IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1873

MICHAEL RIVERA

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENT JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Michael Rivera, Defendant below, will be referred to as "Rivera" or "Appellant" and Appellee, State of Florida, will be referred to as "State". There are four records that will be referenced in this brief and they will be designated as follows: Reference to the direct appeal record in Case no. 70563 will be will by *"Rivera I";* reference to the record on appeal of appellant's initial motion for postconviction relief in Case No. 86, 523 will be by "*Rivera* II; reference to the record on appeal of appellant's remand from the initial motion in Case No. SC01-2523 and reference to the record on appeal in this case, Case No. SC05-1873 will be by "ROA."

STATMENT OF THE CASE AND FACTS

Prior to filing the successive motion there were nine hearings held in connection with Appellant's unopposed motion for DNA testing. Those hearings were held from August 14, 2002 through April 20, 2004. (ROA 1-87).

The motion for postconviction relief was filed on January 20, 2004. The State responded on June 4, 2004. A case management hearing was held on July 27, 2004. (ROA 87). The trial court summarily denied all relief on May 10, 2005. (ROA 180).

SUMMARY OF THE ARGUMENT

Issue I – The trial court denied properly, all of appellant's issues without an evidentiary hearing because they were either successive, legally insufficient, conclusively refuted from the record, or would not have resulted in a new trial below.

Issue II – Appellant's claim that the state presented false and misleading testimony regarding a state witness's alleged plea deal and informant status was properly denied without an evidentiary hearing. The claim was procedurally barred as successive as it was raised in the first motion for postconviction relief. Appellant did not present any evidence that would qualify as new to warrant a waiver of the procedural bar.

Issue III –Appellant's claim that the state withheld or defense attorney failed to uncover exculpatory impeachment evidence regarding a state witness was properly denied without an evidentiary hearing. The claim was procedurally barred as successive as it was raised in the first motion for postconviction relief. Appellant did not present any evidence that would qualify as new to warrant a waiver of the procedural bar.

Issue IV – Appellant was not entitled to relief following the results of DNA testing as he cannot establish that these

results would have led to an acquittal.

Issue V- Summary denial of this claim was proper as it is nothing more than reargument of a claim of judicial bias which already had been denied in the first motion for postconviction relief.

ARGUMENT

ISSUES I AND II

THE TRIAL COURT PROPERLY FOUND APPELLANT'S CLAIM THAT THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY WAS PROCEDURALLY BARRRED AS SUCCESSIVE

Appellant claims that he was entitled to litigate a successive motion for postconviction relief based on newly discovered evidence. The "new evidence" substantiates appellant's earlier claim that the state made a deal with Frank Zuccarello's for his testimony in this case and the state withheld evidence of Zuccarello's status as a confidential informant for various law enforcement agencies in Dade and Broward Counties.

The "new" evidence is as follows; (1) copy of Zuccarello's plea agreement from June 12, 1986 which encompassed charges from four different case numbers in Broward County, wherein Zuccarello promised to offer cooperation with various law enforcement agencies in exchange for his plea, (ROA 11-12); (2) four prisoner receipts dated April 1st, 1986, April 4, 1986, April 17th 1986, and July 17th, 1986, which demonstrate that Zuccarello was transported from jail to several different law enforcement agencies on those specific dates, thereby establishing his status as an informant, (ROA 14-15); (3) a report written on April 4, 1986 entitled "Synopsis" by Detective

Joseph Gross from the Miami Police Department which referenced Zuccarello's knowledge regarding numerous home invasion robberies in Broward and Dade counties, (ROA 15); and (4) a second report written on April 18, 1986 by Detective Joseph Gross which referenced Zuccarello's knowledge/participation in a Broward murder and in the "Cohen murder" in Miami. (ROA 16.)

Rivera alleged that this information constituted newly discovered evidence which entitled him to file a successive motion for postconviction relief based on a violation of Giglio v. United States, 405 U.S. 150 (1972) [1] and United States v. Bagley, 473 U.S. 667 (1985). The trial court denied relief finding as follows:

> Having reviewed the entire record, this Court finds that the Defendant has long had access to substantial documentary evidence of Mr. Zuccarello's status as a witness, victim, and defendant in an array of cases. The Defendant well knew that Zuccarello was working with various State Agencies on a variety of cases as part of a plea bargain. 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,

[1] Appellant further alleges that this new evidence establishes that the state on two separate occasions presented "false testimony." First, at trial Frank Zuccarello falsely told jurors that he did not receive any plea deal in exchange for his guilt phase testimony. (*Rivera I* at 1407). And the second time was seven years later, in 1995, during an evidentiary hearing on this exact claim. Therein, the state presented the testimony of former prosecutor Kelly Hancock, who unequivocally testified that he did not offer any plea deal to Zuccarello in exchange for his testimony. (*Rivera III* at 686, 693).

> let alone his third request for such information. The evidence cited by Defendant is not newly discovered.

(ROA 173). The court also noted that Zuccarello was impeached at trial with evidence of his cooperation with law enforcement on numerous occasions. (ROA 173). And the trial court found that the plea agreement did not encompass this case. (Id.) The trial court's ruling was correct as the records on appeal of Rivera's three prior appeals, clearly establish that the defense was well aware of the information at the time of trial or at the very latest prior to litigation of his first motion for postconviction relief in 1994. Rivera was not entitled to file a successive motion, therefore summary denial was proper.

The law governing claims of "newly discovered" evidence is as follows:

> In Jones v. State, 591 So. 2d 911 (Fla. 1991), this Court set forth the standard that must be satisfied in order for a conviction to be set aside based on newly discovered evidence. First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" Id. at 916 (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979)). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones, 591 So. 2d at 915. In determining whether the evidence compels a new trial under Jones, the trial court must "consider all newly discovered evidence

> which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916. This determination includes
>
> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
>
> Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

Rutherford v. State, 929 So. 2d 1100, 1108, (Fla. 2006) (emphasis added).

Also relevant to a review of this issue is the standard for upholding summary denials of issues in postconviction proceedings:

> A defendant is entitled to an evidentiary hearing on his postconviction motion unless (1) the motion, files and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is legally insufficient. See: Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996); Holland v. State, 503 So. 2d 1250, 1251 (Fla. 1987). In determining whether an evidentiary hearing is warranted, we must accept the defendant's factual allegations to the extent they are not refuted by the record. See: Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). However, we have "rejected the argument that an evidentiary hearing is required to

> resolve every postconviction motion that alleges a public records violation. The defendant must support his motion . . . with specific factual allegations." Thompson v. State, 759 So. 2d 650, 659 (Fla. 2000) (citation omitted) (citing Downs v. State, 740 So. 2d 506, 510-11 (Fla. 1999)). Conclusory allegations do not justify an evidentiary hearing. See: Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Johnson v. State, 904 SO. 2d 400,403-404 (Fla. 2005)(emphasis added). Appellant cannot establish either prong of Jones as the evidence is not new and it would not probably have produced an acquittal at trial. The records establish that appellant knew, at the time of trial or at the very latest at the time he filed his first motion for postconviction relief that Zuccarello had a plea agreement in others cases and that he was an informant for numerous police agencies. Furthermore the record refutes the claim that Zuccarello's testimony in this case was a part of the June 1986 plea deal.

I. TIME OF TRIAL

Zuccarello's status as an informant was known or could have been known as early July of 1986, ten months before trial, Frank Zuccarello was listed as witness in at least four other criminal cases involving; Scott and Jay Richetelli, Tom Josiyn, and Anthony Caracciolo. (ROA 116-117, 205, 207). Zuccarello was involved in criminal activity with all of these individuals. (ROA 69, 77-78, 102, 75, 82, 93, 94, 1169-203). On July 11,

1986, a bond hearing was conducted in the Scott Richitelli case. Therein FDLE agent Emerson stated that Zuccarello was incarcerated in Dade County and that he was cooperating with law enforcement on numerous cases including the Richitelli case. (ROA 157-159). On August 18, 1986, Broward Assistant State Attorney, Joel Lazarus, turned over to counsel for Jay Richitelli, Howard Grietzer, the Zuccarello plea agreement of June 1986. Correspondence to Grietzer references the agreement and indicates that a copy was attached to the letter. (ROA 113). And on September 18, 1996, the deposition of Metro Dade detective Joe Gross was taken in the Jay Richitelli case. (ROA 59-109). Therein he discusses at great length the content of two meetings he had with Zuccarello on April 4th and April 18th, in 1986. [2] (ROA 64-65). Gross' deposition mirrors the "synopsis" appellant claims is newly discovered evidence in these proceedings. [3]

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[2] Gross transcribed his notes, ("synopsis") from those meetings and distributed it to various law enforcement agencies. (ROA 65).

[3] Zuccarello was an informant for numerous agencies, and in fact he was assigned a control officer from Metro-Dade, Detective Baker. (ROA 63, 64). Due to the volume of information Zuccarello provided, FDLE agent Emerson was tasked with ensuring that valuable and relevant information was disseminated to the proper law enforcement agencies in South Florida. (ROA 64). Discussions with Zuccarello ranged from his participation in twenty to thirty home invasion robberies as well as his knowledge of at least forty-six crimes. (ROA 63-65, 68-69, 71, 93, 106). At times Zuccarello would hold back information because he was attempting to negotiate a better plea deal. (ROA

All of the information appellant claims is newly discovered evidence was in the public domain via deposition, bond hearing and discovery pleadings in cases where Zuccarello was listed as a witness against his co-defendants, almost a year prior to his testimony in this case. Consequently, none of appellant's information can be considered newly discovered evidence to warrant the filing of a successive motion. Bolender v. State, 658 So. 2d 82, 84-85 (Fla. 1995)(precluding successive motion on claims that co-defendant was a state informant cooperating with the state due to appellant's failure to explain why he could not uncover this information any sooner); Mann v. State , 937 So. 2d 722 (Fla. 3rd DCA 2006)(upholding summary denial of Brady claim as the identity of witnesses was easily ascertainable and would not have taken much effort to secure).

Moreover, Zuccarello's trial testimony establishes that appellant was well aware of Zuccarello's extensive criminal history, his participation with law enforcement agencies and his plea agreements. He testified on direct examination to the following:

68, 74). Gross also mentioned that they would take Zuccarello out of the facility so he could show them different areas where different crimes occurred. (ROA 69). Gross refused to answer any questions about the investigation into the Cohen murder which was being investigated at that time. However he did state that he and Zuccarello did not speak about it at that time. (ROA 94, 95). Zuccarello entered into a plea deal in Dade County and received 5-10 years. (ROA 95-96).

Q: Where there any promises made whatever about your testifying?
A: No.
Q: And are you presently under sentence?
A: Yes. I am.
Q: And what are you under sentence for? How many years did you get Frank?
A: Seven years.
Q: And there was one in Dade and also in Broward; is that correct?
A: Yes. Five in Dade and one in Broward.
Q: Do you have anything pending right now?
A: Yes. I have a motion for mitigation.
Q: And what are you trying to mitigate?
A: To run with the five I have in Dade from the seven down to the five.
Q: You're looking for five, to go down two years?
A: Yes. I am.

(*Rivera I,* Trans. at 1407). On cross-examination, counsel emphasized Zuccarello's extensive criminal record and his lenient sentence:

Q: Were you not sentenced to prison time?
A: Yes. I was.
Q: And isn't that—at the Broward County jail, prison?
A: No, I think it's called the jail.
Q: You've been—have you been to prison yet?
A: Yes. I have.
Q: Where did you go?
A: South Florida Reception Center.
Q: Where is that?
A: In Miami.
Q: And long were you there?
A: Three weeks.
Q: And from there where did you go?
A: I came back here.
Q: And from here you said you are going home?
A: No. I'm not going home.
Q: Where are you going?
A: Back to prison.
Q: You met Mike in jail right?

A: Yes I did.
Q: How many times have you been convicted of a felony?
A: I was convicted of 23 felonies on two separate cases because that was part of my plea agreement that I cop out to all.
Q: Twenty-three felonies?
A: Yes sir.
Q: And you got just seven years?
A: Yes sir.
Q: And you say that the State of Florida has not made any deals with you regarding your testimony here today?
A: No, sir. Other than I had a mitigation filed and that's not guaranteed.
Q: Explain to us what a mitigation means in your terms.
A: In my terms? It's a hoping that the judge will see that my sentence be reduced down to the same time that I got in Dade County.
Q: And that would be what. Five years?
A: Five years.
Q: You have been in the system for a while now; correct?
A: Yes sir.
Q: Do you know how much time you did in five years?
A: Yes, sir.
Q: How much?
A: A little over half of it.
Q: Half of it? Two and a half?
A: Yeah
Q; And long have you been in jail now on these charges?
A: A year and a month
Q: So you're scheduled to get out soon; right?
A: In about a year and a half, yes.
Q: For 23 felonies?
A: Yes sir.

(Id. at 1409-1411). Counsel continued to focus on Zuccarello's criminal record and exceptionally lenient sentence:

Q: What were those charges? I don't think you ever told us?

A: What charges, sir?
Q: The two felonies.
A: They range from armed robbery to burglary, armed burglary.
Q: With a gun?
A: yes, sir. Credit cards, aggravated assault.
Q: What's an aggravated assault?
A: Aggravated assault is when you hit somebody.
Q: With a gun?
A: No, not with a gun. With your hands. Resisting arrest.
Q: Mr. Zuccarello, how old are you?
A: I am 22
Q: Any home invasions?
A: Yes sir.
Q: How many?
A: Three.
Q: What are those?
A: What are home invasions?
Q: Yes.
A: When you know people that are dealing large amounts of drugs and you go in there and you hold them up and you take their drugs.

(Id. at 1422-1423). Zuccarello explained to the jury that a basis for mitigation in the Broward cases, was his hope that his sentence mirrors what he received in the Dade charges. The plea agreement in fact references the state's intentions to have Zuccarello's Broward cases run concurrently with those in Dade. (ROA 63). Zuccarello listed in part, the charges he pled to in his Broward cases which mirror in part those in the plea agreement, i.e., armed burglary; armed robbery and aggravated assault. These trial excerpts establish that appellant knew at the time of trial that Zuccarello had entered into a plea

agreement in Broward County. Consequently, appellant's claim that he was unaware of Zuccarello's plea deal and informant status is refuted from the record. Archer v. State, 934 So. 2d 1187, 1203 (Fla. 2006)(explaining, "[w]e have held that the State is not considered to have suppressed evidence if such evidence was already known to the defense").

II INITIAL MOTION FOR POSTCONVICTION RELIEF

The trial court also found that appellant possessed information regarding Zuccarello's plea deal and his informant status well before he filed his first motion for postconviction relief. The record supports these findings. In 1991 and 1994, appellant made public requests pertaining to Zuccarello's status as a defendant, witness, suspect, and/or victim were made and the issue was extensively litigated. (*Rviera III*; ROA 77-89, 137). Appellant requested the following information regarding Frank Zuccarello:

> We are interested in any and all records regarding all the above cited persons as to their status as a defendant, witness, suspect and/or victim. Any computer generated information regarding any and all of the above persons as a defendant, witness, suspect and/or victim is requested. RIII, Case No. SC-01-2523).

(*Rivera III* ROA at 78)(emphasis in the original). Appellant also requested; all "jail records"; "investigation reports"; "log sheets and or other records which reflect the physical

location and movements of any suspects"; "all notes of investigators, detectives, and other officers and personnel"; "and any all records and reports of polygraph examinations". (Id at ROA 78-79).

The Broward State Attorney's Office complied and sent letters to appellant outlining the information that was disclosed and identified that which was being withheld pursuant to a statutory exemption. Information turned over to appellant included the criminal case files of Zuccarello in cases 85-4911CF; 86-3841CF; 86-3602CF; 86-3288CF, (*Rivera III* at ROA 82-83)[4], and the criminal files of Zuccarello's co-defendants, Jay Richitelli; Tom Josilyn; Scott Richitelli; and Anthony Caracciolo. (ROA 116-208; *Rivera III* at ROA 82-89). Those files illustrate Zuccarello's status as an informant and soon to be a witness.[5] Also included in the case files was the deposition of Joe Gross; the witness lists in the cases of Scott and Jay Richitelli, Anthony Caracciolo, and Thomas Josilyn; the taped statement of Frank Zuccarello taken on July 9, 1986[6]; and the correspondence from Broward Assistant State Attorney, Joel

[4] These are the cases in which Zuccarello pled guilty on June 12, 1986. (*Rivera IV* at 63).

[5] Additional files were provided on Donald Mack, Scott McGuire, Thomas Nial, William Moyer, Mark Bizzell, Peter Salerno, Andrew Coniglio, and Charles Beers. (*Rivera III* at 82-89).

[6] The statement was included in the case file of Tom Josilyn. (ROA 170-205).Therein Zuccarello discusses his participation in or knowledge about home invasion robberies with the Richitellis, Josilyn, and Caracciolo. (ROA 170-203).

Lazarus, indicating that he turned over to counsel for Jay Richitelli, Zuccarello's plea agreement of June 1986. (ROA 113).

Following the state attorney's disclosure, the trial court conducted a status hearing and a three day evidentiary hearing on all outstanding public records issues. [7] Those hearings were held on May 13, 1994; July 22, 1994; August 25, 1994; and September 23, 1994. (*Rivera II* at Tran. Vol. I-III 1-284 and Vol. I 1-186). Throughout those hearings there were numerous discussions between appellant's counsel and the Broward State Attorney's Office regarding documentation of compliance with Rivera's public record requests. (*Rivera II* at Tran. 67, 143-149, 161-167, 228-233,277). Appellant's counsel referred to Zuccarello as a "confidential informant," on several occasions. (Id at Tran. 28, 29, 138-140).

Based on the information appellant received regarding Zuccarello, Rivera amended his motion for postconviction relief to include claims XX and XXI. In claim XX he alleged:

CONFIDENTIAL INFORMANTS

> At trial, one of the state's key witnesses was Frank Zuccarello, a professional informant. Mr. Zuccarello had testified many times previously in exchange for lenient or favorable treatment. Despite Mr. Zuccarello's history of making deals with the State, he testified that the State

[7] Rivera never appealed any of the trial court's public records rulings nor made any claim that the state had not complied with any of his public records requests.

> had made no promises to him and there was no deal.

(*Rivera II* at ROA 1553-1566). Appellant attached a letter from Assistant State Attorney, John Kastrenakes, the prosecutor in the Cohen murder, to Commissioner Wainwright of Florida's Department of Corrections:

> Please be advised that I am the Assistant State Attorney who prosecuted the above captioned inmate in the Dade County Circuit Court for the home invasion robbery in which he received five years in the State Penitentiary (case number 86-7926 and 86-13578). Mr. Zuccarello has and continues to be a cooperating State witness in reference to several home invasion robberies involving numerous co-defendants as well as homicide investigations being conducted by the City of Miami Police Department, Ft. Lauderdale Police Department, Metro-Dade Police Department and Broward County Sheriff's Office.

(Id. at ROA 1563)(emphasis added).

Claim XXI alleged that the state withheld impeachment evidence of a plea deal between Zuccarello and the state in violation of Brady v. Maryland, 373 U(.S. 696 (1963). (*Rivera II* at 1553-1566).

During the evidentiary hearing on this claim, collateral counsel questioned former prosecutor Kelly Hancock about Zuccarello's plea and informant status:

> Q. So when you wrote this letter that you were aware that Zuccarello, in June of 1986, was convicted of conspiracy to commit armed robbery, armed burglary of a structure, two,

> three counts of- two counts of kidnapping and one count of unlawful possession while engaged in a criminal offense, you were aware of that?.
> A. Well, I was aware. I thought he had convictions for home invasions, what my recollection was, and I knew there was several home invasions, how many, I don't know. I think the –the defense attorney brought that out in his cross examination, and I think he plead to several down there, quite a few that her plead to in Dade County.

(*Rivera II* Case No.86,528 trans 690). Counsel continued:

> Q So you were aware in a separate case in Dade County that he was also convicted of one count of conspiracy to commit armed robbery, one count of armed burglary of a structure, one count of armed robbery and three counts of kidnapping in a separate case in Dade County?
> A. Well I don't know if it was separate, I knew he had convictions and I knew they were serious crimes, so the answer would be yes. What they were, I'm not sure I knew exactly what they were, I knew they involved home invasions.

(*Rivera II* 691). In fact, counsel then detailed the convictions obtained from the plea of June 1986:

> Q <u>Also in June of 1986 in Fort Lauderdale, were you aware that Mr. Zuccarello was convicted of one count of kidnapping, one count of burglary and three counts of robbery, this is in Fort Lauderdale?</u>
> A. In Fort Lauderdale, he had some pending charges in Broward County also, and I think at the time he testified, I believe there was a motion to mitigate pending.
> Q. <u>Also in June of 1986 in another separate case, Mr. Zuccarello was – were you aware that he was convicted of two counts of forgery of a credit card?</u>

(Id.) This record conclusively demonstrates that appellant had the information regarding Zuccarello's plea deal and informant status and presented it as a claim in his first motion. Re-litigation is not permitted. Diaz v. State, 31 Fla. Law Weekly S833 (December 8, 2006)(rejecting claim of newly discovered evidence in successive motion as the information was discusses at pre-trial conference and therefore, "[a]s all of this is contained in the hearing transcripts in the record on appeal, it can hardly be new evidence to Diaz"); Downs v. State, 740 So. 2d 506, 518 n.10 (Fla. 1999)(precluding re-litigation of claim raised in his first motion even if based on different facts); Swafford v. State, 828 So. 2d 966, 978 (Fla. 2002)(finding Brady claim procedurally barred as it was raised and rejected in first motion).

III. FOLLOWING REMAND OF CASE IN 1998

Appellant pursued this issue again following a remand by this Court for an evidentiary hearing on appellant's claim of ineffective assistance of counsel assistance of counsel at the penalty phase. See Rivera v. State, 717 So.2d 477, 484-485 (Fla. 1998). During preparation/discovery process, Rivera filed a demand for additional public records pursuant to Fla. R. of Crim Pro. 3.852(h)(2) on December 30, 1998. (*Rivera III*, ROA 30-52). Therein, Rivera again requested all files wherein Frank

Zuccarello was a defendant, victim, or witness. Rivera claimed that the state's initial compliance back in 1994 was incomplete because only those records wherein Zuccarello was a defendant had been provided. (*Rivera III*; ROA 31, 90). The state countered with conclusive documentation of its previous compliance to the request encompassing Zuccarello as a witness, victim and/or defendant. (*Id.* ROA 53-89). (*Rivera II*; ROA 140). After reviewing the pleadings and transcripts from the public records hearings, the trial court concluded that, "The above-referenced Exhibits and the Court Record compel the conclusion that Defendant Michael Thomas Rivera's chapter 119 requests have been fully and fairly considered previously, and any doubts as to the Defendant's rights to records relating to Zuccarello have been ruled upon." (*Rivera III* at ROA 137).

Following the evidentiary hearing on the claim of ineffective assistance of counsel assistance of counsel, the trial court denied all relief. This Court upheld that ruling. Rivera v. State , 859 So. 2d 495 (Fla. 2003).[8]

IV. SUCCESSIVE MOTION IN 2004

The trial court below denied properly, appellant's fourth attempt to resurrect this claim involving Frank Zuccarello. The records of appellant's three prior appeals as well as those

[8] Rivera did not appeal the trial court's public records rulings.

portions of the records that were attached to the state response below, (ROA 54-222), completely refute any claim that appellant was unaware of Zuccarello's plea agreement and unaware of the fact that Zuccarello was a very active informant for numerous law enforcement agencies. The trial court properly concluded that these records demonstrate that counsel knew or should have known about this information at the time of trial, or at the very latest at the time he filed his initial motion for postconviction relief.

Appellant argues that he is entitled to an evidentiary hearing on whether the information is newly discovered simply by virtue of the fact that collateral counsel said he did not have the information prior to the filing of the first motion. He claims that through "serendipity" he obtained documents from "a Miami criminal defense attorney" while collateral counsel working on "an unrelated case" involving "a capital defendant" in "mid-2002" but did not review it until spring of 2003. **Initial brief at 47, 63, 64.** This explanation is wholly inadequate to justify an evidentiary hearing on the diligence element of a claim of "newly discovered" evidence. Appellant does not name the defense attorney from whom he received the file, he does not name the capital defendant that he was representing, and he does not name the prosecutor targeted in the file. His vague explanation and conclusory claim is legally

insufficient as pled as it does not establish that even with due diligence Rivera could not have obtained this information prior to litigation of his first motion for postconviction relief.[9] The trial court was not required to grant appellant an evidentiary based on that conclusory and inadequate "explanation." Moreover, as detailed extensively above, his protestations are severely rebutted by the record. The court's summary denial was proper.

Unlike the facts of Swafford v. State, 828 So. 2d 966, 977-978 (Fla. 2002), the state herein did object to appellant's assertion that this information was newly discovered and corroborated that objection with extensive cites from the records. And a public records evidentiary hearing was conducted and factual findings were made regarding outstanding public records issues prior to the filing of his first motion. Appellant ignores this proof and simply asserts that his current counsel did not have the information before 2002. The unrebutted facts demonstrate that that the information was available and had been since 1986, and therefore appellant either possessed the documents or with due diligence could have

[9] Current counsel is the fourth collateral attorney who has represented Rivera. Prior counsel Melissa Donohoe previously admitted at a public records hearing that she filed additional public demands in this case in October of 1998 even though she had not ever reviewed all the boxes that contained public records information for Rivera. (ROA 124).

obtained them well before the filing of his first motion. Summary denial was proper. See Bolender v. State, 658 So. 2d 82, 85 (Fla. 1995)(finding that state witness' status as an informant and information regarding plea deal with the state could have been discovered before filing of successive motion).

Irrespective of the fact that the appellant cannot establish that the evidence in support of his claim is not new, he also has failed to demonstrate that the plea agreement of June 1986 encompassed Zuccarello's participation in this case. In support of this argument appellant asserts that Argentine, a law enforcement officer named in the plea agreement, was involved in appellant's prosecution. Appellant also claims that prosecutor Joel Lazarus, also named in the plea agreement, was the prosecutor in this case. Appellant writes, "[w]hen 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." **Initial brief at 63.** The records refute these assertions.

In 1986 Zuccarello gave a statement to Detective Phil Amabile form the Broward Sheriff's Office regarding his conversations with Rivera. Amabile was the lead detective in

this case. (*Rivera I* 1262-1269, 1271, 1285, 1407, 1414-1415).[10] Argentine was never involved in this case. Likewise, Joel Lazarus was never a prosecutor in this case.[11] Kelly Hancock was the only prosecutor and therefore the only one authorized to make any deal with any witness regarding their testimony in this case. In fact Hancock testified that he and he alone was responsible for this case, there was no prosecution team, and no one was authorized to offer any deal to Zuccarello. (*Rivera II* trans. At 560, 695). [12]

Moreover, Zuccarello's plea agreement deal of June of 1986, excluded specifically Zuccarello's participation in any homicide case. The plea agreement states,

> Any participation in any HOMICIDE case will be handled separate and apart from this agreement, by Assistant State Attorneys in the Homicide division.

(ROA 63). Clearly, Zuccarello's participation as a witness in this homicide case is expressly excluded from the terms of the plea agreement. See paragraph four. (ROA 63). There was no

[10] Sergeant Carney, mentioned in the plea agreement testified at this trial, however it is clear that his involvement was limited to listening to Rivera's statement. Carney never spoke to Zuccarello.

[11] Joel Lazarus was the prosecutor in the cases of Jay and Scott Richetelli and Anthony Caracciolo. (ROA 113-117, 207-208) Joel Lazarus may have prosecuted Rivera for another crime but he was never involved in this case. (*Rivera II* at 560, 695).

[12] Rivera did not present any contrary evidence at the 1995 evidentiary hearing. In fact, Rivera presented no evidence in support of this claim.

false testimony presented by Hancock. Summary denial was proper. Rodriguez v. State, 919 So. 2d 1252, 1270 (Fla. 2005)(rejecting Giglio claim finding that testimony of witness was not false).

In conclusion, the motion was successive, and the record refutes any claim that the information presented below was "newly" discovered. Furthermore, the record establishes that Zuccarello was impeached at trial; and that there was never a plea deal that encompassed his testimony in this case. Appellant cannot overcome his burden to establish that he was entitled to pursue a successive motion in this already heavily litigated claim. Summary denial was proper.

ISSUE III

RIVERA'S CLAIM THAT THE STATE INTENTIONALLY WITHHELD OR THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO UNCOVER EXCULPATORY EVIDENCE IS PROCEDURALLY BARRED AND WITHOUT MERIT

Rivera claims that he was unconstitutionally deprived of exculpatory evidence regarding Frank Zuccarello's status as a confidential-informant. He alleges that he was deprived of this evidence due to the state's failure to disclose the information in violation of Brady v. Maryland 373 U.S. 83 (1963) or through trial counsel's ineffectiveness in failing to discover it in violation of Strickland v. Washington , 466 U.S. 668 (1984).

The exculpatory evidence detailed herein includes the

identical information that he relied upon in Claim II,[13] and adds the following: (1) two confidential memos from June of 1986, regarding Zuccarello's deception during a polygraph examinations regarding the Cohen homicide; 2) an internal police memo dated July 28, 1987, where law enforcement comments on Zuccarello's informant status; (3) a newspaper article dated October 1, 1998 reporting that "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." **Initial brief at 74 ;**(4) a newspaper article dated June 25, 2001 regarding a hearsay statement that Rivera may have invoked his right to an attorney before February 18, 1986. **Brief at 73-74, 78-80**.

The trial court determined that the information detailed in the confidential memos regarding polygraph results as well as the internal memo regarding Zuccarello's informant status was information that either was known or could have been known to appellant prior to the initial motion for postconviction relief. (ROA 174). Information detailing Zuccarello's status as an informant was well known to appellant as detailed extensively in the prior claim. Moreover, the Cohen trial received extensive publicity and as the court noted, Zuccarello's participation in same was readily available prior to the filing of the initial

[13] Appellee will rely on the argument and facts presented in the previous issue in response to this specific information.

motion for postconviction relief in 1994-1995. (ROA 174). Consequently, the claim either under Strickland or Brady was successive and dismissal was proper. See Bolender v. State, 658 So. 2d 82, 85 (Fla. 1995)(finding that state witness' status as an informant and information regarding plea deal with the state could have been discovered before filing of successive motion).

In any event, on the merits, appellant's claims must also fail for the following reasons. Zuccarello testified in this case in April of 1987. He testified in the Cohen case in October of 1989. Obviously any "evidence" in support of the claim that Zuccarello testified falsely at the Cohen murder trial was not in existence at the time of Rivera's trial. Consequently the state cannot intentionally withhold nor could defense counsel ever have uncovered "evidence" related to his testimony in the Cohen case. Summary denial was proper. Wright v. State, 857 SO. 2d 861, 871 (Fla. 2003)(rejecting claim of newly discovered evidence because reports and memorandum identified as newly discovered were not generated until three years after trial, "we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings.")

Additionally, none of the information would have been admissible at Rivera's trial. The result of any polygraph examination would have been prohibited as such information would

be admissible at trial because it is inadmissible absent consent of both parties. See Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982); Pendelton v. State, 348 So. 2d 1206 (4th DCA 1977).

Additionally, the opinions of others presented in newspaper articles are not discoverable or admissible evidence that would support any claim under Brady or Strickland. Opinions regarding the veracity of someone's testimony or the admissibility of someone's confessions[14] are not admissible evidence nor is it even useful.[15] It is nothing more than long after the fact hearsay which does not come within any hearsay exception. See Guidinas v. State,693 So. 2d 953 (Fla. 1997)(finding that Chambers v. Mississippi is limited to statements against penal interest, and therefore contents of interviews with other potential suspects is inadmissible hearsay); Crump v. State, 622 So. 2d 963, 969 (Fla. 1993(finding hearsay properly excluded even in capital case where statement did not fall within

[14] A motion to suppress Rivera's confession was held. The state presented three witnesses who testified that Rivera was given his Miranda warnings on five separate occasions. Rivera also signed a consent form to search his residence and a consent to take a polygraph. Rivera did not present any evidence at the hearing. (*Rivera I* at 7-91).

[15] In a separate claim, appellant argues that the trial court should have allowed him to supplement the motion with a transcript from a federal evidentiary hearing in the Cohen case. The trial court's denial of that request was proper. As noted above, Zuccarello's testimony in the Cohen case did not exist at the time of this trial and therefore it could not have been presented. Wright v. State, 857 So. 2d 861,871 (Fla. 2003). Further, opinions about Zuccarello's veracity are not admissible evidence that could have produced an acquittal at trial.

recognized exception). Therefore even if counsel could have uncovered this information it would not have been useful. Summary denial was warranted.

Additionally, any claim regarding Lt. Rios' opinions is something that could have been presented in the first motion for postconviction relief. Therefore summary denial was again warranted. Rios was listed as a state witness before trial, and was deposed by trial counsel on January 15, 1987. (ROA 203, 209-211). Additionally, Rivera subpoenaed Rios for the public records hearing in 1994 and then ultimately excused from his subpoena. (*Rivera II* at ROA 178). Appellant's claim that these newspaper articles are a basis for an evidentiary hearing is frivolous.

Finally, the trial court determined that even if admissible, any further impeachment of Zuccarello regarding his informant status would not have changed the outcome of this case either under Brady or under Strickland. State v. Reichmann, 777 So.2d. 342, 365 (Fla. 2000)(rejecting claim that withheld evidence was material, "[a]s far as the waiter's statements made to the police that Riechmann and Kischnick were in a festive mood the night of the murder, this evidence does not establish a Brady claim because it serves as cumulative evidence.")

ISSUE IV

THE RESULTS OF RIVERA'S DNA TESTING DOES NOT ENTITLE HIM TO A NEW TRIAL

Following no objection by the state and with the trial court's permission, Appellant conducted DNA testing on a hair that had been introduced into evidence. The hair had been found in the van Rivera used to transport the victim Staci Jazvac. State witness Howard Seiden testified that the hair could have belonged to Staci. (ROA 1305). DNA testing now conclusively reveals that the one strand of hair found was not that of the victim. This evidence if presented at trial would have resulted in an acquittal. **Initial brief at 93.**

The trial court denied the claim finding that the jury was never told that the hair was in fact that of Staci Jazvac and there was overwhelming evidence of Rivera's guilt. (ROA 177-180). Appellant claims that the trial court erred in denying him a new trial under Jones v. State, 591 So. 2d 911 (Fla. 1991). Rivera is incorrect.

First and foremost, the jury was never told that the hair was that of Staci's. In fact the jury was well aware of the limited value of this evidence. Seiden stated on direct examination:

> A. It's my scientific opinion that the hair found 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.
Q. And when you say could be, is there ever a positive identification in reference to hair?
A. With respect to hairs, I don't think of it as a fingerprint. It's not unique, so it's not to the exclusion of everyone else.

Hairs do not contain enough microscopic characteristics to be able to exclude everyone else on a hair match.
Q. But it was your determination it could have originated from the source of Staci Jazvac.
A. Oh, certainly. Yes sir.

(*Rivera I* at 1305). On cross examination, the jury was again told of the very limited value of hair analysis/comparison:

Q. Now these hairs that you've found, hairs don't possess a sufficient number of unique individual microscopic characteristics to be positively identified as having originated from the particular person, to the exclusion of all others; isn't that correct?
A. That's correct.
Q. And isn't true that when you prepare a report on hair analysis, you specifically put that paragraph in all your reports?
A. Yes, sir. In fact, where I was trained with the FBI in a training school, they in fact recommended putting that on there.
Q. Now you agree that no—that there isn't the same fingerprint? You can't find the same fingerprint on different people; right?
A. Well, I am not an expert in fingerprints, but from my layperson's knowledge in that and what I know from common knowledge, finger prints are unique.
Q. As far as hair is you can find the same similar characteristics on different people; right?
A. I would imagine if you were to go out and make a comparison on a hair, there's a good chance that the next guy you pick down

> the street might have the same similar characteristics or you might have to go through the whole State of Florida or Broward County to find it.

(ROA 1313-1314). And during the state's closing argument the prosecutor reminded the jury that the there was no positive identification but the hair was consistent. (ROA 1793, 1866). At no time was the jury told that this evidence was conclusive or that it was full proof.

Second, the evidence of Rivera's guilt was overwhelming, consequently any error in telling the jury that a hair "was consistent" with that of the victim was harmless beyond a reasonable doubt. The un-assailed evidence was as follows. Michael Rivera, consistently admitted to five separate people that he killed Staci Jazvac. On February 7, 1986, before Staci's body was found, he called Star Peck, a former work colleague. Rivera had been calling Peck since September of 1985. He admitted to her that he abducted and killed Staci. He grabbed her from behind as she was getting off her bike and he dragged her into a van. (*Rivera I* at 1086-1091).[9] In all his previous calls to her he never mentioned killing anyone. His demeanor this time was different than any other call. (*Rivera I* at 1083-1107).

[9] In previous calls, he has admitted to Star that he wears women's clothing and pantyhose. (*Rivera I* at 1086, 1097).

On that same night, Rivera called Angela Green. She too had received calls from Rivera in the past. This time the call was different. (*Rivera I* at 1246). He told Angela that he "had Staci" and that she was gone and would never be found. He stated that he was wearing his pantyhose during the attack. (*Rivera I* at 1242-1247). Years later when confronted with the fact that he admitted this crime to both Peck and Green, Rivera attempted to explain away his admissions by saying that they were sexual fantasies.[11]

While in jail, Rivera confessed to three different inmates that he killed Staci Jazvac; Frank Zuccarello (*Rivera I* at 1402-1422); William Moyer (*Rivera I* at 1474-1499); and Peter Salerno (*Rivera I* at 1574-1580). Rivera admitted to attacking Jennifer Goetz, but that someone came and scared him away. Rivera also told one of the inmates that he made a big mistake in trusting Star Peck. (*Rivera I* at 1402-1408).

During his discussions with the police, Rivera made various incriminating statements. For instance when Rivera was taken

[11] During litigation of his initial postconviction motion, Rivera attempted to present evidence to establish that his admissions to Peck and Green were in fact fantasy. However his own expert witness Dr. Berlin could not make that assessment. Berlin candidly stated that he could not say that Rivera's statements to others regarding the murder of Staci Jazvac were simply fantasy. They could have been actual admissions. (*Rivera II* at 398, 411). Berlin admitted that if Rivera in fact had not killed Staci Jazvac, he was certainly headed in that direction. (*Rivera II* at 411).

into custody and brought to the sheriff's office for questioning, he stated, "If I talk to you guys, I'll spend the next twenty years in jail." (*Rivera I* at 1011-1012). Rivera told Detective Scheff that he fantasized about murdering a young girl. (*Rivera I* at 1015). Rivera also admitted to Scheff that he borrowed a friend's van and would drive around neighborhoods looking for young girls, and that he would render them unconscious. (*Rivera I* at 1017-1019). Scheff asked Rivera where they would find Jazvac's body and he said it was his belief that it would be found locally. (*Rivera I* at 1020). Staci's body was found the next day in Coral Springs. (*Rivera I* at 1026).

Once arrested Rivera was turned over to Detective Eastwood for questioning. He told Eastwood that he was home alone at the time of Staci's abduction. (*Rivera I* at 1327). Rivera admitted to Eastwood that he liked to expose himself to young girls and he did so in the Coral Springs area numerous times. Coral Springs was a desirable location because there was less of a chance of getting caught. (*Rivera I* at 1328-1329). Rivera told Eastwood that he fantasized about raping young girls. (*Rivera I* at 1330). When asked if there was anything special about any of the girls that he had exposed himself to, he said that about two weeks earlier, one of the girls was pushing a bike. (*Rivera I* at 1330-1331). Rivera was then given his Miranda warnings.

(*Rivera I* at 1331). He admitted to doing terrible things when he got into a vehicle. Rivera broke down and stated, "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 doing what I'm doing if you don't stop me." (*Rivera I* at 1332-1333). Eastwood told Rivera that he thought Rivera had killed Staci, and he asked where he put the body. Instead of denying that he committed the crime, Rivera responded, "Tom, I can't tell you." I don't want to go to jail. They will kill me for what I have done." (*Rivera I* at 1333). Rivera continued crying and the interview was stopped. (*Rivera I* at 1337).

Rivera also spoke to Sgt. Carney. When asked where he was the night Staci disappeared, Rivera said that he was out with his brother all night. (*Rivera I* at 1263). He was then asked if he had ever met Staci Jazvac or if he had ever seen her. He responded that he had never seen her. (*Rivera I* at 1263). A short time later, Rivera was told that they had found Staci and it was possible to detect fingerprints on the body. They further stated that if his fingerprints were on the body it could mean only one thing. (*Rivera I* at 1264). Rivera responded that he thought the police did have fingerprints. There was a notable change in his demeanor when he was told about the possibility of fingerprints. (*Rivera I* at 1266). At that point he asks to see a photograph of Staci. Rivera then

states that he had seen her once before at a gas station in Lauderdale Lakes. When pressed again, he admits that he had seen her on one other occasion although he can't remember when. (*Rivera I* at 1264-1265).

In addition, to the multitude of incriminating statements, collateral crime evidence was also introduced. Jennifer Goetz testified that she was attacked on her way home form summer camp in July of 1985. She was grabbed from behind and pulled off the sidewalk. She was told to shut up or she would be killed. She was turned over on her stomach and she passed out. She woke up naked with a bag over her head. Her attacker was in his mid-twenties with dark curly hair. (*Rivera I* at 1453-1464).[10]

This evidence overwhelmingly establishes Rivera's guilt. The evidence demonstrates that Rivera lied on two occasions regarding his whereabouts on the night of Staci's disappearance. The evidence established that Rivera was within one block from where Staci's bike was found around the time she was abducted. When confronted with the possibility that his fingerprints could be detected on the body, he changes his earlier statement that he had never seen her to admitting that he had seen her on two separate occasions. Furthermore, specific details provided by

[10] Rivera was convicted of the attempted murder and kidnapping of Jennifer Goetz. Rivera v. State, 547 So. 2d 140 (4th DCA 1989).

Rivera to different people are corroborated by the physical evidence. For instance, Rivera admitted that Staci was walking her bike when he abducted her. That is consistent with the evidence. Staci's bike was found in sugar sand, a substance that would make riding a bike impossible. There was pantyhose found at the crime scene. Rivera admitted to wearing pantyhose on many occasions, including the night he abducted Staci. The medical examiner testified that Staci had bruises on her head. Rivera admitted that he dragged her into the van. Rivera was in possession of a blue van at the critical time of Staci's disappearance. Rivera admitted that he used a van to abduct Staci. This overwhelming evidence clearly establishes that Seiden's testimony was harmless error beyond a reasonable doubt. Cf. Reed v. State, 875 So. 2d 415 (Fla. 2004)(noting with approval the trial court's finding that evidence which established the presence of hair that is consistent with the defendant's hat is less significant than evidence establishing a positive identification of the defendant's hat)(emphasis added). Summary denial of this claim was proper.

CLAIM V

RIVERA' CLAIM THAT JUDGE FERRIS WAS BIASED AGAINST HIM AT TRIAL AND DURING LITIGATION OF THE MOTION FOR POSTCONVICTION RELIEF IS PROCEDURALLY BARRED

Rivera claims again that Judge Ferris exhibited bias against him as demonstrated by his two comments in a recent newspaper article. The comments were: "I had great confidence in the prosecutor"; "I wanted the defendant to get a fair trial at all costs, although my personal beliefs might not have been the same." **Initial brief at 96-97.**

The trial court found the claim to be successive as a variation was raised and rejected in the first motion for postconviction relief. Rivera v. State, 717 So. 2d 477, 480-482 (Fla. 1998). (ROA 177). The trial court's ruling was proper. Pope v. State, 702 So. 2d 221 (Fla. 1997)(determining that successive motion which raises variation of same claim raised in initial motion must be summarily denied).

As for the merits, the statements by Judge Ferris do not demonstrate any bias against Rivera. Judge Ferris stated that he wanted "to give appellant a fair trial at all costs." (ROA 177). Indeed they are the same type of statements that were previously found not to have been improper in Rivera's original motion. Rivera, supra. Summary denial is warranted. Jackson v. State, 599 So. 2d 103 (Fla. 1990).

CONCLUSION

WHEREFORE, the State respectfully request that this Court AFFRIM the trial court's denial of all of Appellant's successive motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Martin J. McClain, Esq., 141 N.E. 30th St., Wilton Manors, Fl. 33334 this 24th day of January, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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