information, Zuccarello began talking about two murders; one was the Cohen murder, and the other was the murder of a man by the name of Charles Hodek in Broward County (3PC-R., "Supplemental Record," 31-32).

While talking to police, Zuccarello identified Joyce Cohen's photograph and stated he had seen her during a meeting between her and Anthony Caracciolo in Coconut Grove, Florida. Zuccarello told police that he, Caracciolo and Joslin were hired by Joyce Cohen to murder her husband and make it look like a robbery. Zuccarello then informed the police that he drove his pals to the Cohen house the night of the murder. Miami police polygraphed Zuccarello three times about the details of the murder, and all three times he failed. Florida Department of

Law Enforcement Agent Steve Emerson was brought on to the case for the purpose of corroborating Zuccarello's statements through his co-defendants but was never able to do so (3PC-R., "Supplemental Record," 32).

In 1998 after news Reporter Gail Bright came forward, Zuccarello acknowledged there may be untruthfulness to his testimony. After learning of the information provided by Gail Bright, attorney Alan Ross, counsel for Joyce Cohen, sent private investigator Eric Zeid to talk to Zuccarello. Zeid told Zuccarello, "It's about karma, doing the right thing." Zuccarello replied, "If I did the right thing, I'd piss off a lot of people down there." Art Harris, The Imperfect Murder, The New Times (Miami), Dec. 17-23, 1998 at 28 (3PC-R., "Supplemental Record," 32-33).

Zuccarello also admitted that the information he originally gave Captain Tony Fantigrassi, Broward Sheriff's Office, in the Charles Hodek murder was false. In 1986, during the same time Metro-Dade Police were questioning Zuccarello regarding the Cohen murder, Broward police questioned Zuccarello regarding the murder of Charles Hodek. In that murder, Zuccarello fingered Louis Lamberti, stating that Lamberti's son, Tommy Joslin, told him that Lamberti instructed Joslin where to bring Hodek to be killed. However, soon thereafter, Tommy

Joslin was arrested and provided information that he was present during the killing of Hodek, and that Richie DelGaudio was responsible for Hodek's death. Captain Tony Fantigrassi was able to corroborate all the facts given by Joslin. As a result, Captain Fantigrassi confronted Zuccarello on his statement that Lamberti was the shooter and Zuccarello admitted he lied. Zuccarello stated he always knew DelGaudio shot Hodek, but because he was afraid of DelGaudio, he gave up Lamberti instead. Art Harris, Ending may still be rewritten in 1986 Cohen murder case, Miami Herald, May 16, 1999, §L at 2 (3PC-R., "Supplemental Record," 33).

A Supplemental Report by Lt. R. Rios of the Broward County Sheriff's Office dated 02/18/86 detailed that officer's conversation with Mr. Rivera at 17:30 on Tuesday February 18, 1986 during which he invoked his right to counsel:

> At one point during our conversation he stated that he had an 8 pm appointment with a Mr. Peter Giacoma (Attorney), who may represent him in an upcoming case. As our conversation continued we spoke of...family problems to sexual problems, suicide and mental problems. During the time Mr. Rivera was talking about suicide, he stated that is he died he would return and enter his mother's heart and explain to her all the problems he has had and then "I'll explain about how the accident occurred." At this point he seemed to have caught himself and suddenly became very very angry. He started yelling and screaming "you can't hold me here any longer, I want my Lawyer now." "This is the same bullshit as before." After a quiet period he seemed to settle

> down. He never again mentioned anything about the case unless he was asked a direct question by me.

(3PC-R., "Supplemental Record," 89, 91).

This report was put into context by a recent article in *The Miami Herald*. The Herald reported that when Rivera was delivered to Rios for an interview on February 18, 1986, Detectives Scheff and Amabile told Rios that Mr. Rivera had waived his Miranda rights. However, when Mr. Rivera began to protest, Rios was convinced that Rivera had told the officers that he wanted to speak to an attorney. During an interview with the Herald, Robert Rios stated, "I took it to mean that he was read his rights before, and he didn't waive." Daniel de Vise, *The Miami Herald*, Conduct of Broward detective in another case is questioned, June 25, 2001. Rios also told the Herald reporter that although Rivera had signed a statement requesting an attorney earlier the same day, Scheff and Amabile never informed Rios of that statement. Id. Mr. Rivera was not aware of Robert Rios's conclusions until June 25, 2001, the date the article was published (3PC-R., "Supplemental Record," 41-42). This newly discovered evidence demonstrated that the State failed to disclose that Mr. Rivera was deprived of his Sixth Amendment right to counsel and right to remain silent when a confidential informant for the Broward Sheriff's Office, Frank

Zuccarello, was placed in his jail cell have also recently come to light. These facts involve allegations of misconduct by several Broward Sheriff's Officers, including Richard Scheff. The reported allegations involve cases in which persons arrested and charged with murder by the Sheriff's Office were later determined to be innocent (including Frank Lee Smith, a man who had been condemned to die on death row, and Jerry Frank Townsend) or had their charges dismissed (3PC-R., "Supplemental Record," 42).

On or about March 19, 2001, Governor Bush ordered an investigation into whether Scheff lied under oath to keep an innocent man on death row. Scheff's testimony was pivotal in discrediting a recanting eye-witness's testimony in the Frank Lee Smith case (Broward County Case No. 85-004654CF10A). Based on Scheff's allegedly false testimony, the court denied Smith post-conviction relief. After Frank Lee Smith died of cancer after sitting 14 years on death row, a DNA test proved his innocence (3PC-R., "Supplemental Record," 42-43).

On July 3, 2001, the agency investigating Scheff released its investigative report. The report makes clear that the focus of the investigation was to determine whether there was sufficient evidence that Captain Scheff knowingly gave false testimony to warrant criminal prosecution. While the state

attorney determined that there was insufficient evidence to warrant criminal prosecution, he recognized that Scheff's and Amabile's testimony may have been based on incorrect or careless assumptions. The state attorney also recognized their testimony may have been based on sheer negligence (3PC-R., "Supplemental Record," 43). This constituted newly discovered impeachment evidence of Scheff.

In the Jerry Frank Townsend case, Broward Sheriff's detectives obtained confessions from Townsend for five different murders in Broward County. In April 2001, the BSO crime lab completed DNA testing in all five cases and concluded that Townsend was innocent. He has since been released (3PC-R., "Supplemental Record," 43).

Captain Scheff and Detective Amabile have reportedly been the subject of internal affairs investigations, including investigations for employing improper interrogation techniques. See Keen v. State, 775 So. 2d 263 (Fla. 2000).

Mr. Rivera was not aware of any of this information at trial or during previous postconviction proceedings. All of the new information, that was known to the State and/or its agents, but that was undisclosed to either Mr. Rivera or his counsel, casts doubt on the credibility of the Broward Sheriff's Office

and specifically on those officers investigating Mr. Rivera's case.

B. RELEVANT FACTS FROM TRIAL.

Staci Jazvac, the victim, was last seen on January 30, 1986, between 6:30 and 7:00 p.m. (R. 795). When her body was discovered on February 14, 1986, she was wearing jeans, a white nylon jacket and a white top (R. 897-98, 913).

Sheriff's detectives Scheff and Amabile were assigned to the victim's disappearance on February 4, 1986 (R. 1002). The detectives spoke to Starr Peck who had been receiving phone calls from someone named Tony (R. 1007-08). After speaking to Peck, the detectives went to find Mr. Rivera (R. 1010). They located Mr. Rivera on February 13 and told him they wanted to take him to their office to talk to him about something. Mr. Rivera responded, "If I talk to you guys, I'll spend the next 20 years in jail" (R. 1012-13).

Scheff testified that when they got to the sheriff's office, he read Mr. Rivera his Miranda rights (R. 1013). Mr. Rivera told the detectives he had sexual fantasies about young girls (R. 1014, 1015). He admitted he had made the phone calls to Starr Peck, but denied that he had abducted or murdered Staci Jazvac (R. 1015). The detectives decided to call in Detective Eastwood, who spent four hours talking to Mr. Rivera (R. 1016).

After talking to Eastwood, Mr. Rivera again talked to Scheff and Amabile. He said he had been fantasizing recently about raping young girls and had gone prowling various neighborhoods in Broward County looking for a vulnerable victim (R. 1018). He did this in a van that he had borrowed from Mark Peters (R. 1018). He said the girls would have to be unconscious, so he would knock them out with ether he got from Peters (R. 1019). Mr. Rivera said whoever did this probably did not have very much gas in a van and did not have enough money to get more gas, so he thought the body would be found in Broward County and that the person was afraid of running out of gas with the body in the car (R. 1020). After dinner on February 13, Mr. Rivera spoke with Detective Eastwood for an hour and a half or two hours (R. 1021). Then he again spoke to Scheff, Amabile and Detective Asher (R. 1021). Initially, Mr. Rivera had said that he did not call Bobby Rubino's restaurant, but in the early evening of February 13th, he admitted he did call Bobby Rubino's regarding Staci Jazvac (R. 1032-33).

Detective Scheff also testified that he spoke to jail inmates, Donald Mack, Frank Zuccarello and Peter Salerno regarding the Jazvac case and did not promise them anything regarding their sentences (R. 1035-37).

On cross-examination, Scheff testified that although Mr. Rivera admitted making phone calls regarding Staci Jazvac, the content of the phone calls was a fantasy which he found to be sexually exciting (R. 1041). Mr. Rivera never admitted to the detectives that he abducted or kidnapped the victim (R. 1041). Scheff testified that Donald Mack and Frank Zuccarello contacted the detectives in March or April (R. 1054).

Starr Peck testified that she began receiving phone calls at her home in September of 1985 (R. 1083). The caller knew her name and said his name was Tony (R. 1084). He called twenty-five to thirty or more times (R. 1087). On February 7, 1986, the call was totally different (Id.). In previous calls, the caller was whining and talking baby talk, but this time his voice was clear and he was scared (Id.). He said he had “done something very terrible," and when Peck asked what he had done, he said, "I'm sure you've heard about the girl Staci" (Id.). Peck asked, "Do you mean the eleven-year-old girl?" and he said, "Yes. I've done something very terrible. I killed her and I didn't mean to" (Id.). He said he "had a notion to go out and expose myself,” saw a girl getting off her bike and went up behind her (Id.). The caller said he put ether up to the girl’s mouth and nose and then dragged her into the van (R. 1088). He kept saying, "I didn't mean to kill her. I really didn't mean

to kill her" (R. 1088). He also said the girl “had silky shorts on” (R. 1089). He said that when he dragged the girl into the van, she was dead, but he "put it in her and she bled and then I put it in her anyway" (R. 1089). He said he left the body by Lake Okeechobee (R. 1090).

Julius Minery testified that he saw Mr. Rivera at an IHOP on the afternoon of Friday, January 31, 1986, and Mr. Rivera was driving a blue van (R. 1125-26).

Angela Greene testified that over a two-year period, she received over 200 obscene phone calls at the various restaurants where she worked (R. 1243-44, 1245). On February 7, 1986, the caller said, "I had that Staci girl" (R. 1244). The caller said he was wearing his pantyhose and he “put an ether rag over her face" (R. 1245). He also said “She’s gone” and "They'll never find her" (R. 1245).

Dawn Soter testified that Mr. Rivera lived on the other side of her duplex and drove a light blue van (R. 1255). Soter saw Mr. Rivera with that van during the last part of January of 1986, and saw that van parked in front of Mr. Rivera’s house on the morning of January 31, 1986 (R. 1256).

Deputy Tom Carney testified that on February 14, Detective Amabile asked him to sit in on an interview with Michael Rivera (R. 1262). Mr. Rivera said that on January 30th,

1986, he spent the entire day and night with his brother Peter, first out mudding in a truck and in the evening at a carnival in Lauderdale Lakes (R. 1263). When he was shown a photograph of Staci Jazvac, Mr. Rivera said he recognized her, having seen her once at a Tenneco Station off of Northwest 31st Avenue in Lauderdale Lakes (R. 1266). Detective Amabile told Mr. Rivera that Peter Rivera's work records indicated that Peter was at work on January 30th, 1986, and could not have been with his brother on that date (R. 1267). Mr. Rivera then said that he did not recall where he was on January 30th, 1986, and that he blacks out sometimes (R. 1267). He also said, "I don't remember killing Staci Jazvac. I don't remember killing Staci" (R. 1267). On February 15, Amabile received a call from Mr. Rivera, who asked to see Amabile and Carney (R. 1268). Mr. Rivera said he had thought about it very hard and was certain he was with his brother on January 30th, 1986 (R. 1268). On February 17, Amabile told Mr. Rivera he had spoken with Peter, who had said he was not with Mr. Rivera on January 30th, 1986 (R. 1268). Mr. Rivera replied that he could not recall, that he freebased cocaine and that he blacks out (R. 1269). Once again he said he did not recall and he did not remember killing Staci Jazvac (R. 1269).

Howard Seiden of the Broward Sheriff's Department crime laboratory testified that he compared a hair found in Mark Peters' van with a known head hair from Staci Jazvac. Seiden concluded, "It's my scientific opinion that the hair from the bed of the van could be concluded as being a source from the victim, item number five, which was the head hair sample of the victim" (R. 1305).

Deputy Thomas Eastwood testified that he interviewed Mr. Rivera on February 13 (R. 1326). Mr. Rivera admitted he did make some obscene phone calls about the disappearance of Staci Jazvac and told people he had abducted and killed her (R. 1327). Mr. Rivera also said that on January 30, he was at his home all evening by himself (R. 1327). The deputy and Mr. Rivera also discussed Mr. Rivera's enjoyment of exposing himself to young girls (R. 1328). Mr. Rivera said he got to the places where he exposed himself in a van borrowed from Mark Peters (R. 1329). When Eastwood asked if Mr. Rivera had thought about how he could pick up girls or force them to have sex with him, Mr. Rivera said, "Yes." He said, "Every time I get in a vehicle, I do something terrible" (R. 1329). Mr. Rivera added, "I have thought about it. I could pick up girls and even how to force them into having sex with me, but I haven't done it" (R. 1329). Mr. Rivera said he had thought about this "[o]ften" (R. 1329).

The last time he thought about this was "[t]wo weeks ago when I had the van" (R. 1330). When Eastwood asked Mr. Rivera if there was anything significant about any of the girls he exposed himself to, Mr. Rivera said, "One of them was pushing a bike" (R. 1330). At this point, Eastwood stopped the interview and advised Mr. Rivera of his constitutional rights (R. 1331). Mr. Rivera then said, "Every time I get into a vehicle, I do something terrible" (R. 1332). When pressed for details, Mr. Rivera said he did one time actually grab a young girl and pull her into some bushes (R. 1332). Mr. Rivera broke down, started to cry and said, "Tom, I can't stop myself. I can't control myself. Either kill me or put me in jail because I'm going to keep on doing what I'm going to do if you don't stop me" (R. 1333). On cross-examination, Eastwood testified that Mr. Rivera denied abducting and killing Staci Jazvac and denied knowing anything about the offense (R. 1341-43). Eastwood also clarified that Mr. Rivera's statements about dragging a young girl into the bushes were not about Staci Jazvac and involved an incident which had occurred in Coral Springs (R. 1346-48).

Detective Gerald Asher of the Coral Springs Police Department described an attack which occurred in July of 1985 on a girl named Jennifer Goetz (R. 1370-71). On February 13, 1986, Asher interviewed Mr. Rivera about this attack, and Mr. Rivera

admitted he had dragged Goetz into some bushes, but was scared away because someone was nearby (R. 1379).

Frank Zuccarello testified that he met Mr. Rivera in jail in April of 1986 (R. 1402). Both Zuccarello's and Mr. Rivera's cases had the same investigator, Tom Eastwood (R. 1403). According to Zuccarello, Mr. Rivera said that when he was arrested, Eastwood kept pressing him about Staci Jazvac, so Mr. Rivera confessed to another case involving Jennifer Goetz hoping Eastwood would leave him alone about Jazvac (R. 1403). Zuccarello testified that Mr. Rivera said he made a big mistake in calling Starr Peck and telling her he had killed Staci Jazvac (R. 1403).

According to Zuccarrello, Mr. Rivera confessed to killing Staci Jazvac, saying he choked her after he had brought her to the field and things got out of hand (R. 1404). Mr. Rivera said he was going to fondle her and talked about his problem with young girls (R. 1404). Mr. Rivera said he was driving in the neighborhood when he spotted Staci Jazvac and was going to molest and fondle her (R. 1405). Zuccarello testified that Mr. Rivera said after he choked Staci Jazvac, he dumped her in a rock pit two miles from his house (R. 1405).

Zuccarello testified he notified Nick Argentine of the Broward Sheriff's Office about Mr. Rivera's statements (R.

1406). Zuccarello told Argentine about Mr. Rivera's statements because he thought it was a sick act (R. 1406). No one had promised Zuccarello anything (R. 1406). Zuccarello also talked to deputy Amabile, who made him no promises about testifying (R. 1407).

Zuccarello testified that he had been sentenced to a seven-year prison term (R. 1407). He had filed a motion to mitigate his sentence, looking to reduce it by two years (R. 1407). He had received no promises regarding that sentence in exchange for his cooperation in Mr. Rivera's case (R. 1407).

On cross-examination, Zuccarello clarified that he had been convicted of twenty-three felonies in two separate cases, one in Broward County and one in Dade County (R. 1409). Zuccarello testified that he talked to Amabile on July 16, 1986, at which time he had twenty-three pending felonies (R. 1415). The charges included armed robbery, burglary, armed burglary, aggravated assault, resisting arrest and home invasions (R. 1422-23). Since then he had pled guilty and been sentenced to seven years in prison in the Broward case and five years in the Dade case (R. 1410, 1419). He was hoping to get his Broward sentence reduced by two years so it would be the same as the Dade sentence (R. 1410). His testimony in Mr. Rivera's case had no bearing on what would happen with the motion to mitigate (R.

1419). On redirect, Zuccarello reiterated that he had received no promises regarding the mitigation matter but hoped someone would speak on his behalf (R. 1421).

Jennifer Goetz testified that in July of 1985, when she was eleven years old, she was leaving her apartment to go to day camp when a man grabbed her from behind, put one arm around her neck and the other around her waist, and dragged her into some bushes (R. 1452-54). Ms. Goetz passed out briefly and when she awoke, the man ran away and another man helped her (R. 1454-55). She only got a glance at her attacker and could not identify him (R. 1459, 1461). The medical examiner testified that a photograph of Ms. Goetz's face showed petechial hemorrhages in her eye, a common finding in people asphyxiated by strangling (R. 1467).

William Moyer testified that he met Mr. Rivera around February of 1986 in jail (R. 1475). One day, Mr. Rivera said to him, "I didn't do it, but Tony did it" (R. 1476). Moyer later heard Mr. Rivera on the telephone identifying himself as Tony (R. 1476).

Moyer testified that in January of 1987, he was sentenced to thirteen years in prison for a sexual battery involving his stepdaughter (R. 1478). He had a motion to mitigate that sentence pending, but had received no promises and

had not asked for anything from the State in exchange for his testimony in Mr. Rivera's case (R. 1478-79). He would appreciate someone coming forward to say he cooperated and testified (R. 1479).

On cross-examination, Moyer testified that he had two contacts with prosecutor Hancock, one time about three weeks earlier and the second time that morning (R. 1480). The first meeting was also attended by deputy Amabile (R. 1480). Moyer had his conversation with Mr. Rivera while they were in a pod with about fifteen prisoners (R. 1484). Zuccarello was in that pod later on (R. 1484). Moyer did not remember Donald Mack and did not know Peter Salerno, although he knew a Peter Cardell (R. 1484). Moyer was in jail on several charges of sexual battery, each of which was a capital felony, and was facing life sentences (R. 1490). He pled to one charge and received a thirteen-year sentence on January 30, 1987 (R. 1490). Before his sentencing, Moyer told law enforcement about Mr. Rivera's statement (R. 1490). He had talked to Amabile two or three times, but only one conversation was tape recorded (R. 1490). Moyer did not expect his testimony in Mr. Rivera's case to be taken into account on his motion to mitigate his sentence (R. 1492).

On redirect, Moyer testified that he told law enforcement about Mr. Rivera's statement because it kept bothering him so much that he had to talk to someone about it (R. 1495-96). He did not ask for anything when he told detectives about Mr. Rivera's statement, and they did not promise him anything (R. 1496-97). When he met with Hancock and Amabile, they did not tell him to say anything, but just asked him questions (R. 1497).

Detective Amabile testified similarly to deputies Scheff and Carney regarding Mr. Rivera's statements during his interviews with the deputies (R. 1512-22, 1525-29, 1532-35). Amabile had talked to Zuccarello, Moyer, Mack and Salerno (R. 1539). He made no promises to them, and none of them asked for anything (R. 1539).

Peter Salerno testified that he had contact with Mr. Rivera in 1986 in jail (R. 1574). One day when Mr. Rivera, Zuccarello, Moyer and Salerno were in the yard, Mr. Rivera told Salerno, "I didn't mean to kill the little Staci girl. Just wanted to look at her and play with her. I seen her on a bike and she excited me" (R. 1576). In the month before that, Salerno had heard that Mr. Rivera was involved in the attempted murder of another girl, and he asked Mr. Rivera about this (R. 1577). Mr. Rivera admitted there were some witnesses in that

case and then said, “but I’m not going to get convicted with the Staci girl because she’s dead. There are no witnesses” (R. 1578).

Salerno testified that he was contacted by Hancock (R. 1578). Salerno had a pending case on which he had received a twelve-year sentence, but something happened to the twelve years (R. 1579). He had received no promises regarding his testimony in Mr. Rivera’s case (R. 1579).

On cross-examination, Salerno testified that he met Mr. Rivera in April or May of 1986 (R. 1580). Mr. Rivera just happened to come up to him and make his statement (R. 1580). Salerno had testified as a state or federal witness eleven times (R. 1581). He was not in custody at the time of his testimony in Mr. Rivera’s case and had come to the courthouse on his own (R. 1581-82). He was still under a twelve-year sentence, but was to appear in court on January 15, 1988 (R. 1582). He did not know what the judge was going to do, but that proceeding had nothing to do with Mr. Rivera’s case (R. 1582). He did not know if the State would let the judge know about his cooperation (R. 1582). Salerno was not in the federal witness protection program, but was on probation (R. 1583).

Gail Mastendo, a Denny’s manager, testified that she received many obscene phone calls from the beginning of 1985

until June of 1985 (R. 1587). The caller said that he was wearing pantyhose and a black body suit, breathed heavily and masturbated (R. 1587). He said that his name was Tony and that he liked children (R. 1589). He said he had grabbed a little girl and hurt her badly (R. 1590).

SUMMARY OF ARGUMENT

1. The circuit court erred as a matter of law in denying Mr. Rivera's Rule 3.850 motion without an evidentiary hearing. The motion pled facts regarding both the substance of the new facts and Mr. Rivera's diligence in ascertaining those facts. Taken as true, those facts show that Mr. Rivera is entitled to relief and are not conclusively refuted by the record. However, the trial court failed to take the facts as true, largely ignoring Mr. Rivera's allegations in the order summarily denying relief. This Court should order an evidentiary hearing.

2. At trial and during prior post-conviction proceedings, the State presented false testimony that jail informant Zuccarello had received no promises of assistance from the State in exchange for his testimony against Mr. Rivera. Zuccarello testified at trial that his pleas to twenty-three felonies in Broward and Dade Counties were unrelated to his testimony in Mr. Rivera's case. In fact, Mr. Rivera's counsel

recently discovered a written plea agreement requiring Zuccarello's cooperation. Other recently discovered documents also show the close relationship Zuccarello had with law enforcement, as well as showing that Zuccarello knew how to use that relationship to his benefit. The State is required to show beyond a reasonable doubt that Zuccarello's false testimony had no effect on the outcome of Mr. Rivera's trial and penalty phase. The State cannot make that showing. The lower court applied an incorrect legal standard and did not accept Mr. Rivera's allegations as true in summarily denying relief. This Court should order an evidentiary hearing, a new trial and a new penalty phase.

3. The State withheld material, exculpatory information from Mr. Rivera. In addition to the plea agreement and other evidence discussed in Argument II, the State withheld other evidence of Zuccarello's relationship with law enforcement which impeached Zuccarello's trial testimony. The State withheld information showing that Zuccarello was a State agent at the time he was placed in Mr. Rivera's cell, rendering Zuccarello's testimony inadmissible. The State withheld information that Mr. Rivera requested counsel during custodial interrogation but was not provided counsel, rendering Mr. Rivera's statements inadmissible. Considered cumulatively with

all the exculpatory evidence discovered during post-conviction, as well as with the new DNA evidence, the new evidence undermines confidence in the outcome of Mr. Rivera's trial and penalty phase. In summarily denying relief, the lower court did not accept Mr. Rivera's allegations as true. This Court should order an evidentiary hearing, a new trial and a new penalty phase.

4. DNA testing of a hair found in Mark Peters' van and introduced at trial as consistent with the victim's hair conclusively revealed that the hair was not the victim's. Other hairs found on the victim's body were also tested. Seven of these hairs were definitely not Mr. Rivera's, while the testing of an eighth hair was inconclusive. Considered cumulatively with other evidence, the DNA evidence establishes that the offense did not occur in Mark Peters' van, as the State contended at trial, and that no physical evidence links Mr. Rivera to the victim. The DNA evidence would probably lead to an acquittal. This Court should order an evidentiary hearing and a new trial.

5. New information shows that the trial judge, who also presided over Mr. Rivera's first Rule 3.850 proceedings, was biased against Mr. Rivera. In 2001, the judge told a newspaper that he "had great confidence in the prosecutor," that

although he wanted a fair trial for Mr. Rivera, his personal beliefs were not the same, and that Mr. Rivera's phone calls to Starr Peck convinced him of Mr. Rivera's guilt. The fact that the judge had to strive to set aside his personal feelings could not be a clearer statement of bias or prejudice. This Court should order an evidentiary hearing, a new trial and new proceedings on Mr. Rivera's first Rule 3.850 proceedings.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING MR. RIVERA'S RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

This Court has long held that a post-conviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. "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 to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

The same standard applied where the post-conviction motion is successive. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989). As to a successive postconviction motion, allegations of previous unavailability of new facts, as well as diligence of the movant, are to be accepted as true and warrant evidentiary development so long as not conclusively refuted by the record. Card v. State, 652 So. 2d 344, 346 (Fla. 1995). Successive Rule 3.850 petitioners have received evidentiary

hearings based on newly discovered evidence and merits consideration. State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(the Florida Supreme Court affirmed the circuit court's grant of sentencing relief on a third Rule 3.850 motion premised upon a testifying co-defendant's inconsistent statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered

evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

In Mr. Rivera's case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Mr. Rivera's diligence in attempting to unearth the new evidence. Claim I of Mr. Rivera's Rule 3.850 motion pled that the State had presented false and misleading testimony at Mr. Rivera's trial and during the prior post-conviction proceedings (3PC-R., "Supplemental Record," 4-18) (*see* Argument II, *infra*). The claim specifically pled the new facts upon which the claim was based (3PC-R., "Supplemental Record," 10-17), as well as facts regarding Mr. Rivera's diligence in learning these facts (3PC-R., "Supplemental Record," 13-14, 17-18). The claim also specifically alleged that the State affirmatively deceived Mr. Rivera and his counsel during trial and Mr. Rivera's initial post-conviction proceedings about the existence of these facts (3PC-R., "Supplemental Record," 13-14, 17-18).

Without accepting Mr. Rivera's allegations as true, the circuit court denied this claim, stating that Mr. Rivera had repeatedly made public records requests with which the State complied and that therefore "the Defendant has long had access to substantial documentary evidence of Mr. Zuccarello's status as witness, victim and defendant in an array of cases" (3PC-R., "Supplemental Record," 173). Thus, the court concluded, "The information the Defendant claims he did not have regarding Zuccarello was known or could easily have been known prior to the filing of his first postconviction motion" and denied the claim as successive (3PC-R., "Supplemental Record," 173).

This part of the circuit court's analysis did not mention--much less accept as true--Mr. Rivera's allegations regarding the substance of the new facts or his allegations regarding diligence. For example, Mr. Rivera's Rule 3.850 motion quoted a plea agreement between the State and Zuccarello which had never before been disclosed. However, the circuit court did not mention the substance of this agreement, the fact that Zuccarello testified at trial that his pleas in other cases were unrelated to his testimony at Mr. Rivera's trial, the fact that the State had affirmatively said no such agreement existed, or Mr. Rivera's allegations regarding how the agreement was

discovered. An evidentiary hearing on these matters is required.

Similarly, the circuit court did not address the fact that Mr. Rivera's requests for jail records and logs were repeatedly met with the response that the records had been destroyed in the early 1990's. However, jail logs concerning Zuccarello and his contact with law enforcement in April through July of 1986 were discovered as alleged in the motion to vacate through serendipity when counsel while working on another case in 2002 in Miami-Dade County was provided files a defense attorney had collected on a Miami prosecutor. In those files were records concerning Zuccarello, including not only the previously unseen plea offer, but also jail records. The circuit court simply did not accept the factual allegations contained in the motion to vacate as true when denying the motion without conducting an evidentiary hearing.

Nor did the circuit court accept the fact that the State did not disclose a "Synopsis" of a witness' statement to a prosecutor pursuant to a state attorney subpoena. The "Synopsis" was also discovered by serendipity in a file obtained from a defense attorney in connection with a total unrelated case.

Moreover, the circuit court ignored the United States Supreme Court's recent decision in Banks v. Dretke, 124 S.Ct. at 1263, wherein 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." 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.[17] Under Banks, the burden is on the

[17]The State's argument in response to the amended motion to vacate was to argue that enough other documents were disclosed pursuant to public records that Mr. Rivera previously presented a claim that Zuccarello received undisclosed consideration for his testimony (3PC-R., "Supplemental Transcript, 103-04). This argument failed to challenge that the specific records that Mr. Rivera relied upon in his motion had not been previously disclosed, *i.e.* the plea offer, the jail records, and the "Synopsis." But as to the records disclosed in 1995 and pled at the time and heard at the 1995 evidentiary hearing, the State specifically presented sworn testimony and made argument that there was no agreement. At the evidentiary hearing, Kelly Hancock, the trial prosecutor, testified that neither he nor any members of the prosecution team had made Zuccarello any promises or offered him anything in exchange for his testimony in Mr. Rivera's case (1PC-R. 686, 694-95). The State's closing memorandum urged that Mr. Rivera's claim be denied based upon Hancock's testimony: "Hancock testified that Zuccarello did not receive any deal for his testimony" (State's Memorandum dated 6/1/95 at 11).

Moreover, just because some records are disclosed does not mean that other Brady material was not withheld. In every case in which this Court has order a new trial that counsel is aware of, the State had disclosed many pages of material. However, that did not insulate the State from the obligation to disclose the specific material that this Court found warranted a new trial. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v.

State to "set the record straight," not upon the defense to intuit that the State is holding information back or, in fact, out and out misrepresenting facts.

Here, the State must be held to have known what was contained in the plea offer and in the jail records and in the "Synopsis" regarding the relationship between Zuccarello, and the State must be held responsible for its failure to turn over these specific documents prior to undersigned counsel's discovery of them while working on another case in 2002. The circuit court did not accept the factual allegations as true, nor follow the law as explained by the United States Supreme Court in Banks when it denied an evidentiary hearing saying that the information was known or could easily have been known by Mr. Rivera's counsel.

Alternatively, the circuit court summarily denied Claim I because "the Defendant has failed to establish that Zuccarello received a plea deal for testimony against the Defendant" (3PC-R., "Supplemental Record, 173). Of course, Mr. Rivera cannot "establish" anything without an evidentiary hearing. All that Mr. Rivera can do is allege as a factual

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State,894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

matter based upon the newly discovered documents that Zuccarello in exchange for a reduction in his criminal liability agreed he would "in his cooperation, be giving statements, which will be tested by polygraph as to their veracity; the defendant will further agree to testify at all proceedings in which he is subpoenaed." Because the plea offer specifically refers to the detective that Zuccarello testified he told that Mr. Rivera had made statements to him and because the plea offer specifically refers to the prosecuting attorney who was then assigned to prosecute Mr. Rivera, the allegation was and is made that the obligation to give statements and to testify when subpoenaed included Mr. Rivera's case. At an evidentiary hearing, it would fall upon Mr. Rivera to establish the facts alleged.

Further, the court's conclusion is based upon a misreading of the plea agreement, a misreading which an evidentiary hearing would resolve. The court stated that Mr. Rivera had not "establish[ed]" that Zuccarello received a deal for testifying against Mr. Rivera because "[t]he plea deal cited by the Defendant specifically excludes Zuccarello's participation in any homicide case" (3PC-R., "Supplemental Record," 173). The relevant portion of the plea agreement states:

> IV. **In return for the above consideration, the defendant will not be charged with any additional**

> **cases in Broward county in which he may have participated**, EXCEPT: any cases in which injuries to any person resulted will be examined on a case-by-case basis, and a filing decision made accordingly. Any participation in any HOMICIDE case will be handled separate and apart from this agreement, by Assistant State Attorneys in the Homicide division.

(3PC-R., "Supplemental Record," 63). This paragraph concerned Zuccarello's criminal liability. In context, the agreement is clearly referring to homicides in which Zuccarello participated, not to homicide cases in which he was a witness.[18] The lower court's misapprehension of Mr. Rivera's allegations and its refusal to accept them as true warrants a reversal and requires an evidentiary hearing.

Additionally, the circuit court completely ignored the information contained in the "Synopsis" that certainly contradicted Zuccarello's claim of not trying to seek benefit

[18]Paragraph III concerned Zuccarello's obligations as a witness:

> III. **In return for the considerations show above, the defendant will continue to cooperate with**: Florida Department of Law Enforcement (lead agant: Steve Emerson); **Broward Sheriff's Office (detectives Presley, Argentine, Sgt. Carney)**; Ft. Lauderdale Police Department (detective Potts); **ASA's Lazarus** and Pyers, and their investigators; and other law enforcement offices.
>
> The defendant will, in his cooperation, be giving statements, which will be tested by polygraph as to their veracity; **the defendant will further agree to testify at all proceedings in which he is subpoenaed** and the defendant will testify honestly.

for himself when he first contacted law enforcement about Mr. Rivera. According to the "Synopsis," Zuccarello in early April was very candid about his intentions:

> The CI candidly admits he has not told investigators everything he knows and is holding back some information until he sees how events are shaping up. In addition to the crimes herein detailed the CI is compiling a list of other crimes committed and states that he already has a list of of about 25 HIR in the Hollywood area compiled.

(3PC-R., "Supplemental Record," 69).

As further support for its alternative reason for summarily denying Claim I, the circuit court recited that (1) in prior post-conviction proceedings, the trial prosecutor testified that there was no plea agreement with Zuccarello, (2) trial counsel cross-examined Zuccarello regarding his cooperation in other cases, and (3) Mr. Rivera made "similar admissions" to other witnesses (3PC-R., "Supplemental Record," 173-74). Thus, the court concluded, "the exclusion of Mr. Zuccarello's testimony would not have changed the outcome of the trial" (Id. at 174). Again, the circuit court did not accept Mr. Rivera's allegations as true, not once mentioning the substance and quality of the evidence Mr. Rivera had proffered. First, at trial, Zuccarello testified that he had received no promises and made no deals with the State in exchange for his testimony in Mr. Rivera's case. The written plea agreement

shows that this testimony was false: the plea agreement required Zuccarello to cooperate with Broward sheriff's deputies and Broward prosecutors. Second, the court's reasoning does not recognize that the existence of the written plea agreement requiring Zuccarello's cooperation shows that the trial prosecutor's prior testimony was false.[19] Third, a written plea agreement has much higher significance in impeaching Zuccarello than trial counsel's attempts to show he had cooperated in other cases. Fourth, the "admissions" Mr. Rivera supposedly made to Zuccarello were much more specific and detailed than anything he allegedly said to anyone else. Further, the documentation impeaching Zuccarello would have led the jury to question the veracity of the other jailhouse informants and would have led trial counsel to investigate those informants more thoroughly. *See* Argument III, *infra*. Fifth, the circuit court's reasoning does not mention the documentation indicating that Zuccarello

[19]In fact, the State's failure to correct the testimony or disclose the plea offer impeaches not just Zuccarello, but law enforcement and the prosecuting attorney and the means that they would go in trying to obtain evidence to convict Mr. Rivera, while withholding anything that might assist the defense. Kyles v. Whitley, 514 U.S. 419, 446 (1995)("Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.").

was a State agent well before he allegedly obtained admissions from Mr. Rivera or that this documentation shows that Mr. Rivera's rights to counsel and silence were violated when the State placed Zuccarello, a confidential informant, with Mr. Rivera. Finally, the circuit court's conclusion that the new facts "would not have changed the outcome of the trial" is the wrong legal analysis. When the State presents false or misleading evidence, the State has the burden of showing beyond a reasonable doubt that the error was harmless. Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003). Clearly, the circuit court should have conducted an evidentiary hearing on these issues.

Claim II of Mr. Rivera's Rule 3.850 motion alleged that the State withheld favorable, material evidence or, alternatively, that trial counsel unreasonably failed to discover and present that evidence (3PC-R., "Supplemental Record," 18-49) (*see* Argument III, *infra*). The claim specifically pled the new facts upon which the claim was based (3PC-R., "Supplemental Record," 20-38)), as well as facts regarding Mr. Rivera's diligence in learning these facts (Id.).

The circuit court summarily denied the claim as successive because "the information presented by the Defendant in this claim was either in the Defendant's possession or was

easily discoverable" (3PC-R., "Supplemental Record," 174). As it did with Claim I, the court's conclusion did not accept as true Mr. Rivera's allegations regarding diligence. The plea offer was not disclosed by the State. The existence of the jail records was in fact denied by the State. And, "Synopsis" of witnesses' statements pursuant to a state attorney subpoena are as a matter of routine not disclosed by prosecutors in this State. See Smith v. State, 931 So. 2d at 799. As to Mr. Rivera's specific allegations that these documents were not previously disclosed, an evidentiary hearing is required.

Alternatively, the circuit court denied Mr. Rivera's claim because some of the facts alleged did not exist at the time of trial and therefore, "[t]he documents discussed in claim two are not newly discovered," citing Brady v. Maryland, 373 U.S. 83 (1963) (3PC-R., "Supplemental Record," 174-75). However, although recognizing that this claim included the allegations regarding Zuccarello made in Claim I (id.), the court did not discuss or analyze any of those allegations in denying Claim II. Additionally, the claim included other factual allegations based upon documents in existence at the time of Mr. Rivera's trial (3PC-R., "Supplemental Record," 27, 41). Further, the court did not consider the effect on trial counsel's investigative efforts had the new facts been disclosed

(*See* 3PC-R., "Supplemental Record," 36-39). See Scipio v. State, 31 Fla. L. Weekly S114, 2006 Fla. LEXIS 261 (Fla. February 16, 2006). Finally, the circuit court made no cumulative analysis of the facts not presented at Mr. Rivera's trial, including the new information about Zuccarello, the DNA test results, the impeaching evidence available regarding the other jailhouse informants, the fact that Mr. Rivera was denied his rights to counsel and to silence when the State placed Zuccarello with him, and the fact that sheriff's deputies violated Mr. Rivera's right to counsel during custodial interrogation, as the Rule 3.850 motion argued the court should do (*See* 3PC-R., "Supplemental Record," 28-30, 39-42).

The circuit court alternatively summarily denied Claim II because trial counsel's performance was not deficient (3PC-R., "Supplemental Record," 175-76). The court stated that trial counsel "thoroughly cross-examined" Zuccarello, and Zuccarello's "relationship with law enforcement and the existence of a plea deal in unrelated cases was presented to the jury" (Id. at 176). The court also broadly concluded that admission of the new information "would not have changed the outcome of the trial" (Id.).

Again, the circuit court did not accept Mr. Rivera's allegations as true. Further, while finding that trial

counsel's performance was not deficient, the court inconsistently stated, "the documents listed in the Defendant's amended motion were either already in the possession of the Defendant or readily obtainable with a modicum of due diligence" (3PC-R., "Supplemental Record," 175). An evidentiary hearing is required.

Claim III of Mr. Rivera's Rule 3.850 motion alleged that new evidence established that the trial judge, who also presided over the initial Rule 3.850 proceedings, was biased against him (3PC-R., "Supplemental Record," 50-53). The claim specifically alleged the substance of the new evidence and that the evidence did not come to light until June 28, 2001 (3PC-R., "Supplemental Record," 51-52) (*See* Argument V, *infra*).

Without accepting Mr. Rivera's allegations as true, the circuit court summarily denied Claim III, based upon another statement by Judge Ferris that he wanted Mr. Rivera to get a fair trial (3PC-R., "Supplemental Record," 176-77). The court thus did not consider that a judge with an admitted bias (admitted to a newspaper reporter and appearing in a news article) against Mr. Rivera and for the prosecutor would have to overcome his biases and gave the appearance of impropriety. An evidentiary hearing is required.

Claim IV of Mr. Rivera's Rule 3.850 motion argued that Mr. Rivera was entitled to a new trial based upon the recent DNA testing (3PC-R., "Supplemental Record," 53-56) (*See* Argument IV, *infra*). The claim alleged specific facts and argued that those facts must be incorporated into a cumulative analysis of all the evidence not presented at trial (Id.). The circuit court summarily denied this claim because Mr. Rivera's conviction is based upon "what this Court finds to be overwhelming evidence of his guilt" (3PC-R., "Supplemental Record," 178).[20] The court

[20]In making this statement, the circuit court did not explain why the prosecutor felt obligated to tell the jury about the hair evidence in his opening statement:

> They also checked Mark Peters' van, and you'll hear from Howard Seiden, who is with the Crime Lab, and he's an expert in hair examination.
>
> He'll tell you he found a hair in Mark Peter's van, a long hair, I think it was like six or seven inches, and he compared that with the known hair of Staci Jazvac and that they are similar.
>
> He will not come in and say they are exactly the same and they are Staci's. You can't do that in hair. It's not like fingerprints. He'll say it is similar to Staci Jazvac's hair in the van.

(R. 715). Then again in his initial closing argument:

> What's important about Detective Edel is that he did some vacuuming for the van. He did some vacuuming and he told you where he did vacuuming.
>
> He did vacuuming where? In back of this van. As a result what does he find? He finds hair.

also found that the hair evidence presented at trial "was insignificant and harmless" (Id. at 179).[21]

The circuit court failed to accept Mr. Rivera's allegations as true and to conduct any cumulative analysis. The evidence that the hair found in Mark Peters' van conclusively did not belong to the victim eliminates all evidence that the offense occurred in that van, which was the lynchpin of the State's theory of the case *i.e.* that the murder was committed in the van.[22] Peters testified in the prior Rule 3.850 proceedings,

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> Now they have the standards of Staci. So he sends those standards to Howard Seiden. You heard Howard Seiden. It just so happens that hair was consistent with Staci's. He can't say and he didn't say it's a positive identification, but he says it's consistent with Staci Jazvac's hair standard.

(R. 1793). In his rebuttal closing argument to the jury, the prosecutor again argued: "And it just so happens that a hair similar to Staci's is found in the van" (R. 1866).

[21]The circuit court's willingness to ignore the fact that evidence that has now scientifically been established to be false and misleading was presented to the jury and relied upon by the prosecutor in urging a guilty verdict and a sentence of death. Certainly, the United States Supreme Court has demonstrated that the presentation of evidence that later was revealed to be false warranted grave concern in a capital case. Johnson v. Mississippi, 486 U.S. 578, 590 (Sentencing relief was warranted because "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate.").

[22]The van's role is dictated by the State's argument that the obscene phone call made by "Tony" to Starr Peck reflected the actual facts of the murder as opposed to the fantasies of a drug addled and sexually troubled individual calling out for attention. If Staci was never in the van, then the murder did

and this Court concluded that his testimony showed that Mr. Rivera returned the van to him between 6:15 and 7:00 p.m.--but definitely no later than 7:00 p.m.--on the day of the victim's disappearance. Rivera v. State, 717 So. 2d 477, 482 (Fla. 1998). At trial, the State presented evidence that the victim was last seen between 6:30 p.m. and 7:00 p.m. (R. 795). Considered cumulatively, the DNA evidence and Peters' testimony show that the offense did not occur in the van. Ignoring for the moment that the evidence at trial demonstrates the testimony about the hair found in the van was anything but "insignificant,"[23] the new evidence when evaluated cumulatively completely refutes an essential part of the State's case. Certainly, where DNA testing establishes that evidence presented by the State was false and/or meaningless, at a minimum an evidentiary hearing is required. See Johnson v. Mississippi, 486 U.S. 578, 590 (Sentencing relief was warranted because "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate.").

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not occur there and most of the State's case is rendered meaningless.

[23]Mr. Rivera does not agree that the trial evidence about the hair in the van was insignificant. Neither did the trial prosecutor, who relied upon that evidence in opening and closing arguments.

Mr. Rivera's Rule 3.850 motion pled facts regarding the merits of his claims and regarding his diligence which must be accepted as true. These facts are set forth in the Statement of the Facts, *supra*, and in the discussion of the individual claims below. *See* Arguments II, III, IV, V. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Rivera's claims and that an evidentiary hearing is required.

ARGUMENT II

MR. RIVERA WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE PROSECUTION INTENTIONALLY PERMITTED FALSE AND/OR MISLEADING EVIDENCE TO BE PRESENTED TO MR. RIVERA'S JURY AND USED IT TO OBTAIN A CONVICTION.

At Mr. Rivera's trial in April of 1987, the State called Frank Zuccarello (R. 1402). Mr. Zuccarello testified that he first met Michael Rivera in the Broward County Jail in April of 1986 (R. 1402). During the following several months, Zuccarello had several conversations with Mr. Rivera regarding Mr. Rivera's case. Mr. Rivera discussed his case with Zuccarello "[a]t least" "fifteen, sixteen different times" (R. 1417). Zuccarello also indicated that one of the discussions

with Mr. Rivera was the day that Zuccarello "went to the grand jury" (R. 1417).[24]

Zuccarello testified that after talking to Mr. Rivera, he contacted Nick Argentine with the Broward Sheriff's Office (R. 1406). Zuccarello told Deputy Argentine about his conversations with Mr. Rivera. Zuccarrello indicated that when he made a statement about what Mr. Rivera had told him that he had already pled guilty (R. 1415). Zuccarello explained that he told Deputy Argentino what Mr. Rivera had told him "[b]ecause I think what he did was a sick act" (R. 1406). The prosecutor then asked, "Had anyone at that point promised you anything?" Mr. Zuccarello answered, "No" (R. 1406). Later, during cross, Mr. Zuccarello indicated that he had been "convicted of 23 felonies on two separate cases because that was part of my plea agreement" (R. 1409-10). Pursuant to the plea agreement, he received seven years (R. 1410). Defense counsel then asked in cross, "And you say that the State of Florida has not made any deals with you regarding your testimony here today?" (R. 1410). Mr. Zuccarello answered, "No, sir. Other than I had a mitigation filed and that's not guaranteed" (R. 1410). Mr.

[24]Zuccarello was more than vague in terms of specific dates as to when conversations occurred with Mr. Rivera and as to when he talked with law enforcement regarding his conversations with Mr. Rivera.

Zuccarello then explained that the mitigation was filed to request that the judge reduce his sentence from seven to five years. Mr. Zuccarello testified that "[n]one of these detectives were there to speak on my behalf at the time of sentencing" (R. 1420). Mr. Zuccarello indicated that his testimony at Mr. Rivera's trial would have no bearing on whether his sentence was reduced (R. 1419).

After having been sentenced to seven years on March 13, 1987, Mr. Zuccarello's motion to mitigate was granted on May 12, 1987. The sentence was reduced to five years and a three year mandatory minimum was deleted.

In 1995, Mr. Rivera amended his initial Rule 3.850 motion to include a Claim XXI, which alleged that the State had written letters on Zuccarello's behalf after Mr. Rivera's trial although Zuccarello had denied the State had made any kind of deal with him. Trial prosecutor Hancock testified that the State had not made any deals with Zuccarello. In the State's closing memorandum, the State sought to have the claim denied upon the basis of Hancock's testimony. On the basis of Hancock's testimony and the representations made by the State that there was no deal for Zuccarello's testimony, Mr. Rivera's claim was denied.

However, Mr. Rivera's counsel recently learned that in fact Mr. Zuccarello received a plea offer from the State that was accepted when Zuccarello entered his guilty plea. Under the plea offer, Zuccarello was obligated to continue providing statements to particular law enforcement officers, submit to polygraph examinations, and testify when subpoenaed by the State. The law enforcement officers identified in the plea offer included Argentine, the deputy with whom Zuccarello had made statements to regarding his conversations with Mr. Rivera, and the Assistant State Attorney then assigned to prosecute Mr. Rivera. This plea offer was not disclosed to Mr. Rivera at trial or during prior post-conviction proceedings. When Mr. Zuccarello pled to the numerous pending charges against him on June 12, 1986, he was required to cooperate with Broward sheriff's deputies and prosecutors, specifically those involved in Mr. Rivera's case.

This written plea offer was not disclosed at the time of trial or in the numerous collateral proceedings in Mr. Rivera's case. In fact, the State has affirmatively represented throughout the history of this case that there was no plea agreement with Zuccarello that was in any way connected to his testimony against Mr. Rivera. Mr. Rivera's counsel recently discovered the undisclosed written plea offer in materials

provided to him during his work on an unrelated case in Miami-Dade County. These materials also contained a number of "Prisoner Receipts" from the Broward County Jail, a document entitled, "Synopsis of conversation with FRANK ZUCCARELLO on Friday, April 4, 1986," and another document entitled, "April 18, 1986, Interview with Frank Zuccarello" written by "Det. Joseph Gross" of the Metro Dade Police Department.

These documents support and corroborate the information contained in the "Plea Offer: Frank Zuccarello." They establish that Mr. Zuccarello was working as a confidential informant for law enforcement in Dade and Broward Counties by April 4, 1986. According to the April 4th "Synopsis," Zuccarello was acknowledging that he was initially holding back information until he could see what he could get in exchange. Clearly, he was a State agent by the time of the April 18th statement. Clearly, he received considerable consideration for his "assistance," and clearly this "assistance" included testifying pursuant to a subpoena at Mr. Rivera's trial contrary to his testimony at that capital trial, contrary to the testimony of the trial prosecutor in 1995, and contrary to the representations made by the State in its closing memorandum seeking denial of post-conviction relief in 1995.

Mr. Rivera timely presented this claim. The State did not disclose the plea agreement. At trial and at the 1995 evidentiary hearing, false testimony was presented and the State asserted that there was no connection between Zuccarello's June, 1986, plea, and his testimony pursuant to a subpoena at Mr. Rivera's trial. Mr. Rivera's counsel discovered the documents while reading materials gathered regarding a Miami prosecutor and read the documents while preparing for the April, 2003, oral argument in this Court. The claim was presented in the amendment that the circuit court scheduled to include all new claims arising from new evidence discovered and developed since jurisdiction was returned to that court.

The State deliberately misled and deceived Mr. Rivera's trial counsel, the jury, the circuit court and this Court. The deception affirmatively occurred at trial and at the 1995 evidentiary hearing. This deliberate deception violated Mr. Rivera's right to due process. "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 1263. 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. Under Guzman v. State,

868 So. 2d 498, 506 (Fla. 2003), it is the State's burden to prove this due process violation harmless beyond a reasonable doubt. Under the facts here, the State cannot meet this burden.

In Giglio v. United States, 405 U.S. 150, 153 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" In Gray v. Netherland, 518 U.S. 152, 164-65 (1996), the Supreme Court explained:

> "Yet another way in which the state may unconstitutionally . . . deprive [a defendant] of a meaningful opportunity to address the issues, is simply by misinforming him." Brief for Petitioner 34. Petitioner cites *In re Ruffalo*, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968), *Raley* v. *Ohio*, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959), and *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1935), for this proposition. *Ruffalo* was a disbarment proceeding in which this Court held that the disbarred attorney had not been given notice of the charges against him by the Ohio committee which administered bar discipline. 390 U.S. at 550. In *Raley*, the chairman and members of a state investigating commission assured witnesses that the privilege against self-incrimination was available to them, but when the witnesses were convicted for contempt the Supreme Court of Ohio held that a state immunity statute rendered the Fifth Amendment privilege unavailable. 360 U.S. at 430-434. And in *Mooney* v. *Holohan*, the defendant alleged that the prosecution knowingly used perjured testimony at his trial. 294 U.S. at 110.
>
> *Gardner, Ruffalo, Raley*, and *Mooney* arise in widely differing contexts. *Gardner* forbids the use of secret testimony in the penalty proceeding of a capital case which the defendant has had no opportunity to consider

> or rebut. ***Ruffalo*** deals with a defendant's right to notice of the charges against him. Whether or not ***Ruffalo*** might have supported petitioner's notice-of-evidence claim, see ***infra***, at 169-170, it does not support the misrepresentation claim for which petitioner cites it. ***Mooney*** forbade the prosecution from engaging in "a deliberate deception of court and jury." 294 U.S. at 112. ***Raley***, though involving no deliberate deception, held that defendants who detrimentally relied on the assurance of a committee chairman could not be punished for having done so. ***Mooney*, of course, would lend support to petitioner's claim if it could be shown that the prosecutor deliberately misled him**, not just that he changed his mind over the course of the trial.

(Emphasis added). The Supreme Court has further recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

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). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument or allows it to stand uncorrected in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless

beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. at 433 n.7. The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 473 U.S. 667 (1985), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959), and to refrain from deception of either the court or the jury. 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 or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

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. at 678, quoting United States v. Agurs, 427 U.S. 97, 102 (1976). Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the verdict (as to both guilt-innocence and

penalty phase), relief must issue. In other words, where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is ***required*** unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9.

This Court has recently 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." Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003). The Court described this standard as a "more defense friendly standard" than the one used in connection with a Brady violation. Id.

The circuit court erroneously denied this claim, as is discussed in Argument I, *supra*. The court did not accept as true Mr. Rivera's allegations regarding the substance of the new facts or Mr. Rivera's diligence. The circuit court also did not apply the correct legal standard to this claim. Guzman.

The circuit court did not recognize that the written plea offer shows that Zuccarello's trial testimony was incorrect. Contrary to his trial testimony that he had made no deals and received no promises and that he was testifying just because he thought what Mr. Rivera did was sick, the plea agreement shows that Zuccarello was required to cooperate and

testify. The false trial testimony had to have affected the jury's assessment of Zuccarello's credibility, and the State cannot show it had no effect. Nor did the court consider how existence of Zuccarello's plea agreement would affect the jury's assessment of the credibility of the other jailhouse informants who also testified that they had no deals. The court did not consider that Zuccarello's testimony was much more specific and detailed than the testimony of the other jailhouse informants. Finally, the court did not consider that Zuccarello's testimony was used to support the "heinous, atrocious or cruel" aggravator (R. 2110, 2310), and thus the court did not consider the impact of Zuccarello's testimony on the penalty phase.

At trial and during Mr. Rivera's first Rule 3.850 proceedings, the State presented false or at least materially inaccurate testimony. The State did not correct the testimony or disclose to the defense the necessary documents for the defense to expose the false or misleading testimony. The State cannot show beyond a reasonable doubt that this false and/or misleading evidence had no effect on the verdict. Mr. Rivera is entitled to an evidentiary hearing, to a new trial, and to a new penalty phase.

ARGUMENT III

MR. RIVERA WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS

WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE AND/OR NEW EVIDENCE ESTABLISHES MANIFEST INJUSTICE.

The United States Supreme Court has explained:

> [A] fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Here, Mr. Rivera was denied a reliable adversarial testing. In order "to ensure that a miscarriage of justice [did] not

occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear this evidence. Here, confidence must be undermined in the outcome since the jury did not hear the evidence. Rogers v. State, 782 So.2d 373 (Fla. 2001). Though error may arise from individual instances of nondisclosure and/or deficient performance, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. The proper analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later. The analysis must be conducted when all of the exculpatory evidence which the jury did not know becomes known.

A. THE RECENTLY DISCOVERED INFORMATION WITHHELD BY THE STATE.

Mr. Rivera has recently discovered a wealth of favorable evidence that was in the State's possession, but that the State withheld from Mr. Rivera's counsel. This evidence that was not disclosed by the State includes the written plea offer that Frank Zuccarello accepted when he entered his guilty plea in June of 1986. This written plea offer was not disclosed at the

time of trial or in the numerous collateral proceedings in Mr. Rivera's case. The State also did not disclose Broward County Jail "Prisoner Receipts" which show Zuccarello being released to law enforcement officers numerous times, and specifically provided the dates of his contact with Argentine and Ambile. Also undisclosed was a document written by Miami law enforcement entitled, "Synopsis of conversation with FRANK ZUCCARELLO on Friday, April 4, 1986." According to this "Synopsis," Zuccarello was working as a confidential informant for Dade and Broward law enforcement by April 4, 1986, before he met Mr. Rivera and before he reported any alleged statements by Mr. Rivera to "Nick Argentine." Another withheld document entitled, "April 18, 1986, Interview with Frank Zuccarello" and written by "Det. Joseph Gross" of the Metro Dade Police Department also referred to Zuccarello as a "CI."

These documents would have been beneficial to trial counsel in 1987 and to collateral counsel in 1995. They establish that Zuccarello was working as a confidential informant for law enforcement in Dade and Broward Counties by April 4, 1986. Clearly, he was a State agent during his incarceration in the Broward County Jail in April through June of 1986. Clearly, he received considerable consideration for his "assistance," contrary to his testimony at Mr. Rivera's capital trial,

contrary to the testimony of the trial prosecutor in 1995, and contrary to the representations made by the State in its closing memorandum seeking denial of post-conviction relief in 1995. This undisclosed information impeaches not just Zuccarello, but also law enforcement's investigation and conduct throughout this case. Kyles v. Whitley, 514 U.S. 419, 446 (1995)("Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.").

Another recently discovered document is a confidential memo dated June 24, 1986, from Robert Rios to Sgt. Steve Vinson of the Miami Police Department, reporting that on June 21, 1986, Rios gave Zuccarello a polygraph regarding his version of a Miami homicide and found that Zuccarello made repeated attempts at deception. Another recently discovered document is a portion of a Miami Police Department Report indicating that on June 7, 1986, Zuccarello took a polygraph about the Miami homicide, and the examiner concluded that Zuccarello "showed deception in all

areas regarding the information he gave us regarding the Cohen homicide."

Another recently discovered document is a July 28, 1987 memorandum from Cpl. Iglesias of the Dade County Jail concerning whether Zuccarello should receive gain time. Attached to this memo were incident reports from before Mr. Rivera's 1987 trial which showed that while in jail, Zuccarello used his status as a police informant to bully the guards and try to get his way. Other new evidence which came to light during these Rule 3.850 proceedings includes an article printed in the Miami Herald on Thursday, October 1, 1998, and subsequent investigation stemming from the discovery of that article. This evidence has made it apparent that not only was Zuccarello used as a snitch in numerous cases in Dade and Broward Counties, but also that his testimony in at least two cases was untruthful.

These previously undisclosed documents contain information that would have been favorable to Mr. Rivera at his trial. For example, the documents establish that before Zuccarello was placed with Mr. Rivera, he was already a confidential informant for Broward County law enforcement.[25] Clearly, in any

[25]The fact that Mr. Rivera was denied his right to counsel and right to remain silent is further corroborated by the recent allegations of misconduct by several Broward Sheriff's Officers, including Richard Scheff. The reported allegations involve cases in which persons arrested and charged with murder by the

conversations that he had with Mr. Rivera, Zuccarello was an undisclosed agent for the State interviewing Mr. Rivera in a custodial setting without complying with the Sixth Amendment. As such, Zuccarello's testimony was inadmissible under the Sixth Amendment. Its admission constituted constitutional error that the State cannot establish is harmless beyond a reasonable doubt.

Frank Zuccarello was a professional snitch. He gave police information in over 29 home-invasion robberies and more than two murder cases including the Staci Jazvac case. During 1986, Zuccarello was shuffled back and forth between Dade and Broward County for his testimony in all these cases. In addition, he received numerous favors from the Metro-Dade police and Dade County State Attorney's Office including trips out of jail to his hair salon, to Dolphin training camp and football games, and to his girlfriend's house so they could have sex.

Frank Zuccarello was himself charged with 23 felonies including kidnapping, armed robbery and aggravated assault. If convicted, he faced the rest of his life in prison. Yet, for all offenses committed in Dade and Broward counties, Zuccarello was sentenced to **only five (5) years** in state prison and

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Sheriff's Office were later determined to be innocent (including Frank Lee Smith, a man who had been condemned to die on death row, and Jerry Frank Townsend) or had their charges dismissed.

received complete immunity in the Cohen case. Of the five years he was sentenced to, Zuccarello only served two (2) years, all of which was served in county jail.

Frank Zuccarello knew how to work the system to his advantage, and testifying to false information was his way out of life in prison. All of the information he testified to in Mr. Rivera's case Zuccarello could have learned from other sources, including through his attorney who had prosecuted Mr. Rivera in 1980. Mr. Rivera's case was highly publicized in 1986 when Zuccarello began giving information to the police. In fact, in his testimony at trial, Zuccarello admitted that there was a picture of Staci Jazvac hanging at the Broward County Jail and he knew who Michael Rivera was before there was any contact between the two of them (R. 1417). Zuccarello saw Michael Rivera and the Staci Jazvac case as one more case to ensure his freedom.

Without Frank Zuccarello, the State's case was highly circumstantial. The State presented evidence to try to link Staci to a blue van which Mr. Rivera was supposedly driving at the time the victim was abducted. The State's theory at trial was that Mr. Rivera used the van to abduct Jazvac and smothered her inside the van. However, as presented at Mr. Rivera's evidentiary hearing in April 1995, Mark Peters, the owner of the

van, had dropped Mr. Rivera off at his home no later than 6:30 to 7:00 p.m. Peters testified that Mr. Rivera had picked him up by 6:00 p.m., and that from that time on he retained possession of the van. Therefore, Mr. Rivera was not in possession of the van at the time of the offense, and it was impossible for him to have committed the murder in the van.[26] The State's entire case, without the testimony of Zuccarello, hinged on the circumstantial evidence found in the van.[27] Had the jury known the extent of Zuccarello's involvement with law enforcement, he would have had no credibility with the jury, because the reality of that relationship did not match his testimony. The undisclosed information did more than just impeach Zuccarello - it impeached law enforcement and the techniques used and its willingness to countenance false or misleading testimony. As a result, the failure to disclose casts the case in a whole new light and undermines confidence in the outcome of the trial.

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[26]This is corroborated by the DNA testing conducted in 2003 that concluded that a hair in the van introduced at Mr. Rivera's trial as possibly matching Staci Jazvak's hair was not Staci Jazvak's hair.

[27]The defense was that Michael Rivera had difficulty distinguishing fact from fantasy and that the obscene phone calls made by Tony, his alter-ego, reflected his fantasies and his need to grab attention. It was the alleged statements to Zuccarello that were more detailed than any others attributed to Mr. Rivera that combined with the hair evidence was used by the State to counter the defense's fantasy contention.

Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002).

Had the State revealed the extent of Zuccarello's involvement with law enforcement officials in Dade and Broward counties, Mr. Rivera's trial counsel would have been able to cross-examine Zuccarello regarding the numerous favors he was receiving from Dade police and attack his motives for testifying. Zuccarello clearly knew if he gave information to the police, he would receive something in return. This is not only evident from his involvement in dozens of other cases, but specifically from the undisclosed April 4th "Synopsis."[28] When the withheld evidence goes to the credibility of a state witness, the Sixth Amendment right to confront and cross-examine witnesses is violated. Chambers v. Mississippi, 419 U.S. 284 (1973).

[28]Therein, it was stated that the CI, Zuccarello:

> candidly admits he has not told investigators everything he knows and is holding back some information until he sees how events are shaping up. In addition to the crimes herein detailed the CI is compiling a list of other crimes committed and states that he already has a list of of about 25 HIR in the Hollywood area compiled.

(3PC-R., "Supplemental Record," 69.

Furthermore, had the State provided defense counsel with this impeachment evidence, it would have led defense counsel to other exculpatory evidence. If defense counsel had known that Zuccarello was being shuffled between Dade and Broward counties, taken to his hair salon, football games and his girlfriend's house, defense counsel would have investigated and scrutinized Zuccarello's visitation logs and logs of physical movement within the jail. This not only could have been used to impeach Zuccarello, but to determine if he was being used as a police agent. The Broward Sheriff's Office and its officers and investigators were aware of Zuccarello's willingness to testify against other suspects and defendants simply based on the numerous occasions he had been used for those purposes. Broward Sheriff's Office was the agency responsible for investigating the case against Mr. Rivera. In fact, as Zuccarello testified, Detective Tom Eastwood worked on both Zuccarello's case and Mr. Rivera's case. It is highly likely that Broward Sheriff's Office saw Zuccarello as an opportunity to obtain information from Mr. Rivera, thus placing Zuccarello in the same pod area as Mr. Rivera at the Broward County Jail.

A Supplemental Report by Lt. R. Rios of the Broward County Sheriff's Office dated 02/18/86 details that officer's conversation with Mr. Rivera at 17:30 on Tuesday February 18,

1986. During the conversation, Mr. Rivera "started yelling and screaming 'you can't hold me here any longer, I want my Lawyer now.' 'This is the same bullshit as before.'" This report was put into context by a recent article in *The Miami Herald*, which reported that when Rivera was delivered to Rios for an interview on February 18, 1986, Detectives Scheff and Amabile told Rios that Mr. Rivera had waived his Miranda rights. However, when Mr. Rivera began to protest, Rios was convinced that Rivera had told the officers that he wanted to speak to an attorney. During an interview with the Herald, Robert Rios specifically stated, "I took it to mean that he was read his rights before, and he didn't waive." Daniel de Vise, *The Miami Herald*, Conduct of Broward detective in another case is questioned, June 25, 2001. Rios also told the Herald reporter that although Rivera had signed a statement requesting an attorney earlier the same day, Scheff and Amabile never informed Rios of that statement.[29] Id. Mr. Rivera was not aware of Robert Rios' conclusions until June 25, 2001, the date the article was published. This evidence shows that Mr. Rivera was denied his constitutional

[29]Of course, the undisclosed plea agreement with Mr. Zuccarello and the discovery that he was a confidential informant working on behalf of the State before he even met Mr. Rivera has revealed the tactics and techniques that the State was using to obtain a conviction in this case. Cumulative consideration of the undisclosed evidence and information is required.

right to counsel during interrogation and therefore that Mr. Rivera's statements were inadmissible.

Mr. Rivera asserts that the State withheld this material and exculpatory evidence pertaining to Frank Zuccarello, key forensic evidence and the misconduct of the Broward Sheriff's Office from defense counsel thereby depriving Mr. Rivera of his rights under the Fifth, Sixth, and Eighth Amendments in violation of Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U. S 264 (1959), and Giglio v. United States, 405 U.S. 150 (1979).

To the extent that the State now defends on an argument that trial counsel knew or should have known of the undisclosed and unpresented evidence, then trial counsel rendered ineffective assistance. Due to the circumstantial nature of the State's case at trial, it was important for the defense to attack the credibility of the jailhouse informants and police officers that testified against Mr. Rivera. If trial counsel knew or should have known of information pertaining to the extent of the favors bestowed upon Zuccarello, but failed to cross-examine Zuccarello about those favors, then his performance was unreasonable. If reasonable investigation could have led to the information discussed here, counsel's failure to conduct reasonable investigation was deficient performance.

The information about Zuccarello discussed herein would have led trial counsel to discover significant impeachment of Zuccarello and would have revealed prosecutorial and/or police misconduct. In turn, this would have led to impeachment regarding the two other informants testifying at trial. Information regarding Zuccarello's participation in the Cohen and Hodek cases was valuable impeachment evidence not only of Zuccarello, but of law enforcement officers involved in this case.

To the extent that the State lays the blame for the fact that this impeachment was not presented because counsel failed to discover it,[30] then trial counsel's unreasonableness in failing to adequately cross-examine and impeach state witnesses at trial, failing to gather, test and present forensic evidence and failing to adequately investigate information of officer misconduct, was deficient performance that undermines confidence in the outcome of the trial.

B. CUMULATIVE ANALYSIS

[30]Although such an argument would seem to fly in the face of the United States Supreme court decision in Banks v. Dretke, 124 S. Ct. at 1263 ("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."). 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.

In evaluating the prejudice flowing from the failure to disclose these documents and the information contained therein, a cumulative analysis must be undertaken. This cumulative analysis requires cumulative consideration of not only these documents, but also other favorable or exculpatory information that did not reach the jury because it either was not disclosed by the State, was unreasonably not discovered by the defense, or is new evidence that neither the State nor the defense knew about at the time of trial. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996). When the proper cumulative analysis is conducted, it is clear that confidence is undermined in the reliability of the outcome and that a new trial is warranted.

The cumulative analysis must consider the recent DNA testing. At Mr. Rivera's trial, the State presented evidence that has now been shown to be scientifically incorrect - the hair found in the van in which the State contended the crime occurred we now know was in fact not the victim's hair (R. 1293, 1305). See Johnson v. Mississippi, 486 U.S. 578, 590 (Sentencing relief was warranted because "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate."). The State told the jury about this hair in opening statement: "They found a hair in Mark Peter's

van, a long hair, I think it was like six or eight inches, and he compared that with the known hair of Staci Jazvac and that they are similar" (R. 1305). The State also relied upon the testimony about the hair in its closing argument (R. 1793). DNA testing conducted in 2003 has now conclusively established that this hair did not come from the victim (3PC-R., "Supplemental Record Transcript," 39-41, 67).

In investigating the case, sheriff's deputies collected dark hairs found on the victim's white knit top and left shoe. In an affidavit dated February 24, 1986, Detective Amabile discussed these hairs to support issuance of a search warrant to obtain hair from Mr. Rivera. DNA testing conducted in 2003 on eight of these hairs has established that Mr. Rivera is definitely not the source of seven of these hairs, while the analysis of the eighth hair was inconclusive (3PC-R., "Supplemental Record Vol 1, Etc.," 42-44). This is new evidence that demonstrates that someone other than Mr. Rivera deposited that hair on Staci's clothing.

The DNA testing on the hair introduced at trial shows that the offense did not occur in Mark Peters' van, which was the basis of the State's theory of the prosecution. Peters testified in the prior Rule 3.850 proceedings, and this Court concluded that his testimony showed that Rivera picked Peters up

at work by 6:00 P.M., returning the van to him and that Peters retained custody of the van thereafter on the day of the victim's disappearance. Rivera v. State, 717 So. 2d 477, 482 (Fla. 1998). At trial, the State presented evidence that the victim was last seen between 6:30 p.m. and 7:00 p.m. (R. 795). Considered cumulatively, the DNA evidence and Peters' testimony show that the offense did not occur in the van. Thus, the DNA evidence completely refutes an essential part of the State's case. The DNA testing conducted on the hairs found on the victim show that there is no physical evidence linking Mr. Rivera to the victim, another blow to the State's circumstantial case.

Cumulative analysis must also consider that if the exculpatory information regarding Zuccarello had been disclosed by the State, defense counsel would have had a clearer picture of the tactics and techniques of the State and of Zuccarello's motives in testifying, which in turn would open the door to extensive investigation and impeachment of the other snitches and their motives. Peter Salerno, who also testified to vague admission by Mr. Rivera, was also a professional snitch, testifying for the state and federal government numerous times. Salerno, aka Pierre Cardin, claimed at Mr. Rivera's trial that Mr. Rivera confessed the murder to him. As did Mr. Zuccarello,

Salerno testified that no promises were made to him in exchange for his testimony (R. 1579). Salerno testified that he had pled guilty to charges in Broward County and received a twelve year sentence (R. 1579). He further testified that despite that twelve year sentence he had traveled to the courthouse on his own to testify, making it clear he was not in custody (R. 1582). He further testified that he would be appearing before the sentencing judge again on January 15, 1988, but that he had no expectation that testifying against Mr. Rivera would be of any assistance in regards to his sentence (R. 1583).

In fact on May 27, 1986, Salerno had pled guilty in Broward County to count I (battery in the course of an armed burglary) of a three count information. The two other counts were nolle prossed by Assistant State Attorney Mark Springer. Springer advised the presiding judge "that he is cooperating, the State will not be opposed to anything presented to you for mitigation later on." Salerno received his twelve year sentence in July of 1986. On January 15, 1987, the State appeared before the judge and waived its objection to Salerno's untimely motion to modify sentence. Salerno's counsel stated that, "It was the understanding at the time there was substantial cooperation which was proposed to the court of Mr. Cardin [Mr. Salerno] in certain past matters, and present matters, and future matters."

In light of Salerno's continuing cooperation, Salerno's attorney proposed that Salerno receive a "five year probationary period" in light of his extensive cooperation with law enforcement. Present at this proceeding were representatives from the FBI, U.S. Customs, the Metro Dade Police Department, and the Broward Sheriff's Office. A representative of the Broward Sheriff's Office joined in a request by the various law enforcement agencies in requesting that Salerno be released from jail to facilitate his cooperation. The Broward Sheriff's Office representative stated, "I'd like to have him for several years actually, to talk to him." Thereupon, the presiding judge stated, "I'm going to leave the sentence alone, but what I will do is vacate or postpone or whatever the magic word is, the remainder of the sentence for one year. Let him go out and work with those gentlemen and then let's see what he does or doesn't do. If he does well and they come in and say you did well, and they make further recommendations, I'll be happy to listen." On January 15, 1988, Salerno appeared before the same judge. At that time, the parties stipulated to a thirty day continuance for Salerno to finish his work. However, later that day Salerno was arrested and charged with burglary in Palm Beach County. A sentencing hearing was scheduled for January 25th. Assistant State Attorney Mark Springer was quoted in a newspaper account

as telling the judge during that proceeding, “You got burned, we all got burned by Mr. Salerno.” The judge reimposed the twelve year sentence. On March 25, 1988, Salerno moved for mitigation of his sentence because of his extensive work for state and federal law enforcement officers. On April 30, 1988, Salerno wrote Assistant State Mark Springer requesting help on a sentence reduction saying, “I hope you will consider the (Stacey Jacvick [sic]) case for Kelly Hancock A.S.A.”

William Moyer testified at trial that Mr. Rivera made incriminating statements to him. Moyer had pled guilty to a sexual battery and received a thirteen year prison sentence in January of 1987 (R. 1478). Even though he had a motion to mitigate pending at the time of his testimony against Mr. Rivera, he testified that he had received no promises in exchange for his testimony (R. 1478-79). On April 21, 1987, on Kelly Hancock’s recommendation, Moyer in fact received a reduction of his sentence down to eight years imprisonment. This reduction occurred despite a January 27, 1986, file memo from Assistant State Attorney Gene Malpas concerning Moyer in which Malpas stated, “This guy is bad! He has a prolonged history of sexual abuse of children all the way back to 1957.”

Each of the inmates who testified at trial--Zuccarello, Salerno, and William Moyer--knew the system and how to get what

they wanted from the system. Also, while in jail the three inmates associated with each other and had ample opportunity to compare stories and/or concoct a scenario pertaining to the Staci Jazvac case based on news accounts and police information.

The newly disclosed evidence seriously calls into question the veracity not only of Zuccarello's testimony, but also that of Salerno and Moyer, thereby destroying any credibility they may have had in front of the jury. Not only is the testimony of the snitches undermined, but so is the testimony of the Broward Sheriff's Officers involved in the case, including Scheff, Amabile and Eastwood. Without this testimony, the State would be left with purely circumstantial evidence at best. DNA testing has now revealed that there was no physical evidence connecting Mr. Rivera to the victim. The hair in Mark Peters' van was not from Staci Jazvac. The dark hairs found on the victim's body were not from Michael Rivera. Although state witness Starr Peck testified that Mr. Rivera called her and while making an obscene phone call confessed to the crime, the details given by Mr. Rivera during the obscene phone call were completely inconsistent with the actual crime. For example, Mr. Rivera allegedly told Peck that Jazvac was wearing silky shorts (R. at 1089) and the body was disposed of by Lake Okeechobee (R.

at 1090). In actuality, the body was found in a field in Coral Springs, wearing a pair of blue jeans.

In Gunsby, this Court explained that a new trial was required in 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance, and/or newly discovered evidence of innocence:

> Regarding the first issue, no question exists that Brady violations occurred when the State failed to disclose the criminal records of two key witnesses. The State argues, however, that the trial judge correctly determined that no reasonable probability existed that the outcome of Gunsby's trial would have been different even had this evidence been presented. If this were the only guilt-phase issue having merit, we would be inclined to agree that the trial judge correctly decided this "close call." There were two eyewitnesses who positively identified Gunsby as the shooter and the Brady violations involved only one of those eyewitnesses. Additionally, at least three people overheard Gunsby make admissions concerning his commissions of the murder and the Brady violations involved only one of those individuals. **When we consider this error in combination with the evidence set forth in the second issue, however, we cannot agree with the State's position.**
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> * * *
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> Clearly, the evidence presented at the rule 3.850 hearing undermined the credibility of several key witnesses who testified at trial. For instance, the husband of one of the eyewitnesses testified she told him she could not see who shot the victim because the shooter was wearing a mask. Further testimony indicated that the eyewitness was romantically involved with one of the original suspects in the case. A third eyewitness, who did not testify at trial, also testified at the rule 3.850 hearing that the assailants were wearing pantyhose masks. A number

of other inconsistencies existed between the testimony presented at the rule 3.850 hearing and the testimony presented at trial, which we do not address here.

We do find some merit in the State's argument that much of this evidence does not meet the test for newly discovered evidence. Newly discovered evidence is evidence that must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of the evidence by the use of diligence. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Id. at 915. In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(to establish ineffective assistance of counsel, a defendant must show that (1) counsel performed outside the broad range of competent performance and (2) the deficient performance was so serious that the defendant was deprived of a fair trial). The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, **when we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.** Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial

> judge's order denying Gunsby's motion to vacate his conviction.

State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996)(emphasis added).

This Court must examine the newly disclosed evidence claims presented here in conjunction with the State's case at trial and the evidence proffered by Mr. Rivera in this and prior Rule 3.850 proceedings. This Court will find after examining all the evidence Mr. Rivera has presented through direct evidence, cross-examination and proffer throughout his capital proceedings, that this new evidence, along with evidence introduced in Mr. Rivera's first Rule 3.850 motion and the evidence introduced at trial, would have produced a different result at trial.

The court must also consider the effect this new evidence would have on Mr. Rivera's penalty phase and sentencing. This review must also be cumulative and thus must include consideration of the facts that this Court struck the "cold, calculated and premeditated" aggravator on direct appeal, that some counts of Mr. Rivera's prior violent felony conviction were vacated on appeal and that substantial mitigation was not presented at the penalty phase. Mr. Rivera should receive an evidentiary hearing, a new trial and a new penalty phase.

ARGUMENT IV

THE RESULTS OF DNA TESTING CONSTITUTE NEWLY DISCOVERED EVIDENCE THAT ESTABLISH MR. RIVERA'S ENTITLEMENT TO A NEW TRIAL.

Mr. Rivera sought and obtained permission to conduct DNA testing on the hair introduced into evidence at Mr. Rivera's trial (State's NNN for identification, item 11). This hair had been compared to another hair introduced into evidence, a known head hair from the victim, Staci Jazvac (State's CCC for identification, State's #58 in evidence). The comparison in 1986 was made by Howard Seiden of the Broward Sheriff's Office (R. 1293). He testified, "It's my scientific opinion that the hair from the bed of the van could be concluded as being a source from the victim, item number five, which was the head hair sample of the victim." (R. 1305). The DNA testing in 2003 has now conclusively established that the hair introduced into evidence was not from Staci Jazvac.

Mr. Rivera also sought and obtained permission to conduct DNA testing on the dark hairs found with Staci Jazvac's body which were discussed in Detective Amabile's affidavit of February 24, 1986, in support of a search warrant issued to obtain hair from Michael Rivera. Certainly, the source of hair found with the body was considered significant by law enforcement as indicated in the February 24, 1986, search

warrant affidavit signed by Detective Amabile. He indicated that Michael Rivera's hair was needed in order to facilitate hair comparison to determine if the hair found on Staci's body matched Michael Rivera. DNA testing conducted in 2003 on eight of these hairs has established that Mr. Rivera is definitely not the source of seven of these hairs, while the analysis of the eighth hair was inconclusive (3PC-R., "Supplemental Record Vol 1, Etc.," 42-44). This Court recognized in Jones v. State, 591 So.2d 911 (Fla. 1991), that where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warranted if the previously unknown evidence would probably have produced an acquittal had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial is required.

The results of the DNA testing provide evidence that qualifies as newly discovered evidence which may be presented in a Rule 3.850 motion. Moreover, this evidence now conclusively refutes as scientifically wrong the State's evidence that the hair found in the blue van may have been Staci's. Thus, the State presented the jury with materially incorrect evidence. See Johnson v. Mississippi, 486 U.S. 578, 590 (Sentencing relief

was warranted because "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate."). Had the jury known of this evidence it would have had a reasonable doubt regarding Mr. Rivera's guilt. This is confirmed by the recent newspaper article reporting the results of interviews with a number of Mr. Rivera's jurors. One juror was definitive in her conclusion that the DNA testing created reasonable doubt. Two other jurors were uncertain of what outcome they would reach, but at a minimum their confidence in the guilty verdict they had returned was shaken.

But, of course, as this Court has made abundantly clear, the results of the DNA testing are not to be analyzed in a vacuum. Cumulative analysis of newly discovered evidence with undisclosed Brady material is required. Mordenti v. State, 894 So. 2d 161 (Fla. 2004). The other exculpatory evidence that the jury did not hear must also be considered and evaluated with the results of new DNA testing. That analysis and evidence is discussed in Argument III.B., *supra*, and is incorporated into this argument. When the wealth of unpresented favorable evidence is considered cumulatively, it is clear that an evidentiary hearing, a new trial and a new penalty phase are required.

ARGUMENT V

MR. RIVERA WAS DENIED A FAIR TRIAL AND POSTCONVICTION PROCEEDING DUE TO JUDGE FERRIS'S BIAS AND PREDETERMINATION OF THE ISSUES CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Judge John G. Ferris has exhibited bias against Mr. Rivera and a predisposition to rule against him throughout the proceedings in this case. Five months before Mr. Rivera's trial, on Friday, November 21, 1986, Judge Ferris was quoted as follows in the Sun Sentinel, page 8 B:

> I believe this man has committed crimes many times in the past, and I believe he has resisted many attempts at rehabilitation, Ferris said. I don't think society should permit him to visit this conduct on anyone else.

Judge Ferris ruled against the defense and for the state repeatedly and summarily. Judge Ferris had at the very least a business relationship with the foreman of the jury, Robert Thornton. Judge Ferris had a close relationship with Sheriff Navarro.[31] Judge Ferris refused to grant a mistrial or withdraw juror Thornton from the panel, once Mr. Thornton's close connections with the sheriff became known.

Judge Ferris presided over the jury trial of this capital case and ultimately imposed the sentence of death. However, prior to this trial, Judge Ferris had also presided over the

[31] Sheriff Navarro sponsored a retirement party for Judge Ferris after the trial.

trial of this same defendant in an unrelated case which resulted in Mr. Rivera's convictions of attempted first degree murder, kidnapping, aggravated child abuse and aggravated battery.[32] In the capital case, over Mr. Rivera's objection, Judge Ferris admitted some limited testimony regarding the earlier case. However, Judge Ferris was aware of and actually considered evidence presented during the previous trial which was outside the record in the capital trial. In a letter written to Carolyn Tibbets in regard to the issue of clemency, Judge Ferris referred to the testimony of the previous trial as a reason he believed Mr. Rivera should die.

The bias exhibited by Judge Ferris at the time of trial led Mr. Rivera to request that he recuse himself. The request was denied (R. 1664).

On June 28, 2001, Mr. Rivera learned of new information that conclusively demonstrates judicial bias.[33] Specifically, the *New Times Broward-Palm Beach* reported on that date

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[32] The convictions of aggravated child abuse and aggravated battery have since been reversed on appeal. Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989).

[33]At the time that counsel learned of this new evidence, Judge Ferris was no longer presiding over Mr. Rivera's case. Accordingly, a motion to disqualify was not filed, although a claim of judicial bias was added to the pending motion to vacate.

additional statements of Judge Ferris which reflect his bias against Mr. Rivera at the time of trial.

In an interview with a *New Times* reporter, Judge Ferris stated that Mr. Rivera's case was the most highly publicized of his career, and while he admitted he could not remember any particular thing that proved Mr. Rivera's guilt, he "had great confidence in the prosecutor, Kelly Hancock." Bob Norman, A Single Hair, *New Times Broward-Palm Beach,* June 28, 2001. Judge Ferris's confidence in the prosecutor was evidenced by his repeated rulings against the defense and for the State. While Ferris reported he wanted a fair trial for Mr. Rivera, he admitted his personal beliefs were not the same. Id. The fact that Judge Ferris had to strive to set aside his personal feelings could not be a clearer statement of bias or prejudice. In the same interview, Judge Ferris essentially conceded that he failed to consider all the evidence presented at trial when he admitted that Mr. Rivera's phone calls to Starr Peck convinced him of Mr. Rivera's guilt. Id.

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has

personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b), Rule 2.140(d)(1) & (2).

Due process guaranteed Mr. Rivera the right to a fair and impartial tribunal. By Judge Ferris' own words, it is clear that Mr. Rivera did not receive what the constitution guaranteed. Instead, he had a judge who had an internal struggle going on, a struggle to set aside his personal feelings.

There was no way for Mr. Rivera to get inside Judge Ferris' head to establish the bias or prejudice that resided there. It was not until Judge Ferris revealed that his personal feelings were biased against Mr. Rivera that proof of the deprivation of a constitutional right had occurred. This claim was raised in an amendment to the pending motion within months of the appearance of the newspaper account of Judge Ferris' comments revealing his bias and prejudice. Judge Ferris' bias permeated the trial, the sentencing and the post-conviction proceedings heard by Judge Ferris. Those proceedings must be vacated. Rule 3.850 relief is warranted.

ARGUMENT V I

MR. RIVERA WAS DENIED DUE PROCESS WHEN HE LEARNED THAT AN EVIDENTIARY HEARING HAD BEEN

CONDUCTED IN FEDERAL COURT CONCERNING FRANK ZUCCARELLO AND HIS ACTIVITIES AS A CONFIDENTIAL INFORMANT IN 1986 AND ASKED THE CIRCUIT COURT FOR TIME TO OBTAIN THE TRANSCRIPTS OF THOSE PROCEEDINGS AND PRESENT ANY CLAIMS ARISING THEREFROM, AND HIS REQUEST WAS IMMEDIATELY DENIED.

On August 29, 2005, while a motion for rehearing was pending, Mr. Rivera's counsel learned from an August 26, 2005, newspaper article regarding a federal evidentiary hearing that was held in late July of 2005 concerning Frank Zuccarello and his activities as a confidential informant in 1986 (3PC-R., "Supplemental Record," 191). According to the article, Broward sheriff's officer, former Maj. Tony Fantigrassi, testified concerning his contact with Zuccarello in 1986, and Zuccarello's admission to him that he was lying when he claimed to have information regarding a Broward murder case (3PC-R., "Supplemental Record," 196). After hearing testimony from Zuccarello, dispite Fantigrassi's account, the federal judge reportedly "doubted the veracity of Zuccarello's truthfulness in dealing with Broward authorities" (3PC-R., "Supplemental Record," 196).

After learning of the newspaper article, Mr. Rivera filed a supplement to his pending rehearing motion in which he sought rehearing and an opportunity to obtain the transcript and supplement his motion to vacate accordingly. However, the

circuit court denied Mr. Rivera's motion for rehearing the next day, August 30, 2005, and effectively denied Mr. Rivera an opportunity to investigate and present to the Court any additional relevant information. In this regard, the circuit court erred. An opportunity to investigate and present to the circuit court any additional relevant information should have be granted.

CONCLUSION

In light of the foregoing arguments, Mr. Rivera requests that this matter be remanded to the circuit court for a full and fair evidentiary hearing and for other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Celia Terenzio, Assistant Attorney General, Office of Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No. 0754773
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

NEAL DUPREE
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Counsel for Appellant