IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-859

MANUEL ANTONIO RODRIGUEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

The State will rely on its statement of case and facts from its initial answer brief in this appeal and its statement of fact and procedural history in its Response to Defendant's Petition for Writ of Habeas Corpus, FSC Case No. SC07-1314, with the following additions:

After this appeal had been fully briefed, Defendant filed a successive motion for post conviction relief and a motion to relinquish jurisdiction for this motion to be heard. (SPCR. 3856-3949) In this successive motion, Defendant sought to raise two claims. The first claim was premised on the assertion that Defendant had located Willie Sirvas, a former jail inmate who alleged had information that allegedly could have been used to impeach Luis Rodriguez's trial testimony, and that he had learned of a practice of sealing the existence of plea agreement, which alleged had "implications" for Isidoro. (SPCR. 3860-72)

On April 30, 2008, after this Court had heard oral argument, this Court entered an order affirming the denial of Defendant's repeated motions to disqualify the lower court judge but reversing the summary denial of certain, specific claims in the original motion. (SPCR. 4192) This Court specifically ordered an evidentiary hearing on the claims asserted in

paragraphs 21, 37, 38 and 44 of Claim I of the original motion for post conviction relief, paragraph 13 of Claim VI of the original motion and paragraph 22 through 26 of Claim I of the successive motion "as those claims relate to Isidoro Rodriguez." (SPCR. 4192-93) This Court also directed the State to cooperate in obtaining Sirvas' testimony and to produce discoverable information it had regarding "Isidoro Rodriguez's criminal records" or "his status as an informant." (SPCR. 4193) This Court ordered that the lower court complete the proceedings within 180 days of the order. (SPCR. 4194)

At a series of status hearings, Defendant repeatedly averred that he was looking into how to have Sirvas returned to this country but that he did not believe he would be able to do so within the relinquishment period. (SPCR. 4360-62, 4312-18, 4592-97) The lower court repeatedly ordered Defendant to pursue the immigration process and to look into have Sirvas testified by satellite in case it was not possible to get Sirvas.[1] (SPCR. 4363-64, 4319-20) Eventually, Defendant moved to be permitted to take a deposition to perpetuate Sirvas' testimony in Peru because he had yet to apply to have Sirvas allowed in the US. (SPCR. 4418-24) Alternatively, Defendant requested that the

[1] During the course of these proceedings, it was disclosed that the address for Sirvas that Defendant had provided was incorrect and a different address was provided. (SPCR. 4315-16, 4590-91)

State be required to apply for a visa for Sirvas or that the JAC be required to pay for Sirvas to apply to get a visa. (SPCR. 4424-26)

At the hearing on this motion, Defendant explained that he had yet to apply for the visa because Sirvas did not have identification or a passport from Peru, he needed these documents to apply for a visa and Defendant was attempting to pay the costs of obtaining these documents. (SPCR. 4830) Defendant claimed to need approval for the costs associated with this process even though he acknowledged that JAC did not pay his expenses and the Department of Financial Services had sent a letter indicating that Defendant was free to spend its budget at will. (SPCR. 4829-30, 4833, 4498-99) He complained that it was necessary for the costs to be advanced. (SPCR. 4831) Because Defendant believed that it was somehow improper to require someone from CCRC to advance the costs, Defendant asked that the State be responsible for getting Sirvas before the court. (SPCR. 4831)

The State responded that it should not have to assume Defendant’s burden of producing his witness because he failed to act diligently in producing the witness. (SPCR. 4836-37) The State then suggested that Defendant be required to present Sirvas’ testimony by satellite and asked that it be allowed to

depose Sirvas in advance of the hearing. (SPCR. 4837-39)

After listening to these arguments, the lower court, over the State's objection, declared Sirvas unavailable, while finding that Defendant had not been diligent in procuring Sirvas' attendance, and ordered Defendant to present his testimony by satellite. (SPCR. 4839-41, 4626-27)

Beginning at the first status hearing, the State informed Defendant that it had already provided him with information about Isidoro's criminal history and that it had no information that he had ever been an informant. (SCPR. 4360, 4367) Defendant insisted that he had information that Isidoro had been an informant in a case regarding an Andres Roman. (SCPR. 4367-69) When the State later provided the documents it had regarding Isidoro's arrest history, Defendant acknowledged that he had already received these documents. (SCPR. 4321, 4324-25) When the State informed Defendant that Isidoro was an eyewitness and not an informant in the Roman case, Defendant acknowledged that he was already aware of this informant but requested, and was allowed, to review the State Attorney's file in the Roman case anyway. (SCPR. 4325-26, 4283-84)

In the meantime, Defendant served additional public records requests pursuant to Fla. R. Crim. P. 3.852(i), directed to a

number of law enforcement agencies in central Florida,[2] basically seeking any document concerning Isidoro, his wife or Andres Roman. (SPCR. 4220-48) He later served another set of public records requests pursuant to Fla. R. Crim. P. 3.851(i), to agencies in Dade County,[3] generally seeking the same records. In this set of requests, Defendant sought records from (SPCR. 4253-75) During argument considering whether the lower court should order the central Florida agencies to respond, Defendant acknowledged that his purpose for making these requests was that he had raised a claim about Isidoro being the subject of narcotics investigation but that he allegedly did not know which agency had conducted the alleged investigation. (SPCR. 4333-35) After reviewing the requests and the files, the lower court entered an order refusing to require the central Florida agencies to respond because the requests were untimely, overly broad and not calculated to reveal relevant information. (SPCR. 4280-82)

During argument regarding requests to the Miami-Dade Police

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[2] Specifically, the requests went to Altamonte Springs Police Department, the Winter Springs Police Department, the Oviedo Police Department, the Longwood Police Department, the Casselberry Police Department, the Sanford Police Department, the Lake Mary Police Department and the Seminole County Sheriff's Office.

[3] These requests went to the Miami-Dade Department of Corrections, the Miami Police Department, the Hialeah Police Department, the Miami-Dade Police Department and the State Attorney.

Department and the Miami-Dade Department of Corrections, Defendant insisted that he was entitled to the records because he had raised claims concerning the individuals about whom he had requested records and that he was not requesting records he had previously requested. (SPCR. 4515-17) When the State presented prior requests showing that Defendant was making request that had been previously raised and ruled upon and argued that Defendant should have requested the other records earlier, Defendant responded that his previous requests and failure to have made requests earlier should be ignored because he had now been granted an evidentiary hearing. (SPCR. 4520-29, 4579-87) Defendant indicated also that he had been told that the Hialeah Police had no records and that he was not pursuing the request to the Miami Police. (SPCR. 4576) He presented no argument regarding the request to the State Attorney's Office.

On July 21, 2008, the lower court entered orders regarding Defendant's requests to the Miami-Dade Police and Department of Corrections, finding that the requirements of Fla. R. Crim. P. 3.852(i) were not met. (SPCR. 4413-16) However, it did order the Miami-Dade Police to disclose records related to Isidoro's wife and Roman. (SPCR. 4414)

On September 17, 2008, Defendant moved the lower court to take judicial notice of the several court files and of the date

on which the Mariel boatlift began. (SPCR. 4733-35) At the beginning of evidentiary hearing, Defendant asked the court to take judicial notice of a file Isidoro's 1978 arrest for loitering, which had been dismissed, claiming that the documents showed that Isidoro really committed a burglary and drug rip-off. (SPCR. 6148-52) Defendant insisted that this information was admissible, even though it concerned a dismissed misdemeanor, because he had allegedly made a general claim about impeaching Isidoro and this and other evidence about Isidoro's lifestyle would prove this claim. (SPCR. 6156-59, 6160-62) He made the same argue in a request to take judicial notice of the Roman file. (SPCR. 6168-69)

Defendant next asked the court to take judicial notice of a file regarding one of Luis Rodriguez's post conviction appeal and to have two documents from that file admitted as self authenticating documents. (SPCR. 6173-74, 6229-30) Defendant asserted, even though he had unsuccessfully made the same request previously and the documents did not concern a claim about the relinquishment, they were admissible now so that the court could conduct a cumulative analysis and were newly discovered evidence, which showed that the State had taken inconsistent positions. (SPCR. 6175-77)

Defendant finally asked the court to take judicial notice

of the date on which the Mariel boatlift started because it allegedly showed that Isidoro moved out of Miami because he was involved in drug dealing and had testified against a drug dealer. (SPCR. 6232-33) The lower court then ruled that it would not take judicial notice of the files regarding Isidoro, Roman or Luis's appellate proceedings because they were not relevant to any issue before the court. (SPCR. 6237) However, it did take judicial notice that the Mariel boatlift began in April 1980. (SPCR. 6237-38)

Defendant presented a deposition of Lt. Pete Kelting of the Seminole County Sheriff's office. (SPCR. 6147-48) In the deposition, Lt. Kelting testified that he had been assigned to assist the Miami-Dade Police in locating a witness in this case in 1992. (SPCR. 4776-78) He had no real recollection of having conducted a narcotics investigation but had reviewed a report indicating that he probably did one. (SPCR. 4778) He stated that the report indicated that his department had received an anonymous tip about Isidoro and drug and reflected that he had pulled some toll records on what was probably a phone number associated with Isidoro. (SPCR. 4778-80) He stated that this seemed to be consistent with what he would have done based on such a tip. *Id.*

On cross, Lt. Kelting stated that he did not recall doing

anything else to investigate the tip and did not know if Isidoro was ever informed of an investigation. (SPCR. 4790-92) He stated that if Isidoro had ever been an informant or had a search warrant issued related to him, there would be documentation of it, that he checked and that there was none. (SPCR. 4793-95)

Defendant then called Sirvas as a witness. (SPCR. 6179-80) As soon as the clerk sworn Sirvas, he began providing testimony even though no question had been posed to him. (SPCR. 6182) Sirvas was then asked his name and birthday while clearly reading from a document. (SPCR. 8183-84) Based on the State's objection about reading documents, the lower court then instructed the investigator not to instruct the witness on how to answer questions, to remove the papers, to hand documents to Sirvas only when asked to do so regarding a specific document and not to speak to the witness while he was testifying. (SPCR. 6185)

Sirvas then stated that he moved to the US in 1980, when he was 18 years old and worked a variety of jobs. (SPCR. 6187-88) At some point, he began drinking and being arrested for crimes such as DUI and trespassing, for which he was given probation and violated probation. (SPCR. 6188-89) He stated that he was eventually convicted of burglary of an unoccupied conveyance. (SPCR. 6189) He stated that he was a convicted felon but that he

did not remember the number of times he had been convicted. (SPCR. 6189)

In 1995, Sirvas was in pretrial detention on the burglary charge at Metro West, where Luis had adjoining maximum security cells. (SPCR. 6189-94) They started talking to one another about their cases in the cells and in the yard. (SPCR. 6194-95) According to Sirvas, Luis admitted to being involved in the murder and claimed that the State could not prove its charges but stated that taking the plea was the only way he could avoid a death sentence. (SPCR. 6196) However, Luis never told him about the facts of the case. (SPCR. 6199) In fact, Sirvas claimed that Luis never even told him the name of his codefendant. (SPCR. 6205)

Sirvas stated that he wrote the letters dated August 10, 1995, and May 28, 1996. (SPCR. 6201-03) Sirvas stated that his reference to Luis's lies in the 1996 letter concerning Luis breaking a pact with his codefendant not to testify against one another. (SPCR. 6204-05)

Sirvas stated that he served 6 years for the burglary conviction, was released in September 2001, and was then deported back to Peru. (SPCR. 6190) He stated that he was contacted through his father in 2007, and that he would have been willing to have testified at trial. (SPCR. 6205-06)

On cross, Sirvas stated that he had been charged with 13 separate felonies between 1982 and 1992, but had only been convicted of one felony. (SPCR. 6208) He then acknowledged that he had been convicted of grand theft, resisting arrest with violence and battery on a police officer in December 1982, and serving 2 years in prison as a result. (SPCR. 6209) He then claimed that the case had been dismissed because he had some document he was reviewing that said the case had been dismissed. (SPCR. 6213-14) He then claimed not to remember being convicted in 1986 of aggravated assault and serving another two years imprisonment because it was not on the document. (SPCR. 6214-15) Sirvas admitted that he had not put his name on either the 1995 letter or the envelope in which it was sent. (SPCR. 6216-18) He insisted that Luis never told him his codefendant's name, when Luis entered a plea agreement or anything about the facts of the crimes other than that the codefendant had been involved as well. (SPCR. 6218-21)

Defendant next called Sgt. Al Singleton and had him identify a series of depositions of himself and Isidoro and a transcript of a statement he took from Isidoro in connection with the Roman case. (SPCR. 5151-64) Defendant then started to question Sgt. Singleton about the Roman case, the State objected and the lower court sustained the objections. (SPCR. 5164-65,

5167-68) Sgt. Singleton did testify that he knew that Isidoro was not charged with any crime in connection with the Roman case and did not believe that Isidoro was criminally liable for any actions in that case. (SPCR. 5179-80) Sgt. Singleton testified that Isidoro testified against Roman at his trial and that Roman was acquitted but that he did not recall Isidoro ever being provided protection. (SPCR. 5195)

Regarding this case, Sgt. Singleton testified that the investigating officers believed that Isidoro was a potential witness in this matter, knew that he had previous contact with Isidoro and asked him to interview Isidoro for them. (SPCR. 5180) He travelled to Orlando to conduct this interview. (SPCR. 5181-82) He denied that he or any other officer threatened Isidoro. (SPCR. 5185-86) He also did not recall making any deals with, or promises to, Isidioro in exchange for his statement. (SPCR. 5193)

Sgt. Singleton stated that he was assigned to homicide in 1993, as were Det. Smith and Det. Crawford. (SPCR. 5181) He stated that he knew Lt. Villanueva but did not know where he was assigned at that time. (SPCR. 5181) He knew that Isidoro’s wife was a distant relative of Lt. Villanueva. (SPCR. 5195-96)

On cross, Sgt. Singleton testified that Isidoro was not charged with any crimes in connection with the Roman case

because he had not committed any. (SPCR. 5197) Instead, Isidoro was merely a witness, who received no benefits from his testimony and was not threatened to provide his testimony. (SPCR. 5197-98) Isidoro was not a confidential informant. (SPCR. 5198) In this case, Isidoro also did not receive any benefit for his testimony, receive any threat to cause him to testify and was not a confidential informant. (SPCR. 5198-99)

Det. John LeClaire testified that while he did not recall being present at the interview of Isidoro Rodriguez, his deposition indicated that he was, that Isidoro was cooperative and that Isidoro's wife came to the station at Isidoro's request. (SPCR. 5209-11) He stated that he did not know of any deal for Isidoro's cooperation, that Isidoro was not threatened and that he did not tell Isidoro what to say in his statement. (SPCR. 5211) He did not know Lt. Villanueva. (SPCR. 5211)

Det. Gregory Smith testified that he met Alejandro Lago on September 13, 1993, at one of the jails in Dade County after Lago had called the police. (SPCR. 5217-20) He believed that Lago was awaiting sentencing at the time they met. (SPCR. 5230) Det. Smith was aware that Lago became a known informant in Miami. (SPCR. 5227) He would not be surprised to learn that Lago also claimed to be an informant for the federal government. (SPCR. 5227) However, Lago did not tell Det. Smith that he was

expecting a benefit for his cooperation in this case. (SPCR. 5231)

Det. Smith recognized a May 22, 1995 letter on which his name, but not his signature, appeared. (SPCR. 5232) He believed the letter had been written by Det. Crawford and stated that he probably authorized Det. Crawford to sign the letter on his behalf. *Id.* He also recognized a February 8, 1996 letter, which again was not written by him. (SPCR. 5232-33) He did not know to whom either of these letter written. (SPCR. 5233) Det. Smith stated that he did write a March 7, 1997 letter to the INS on Lago's behalf because Lago was afraid he would be deported. (SPCR. 5233) Lago probably asked Det. Smith for this letter during a phone call. (SPCR. 5233)

On cross, Det. Smith stated that Lago initiated contact with the police, voluntarily provided information about Defendant and voluntarily provided a sworn statement. (SPCR. 5235-36) Lago only asked for assistance with immigration officials after he had done so and the first of the letter was not written until almost a year and a half after Lago had cooperated. (SPCR. 5236-37) The last letter, which was the only one specifically addressed to anyone, was not sent until after this case had concluded. (SPCR. 5237-38) Lago received no other benefit connected with this case. (SPCR. 5238-39) On redirect,

Det. Smith stated that he did not know if the first two letters were ever sent to anyone of to whom they would have been sent. (SPCR. 5240)

Lt. Daniel Villanueva testified that he was Isidoro's wife's cousin and he met Isidoro when he married his wife. (SPCR. 5243-46) He believed that Isidoro and his wife moved to Orlando shortly after they married. (SPCR. 5246) In addition to being a police officer, Lt. Villanueva also engaged in the real estate business. (SPCR. 5247) He purchased two residences with Isidoro and his wife between 1989 and 1995. (SPCR. 5247-51) They did so because Isidoro was doing some real estate work in the Orlando area and he approached Lt. Villanueva about investing with him. (SPCR. 5250-51) The monies used to obtain these properties came from mortgages and checks. (SPCR. 5251)

Lt. Villanueva did not know that Isidoro was involved in the investigation of this case. (SPCR. 5252) He learned that Isidoro had testified in this case after it was over. (SPCR. 5256) He was acquainted with Det. Smith, Det. LeClaire and Sgt. Singleton but did not know Det. Crawford. (SPCR. 5252-53) However, he never had any contact with them about this case or any involvement in the investigation. (SPCR. 5265-67)

Over the State's objection Defendant then called Diane Pattavina and Jose Arrojo. (SPCR. 5268-71) Ms. Pattavina

testified that she was the chief of the felony division of the clerk's office and that she personally performed a search for records regarding Isidoro. (SPCR. 5272-73) The search included records from 1970 to date and would only reveal case in which Isidoro was a defendant. (SPCR. 5274, 5276-77) The only record regarding Isidoro that was found was the dismissed case from 1978, the file about which had been destroyed. (SPCR. 5275, 5285)

Mr. Arrojo testified that he was a chief assistant state attorney and that he had his assistant run a check of a number of database maintained by the State Attorney Office for Isidoro. (SPCR. 5287-90) The search covered a period from a date in the 1980's to the present. (SPCR. 5290-91) The search did not reveal any information concerning Isidoro. (SPCR. 5291-93)

Richard Houlihan, Defendant's lead trial attorney, testified that he first saw the Sirvas letters a week before the hearing and that they appeared to him to be an attempt by an inmate to get the State to give him a deal. He stated that he would like to have seen the letters prior to trial in an attempt to develop some form of impeachment evidence. (SPCR. 5302-07, 5310) He stated that to do so he would have spoke to Sirvas and to any other inmates that were in a cell with Luis and Sirvas. (SPCR. 5312-13)

Mr. Houlihan did not recall being aware that Isidoro had guns. (SPCR. 5329) When Defendant attempted to inquire further about Isidoro having guns, the State objected, and the lower court sustained the objection. (SPCR. 5329-31) When Defendant then continued to attempt to ask about other alleged bad acts by Isidoro, the State again objected. (SPCR. 5331) Defendant argued that the questions were proper because materiality and prejudice were proven by showing that an investigation would have been made even if the investigation did not lead to admissible evidence. (SPCR. 5331-46) The State responded that Defendant actually needed to show that the questions were relevant to a issue before the court, that the information was actually admissible or that it actually would have lead to admissible evidence and that nothing Defendant was asking about did any of the above. *Id.* During argument about this objection, Defendant attempted to admit Isidoro's deposition from the Roman case. (SPCR. 5334) The lower court sustained the objection because Defendant failed to show that anything would ever have been admissible. (SPCR. 5346, 5350-52)

Mr. Houlihan did not recall if he had any information about an alleged investigation of Isidoro regarding narcotics in Seminole County. (SPCR. 5353) If such any investigation had existed, he would have wanted to have looked into it. (SPCR.

5353-54) He explained that he was attempting to defend this case on the theory that Luis and other family members were blaming Defendant because they did not like him and were trying to protect one another. (SPCR. 5355-56) However, Mr. Houlihan stressed that he would not present allegations that he could not prove to the jury because he would lose credibility. (SPCR. 5354)

Mr. Houlihan also did not recall if he knew Isidoro's wife was related to Lt. Villanueva. (SPCR. 5356) He would have like to have known of this. (SPCR. 5356) He also did not recall Lago or having letters about Lago. (SPCR. 5361-62)

Mr. Houlihan admitted that his memory was poor. (SPCR. 5306) In fact, he stated that he would not have remembered that he commented in opening that Luis was the linchpin of the State's case had he not read the transcript recently. (SPCR. 5307) He also did not recall what he received in discovery but would have received the discovery. (SPCR. 5359) He stated that even reading the transcript of his cross examination of Isidoro only partially refreshed his recollection of the subject matter that he read. (SPCR. 5359-60)

On cross, Mr. Houlihan admitted that there was no identifying information about the author in the first Sirvas letter and that the letter did not mention anything about

Defendant. (SPCR. 5363-65) However, Mr. Houlihan insisted that he would still have like to have seen the letter because it could lead to useful information. (SPCR. 5365-66) When asked if he learned that the author of the letter was a multiple time convicted felon who was going to say that Luis was a liar because he reneged on an agreement with his codefendant but that Luis acknowledged he and the codefendant committed the crime, Mr. Houlihan refused to answer whether he would have used the information and continued to insist that he would have wanted to investigate. (SPCR. 5374-78)

Mr. Houlihan insisted that he did not recall being informed that Isidoro had been a witness in a prior case and continued to do so even when shown Sgt. Singlton's deposition. (SPCR. 5378-81) He did admit that he could not offer a theory on which an investigation of a witness that went nowhere and that did result in a charge would be admissible. (SPCR. 5385-86) He acknowledged that he could not have based a defense argument on information that was not admissible. (SPCR. 5386) He admitted that the fact that Isidoro's wife's cousin was a police officer and was involved in the purchase of land with Isidoro would not be relevant. (SPCR. 5387) He believed that presenting that information would be harmful to a defense. (SPCR. 5388-89)

Eugene Zenobi, Defendant's other trial attorney, testified

that he did not remember seeing the 1995 and 1996 letters concerning Lago before trial. (SPCR. 5429-35) He had also not seen a series of letters written about Lago both before and after this matter was tried concerning his involvement in other cases. (SPCR. 5435-37) When Defendant attempted to admit the letters about the other cases, the State objected to the admission of the letters written after this case was tried, and the lower court sustained the objection. (SPCR. 5437-39) Mr. Zenobi stated that he did not believe that not having the letters was prejudicial. (SPCR. 5443) Instead, he believed the prejudice from allowing hearsay about Lago arose because he thought the State had agreed not to present this evidence at all. (SPCR. 5432, 5443-45) He did state that he would have like to have investigated the letters but admitted that he chose not to attempt to impeach Det. Crawford's testimony about Lago. (SPCR. 5448-49)

Mr. Zenobi acknowledged that the trial transcript reflected that the defense was aware that Lago had been a paid informant in other case and that he knew he could have impeached Det. Crawford's testimony with anything that could have been used to impeach Lago. (SPCR. 5462-63) He acknowledged that the record showed that he chose not to cross examine Det. Crawford. (SPCR. 5463-64)

Mr. Zenobi did not recall knowing of Sirvas or a letter from him before trial. (SPCR. 5449-50) He would have liked to have interviewed Sirvas. (SPCR. 5451-52) On cross, he admitted that he would not have called Sirvas if he had told him that Luis had stated that both he and Defendant committed the murders. (SPCR. 5460-61)

Abraham Laeser, the prosecutor, testified that he would have seen the Sirvas letters when they arrived at the State Attorney's Office and that he did not disclose them to the defense. (SPCR. 5486-87) He had never seen any of the letters concerning Lago before the hearing. (SPCR. 5488) He was aware that Isidoro had been a witness in the Roman case but would have had no reason to disclose documents about that in this case. (SPCR. 5493-95)

On cross, Mr. Laeser testified that Isidoro received no benefit for his testimony. (SPCR. 5501) He had never been told of any threats or promises made to Isidoro, other than Isidoro's claim at deposition that the police had promised that his mother would not be arrested. (SPCR. 5502-03) He had no information showing that Isidoro had ever been a confidential informant. (SPCR. 5503-05)

Mr. Laeser stated that the first Sirvas letter contained no information identifying its author and that he simply placed it

in his file after receiving it. (SPCR. 5506) When he received the second Sirvas letter, he asked his colleague about Sirvas but did not think much of the letter because it contained nothing other than a general assertion that Luis was lying. (SCPR. 5512) As a result of the investigation and based on the content of the letter, Mr. Laeser decided that he would not use Sirvas and that it did not contain relevant information so he did not disclose it to the defense. (SPCR. 5514-15)

Mr. Laeser stated that he decided that he would not call Lago in as a witness in this case because Lago had made statements during his deposition that would adversely affect his credibility. (SPCR. 5516) Mr. Laeser was not aware of any benefit Lago received for his cooperation in this case. (SPCR. 5516-17)

Mr. Laeser stated that he had disclosed all of the police reports in this case. (SPCR. 5518) This would have included the report written by Det. Crawford that mentioned the alleged narcotics investigation in Seminole County. (SPCR. 5518-20)

Mr. Laeser stated that his understand of the concept of “secret dockets,” consisted of two categories of case. (SPCR. 5521) The first category concerned the creation of false cases in connection with the Operation Courtbroom investigation of judicial corruption. (SPCR. 5521-22) The second category

concerned plea agreement that were entered in public corruption and drug trafficking case and that were sealed from public view. (SPCR. 5522-23) He did not believe this procedure had been used in a homicide case. (SPCR. 5523) Mr. Laeser did not know of any connection between these categories of case and the prosecution of this case. (SPCR. 5523)

After considering this evidence, the lower court denied the claims that were before it. (SPCR. 5082-90) It denied the claim about Sirvas finding Sirvas incredible. (SPCR. 5082-04) It rejected the claim about the threats and promises about police protection, finding that the credible evidence showed there were never any threats or benefits. (SPCR. 5087) It rejected the claim about the investigation because Defendant failed to show that any evidence about the investigation and the familial relationship with a detective would have been admissible. (SPCR. 5087-88) It rejected the claim about Isidoro being an informant with a sealed plea because there was no evidence that Isidoro had ever been an informant or ever had a sealed plea. (SPCR. 5088-89) It rejected the claim about Lago finding the letters immaterial. (SPCR. 5089-90)This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claims upon which jurisdiction was relinquished. Moreover, it properly refused to

consider evidence that did not concern these claims and did not abuse its discretion in rejecting untimely and over broad public records requests.

ARGUMENT

I. THE CLAIMS REGARDING ALLEGED IMPEACHMENT INFORMATION ABOUT LUIS AND ISIDORO WERE PROPERLY DENIED.

Defendant first asserts that the lower court erred in denying his claims concerning alleged impeachment information regarding Isidoro and Luis Rodriguez. However, the lower court did not err in denying these claims. Moreover, it did not abuse its discretion regarding its ruling on evidence or public records request.

With regard to Isidoro, Defendant first complains that the lower court analyzed the claims that he raised instead of concerning the claims as a general allegation that Isidoro was subject to impeachment based on his alleged "complex and involved relationship" with the police. However, the lower court did not have a claim before it concerning any alleged complex and involved relationship with the police. Instead, the claims regarding Isidoro that were before the lower court were claims that counsel was ineffective for failing to impeach Isidoro with alleged threats and promises regarding allegedly police protection, that the State allegedly withheld evidence regarding

a Seminole County narcotics investigation, that the State allegedly withheld evidence that Isidoro's wife's cousin was a police detective and that evidence regarding the practice of sealing plea agreements allegedly had some implications for Isidoro. (SPCR. 4192-93, 3860-72, PCR. 54-55, 64-65) Given this matter was before the lower court on an order relinquishing jurisdiction for a specific purpose, the lower court properly refused to consider a claim that was not before it. *Palma Sola Condominium, Inc. v. Huber*, 374 So. 2d 1135 (Fla. 2d DCA 1979).

To the extent that Defendant is complaining that the lower court considered the claims that were actually before it individually, Defendant is still entitled to no relief. The Supreme Court has recognized that claims must be analyzed individually first. *Kyles v. Whitley*, 514 U.S. 419, 436 n.10 (1995). Moreover, this Court has repeatedly rejected claims about an alleged cumulative effect of errors when the individuals errors are procedurally barred or meritless. *Griffin*, 866 So. 2d at 22. As such, it was entirely proper for the lower court to have considered the individual claims individually.

To the extent that Defendant is complaining about the rejection of the individual claims, the lower court should be affirmed. In order to prove a claim of ineffective assistance of

counsel, a defendant must prove both that counsel's conduct was not a reasonable, strategic decision and that conduct's conduct prejudiced him, which requires a showing that but for counsel's deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 690-94 (1984). In reviewing this claim, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support a finding of deficiency and prejudice. *Id.*

In order to prove a *Brady* claim, a defendant must show:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). To show prejudice, the defendant must show that but for the State's failure to disclose this evidence, there is a reasonable probability that the results of the proceeding would have been different. *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003). The question of whether the evidence is exculpatory or impeaching is a question of fact,

as is the question of whether the State suppressed the evidence. *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). Questions of fact are reviewed to determine if they are supported by competent, substantial evidence. *Way*, 760 So. 2d at 911. The question of whether the undisclosed information is material is a mixed question of fact and law, reviewed de novo, after giving deference to the lower court's factual findings. *Rogers v. State*, 782 So. 2d 373, 377 (Fla. 2000); *Stephens*, 748 So. 2d at 1032-33.

Here, the lower court denied the claims:

> While Defendant claims in paragraph 21 that trial counsel was ineffective for failing to show that Isidoro was threatened and that the police made promises to Isidoro, every witness called by the Defendant said exactly the opposite. Singleton, LeClair and Smith, all of whom were very credible, all testified that Isidoro was not threatened. He was not given special benefits. While Defendant alleges that Isidoro was involved, the record reflects that Isidoro provided proof that he was working in central Florida at the time of the murders. *Rodriguez*, 753 So. 2d at 34-35.
>
> In paragraph 37, Defendant alleges that the state failed to disclose that Isidoro was investigated by Seminole County law enforcement officials for possible narcotics offenses. The deposition of Pete Kelting was introduced into evidence. Kelting stated that there was no indication that Isidoro ever worked as an informant or that he was ever arrested. There was an anonymous tip that drugs were being sold out of a residence where Isidoro lived. It was investigated and no arrests were made.
>
> The fact that Isidoro was investigated in Seminole County would not have been admissible as impeachment. Under §90.610, Fla. Stat., only contact which results in a criminal conviction is admissible

> to prove bad character. Since Isidoro was not arrested, he was not convicted. It's possible Isidoro didn't know he was investigated.
>
> In paragraph 38, Defendant alleges that the State failed to disclose that a business partner and relative of Isidoro was a law enforcement officer. Villianueva testified that he did not know about Isidoro's involvement in either the Roman case or this case until after the fact. He did not have any contract [sic] with any of the officers who investigated the cases. As there was no involvement by Villanueva, there was nothing that Luis or Isidoro could have been impeached with.
>
> In paragraphs 22-26 of the Successive Motion, Defendant alleged that there was a secret docket relating to Isidoro. . . . There was absolutely no evidence presented that there is a secret docket that relates to Isidoro Rodriguez. Since Isidoro was not arrested for anything but trespass in 1978, there can be no secret docket since there was no arrest. In fact, it is clear to this Court that the Defendant confuses sealed plea agreements, which were the topic of the Miami Herald article, with a sealed docket.
>
> There is no evidence that Isidoro is a snitch, received a benefit, or that there was a secret docket on Isidoro. There is no evidence Isidoro's business relationship or familial with Villanueva led to special favors or treatment. The claims are not plausible nor credible.

(SPCR. 5087-89) The factual findings are all supported by testimony of Sgt. Singleton, Det. LeClaire, Mr. Laeser, Lt. Kelting, Lt. Villanueva, Ms. Pattavina and Mr. Arrojo. (SPCR. 5185-86, 5193, 5195, 5198-99, 5501-03, 4778-80, 4791-92, 5252, 5265-67, 5272-93) Since the lower court's factual findings are all supported by competent, substantial evidence, this Court must accept them. *Stephens*, 748 So. 2d at 1032-33.

Moreover, given these factual findings, the rejection of

the claims was proper. Since there was no police protection provided to Isidoro for being a witness in the Roman case and no threats or promises related to the nonexistent protection, counsel could not be ineffective for failing to impeach Isidoro about it. *See Breedlove v. Singletary*, 585 So. 2d 8, 11 (Fla. 1992). As such, Defendant's claim that counsel was ineffective for failing to try to do so was properly denied.

Further, the lower court was entirely correct that the alleged investigation in Seminole County was not admissible as impeachment material. This Court has held that the theory under which pending charges or investigations of state witnesses is admissible is that they give the witnesses a motive to curry favor with the State. *Breedlove v. State*, 580 So. 2d 605, 607-08 (Fla. 1991). This Court has also required that when there was merely an investigation with no charges or conviction, the defendant must show that the investigation is neither remote in time nor unrelated to the crime being tried for questions regarding it to be admissible. *Id.* at 608-09. Here, Defendant presented no evidence to show that the alleged investigation was admissible. In fact, he did not even show that Isidoro was ever aware that the investigation had occurred or was occurring such that he could have been motivated by it to curry favor. As such, the lower court properly found that nothing about this

investigation could have been used to impeach Isidoro. As such, Defendant failed to prove a *Brady* claim based on it. *Id.* at 607-09.

Despite the inadmissibility of this information, Defendant insists that the lower court should have granted him relief because Defendant insists that he did not need to show that the information would have been admissible. Instead, he asserts that he proved that knowing of the investigation[4] might have affected counsel's actions in other ways so as to show materiality. However, in *Wood v. Bartholomew*, 516 U.S. 1 (1995), the United States Supreme Court summarily reversed the Ninth Circuit for granting *Brady* relief based on inadmissible evidence. The Court held that it was improper to grant relief on a *Brady* claim without proof that the allegedly suppressed information would have lead to some admissible information that would create a reasonable probability of a different result. *Id.* at 5-8. The

[4] The State would note that Defendant also failed to prove that he did not know of the investigation. The information about the investigation was included in Det. Crawford's report in this case. (SPCR. 4805-10) Mr. Laeser testified that he turned over all of the police reports regarding this case during discovery. (SPCR. 5518) Defendant presented no evidence to contradict this testimony. Instead, he simply had Mr. Houlihan testify that he did not recall this information. (SPCR. 5353) However, Mr. Houlihan admitted that his memory was poor and that he did not recall what he got in discovery. (SPCR. 5306-07, 5359-60) Thus, Defendant also failed to prove that the State suppressed this information. *State v. Knight*, 866 So. 2d 1195, 1201-02 (Fla. 2003).

Court held that mere speculation that additional evidence might have been learned was not sufficient to meet this standard. *Id.*

Here, not only did Defendant not show that the investigation itself would have been admissible, he also did not show that it would have lead to admissible information. Instead, he simply had counsel state that they would have investigated this information without even showing that the investigation would have lead to admissible information. Defendant appears to believe that the lower court should have relied on speculation that this investigation might have lead to some admissible evidence. Since this is insufficient to show materiality under *Wood*, the lower court properly denied this claim.

Defendant's reliance on *Rogers v. State*, 782 So. 2d 373 (Fla. 2001), does not compel a different result. In *Rogers*, this Court merely noted that a defendant could prove a *Brady* claim by showing that the inadmissible information would have lead to admissible information. *Id.* at 383 n.11. Here, Defendant not only did not show that the information was admissible, he also did not show that it would lead to admissible information. As such, *Rogers* is inapplicable to this matter.

The lower court also properly found that information that

Isidoro had a relationship with Lt. Villanueva[5] was not admissible. Under Florida law, the manner in which a witness may be impeached are limited. §90.608, Fla. Stat.; *Rose v. State*, 472 So. 2d 1155, 1157-58 (Fla. 1985). Being related to a police officer who has no connection to an investigation and doing business with him does not satisfy any of these methods of impeachment. As such, the lower court properly determined that this information was not admissible. Moreover, since Defendant did not prove that this relationship would have lead to any admissible evidence, the lower court properly denied the claim. *Wood*, 516 U.S. at 5-8. The denial of these claims should be affirmed.

Defendant appears to challenge the rejection of his claim about "secret dockets" by claiming that he showed it was possible that a secret docket might exist. However, this Court has made it clear that a defendant must actual prove his claims for post conviction relief and cannot rely on mere speculation or possibility to do so. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). As this is exactly what Defendant is doing the claim was properly denied.

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[5] The relationship between Isidoro and Lt. Villanueva was also discussed in Det. Crawford's report. (SPCR. 4809-10) As such, for the same reasons asserted in footnote 2, *supra*, that Defendant failed to show that the investigation was suppressed, he also failed to show that this information was suppressed.

In attempt to avoid the fact that he did not prove any of the claims he actually raised, Defendant claims that the lower court denied him of a fair hearing by refusing to admit evidence concerning Isidoro having been a witness in the Roman case years before this crime was committed. However, the lower court did not abuse its discretion[6] in refusing to admit this evidence.

This Court has held that a trial court does not abuse its discretion in refusing to admit testimony regarding a claim that would be barred. *Riechmann v. State*, 966 So. 2d 298, 304-07 (Fla. 2007). It has held that claims that were not properly plead in a motion for post conviction relief by the time of a *Huff* hearing are properly rejected as procedurally barred. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003)(allegations added in support of claim for the first time during post conviction appeal are barred); *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002)(claim raised properly in motion for rehearing after *Huff* hearing); *Hunter v. State*, 817 So. 2d 786, 796-97 (Fla. 2002)(claim raised for the first time in a post hearing memo was not properly raised). This Court has applied this bar even where the defendant was asserting that the claim was based on newly produced public records when the defendant could and

[6] A trial court's rulings regarding the admissibility of evidence are reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000).

should have sought the public records on which the claim is based within the proper time limit to file the claim. *Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993); *see also Buenoano v. State*, 708 So. 2d 941, 952-53 (Fla. 1998). This Court has only permitted amendment to include new information were the defendant shows that he could not get access to the information on which the claim was based in time to file the claim properly. *Lugo v. State*, 33 Fla. L. Weekly S824, S830-31 (Fla. Oct. 8, 2008); *Vining*, 827 So. 2d at 212-13.

Here, Sgt. Singleton disclosed that Isidoro had been a witness in the Roman case during his pretrial deposition in this case. (SPCR. 5850-51, 5876-77) During the nearly 4 years between this Court's issuance of mandate and the filing of his final amended version of his initial motion for post conviction relief on April 16, 2004, (PCR. 43-167), Defendant never requested access to the State Attorney's Office file in the Roman case. (SPCR. 1719-22) He also never listed Roman among the more than 250 individuals about whom he repeatedly requested records from the Miami-Dade Police Department. (SPCR. 1695-1705, 1908-52, 1953-95) The *Huff* hearing regarding this motion was held on August 25, 2004. (PCR. 915-39) Defendant did not raise a claim that anything about Isidoro's involvement as a witness in the Roman case subjected him to impeach in the initial motion for

post conviction relief or at the *Huff* hearing other than to claim that the police allegedly threatened to remove alleged police protection to get Isidoro to make a statement in this case. (PCR. 43-167) Under these circumstances, any claim based on Isidoro's deposition in the Roman case is barred. *Zeigler*, 632 So. 2d at 50; *see also Buenoano*, 708 So. 2d at 952-53. As such, the lower court did not abuse its discretion in refusing to allow Defendant to present evidence about it. *Riechmann*, 966 So. 2d at 304-07. The lower court should be affirmed.

Even if the information did not concern a barred claim, the lower court would still not have abused its discretion in not admitting this evidence. Here, the evidence Defendant claims should have been admitted concerns Isidoro's alleged admissions to owning guns and committing bad acts. While Defendant insists that this evidence should have been used to impeach Isidoro at trial, he has never explained how the evidence would have been admissible as impeachment. Such a lack of explanation is not surprising, as the evidence would not have been admissible. Again, the manner in which a witness may be impeached are limited. §90.608, Fla. Stat.; *Rose*, 472 So. 2d at 1157-58. While §90.608(3), Fla. Stat., permits attacking a witness's character, it provides that the attack must be made in accordance with §§90.609 & 90.610, Fla. Stat. These sections provide that the

attack must take the form of testimony regarding the witness's reputation for truthfulness, §90.609, Fla. Stat., or the form of evidence that the witness had previously been convicted of a felony or crime involving dishonesty, §90.610, Fla. Stat. Even when a witness has been convicted of a prior felony or crime of dishonesty, the nature of the prior conviction is not admissible unless the witness does not admit the correct number of prior convictions. *Livingston v. State*, 682 So. 2d 591, 592 (Fla. 2d DCA 1996). Moreover, pursuant to §90.404, Fla. Stat., evidence of anyone's commission of prior bad acts are only admissible when the acts are relevant to a material fact at issue. This Court had held that a defendant seeking to admit evidence of a bad act must meet the same standard of relevancy that the State would have to meet to admit *Williams* Rule evidence. *See Gore v. State*, 784 So. 2d 418, 430-32 (Fla. 2001).

Here, nothing about the information about which Defendant complains concerns Isidoro's reputation for truthfulness or his having been convicted of a felony or crime of dishonesty. Instead, it concerns alleged bad acts committed by Isidoro that do not meet the requirements for reverse *Williams* rule. As such, the lower court did not abuse its discretion in refusing to admit this evidence. It should be affirmed.

With regard to the claim concerning Sirvas letters, the

lower court denied this claim, stating:

> Sirvas testified at the evidentiary hearing on September 22, 2008, via satellite. Sirvas testified that Luis told him that he took the deal to accept a life sentence and testify against defendant to save his ass. Sirvas further stated that Luis did not tell him any details of the crime. During the hearing, Sirvas testified that he had no knowledge of what Luis or the Defendant did. Sirvas did not testify what Luis allegedly lied about. Sirvas testified at the hearing that Luis and Defendant had an agreement not to testify against each other. Sirvas acknowledged that the August 10, 1985 letter was not signed and that his name does not appear on the letter or the envelope.
>
> * * * *
>
> At the evidentiary hearing, Sirvas testified that he did not know details of the crime Luis committed, that Luis only told him that he took the plea to save his ass. In the letter, Sirvas claims that Luis told him everything. Clearly, either Sirvas was not telling the truth in the letter or Sirvas was not telling the truth at the hearing. Either Sirvas lied in the letter, lied during his testimony at the hearing, or both. Sirvas' testimony was not believable.
>
> * * * *
>
> The 1995 letter was not signed and it was unknown by the prosecutor from whom it was sent. It would not have been helpful to defense counsel. Arguably, the 1996 letter should have been turned over. However, Defendant was not prejudiced as a result of the failure to turn over the 1996 letter. Counsel for Defendant testified at the hearing that they did not think that Luis was telling the truth. Luis was extensively cross-examined. Even if Sirvas was called to testify, his oral testimony contradicted what he wrote in the letter. He did not have any credibility in front of this Court and he would not have had any credibility in front of the jury.
>
> Luis testified at trial. His plea agreement was known at that time and he was questioned at length about the agreement. It was clear Luis entered into the plea agreement to avoid the death penalty. Luis testified to that at the trial. The inconsistencies in his trial testimony from his initial confession were noted by the Florida Supreme Court on direct appeal.

Rodriguez v. State, 753 So.2d 29, 34 (Fla. 2000).

> If any *Brady* violation occurred, it was not material and did not prejudice the Defendant's ability to investigate or present other aspects of the case.

(SPCR. 5082-84) Once again, the lower court's findings of fact are supported by competent, substantial evidence. While the letters of which Sirvas claimed authorship indicated that Luis had told him everything about the murders and named Defendant's counsel, Sirvas testified that Luis never told him anything about the case except he and his codefendant were involved in the murder, without even providing Defendant's name. Moreover, Sirvas read his name and birthdate from a piece of paper. He vacillated on the number of prior felony convictions he had but insisted that he had only served a prison sentence once. Thus, the lower court's findings that Sirvas was incredible and could testify to nothing other his own belief that Luis was a lying are binding on this Court.

Further, while Defendant insists that it was improper to deny this claim because Sirvas was incredible, this is not true. This Court has rejected *Brady* claims, where the evidence that was allegedly suppressed was not credible. *Sochor v.* State, 883 So. 2d 766, 786 (Fla. 2004); *Kight v. State*, 574 So. 2d 1006, 1073 (Fla. 1990). As such, the lower court should be affirmed.

Moreover, affirmance is particularly appropriate here, given the content of Sirvas' testimony. The essence of Sirvas'

testimony was that he believed Luis was lying even though he knew nothing about the crime. However, Florida law does not permit one witness to comment on the credibility of another witness. *See Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007). Thus, the content of Sirvas' testimony would not even have been admissible, and there was no proof that it would have lead to the discovery of admissible evidence. Thus, it does not prove a *Brady* claim. *Wood*, 516 U.S. at 5-8. The lower court should be affirmed.

In an attempt to avoid the fact that Sirvas provided no admissible or credible evidence, Defendant complains that lower court refused to allow him to present evidence that the prosecutor wrote a letter about Luis to the parole commission. Defendant insists that this letter would prove his prior claim about the State knowingly presenting false testimony that it had not agreed to assist him in obtaining his early release from prison. However, once again, this issue was not an issue on which jurisdiction had been relinquished and was, thus, not properly before the lower court. *See Palma Sola Harbour Condominum, Inc.*, 374 So. 2d at 1135.

Moreover, the letter would not substantiate any claim. In the plea agreement that Luis entered in Defendant's presence prior to trial, the State specifically promised "to directly

communicate with the proper authorities, in writing, to notify them of the terms of this agreement; and that [Luis] had fully co-operated, pursuant to these terms, when he testified against [Defendant].” (E. 24, PCR Exhibit 22) At trial, Luis testified that he planned to apply for clemency in 10 years. (T. 2870-73) Since the Parole Commission is actually the agency that investigates clemency petitions, §20.32, Fla. Stat., the letter merely represents a fulfillment of the express terms of the plea agreement, which was fully disclosed before trial. As such, the letter would not prove any claim.[7] Thus, the lower court did not abuse its discretion in refusing to admit it.

Defendant also attempts to show that he was entitled to some relief by claiming that the lower court abused its discretion[8] in denying public records requests. In the course of arguing this claim, Defendant mentions his requests to the Seminole County Sherriff’s Office, the Miami-Dade Department of

[7] Moreover, in arguing the claim, Defendant relies on a clear transcript error to assert that the State contended it was surprising that the letter had been written. In arguing Defendant’s request to take judicial notice and admit the letter, the State had pointed out that the fully disclosed plea agreement contained an expressed provision for the writing of the letter. (SPCR. 6230-31) Moreover, immediately after the statement on which Defendant relies, he responded that he did not agree that it was part of the plea agreement. (SPCR. 5493) Thus, in context it is clear that the court reporter simply missed the not in the sentence Defendant quotes.

[8] A trial court’s ruling on a public records request is reviewed for an abuse of discretion. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

Corrections, the Miami-Dade Police Department and the Office of the State Attorney. However, Defendant then only presents argument regarding the denial of his requests to the Miami-Dade Police and the Miami-Dade Department of Corrections. Since Defendant has not presented any argument regarding the requests to State Attorney and the Seminole County Sherriff's Office, there claims are waived. *Doorbal v. State*, 983 So. 2d 464, 482-83 (Fla. 2007).

Moreover, the claim regarding the State Attorney's Office is not preserved. Pursuant to Fla. R. Crim. P. 3.852(i), a defendant is required to file an affidavit and obtain an order from the lower court within 30 days before the request is effective. Here, while Defendant filed the affidavit, he did not ever obtain the required order. (SPCR. 4253-57) In fact, when the lower court heard argument regarding the outstanding affidavits, Defendant did not present any argument about the request to the State Attorney's Office or even mention the request as being outstanding. (SPCR. 4511-87) Where a defendant fails to obtain a ruling in the lower court, any issue regarding the ruling the defendant did not obtain is unpreserved. *Simpson v. State*, 34 Fla. L. Weekly S199, S202 (Fla. Feb. 12, 2009). As that is true here, any issue regarding the State Attorney's Office is not preserved.

Even if Defendant had presented the same arguments regarding all of the agencies that he names and had preserved an issue regarding the State Attorney's Office, Defendant would still be entitled to no relief. For an affidavit under Fla. R. Crim. P. 3.852(i) to be properly filed, it must specifically identify the documents that are sought, show that the request is made in a timely and diligent fashion and show that the specific documents requested are either relevant to the post conviction proceeding or calculated to lead to the discovery of admissible information. Fla. R. Crim. P. 3.852(i). To order production pursuant to the affidavit, a trial court must find that all of these showing had been made and that the request is not overly broad and unduly burdensome. Fla. R. Crim. P. 3.852(i)(2). The requirement that the request be made in a timely and diligent fashion is entirely consistent with this Court's prior precedent holding that a defendant who failed to seek public records production in a timely and diligent fashion waives the right to have public records produced. *Pace v. State*, 854 So. 2d 167, 180 (Fla. 2003); *Vining*, 827 So. 2d at 218-19. Moreover, this Court has held that requests that seek any and all documents of any form are overly broad and unduly burdensome. *Diaz v. State*, 945 So. 2d 1136, 1150 (Fla. 2006); *Mills v. State*, 786 So. 2d 547, 552 (Fla. 2001). It has stressed that public records requests

are not to be used for fishing expeditions and that defendants bear the burden of proving that the records they request are, in fact, related to a colorable claim for post conviction relief. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002); *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001); *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000).

Here, Defendant's only argument regarding why requests he presented in 2008 should be considered to be made on a timely and diligent fashion was that the fact that an evidentiary hearing had now been ordered somehow permitted the requests to be presented at such a late date. However, this Court has held that motions for post conviction relief are to be fully plead when filed. *Vining*, 827 at 212-13. In fact, this Court characterized the belief that a defendant did not have to present the specific facts in support of his claims until after an evidentiary hearing was ordered as an "incorrect assumption." *Doorbal*, 983 So. 2d at 484. Of course, a defendant must have investigated his claim in advance of filing it to meet this requirement. Thus, the mere fact that an evidentiary hearing has been ordered provides no basis for asserting that the requests were made in a timely and diligent fashion.

While Defendant insists that this requirement creates a catch 22 because he has to show that the records "are relevant

to a claim," this is not true. The requirements under Fla. R. Crim. P. 3.852(i)(1)(C) and (2)(C) are not that a defendant has to show that a request is relevant to a filed claim. Instead, they require a showing and finding that the records "are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i)(1)(C) & (2)(C). Thus, there is no catch 22.

Moreover, the lower court also found that the requests were overly broad and unduly burdensome. Requests to the Miami-Dade Police, the Miami-Dade Department of Corrections and the State Attorney's office each sought "all records" related to numerous individuals. (SPCR. 4252-62, 4271-75) The request to the Seminole County Sheriff sought records regarding Isidoro, his wife and Roman "in any capacity." (SPCR. 4276-79) Thus, Defendant again sought all records. However, as noted above, this Court has ruled that requests in this form are overly broad. *Diaz*, 945 So. 2d at 1150; *Mills*, 786 So. 2d at 552. As such, the lower court did not abuse its discretion in denying the requests. It should be affirmed.

Defendant finally asserts that he is entitled to relief based on the cumulative effect of the claims he has raised concerning Luis and Isidoro. However, as can be seen above and

in the State's answer brief, Defendant failed to prove that there was any information that could have been presented to impeach Isidoro's testimony and has failed to prove his claims related to additional impeachment of Luis. Moreover, it should be remembered that Luis was extensively cross examined at trial. He admitted that he entered a plea agreement to avoid the death penalty. He acknowledged that he was hoping to receive clemency after 10 years. He admitted that he was a convicted felon and made inconsistent statements about the crime. Evidence that he was given visits with his family and used the occasion to have sex with his wife was presented. Moreover, Defendant made inculpatory statements. Further, as argued in the State's briefs and habeas response, Defendant's claims are all individual barred and meritless. As such, his cumulative error claim also fails, as the lower court properly found. *Griffin*, 866 So. 2d at 22. It should be affirmed.

II. THE CLAIM REGARDING LAGO WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that the State suppressed information that would have impeached the testimony regarding statement that Alejandro Lago made to the police. However, the claim was properly denied.

In denying this claim, the lower court stated:

[T]he claim is lacking in merit. It was raised on direct appeal and found to be harmless error.

Additionally, Mr. Laeser testified that Lago was a jailhouse snitch, that he did not find him credible, and did not call him as a witness. Mr. Zenobi testified that he was aware of Lago, and that Mr. Laeser told him that Mr. Laeser would not be calling him as a witness.

Numerous mental health experts testified at trial.

> Both the State and [Defendant] presented the testimony of numerous psychologists and psychiatrists who had evaluated [Defendant] over the preceding twenty years. Apparently, whenever [Defendant] was charged with a crime, a question of competency was raised and he was evaluated. Most of those who examined him agreed that he suffered from some sort of mental illness, but the testimony varied greatly in that some had previously found him to be incompetent and in need of hospitalization; others had found him to be malingering. None could testify to his state of mind at the time of the murders. The testimony did establish that [Defendant] had a long history of drug abuse. Several of his family members testified regarding his childhood and his mother's mental problems.

Rodriguez, 753 So. 2d at 35.

Additionally, Judge Rothenberg's sentencing order details the testimony of the mental health experts and Defendant's drug use. Fourteen pages of the order are devoted to the subject of whether was suffering from a mental disturbance. ROA 1760-1774. Numerous pages recount the testimony of the mental health experts. What Lago said to Crawford is not mentioned, while the testimony of Defendant's family and friends, are. Judge Rothenberg noted in her sentencing order that the all of the letters sent by Defendant's family and friends "are devoid of any mention of mental illness". p. 34. Pages 36 and 37 of the Sentencing Order conclude that the actions of Defendant "demonstrate deliberation and planning. These actions demonstrate clear thinking and the ability to react to unanticipated events, quickly, calmly and rationally.

> As Dr. Mutter testified, there are not the actions of or the disorganized behavior of a person who is suffering from schizophrenia." P. 36. "Based upon a careful consideration of all the evidence, this court finds that when the Defendant was arrested in 1977, he was suffering from a substance abuse disorder based upon Defendant's long-term and extensive use of heroin and LSD. This Court concludes that when the Defendant learned he could stay at a hospital and avoid going to Court and to prison for his criminal behavior if he was "sick", he consciously exaggerated his symptoms, manipulated the doctors and the system and became a malingerer. " p.36.
>
> Based on the testimony of the mental health experts and the fact that the Defendant had 71 prior violent felony convictions, the jury and judge easily could have reached the conclusion that death was the appropriate sentence.

(SPCR. 5089-90) Once again, the lower court's factual findings are fully support by the testimony of Mr. Laeser, Mr. Zenobi and the sentencing order. As such, these factual findings are fully supported by the record and are binding on this Court. *Stephens*, 748 So. 2d at 1032-33.

Moreover, given these factual findings, the lower court properly denied this claim. This Court found that the admission of Lago's statements at trial was error but harmless on direct appeal. *Rodriguez*, 753 So. 2d at 43-45. By holding the error harmless, this Court has already determined that the State has proven beyond a reasonable doubt that Lago's statement did not affect Defendant's sentence. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The only purpose of impeachment is to show that a witness's statement was not credible. *Morton v. State*, 689 So.

2d 259, 263 (Fla. 1997). Thus, the most that Defendant showed was that evidence that did not affect his sentence could have been impeached. However, such a showing does not demonstrate a reasonable probability of a different result. *See Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003). This is particularly true since possession of the letters would not have prevented malingering from being an issue as Defendant suggests given all the other evidence of malingering. As such, the denial of the claim should be affirmed.

Moreover, contrary to Defendant's assertion, he did not prove that Lago received substantial benefits for his testimony. The only "benefit" that Defendant showed that Lago received regarding this matter was the writing of two letters addressed to "whom it might concern," stating that Lago has assisted in this matter. Such insubstantial information does not generally support a claim of a *Brady* violation. *United States v. Curtis*, 380 F.3d 1311 (11th Cir. 2004); *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999); *McCleskey v. Kemp*, 753 F.2d 877, 882-84 (11th Cir. 1985). This is particularly true as Lago received even these letters after he had cooperated and given his statement. There was no evidence presented that this benefit was discussed or agreed upon until that time. However, evidence that the State conferred a benefit after a witness acted is generally

considered not to support a *Brady* claim, when the State did not agree to the benefit in advance. *State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000). Thus, lower court properly rejected this claim.

While Defendant asserts that the lower court ignored the use to which Defendant could have put these letters, it is Defendant who is ignoring the testimony and record. At the hearing, Mr. Zenobi acknowledged that not having these letters was not what affected the defense. (SPCR. 5443) Instead, he believed that the prejudice arose because he believed that the State had promised not to present evidence about Lago. (SPCR. 5432, 5443-45) Moreover, as Mr. Zenobi admitted at the evidentiary hearing, the record reflects that the defense was aware that Lago was a paid informant at the time of trial. (T. 4069-70, SPCR. 5462-63) As such, the information that Lago received two letters indicating that he had cooperated in this matter after he had given his statement to the police but before trial and that he received another letter for cooperating in a different case was merely cumulative to the information that Defendant already had about Lago. However, the failure to disclose cumulative information does not demonstrate a *Brady* claim. *Knight*, 866 So. 2d at 1202-03. This is particularly true here. Despite having information that Lago was a paid informant

and the facts that Lago had made statements in deposition that counsel characterized as being "patently absurd," counsel chose not to seek to impeach Lago at the time of trial. As such, the denial of the claim should be affirmed.

Defendant again seeks relief based on the alleged cumulative effect of the errors. However, as seen in the State's briefs and habeas response, all of Defendant's individual claims are procedurally barred and without merit. As such, his cumulative error claim fails as well. *Griffin*, 866 So. 2d at 22.

CONCLUSION

For the foregoing reasons, the denial of post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **ROSEANNE ECKERT**, Assistant CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 10th day of March 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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