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

REPLY 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

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ARGUMENT I

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

A. Introduction

In its half-hearted Answer Brief, the State can only defend the circuit court's summary denial by ignoring this Court's well-established jurisprudence that in determining whether an evidentiary hearing is warranted on a Rule 3.850 or 3.851 motion, the factual allegations set forth therein must be accepted as true. *See* Card v. State, 652 So. 2d 344, 346 (Fla. 1995); Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989). The State tries to circumvent this Court's well-established jurisprudence in two ways. First, the State relies upon the circuit court's order denying an evidentiary hearing as making binding factual "findings" that are contrary to and reject Mr. Rivera's factual allegations.[1] Second, the State relies upon

[1] Early in its joint discussion of Arguments I and II, the State indicates that relief was denied by the circuit court on the basis of its "finding" which the State thereupon quotes (Answer Brief at 5). Within the quote, the "finding" is clearly a factual one, made without benefit of an evidentiary hearing.

Subsequently, the State says "the trial court **found** that the plea agreement did not encompass this case" (Answer Brief at 6)(emphasis added). Again, the State is relying upon the circuit court as having made a binding factual finding without having conducted an evidentiary hearing.

Later, the State says, "The trial court also **found** that appellant possessed information regarding Zuccarello's plea deal

non-record material that apparently accompanied its response to Mr. Rivera's motion to vacate.[2] This non-record material consisted of documents from the State Attorney's files in other cases, and which were not in evidence at Mr. Rivera's trial or in his prior collateral proceedings.[3] By resorting to reliance

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and his informant status well before he filed his first motion for post conviction relief" (Answer Brief at 14)(emphasis added). Once again, the State is relying upon the circuit court as having made a binding factual finding without having conducted an evidentiary hearing.

The State then says that "The record supports these **findings**" (Answer Brief at 14)(emphasis added). Here, the State is treating the standard of review to be that which applies to determinations of historical fact made after an evidentiary hearing, *i.e.* whether there is evidence in the record to support the circuit court's finding of fact.

[2] The documents on which the State seeks to rely are labeled as exhibits 1-9 (1/3/07 Supplemental Record at 54-168). These "exhibits," though apparently accompanying the State's 2004 response, were never identified within the response as being relied upon (3PC-R. 117-40). Counsel can find no reference to attached or accompanying "exhibits" in the response. In fact, the clerk's office in preparing the record was unaware that the exhibits went with the response and did not include them with the record submitted to this Court. Only after the submission of the Initial Brief did the State move to supplement the record with the "exhibits" that it had submitted to the circuit court outside the parameters of an evidentiary hearing.

[3] In its Answer Brief, the State makes representations as to what the documents in "exhibits 1-9" are (Answer Brief at 9-10, 15-16). These factual representations are without evidentiary support. Within these representations, the State seems to concede that these "exhibits" were not documents from Mr. Rivera's case nor were these documents within the court files in his criminal prosecution. Since there was no evidentiary hearing, there is no sworn testimony identifying these documents nor explaining how these documents from others criminal cases not involving Mr. Rivera were relevant to his claims.

upon non-record material, the State has in fact conceded an evidentiary hearing is required. *See* McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993)(by attaching materials outside the record to refute the allegations contained in a motion to vacate, the State demonstrates the need for evidentiary development); Gholston v. State, 648 So. 2d 192 (Fla. 1st DCA 1994)(same); Flores v. State, 662 So. 2d 1350 (Fla. 2nd DCA 1995)(same); Mogford v. State, 883 So. 2d 340 (Fla. 4th DCA 2004)(same).

B. Legal Analysis

Despite some twenty pages attempting to defend the circuit court's summary denial, the State does not address the central questions of Mr. Rivera's Arguments I and II.[4] The Answer Brief *never* contends that Zuccarello's *written plea agreement* was disclosed to Mr. Rivera at the time of trial or in the prior Rule 3.850 proceeding (*see* Answer Brief at 4-25). The Answer Brief *never* contends that the "*prisoner receipts*" were disclosed to Mr. Rivera at the time of trial or in the prior Rule 3.850 proceeding (*see* Id.). The Answer Brief *never* contends that *Detective Gross's reports* were disclosed to Mr. Rivera at the time of trial or in the prior Rule 3.850 proceeding (*see* Id.). The State's Answer Brief seems to assume

[4] The State's brief combines Arguments I and II.

that there can only be one Giglio/Brady claim. It assumes that additional undisclosed exculpatory evidence that amplifies and broadens the favorable nature of undisclosed evidence previously litigated cannot be raised in subsequent proceedings when its existence is discovered. According to the State, Mr. Rivera had his one shot when he presented Giglio/Brady claims in his prior collateral proceedings. The State's position has been squarely rejected by this Court. Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate additional evidence supporting previously presented Brady claim).

The State's argument also rests upon an incorrect statement of the law applicable to Mr. Rivera's Argument II.[5] Mr. Rivera's Giglio claim is that the State presented false testimony at trial when Zuccarello testified that he had made no agreement with the State in exchange for his testimony. This is not a "newly discovered evidence" claim, as the State so fervently wishes (Answer Brief at 6-7, 8, 10, 19, 25). The claim is based on new evidence--that is, evidence which the State did not previously disclose. However, the legal basis of

[5] The State makes this argument by misrepresenting the basis of Mr. Rivera's claim. The State tries to convert Mr. Rivera's constitutionally based Giglio/Brady claims into newly discovered evidence claims under Jones v. State, 591 So. 2d 911 (1991), by mislabeling them.

the claim is Giglio v. United States, 405 U.S. 150, 153 (1972), where 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." If this occurs, 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. 419, 433 n.7 (1995).

The State argues that the circuit court's summary denial of Mr. Rivera's Rule 3.850 motion was proper because "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" (Answer Brief at 6).[6] However, the words employed by the State in its

[6] The falseness of the State's argument is revealed by the fact it has to rely on "exhibits 1-9," documents not from Mr. Rivera's court file, documents not even from the State's files regarding Mr. Rivera, but documents from other criminal cases involving criminal defendants unconnected to Mr. Rivera. The very fact that the State believes that "exhibits 1-9" are necessary--*i.e.* needed to be submitted to the circuit court, needed to be included in the record on appeal, and needed to be relied upon in the Answer Brief to refute Mr. Rivera's factual allegations--clearly demonstrates the falseness of its claim that "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" (Answer Brief at 6).

brief belie its argument that the circuit court's decision was merely a legal one, as opposed to a determination of contested historical fact. The State repeatedly uses the word "finding" when describing the underpinnings to the circuit court's decision to deny an evidentiary hearing (*See* Answer Brief at 5, 14). The "findings" that the State relies upon are clearly factual ones, made without benefit of an evidentiary hearing. The State also uses the word "found" in describing the circuit court determinations: "the trial court **found** that the plea agreement did not encompass this case" (Answer Brief at 6)(emphasis added). Similarly, the State argues that "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 post conviction relief" (Answer Brief at 14)(emphasis added).[7] Factual findings rejecting the factual

[7] It appears from the State's brief that the State believes that such a "finding" is justified upon the basis of "exhibits 1-9," documents from State Attorney files regarding other criminal defendants. However, these "exhibits" were not part of the court files and records in Mr. Rivera's case, were not introduced into evidence at an evidentiary hearing with a proper foundation laid, and were not subjected to the adversarial process in any fashion. Permitting a circuit court to summarily deny based upon such "exhibits" is akin to the circumstances in Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994), where this Court reversed and remanded for an evidentiary hearing after a summary denial of relief was premised upon non-record documents submitted by the State, while the defense was precluded from presenting evidence supporting the factual allegations in the motion to vacate.

allegations set forth in a motion to vacate can only occur after affording the movant the opportunity to prove his factual allegations.[8]

The problem here is that neither the circuit court nor the State, in its Answer Brief, have accepted Mr. Rivera's factual allegations as true. As a result, neither the circuit court nor the State have addressed Mr. Rivera's specific allegations that the documents he set forth in the motion to vacate and included in an appendix were not disclosed and demonstrate that the trial testimony of Zuccarello and collateral testimony of the trial prosecutor[9] were false.

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[8] The State's response to this seems to be an argument that the trial testimony and prior collateral testimony which Mr. Rivera alleged in his motion were false, and therefore can be relied upon in concluding that the factual allegation that the testimony was false is refuted by the record. That is, the State's argument is that the very testimony challenged as false refutes the allegation that it was false (*See* Answer Brief at 10-14, relying on Zuccarello's trial testimony as refuting Giglio allegation; and Answer Brief at 17-19, relying upon the trial prosecutor's collateral testimony as refuting allegation that the prosecutor's collateral testimony was false). This *Catch-22*, if accepted as the law, would preclude evidentiary hearings on any Giglio/Brady claims, which clearly has not been this Court's position. *See* Lightbourne v. State.

[9] For reasons that are unclear, the State insists in its Answer Brief on arguing that Kelly Hancock was the only prosecutor involved in this criminal prosecution of Mr. Rivera (Answer Brief at 24)("Joel Lazarus was never a prosecutor in this case. Kelly Hancock was the only prosecutor and therefore the only one authorized to make a deal with any witness regarding their testimony in this case."). For its false factual assertion, it relies upon Mr. Hancock's testimony in

Instead, the State relies upon generalized "information" about Zuccarello and upon representations lacking in evidentiary hearing support about the prior public records litigation in Mr. Rivera's case. The State's position seems to be that it disclosed enough "information" to convert its duty to disclose into an obligation upon defense counsel to discover.

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prior collateral proceedings at which he was not asked whether Mr. Lazarus was handling Mr. Rivera's "case" in June of 1986. As noted in the Initial Brief at 14, n.10, Mr. Rivera's allegation in the current motion to vacate was that, in June of 1986 when the deal was made with Zuccarello, Mr. Lazarus was the prosecutor assigned to Mr. Rivera's case. First, it is unclear how Mr. Hancock's testimony in which he was not asked about the events in June of 1986 (two months before the indictment in the present murder case was returned) refutes Mr. Rivera's factual allegation. Moreover, Mr. Rivera was arrested in February of 1986. His indictment was not returned until August because the assigned prosecutor, Mr. Lazarus, decided to prosecute a separate attempted murder case first (which was subsequently used as aggravation in the murder case), while he worked on developing evidence in the murder case. Under the controlling law, the State's insistence on contesting Mr. Rivera's factual allegations further demonstrates the need for an evidentiary hearing.

The State also for some reason insists on contesting Mr. Rivera's factual allegation that Deputy Nick Argentine was Zuccarello's original contact with law enforcement regarding Mr. Rivera (Initial Brief at 15, n. 12). In its Answer Brief, the State asserts, "Argentine was never involved in this case" (Answer Brief at 24). Again, it is unclear why the State insists on contesting Mr. Rivera's factual allegations, particularly this one, given the fact that Zuccarello testified that it was Deputy Argentine who he first contacted regarding Mr. Rivera (R. 1406) ("I told him [Argentine] that I met Mike in the cell and that he was - - he told me a couple of things and then he asked me what he told me"). Perhaps, the State is trying for the first time to acknowledge that Zuccarello's trial testimony contained falsehoods and is not worthy of belief.

Seemingly, the State's argument is that it was up to Mr. Rivera's counsel to ascertain whether the testimony presented by the State was truthful, and if not, to correct it. It was up to defense counsel to go find exculpatory evidence that the State did possess and, in some fashion, had placed in the "public domain" (Answer Brief at 10). However, this argument is contrary to the law that has been enunciated by the United States Supreme Court.

"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). 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. Merely placing exculpatory evidence somewhere in the "public domain" does not relieve the State of its obligation to disclose favorable evidence and/or correct false or misleading testimony.

In making its argument, the State also contends that Mr. Rivera either was or should have been aware of "information" about Zuccarello, arguing that "Zuccarello's status as an informant was known or could have been known" before trial (Answer Brief at 8-14). As support for this argument, the State

cites to the attachments to its circuit court response to Mr. Rivera's Rule 3.850 motion (Answer Brief at 8-10). The State cites to depositions, a bond hearing and discovery responses in other criminal cases in which Zuccarello was a witness (Answer Brief at 8-10). The State's citations and argument establish the need for an evidentiary hearing: the State does not accept Mr. Rivera's allegations as true, but instead attempts to offer its own version of the facts.[10] McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993)(by attaching materials outside the record to refute the allegations contained in a motion to vacate, the State demonstrates the need for evidentiary development); Gholston v. State, 648 So. 2d 192 (Fla. 1st DCA 1994)(same); Flores v. State, 662 So. 2d 1350 (Fla. 2nd DCA 1995)(same); Mogford v. State, 883 So. 2d 340 (Fla. 4th DCA 2004)(same).

Further, none of the criminal cases involved or mentioned in the "exhibits" concerned Mr. Rivera. The State's position is seemingly the position rejected by the Supreme Court

[10] Specifically, the State relies upon documents that it marked as "exhibits" and submitted to the circuit court. These documents were not submitted within the course of an evidentiary hearing. Testimony subject to cross-examination setting forth a proper foundation was not heard. An opportunity to register objections under the rules of evidence was not provided, nor was an opportunity afforded to present evidence conflicting with the State's representations as to what these "exhibits" showed. Simply put, these "exhibits" were not submitted as part of any adversarial process. *See* Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994).

in Banks: Mr. Rivera's counsel was supposed to assume that the State had not complied with its constitutional obligations and thus should have engaged in a thorough scrubbing of the "public domain" for information that the State had withheld from him, but had allowed in some fashion to be seen by others who may have, but were not required to, let him see it.[11] The State offers no valid explanation comporting with Banks of how Mr. Rivera was supposed to know about these matters, or why these matters excuse the State's presentation of Zuccarello's false or misleading testimony at Mr. Rivera's trial, and/or its failure to correct it.

Most importantly, none of the criminal cases referenced in the "exhibits" on which the State seeks to rely indicated the existence of a written plea agreement requiring Mr. Zuccarello to cooperate in Mr. Rivera's case. The Answer Brief states:

[11] Attorneys representing other criminal defendants are under no constitutional obligation to disclose information that they obtain from the State in the course of their representation of a client to Mr. Rivera or his counsel.

> On August 18, 1986, Broward Assistant State Attorney, Joel Lazarus, turned over to counsel for Jay Richitelli, Howard Grietzer [sic], 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).

(Answer Brief at 9). The citation to page "113" is in fact to the January 3, 2007, Supplemental Record. The letter referenced in the quoted passage appears as "Exhibit 3." Moreover, the Answer Brief does not explain how this supposed disclosure to Howard Greitzer relates to the State's failure to disclose the written plea agreement to Mr. Rivera or its failure to correct Zuccarello's false trial testimony. It should be noted that Howard Greitzer was not Mr. Rivera's counsel.[12] So, disclosure to Mr. Greitzer had nothing to do with Mr. Rivera.[13] Again, the State's failure to accept Mr. Rivera's allegations as true and

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[12] Mr. Rivera was indicted in the instant case on August 6, 1986. He was arraigned on August 14, 1986. At that time, Ed Malavenda, who was also representing Mr. Rivera in the separate attempted murder case, was appointed to represent him in the instant matter as well.

[13] Moreover, to the extent that the State is alleging, without having presented any supporting testimony, that the Greitzer letter was disclosed pursuant to a public records request in 1995, the State makes no allegation that the written plea agreement was disclosed with the letter in 1995 pursuant to the public records request (Answer Brief at 9). Mr. Rivera's claim in the motion to vacate was premised upon the actual plea agreement, *i.e.* that specific piece of paper. It was not premised upon some letter an attorney named Howard Greitzer.

its references to supposedly contradictory facts shows the need for an evidentiary hearing.

The State concludes this portion of its argument by stating:

> 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.

(Answer Brief at 10). First, the State does not even discuss "all" of the new information alleged in Mr. Rivera's Rule 3.850 motion, much less show that it had previously been disclosed to Mr. Rivera. The State never says that Zuccarello's written plea agreement was disclosed to Mr. Rivera. The State never mentions the "prisoner receipts" showing that Zuccarello was working with Broward deputies before and during the time he was supposedly getting admissions from Mr. Rivera. The State never says that the reports written by Detective Gross were disclosed to Mr. Rivera.

The State also relies upon Zuccarello's trial testimony as showing that Mr. Rivera "was well aware of Zuccarello's extensive criminal history, his participation with law enforcement agencies and his plea agreements" (Answer Brief at 10-14). The main problem here is that the portions of

Zuccarello's trial testimony cited by the State were *false and/or misleading*, as Mr. Rivera has alleged.

When 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. This plea agreement required Zuccarello to cooperate with Broward sheriff's deputies Presley, Argentine and Carney and with Broward prosecutor Lazarus. Argentine was the deputy to whom Zuccarello claimed he had reported Mr. Rivera's admissions (R. 1406). Carney had interviewed Mr. Rivera during the investigation (R. 1525-26, 1533-34). Presley was one of the Broward detectives who had received custody of Zuccarello from the jail (3PC-R., "Supplemental Record," 65). At the time of the agreement, Lazarus was the prosecutor on Mr. Rivera's case (R. 1922). The agreement also required Zuccarello to testify when he was subpoenaed to do so. As a reward for his cooperation, Zuccarello received the following consideration:

> 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.
>
> . . . .

> 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.
>
> . . . .
>
> 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).

Thus, when Zuccarello testified on direct examination that he had been made no promises in exchange for testifying in Mr. Rivera's case (R. 1407), that testimony was false and/or misleading. When Zuccarello testified on cross-examination that the State had made no deals with him regarding testifying in Mr. Rivera's case (R. 1410), that testimony was false and/or misleading.

Despite making no argument that Zuccarello's written plea agreement was disclosed to Mr. Rivera, the State insists that "appellant knew at the time of trial that Zuccarello had entered into a plea agreement in Broward County" (Answer Brief at 13-14). However, the defense did not know that Zuccarello's

plea agreement said the Zuccarello would "not be charged with any additional cases in Broward County" or that at Zuccarello's sentencing, the State would "bring forward all law enforcement personnel familiar with the cases and the efforts of [Zuccarello] for the Court's consideration in sentencing." In his trial testimony, Zuccarello emphatically testified that he had received no consideration in his plea agreement and that he had not agreed to cooperate with the State in exchange for that consideration. Although he had a motion to mitigate his sentence pending, he testified, the outcome of that motion was "not guaranteed," and his testimony in Mr. Rivera's case would have no bearing on whether or not his sentence would be reduced (R. 1410, 1419).

The State next argues that Mr. Rivera "possessed information regarding Zuccarello's plea deal and his informant status well before he filed his first motion for postconviction relief" (Answer Brief at 14). Again, this discussion never addresses Zuccarello's written plea agreement, the prisoner receipts or Detective Gross's reports. Instead, the State selectively summarizes some of the public records litigation in Mr. Rivera's case, broadly asserting that the State Attorney's Office "complied" with Mr. Rivera's public records requests (Answer Brief at 14-16). The only thing that this summary shows

is that Mr. Rivera requested public records. It does not show that the records at issue in Argument II were ever disclosed. In fact, in connection with the discussion of the prisoner receipts, Mr. Rivera's Rule 3.850 motion pled, "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" (3PC-R. 14 n.3). The State's arguments show the need for an evidentiary hearing.

The State argues that Mr. Rivera's allegations in his first Rule 3.850 motion, his arguments in the circuit court, his 1995 examination of trial prosecutor Hancock, and the resolution of his 1998 public records demand show "that appellant had the information regarding Zuccarello's plea deal and informant status and presented it as a claim in his first motion" (Answer Brief at 16-20). Again, this argument never states that Zuccarello's written plea agreement, the prisoner receipts and Detective Gross's reports were disclosed to Mr. Rivera. The only thing that these prior allegations and arguments demonstrate is general information that Zuccarello had a history as an informant and had entered pleas in some cases. In contrast to that general information, the written plea agreement, the prisoner receipts and Detective Gross's reports

are documentary evidence specifically showing that Zuccarello entered a plea agreement requiring his cooperation *in Mr. Rivera's case*, that Zuccarello was cooperating with the deputies and prosecutor responsible *for Mr. Rivera's case*, and that Zuccarello was cooperating with Broward deputies well before he met Mr. Rivera or reported any alleged statements by Mr. Rivera to "Nick Argentine."

Moreover, the State's summary of the prior litigation omits an essential fact: prosecutor Hancock testified that the State had made no deals with Zuccarello in exchange for his cooperation in Mr. Rivera's case. In 1995, Hancock 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). This testimony was false and/or misleading, as the written plea agreement demonstrates; it certainly misled Mr. Rivera's counsel, the circuit court and this Court.

The State argues that Mr. Rivera's allegations regarding diligence are "wholly inadequate to justify an

evidentiary hearing on the diligence element" (Answer Brief at 21-23). The State offers no authority to support this argument.[14] Mr. Rivera proffered quite specific facts regarding counsel's diligence in discovering the facts supporting Argument II and described in detail how counsel found the documents (3PC-R. 12-14). Mr. Rivera's proffer included the facts that "counsel had never seen this 'Plea Offer' before" and that counsel had found no "evidence of its previous disclosure" (3PC-R. 13-14). The State relies on previous public records litigation without once stating that the specific documents at issue in Argument II were ever disclosed (Answer Brief at 22-23). The State does not mention that prosecutor Hancock's 1995 testimony and the State's 1995 closing memorandum stated that no Zuccarello plea agreement existed.

The State argues that Mr. Rivera "has failed to demonstrate that the plea agreement of June 1986 encompassed Zuccarello's participation in this case" (Answer Brief at 23-

[14] Certainly, Mr. Rivera did make factual allegations regarding his diligence in his motion to vacate. However, the State overlooks the fact that after the motion to vacate was filed, the United States Supreme Court held that due process required the State to disclose favorable evidence or correct false and/or misleading testimony, and until the State honored its constitutional obligation, there was no diligence requirement imposed upon a criminal defendant to figure out that the State had not honored its constitutional obligation. Banks v. Dretke.

24). The State contests the facts pled by Mr. Rivera, contending, for example, that Detective Argentine and prosecutor Lazarus were not involved in Mr. Rivera's prosecution (Id.). However, Zuccarello testified at trial that Argentine was the officer to whom Zuccarello reported his alleged conversations with Mr. Rivera (R. 1406).[15] The prisoner receipts show that Zuccarello was removed from the jail by Broward deputy Argentine (3PC-R., "Supplemental Record," 67). Presley, another Broward detective named in the plea agreement, had also received custody of Zuccarello from the jail (3PC-R., "Supplemental Record," 65). The State dismisses the fact that Broward deputy Carney was named in the plea agreement as an officer with whom Zuccarello was required to cooperate because Carney testified at Mr. Rivera's trial only about interviewing Mr. Rivera (Answer Brief at 24 n.10). The State asserts, without more, "Carney never spoke to Zuccarello" (Id.). The fact that the State is contesting the truth of Mr. Rivera's allegations establishes the need for an evidentiary hearing.

The State argues that Zuccarello's plea agreement was not related to Mr. Rivera's case because the agreement "excluded

[15] After Zuccarello testified that he first notified "Nick Argentino" with the Broward Sheriff's Office, he was asked "And what did you tell him?" Zuccarello answered, "I told him that I met Mike in the cell and that he was - - he told me a couple of things and then he asked me what he told me" (R. 1406).

specifically Zuccarello's participation in any homicide case" (Answer Brief at 24). This argument repeats one basis of the circuit court's summary denial which Mr. Rivera addressed in his Initial Brief. The paragraph of the plea agreement which the State references begins, "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" (3PC-R., "Supplemental Record," 63). The paragraph then states that this agreement does not include "any cases in which injuries to any person resulted" and that "any HOMICIDE case will be handled separate and apart from this agreement" (Id.). The paragraph clearly addresses Zuccarello's exposure to charges against him, not cases in which he might be a witness.[16]

When a successive postconviction motion alleges the previous unavailability of new facts and the movant's diligence, an evidentiary hearing is required if the facts are disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995). 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

[16] Certainly, the State, as the circuit court before it, is ignoring Mr. Rivera's factual allegation as to the import of the clear language in the plea agreement.

"disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). The State has disputed Mr. Rivera's factual allegations, and an evidentiary hearing is required.[17]

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.

The Answer Brief combines the State's responses to Arguments I and II. This reply has addressed the State's responses to Argument II in Argument I, *supra*.

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 State contends that the circuit court properly determined that the evidence supporting Mr. Rivera's allegations in Argument III was "known or could have been known to appellant prior to the initial motion for postconviction relief" (Answer Brief at 26-27). However, as it did regarding Arguments I and II, the State never contends that the specific documents upon

[17] Argument I of Mr. Rivera's Initial Brief also addressed the circuit court's erroneous summary denial of Arguments III, IV and V. The Answer Brief does not address those errors. An evidentiary hearing is required on those issues as well.

which Argument III relies were ever disclosed to Mr. Rivera. Rather, the State again refers to generalized "information" out in the ether as fulfilling the State's obligation to disclose favorable information to Mr. Rivera. This is not the law. "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). 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.

The State argues that "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" because the Cohen trial occurred after Mr. Rivera's trial (Answer Brief at 27). Mr. Rivera's claim does not rely upon any evidence which came out during the Cohen trial. Rather, Mr. Rivera proffered two previously undisclosed documents, one concerning a polygraph of Zuccarello conducted on June 21, 1986, and the other concerning a polygraph of Zuccarello conducted on June 7, 1986 (3PC-R., "Supplemental Record," 80-83, 84-86). Both of these documents existed well before Mr. Rivera's 1987 trial.

The State argues that the results of the polygraphs would not have been admissible at Mr. Rivera's trial (Answer Brief at 27-28). However, in his written plea agreement dated June 12, 1986, Zuccarello agreed to the following: "The defendant [Zuccarello] will, in his cooperation, be giving statements, which will be tested by polygraph as to their veracity" (3PC-R., "Supplemental Record," 63). Of course, the State did not disclose this written plea agreement. However, had the agreement been properly disclosed, it opened the door for Mr. Rivera's defense to question Zuccarello and the polygraph administrators about Zuccarello's truthfulness on the polygraphs.

The State argues that opinions contained in newspaper articles are not discoverable or admissible (Answer Brief at 28-29). As one support for Argument III, Mr. Rivera proffered a *Miami Herald* article written in 2001 in which the reporter interviewed Lt. R. Rios of the Broward County Sheriff's Office. Rios had interrogated Mr. Rivera in 1986. The 2001 news article quoted Rios as saying that in 1986, Rios believed Mr. Rivera had invoked his right to counsel in earlier interrogations by Detectives Scheff and Amabile, who had told Rios that Mr. Rivera had waived his Miranda rights. Contrary to the State's position, this evidence existed before Mr. Rivera's trial. The

article reported what Rios believed *in 1986*, but the State did not disclose it to Mr. Rivera.

The State argues that the evidence from Rios was previously available because Rios was deposed before trial and was excused from a subpoena to a public records hearing (Answer Brief at 29). A deposition does no good if the deponent does not reveal exculpatory evidence; a subpoena to a public records hearing only involves the pursuit of public records, which also does no good if the State withholds exculpatory evidence. The State never says that Rios or the State ever revealed Rios's views to Mr. Rivera, which the State was obliged to do. Banks, 124 S. Ct. at 1263, 1275.

The State's only argument regarding prejudice is the broad statement that "any further impeachment of Zuccarello regarding his informant status would not have changed the outcome" (Answer Brief at 29). The State does not address the significant documentary evidence impeaching Zuccarello which was not previously disclosed. More importantly, the State does not address the cumulative analysis detailed in Mr. Rivera's Initial Brief which must be conducted (Initial Brief at 90-99).

ARGUMENT IV

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

The State argues that the DNA testing showing that the hair found in Mark Peters' van did not belong to Staci Jazvac does not require a new trial because "the jury was never told that the hair was that of Staci's [sic]" (Answer Brief at 30-32). The State acts as if its presentation of the hair evidence at trial and its references to the hair evidence in opening and closing arguments was only intended to tell the jury that the hair evidence was insignificant. To the contrary, the State relied upon the hair evidence at trial to show that the murder occurred in the van and to establish Mr. Rivera's guilt.

The State's argument that the jury was not told that the hair evidence was "conclusive or that it was full proof" (Answer Brief at 32) completely misses the point. The hair evidence was the only physical evidence the State had that the offense occurred in the van. The State's whole theory of prosecution rested upon the offense having occurred in the van. The DNA testing shows that the State has no evidence that the offense occurred in the van.

The State also argues that the DNA testing does not require a new trial because "the evidence of Rivera's guilt was overwhelming" and the erroneous hair evidence "was harmless

beyond a reasonable doubt" (Answer Brief at 32). The State describes this evidence as "un-assailed [sic]" and then proceeds to recite a summary of the trial evidence as if that evidence is reliable and has not been seriously called into question by the evidence discovered in post-conviction.

For its "overwhelming evidence" argument, the State relies upon the testimony of the jailhouse informants, two women to whom Mr. Rivera had made supposedly incriminating phone calls, Mr. Rivera's contradictory and supposedly incriminating statements to police, and the Jennifer Goetz incident (Answer Brief at 32- 37). Argument III of Mr. Rivera's Initial Brief provides a comprehensive, cumulative discussion of the trial evidence, the evidence presented in the prior Rule 3.850 proceeding, and the evidence presented in this Rule 3.850 proceeding. That evidence shows that the testimony of all the jailhouse informants is at least suspect, that Zuccarello's testimony was outright false, that the phone calls to the two women were inconsistent with other evidence, that Mr. Rivera never confessed to the police, and that the hair evidence upon which the State relied at trial to place the offense in the van was wrong. The State addresses none of this.

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.

The State argues that this claim is procedurally barred and without merit (Answer Brief at 38). The State's procedural bar argument does not survive the fact that this claim is based upon evidence which only came to light in 2001. The State's merits argument does not address the fact that although Ferris stated he wanted a fair trial for Mr. Rivera, he admitted his personal beliefs were not the same. The fact that Judge Ferris had to strive to set aside his personal feelings could not be a clearer statement of bias or prejudice.

ARGUMENT VI

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.

The Answer Brief does not address this argument.

CONCLUSION

In light of the arguments presented here and in his Initial Brief, 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, on March __, 2007.

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.

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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