IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-23

MARCO NORDELO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review of a Decision from the Third District Court of Appeal Rendered in an Appeal from the Circuit Court for Miami-Dade County, Florida

L.T. Case Nos. 3D09-1269, 90-25016

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STATEMENT OF THE CASE AND FACTS

Overview of Nature of the Case

Mr. Nordelo is serving a life sentence arising out of his conviction for armed robbery 20 years ago. He filed a rule 3.850 motion for post-conviction relief based upon newly discovered evidence and prosecutorial misconduct. In support of his motion, he adduced an affidavit by the actual perpetrator completely exonerating Mr. Nordelo of wrongdoing and establishing that the prosecution used evidence to convict Mr. Nordelo that was false and misleading. The trial court summarily rejected Mr. Nordelo's motion. The issue before this Court is whether the trial court erred when it denied Mr. Nordelo's motion for post-conviction relief without first holding an evidentiary hearing, without attaching to its order record excerpts ostensibly supporting the order, and without giving Mr. Nordelo leave to amend his motion to address any perceived deficiencies.

Facts and Course of Proceedings[1]

The Original Trial and Direct Appeal

On December 17, 1990, the State charged Mr. Nordelo and Angel Lopez with committing armed robbery and kidnapping on May 29, 1990. (R. 23-25, 32,

[1] As noted above in the overview, the trial court did not attach any excerpts from the original trial record with its order denying Mr. Nordelo's rule 3.850 motion, and none appears in the record on appeal here. Accordingly, we refer to facts about the trial only to the extent they were alleged in ***both*** Mr. Nordelo's rule 3.850 motion and the State's response to that motion.

48).[2] The State tried the case against Mr. Nordelo on April 1, 1991. (R. 32, 48). On that same day, Lopez pled guilty to the robbery charge in exchange for a 25-year prison sentence. (R. 2, 48; *Am. Init. Br.* at 2).

At trial, Francisco Benavides testified that toward the end of his shift at a convenience store, two men entered the store and held him up at gunpoint. (R. 32, 49). Lopez hit Benavides with a handgun, knocking him to the ground. (R. 32-33, 49). Lopez continued to kick Benavides until he momentarily lost consciousness. (R. 33, 49). The two men fled the store after taking money from the cash register and the victim's wallet. (R. 33, 49). As Benavides was dialing "911," he saw a white car at the end of the street, which he took to be the robbers' getaway car. (R. 33, 49).

Officer Julio Pino testified that he later engaged in a high-speed chase with a "white Ford Taurus" occupied by Lopez and Mr. Nordelo. (R. 34, 49). He apprehended and arrested the two men. (R. 34, 49). One month later, Benavides identified Mr. Nordelo in a photo array. (R. 33, 49). Benavides' belated identification of Mr. Nordelo, coupled with Benavides' testimony about a white getaway car and Officer Pino's testimony about the white Ford Taurus driven by

[2] Citations to "R. __" refer to the Record on Appeal and the page numbers assigned by the clerk of the district court. Citations to "App. __" refer to page numbers of the Appendix, attached to this brief as Tab A.

Lopez and Mr. Nordelo at the time of their arrest, provided the sole evidence tying Mr. Nordelo to the robbery.

The jury convicted Mr. Nordelo, and the trial court adjudicated him guilty of robbery. (R. 34, 50). The court sentenced him to spend the rest of his life in prison. (R. 34, 50).

On direct appeal, the district court held that Officer Pino's testimony about the high-speed car chase involving Mr. Nordelo in a white car was collateral evidence and should have been excluded. (R. 34, 50; *see Nordelo v. State*, 603 So. 2d 36 (Fla. 3d DCA 1992)). The district court determined, however, that the error was harmless and upheld the conviction. (R. 34, 50). At the time of the direct appeal, neither Mr. Nordelo nor the district court had reason to believe that the State had proffered the evidence about the white car with knowledge that the car was stolen the day after the robbery, or to believe that the State had withheld this exculpatory evidence from defense counsel prior to trial.

The Lopez Affidavit

In July 2008, Lopez provided an affidavit that exonerated Mr. Nordelo of any involvement in the crime for which he had been convicted. (R. 47; App. 1b). Lopez stated that his actual accomplice during the armed robbery on May 29, 1990, was Jose Sanchez, not Mr. Nordelo. (R. 47; App. 1b). Indeed, Lopez stated

that "Mr. Nordelo was not present at the time of the robbery, and was not involved in any way." (R. 47; App. 1b).

Lopez also disclosed that, on ***May 30, 1990*** (the day following the robbery), he had stolen the Ford Taurus in which he and Mr. Nordelo were riding when they were arrested on May 31, 1990. (R. 47; App. 1b). This established that the white getaway car spotted by Benavides could not have been the same white Ford Taurus Mr. Nordelo was riding in at the time of his arrest. Because the police must have known when the Taurus was stolen, the State's use of evidence about this car in Mr. Nordelo's trial to link him to the robbery would have been willfully misleading.

Lopez explained that he had not come forward with this evidence earlier because, being "ignorant of the law," he had been concerned that the State would penalize him for helping Mr. Nordelo by reneging on his plea agreement resulting in his lesser sentence. (R. 47; App. 1b). This is why he simply "took the plea and then ***refused to testify***." (R. 47; App. 1b) (emphasis added).

Rule 3.850 Motion Based on Newly Discovered Evidence

On August 11, 2008, Mr. Nordelo filed a rule 3.850 motion asserting two claims for a new trial based on the newly discovered evidence exculpating him from the crime for which he had been convicted and also establishing that the State had used evidence to obtain that conviction that the prosecution must have known

was false and misleading. (R. 26-47). The motion attached Lopez's affidavit. (R. 47; App. 1b).

In the first claim, Mr. Nordelo alleged that his defense counsel "was legally precluded from compelling Lopez's admission exculpating Mr. Nordelo." (R. 36). Because Lopez had been charged with the robbery, Nordelo could not have compelled his testimony. Therefore, Lopez was unavailable as a witness for the defense. (R. 36). Because Mr. Nordelo had nothing to do with the robbery, neither he nor his lawyer knew the identity of Lopez's co-perpetrator in the robbery until Lopez came forward with that information many years later. (R. 36). This exculpatory evidence, the motion alleged, "was unknown and unknowable through due diligence at the time of the trial." (R. 36).

Mr. Nordelo asserted that Lopez's exculpatory testimony would probably have changed the outcome of his trial. (R. 36-37). To support this point, Mr. Nordelo's motion emphasized that the victim's identification of Mr. Nordelo took place one month after the robbery, and (apart from the misleading evidence about the white Ford Taurus) it was the only evidence against him. (R. 37). The motion then discussed authoritative studies establishing the inherent weaknesses in eyewitness identification, and it recounted weaknesses in Benavides' identification of Mr. Nordelo in particular. (R. 37-38). Specifically, Benavides admitted he suffered memory loss after the robbery. (R. 37). He also stated that he had seen

Mr. Nordelo the day before the robbery. (R. 37). All this suggested that Benavides misidentified Mr. Nordelo in the photo array as the perpetrator based upon his recollection of seeing Mr. Nordelo the day before that event. (R. 37). Mr. Nordelo's motion requested a new trial based on Lopez's newly provided exculpatory testimony. (R. 39).

Mr. Nordelo's motion asserted a second claim stemming from additional information in Lopez's affidavit. Specifically, Lopez admitted for the first time in his affidavit that he had stolen the white Ford Taurus ***the day after the robbery***. He said he picked up Mr. Nordelo after he had stolen the car. Although there is no evidence suggesting that Mr. Nordelo knew this before he received Lopez's affidavit, there is every basis to conclude that the police knew exactly when the car was reported stolen. This established, therefore, that the State knowingly used false and misleading evidence at Mr. Nordelo's trial suggesting the white Ford Taurus was the getaway car used in the robbery to shore up Benavides' vulnerable eyewitness identification testimony linking Mr. Nordelo to that crime. (R. 42-43). Mr. Nordelo requested a new trial based on this claim as well. (R. 44).

The State filed a response to the motion. Despite making references that ostensibly were to the trial transcript, the State did not attach a single trial record excerpt to the response. (R. 48-55). The State argued, without support, that the motion was "conclusively refuted by the record and inherently incredible." (R.

51). The State asserted that there was "overwhelming evidence of guilt" presented at trial, including the fact that Benavides identified Mr. Nordelo "from photo lineups with 100% certainty." (R. 51).

Moreover, according to the State, Mr. Nordelo did not dispute Officer Pino's testimony at trial that Mr. Nordelo was the driver of the Ford Taurus when he and Lopez were arrested, while Lopez claimed in his affidavit that he was the driver of the car that day. (R. 51). Additionally, the State's response observed that the record was "clear" that Mr. Nordelo and his lawyer had had an opportunity to speak with Lopez after his plea had been accepted but before Mr. Nordelo's trial, and that the record was "clear" that Mr. Nordelo did not call Lopez as a witness. (R. 52). The State urged, then, that Lopez's affidavit be rejected as "inherently incredible." (R. 51-53). Alternatively, the State acknowledged that the trial court "may set the matter for an evidentiary hearing." (R. 53).

The State addressed the prosecutorial misconduct claim by characterizing it as "untimely and successive." (R. 53-54). Ignoring the fact that the second claim was based on Lopez's newly discovered testimony, the State asserted that the claim was untimely because it did not "fall within any of the exceptions" of rule 3.850's two-year limitations period. (R. 53). In addition, the State argued that the claim was successive because Mr. Nordelo had alleged prosecutorial misconduct in a rule 3.850 motion filed on April 11, 1994, and denied May 13, 1994. (R. 54). The

State provided no record support for this assertion, however, and the State's assertion is factually insupportable. This is confirmed by the fact that Mr. Nordelo's present claim of prosecutorial misconduct is based on the newly discovered evidence provided by Lopez in his recent affidavit. (R. 42-43, 47; App. 1b).

Trial Court's Review of the 3.850 Motion

On January 15, 2009, the trial court held a hearing with counsel to determine whether Mr. Nordelo's rule 3.850 motion warranted an evidentiary hearing. (R. 63, 65). At the hearing, Mr. Nordelo's counsel discussed the facts supporting his claim of newly discovered evidence and stated that when Mr. Nordelo's trial counsel asked Lopez to testify at trial, he refused. (R. 65-66). Mr. Nordelo's counsel insisted that an evidentiary hearing was required because Lopez's affidavit was not refuted by the record, and the trial court needed to weigh Lopez's credibility before determining whether a new trial was warranted. (R. 66-67).

The trial court inquired "as to why, as to whether or not this falls within the ambles [sic] of newly discovered evidence this many years later, we are talking about eighteen years later." (R. 67). The court shortly thereafter reminded counsel it "was not turning this into a full blown evidentiary hearing." (R. 69). In addressing Lopez's refusal to testify when asked by Mr. Nordelo's trial counsel, Mr. Nordelo's counsel contended that the "the State specifically says in regards to

[Mr. Nordelo's trial counsel's] conversation with Mr. Lopez, that it falls outside the record, our position is if Mr. Lopez refused to speak with [trial counsel], your Honor needs to hear." (R. 69-70). Abruptly, the trial court stated in response: "Counsel, here's the finding, I am finding the evidence is not newly discovered evidence. . . . [T]he evidence could have been obtained through due diligence simply, because the witness now, because his custodial status has changed, has decided to come forward does not render the evidence newly discoverable." (R. 70). Following these statements, the court ruled that the evidence was not newly discovered, as it "could have been obtained through due diligence . . . ." (R. 70).

Addressing the claim of prosecutorial misconduct and the State's assertion it was untimely and successive, Mr. Nordelo's counsel clarified that the prosecutorial misconduct claim, like the first claim, was previously unknown and was based on the newly discovered information in Lopez's affidavit. (R. 71). The trial court denied the motion as to both claims, stated there would be no evidentiary hearing, and determined, without explanation or apparent evidentiary basis, that the prosecutorial misconduct claim was successive. (R. 71-72). The court characterized its ruling as a summary denial and stated it needed "a copy of the relevant portions of the transcript regarding the identity, whether or not it was even a disputed issue." (R. 71, 73). The State advised the trial court it would provide "a copy of the entire trial transcript." (R. 73). The State never filed that transcript or

any record support for its representations to the trial court or for the rulings the trial court made in reliance on those representations. (*See* R. 18, 20; App. 12a n.2).

The trial court first entered a written order denying Mr. Nordelo's motion "without a hearing" in open court the same day as the non-evidentiary hearing; the following month, it vacated that first order. (R. 16, 56). The trial court received the transcript from the January 15 hearing on March 6, 2009, and it entered a new order denying the rule 3.850 motion on April 6, 2009. (R. 18, 20, 57, 63).

The new order reflected the determinations the trial court had made at the January 15 hearing—the trial court ruled "that the evidence as to both counts is not newly discovered and could have been obtained through due diligence" and that Mr. Nordelo's second claim for relief was "successive to his prior Motion for Post-Conviction Relief." (R. 57). The trial court did not attach any excerpts from the original trial record; instead, it directed the court clerk "to attach all the necessary record excerpts from the court file that support the Court's ruling in this matter." (R. 57). The order did not identify anything specific that was to be attached. (App. 12a). And the order in the record is a one-page document with no record attachments. (R. 20, 22, 57).

Decision of District Court on Review

Mr. Nordelo appealed the denial of his rule 3.850 motion to the district court. (R. 58). A divided panel affirmed the trial court's summary denial in a

decision published at *Nordelo v. State*, 47 So. 3d 854 (Fla. 3d DCA 2010). (App. 1a-18a).

In its decision, the district court articulated the two-part test it would follow for considering a post-conviction claim based on newly discovered evidence, set out by this Court in *Jones v. State*[3] as follows: 1) To be newly discovered evidence, the evidence must not have been known "by the trial court, by the party, or by counsel at the time of trial" and "must appear that defendant or his counsel could not have known [of it] by the use of diligence"; and 2) To be entitled to relief, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." (App. 3a) (internal quotations and citations omitted).

The district court determined that Lopez's affidavit "cannot be deemed newly discovered evidence because it was either known to or easily discoverable by [Mr. Nordelo] and his counsel." (App. 4a). According to the district court, the original trial court "allowed them both to speak with the codefendant after his plea was accepted and before [Mr. Nordelo's] trial began." (App. 4a). The district court reasoned that Mr. Nordelo would have sought to elicit the testimony of his codefendant at trial had he thought at the time Lopez would provide exculpatory testimony. (App. 4a).

[3] 591 So. 2d 911 (Fla. 1991).

Moreover, the district court disagreed with Mr. Nordelo's assertion that Lopez's statement was newly discovered evidence because it was "newly available testimony" of a defendant "previously unwilling to testify." (App. 4a) (quoting *Totta v. State*[4]). According to the district court, Mr. Nordelo did not sufficiently allege Lopez's previous unwillingness to testify—he "failed to allege in his motion that he ever, in seventeen years, asked his codefendant to testify." (App. 4a-5a). The district court characterized as "nonsensical" Lopez's statement in his affidavit that he was afraid to come forward with the information sooner because he was afraid of losing the benefits of his plea offer. (App. 5a).

The district court then rejected the need for an evidentiary hearing to assess Lopez's credibility or to explore why he did not come forward earlier. (App. 5a-6a). According to the district court, an evidentiary hearing is required, "if at all, for the sole purpose of allowing the trial court to determine whether the newly discovered evidence is of 'such a nature that it would *probably* produce an acquittal on retrial.'" (App. 6a) (quoting *Jones*, 591 So. 2d at 915) (emphasis in original). Where "the affidavit is inherently incredible or obviously immaterial to the verdict," an evidentiary hearing is not required, according to the district court. (App. 6a) (citations omitted).

[4] 740 So. 2d 57 (Fla. 4th DCA 1999).

The district court approved the trial court's summary denial of Mr. Nordelo's rule 3.850 motion without attaching portions of the record that conclusively refuted his claims. (App. 7a). According to the district court, Mr. Nordelo's motion was "legally insufficient" on its face, so the trial court's summary denial was "adequate." (App. 7a).

Upholding the trial court's summary denial of the rule 3.850 motion, the district court determined that Mr. Nordelo's claims were "both" facially invalid and conclusively refuted by the record. (App. 7a). The claims were facially invalid because "the affidavit provides no information that neither Nordelo nor his counsel could have discovered at the time of trial through the exercise of due diligence." (App. 7a). The claims were "conclusively refuted by the record" because "the State presented overwhelming evidence of Nordelo's guilt during the trial, including the victim's identification of both defendants from photo lineups with one hundred percent certainty." (App. 7a). The record, according to the district court, also rendered the affidavit "inherently incredible" because Lopez claimed he was the driver of the white car, "while the record shows that the arresting officer testified—and Nordelo never disputed—that Nordelo was driving at the time of his arrest." (App. 7a).

Because the district court concluded that the information in Lopez's affidavit could not meet the first prong of the newly discovered evidence test, the court affirmed the trial court's summary denial of the rule 3.850 motion.

In his dissent, Judge Cope opined that the rule 3.850 motion was sufficiently pled as to warrant an evidentiary hearing. Alternatively, he noted that "if there is any pleading deficiency, then the State is correct that leave to amend should be granted." (App. 9a). His dissent noted this Court's requirement that when reviewing the summary denial of a rule 3.850 motion, a court must accept a movant's allegations as true to the extent that they are not conclusively refuted by the record. (App. 13a) (citing *Hunter v. State*, 29 So. 3d 256, 261 (Fla. 2008)).

According to Judge Cope, the amount of time that had elapsed between the time of the original crime and Lopez's decision to come forward was not dispositive. (App. 13a). He also highlighted the distinction this Court drew "between the requirements (a) to plead the existence of newly discovered evidence, versus (b) the heightened requirements to establish due diligence during an evidentiary hearing. The pleading requirement is lower; the proof requirement is higher." (App. 14a) (discussing *Davis v. State*, 26 So. 3d 519 (Fla. 2009)). Judge Cope explained that, at the pleading stage, the court must take as true Lopez's statements that he did not come forward earlier because he was afraid of losing the benefits of his bargain with the State and that he had refused to testify at Mr.

Nordelo's trial. Moreover, Judge Cope explained, the court must assume that Lopez would have persisted in his refusal to testify to assist Mr. Nordelo at trial. (App. 15a-16a).

Judge Cope concluded that Mr. Nordelo was entitled to an evidentiary hearing on the question of due diligence or to leave to amend his motion to address any deficiencies perceived by the court. (App. 17a-18a).

Mr. Nordelo sought to invoke this Court's discretionary review based on conflict. This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The trial court erred when it summarily denied Mr. Nordelo's rule 3.850 motion in an order devoid of any actual record support and contrary to the allegations of the motion. Under controlling decisions of this Court, the motion's allegations had to be taken as true, and, taken at face value, they met the requirements for pleading newly discovered exonerating evidence as a basis for a new trial.

In rejecting Mr. Nordelo's motion, the trial court erroneously made fact findings contrary to the allegations of the motion based upon unsubstantiated representations by the State. The trial court was not in a position to make fact findings without first conducting an evidentiary hearing and without having any

evidentiary materials in hand other than those provided by Mr. Nordelo. At a minimum, if the trial court believed that Mr. Nordelo's motion was facially insufficient in some respect, the court was duty-bound to permit Mr. Nordelo an opportunity to amend his motion, as the State conceded. Instead, the trial court perfunctorily rejected Mr. Nordelo's motion without identifying or adducing any record materials supporting its order and without affording Mr. Nordelo even a single opportunity to amend his motion to remedy any perceived deficiencies.

The district court erred in upholding the trial court's order. The district court's decision conflicts on its face with this Court's requirements for considering such motions, as set out in *Jacobs*[5] and *Davis*,[6] and with the decisions of several district courts.

The district court's decision must be quashed, the trial court's order should be reversed, and this case should be remanded to the trial court for an evidentiary hearing or for Mr. Nordelo to amend his motion.

[5] *Jacobs v. State*, 880 So. 2d 548 (Fla. 2004).

[6] *Davis v. State*, 26 So. 3d 519 (Fla. 2009).

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY DENIAL OF PETITIONER'S NEWLY DISCOVERED EVIDENCE MOTION UNDER RULE 3.850, WHERE PETITIONER SUFFICIENTLY PLED NEWLY DISCOVERED EVIDENCE OF HIS ACTUAL INNOCENCE AND PROSECUTORIAL MISCONDUCT AND PETITIONER'S ALLEGATIONS WERE NEITHER CONCLUSIVELY REFUTED BY THE RECORD NOR INHERENTLY INCREDIBLE.

Standard of Review

The trial court's decision to dismiss Mr. Nordelo's rule 3.850 motion summarily without either an evidentiary hearing or even an opportunity to amend was based solely on the written materials before the court, so this ruling is "tantamount to a pure question of law, subject to de novo review." *Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011); *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (to the extent rule 3.850 claims "are discernable from the record, they constitute pure questions of law and are subject to de novo review").

Law and Analysis

A. Procedures and Pleading Standards Mandated by this Court for Considering Rule 3.850 Motions.

This Court has definitively set out the steps a trial court should follow when it considers a motion under rule 3.850. *See Jacobs v. State*, 880 So. 2d 548, 550-51 (Fla. 2004).

First, the trial court "must determine whether the motion is facially sufficient, i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted." *Id.* at 550. A rule 3.850 motion is facially sufficient if it sets out a valid legal claim and contains specific, sworn facts providing a "detailed factual predicate for the claim." *Id.* at 551, 553.

Second, if there are claims that are facially sufficient, the trial court reviews the record. *See id.* "If the record ***conclusively*** refutes the alleged claim, the claim may be denied. In doing so, the court is required to attach those portions of the record that conclusively refute the claim to its order of denial." *Id.* (emphasis in original). Ultimately, "if the trial court finds that the motion is facially sufficient, that the claim is not conclusively refuted by the record, and that the claim is not otherwise procedurally barred, the trial court should hold an evidentiary hearing to resolve the claim." *Id.* at 551.

At the pleading stage, the standard for whether a claim has been sufficiently alleged is permissive, and even statements of counsel at a status hearing may, when combined with assertions in a motion, establish a prima facie case requiring an evidentiary hearing. *See Davis*, 26 So. 3d at 528; *see also Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996) (concluding that at the pleading stage, counsel's clarification regarding an affidavit submitted as newly discovered evidence and explanation that witness could not be located were sufficient to demonstrate why

an evidentiary hearing was required). Courts "must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." *Hunter v. State*, 29 So. 3d 256, 261 (Fla. 2008). If a deficiency in the motion can be cured by amendment, the movant must be given an opportunity to amend. *See Davis*, 26 So. 3d at 527.

This Court has emphasized that there is an important distinction made in rule 3.850 "between claims that are facially insufficient and those that are facially sufficient but are also conclusively refuted by the record." *Jacobs*, 880 So. 2d at 551. The trial court first will determine the facial sufficiency of a claim by examining the contents of the postconviction motion; then, "***after*** a claim is found to be facially sufficient," the court will examine the record "solely to determine whether the record conclusively refutes the claim." *Id.* (emphasis in original). The only way a claim can be "resolved without a hearing" is if "the record evidence [] ***conclusively*** rebut[s] the claim." *Id.* at 555 (emphasis in original).

B. Mr. Nordelo's Rule 3.850 Motion Asserting Newly Discovered Evidence Stated a Facially Sufficient Claim.

Florida Criminal Rule 3.850 allows a noncapital defendant to attack his judgment and sentence collaterally more than two years after they become final based on newly discovered evidence. *See* Fla. R. Crim. P. 3.850(b). To prevail on a claim of newly discovered evidence, a movant must show the following: (1) the

evidence was unknown to the movant or his counsel and could not have been uncovered by due diligence at the time of trial; and (2) the evidence is such that it would probably produce an acquittal on retrial. *See Jones v. State*, 591 So. 2d 911, 915-6 (Fla. 1992); *see also Wyatt v. State*, Nos. SC08-655, SC09-556 at 6 (Fla. July 8, 2011) (applying the *Jones* test). These requirements are the due diligence and probability prongs, respectively. *See Davis*, 26 So. 3d at 526.

Assuming a newly discovered evidence claim is properly pleaded, "[t]he determination of whether the statements are true and meet the due diligence and probability prongs [] usually requires an evidentiary hearing to evaluate credibility unless the affidavit is inherently incredible or obviously immaterial to the verdict and sentence." *Id.*; *see McLin v. State*, 827 So. 3d 945, 955 (Fla. 2002) (requiring an evidentiary hearing to test the credibility of the codefendant's statements that served as the basis for a newly discovered evidence claim); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996) (requiring an evidentiary hearing on a newly discovered evidence claim where there was a factual dispute as to whether recanting witness was cajoled by the state).

Newly discovered evidence may give rise to other claims, such as ineffective assistance of counsel and prosecutorial misconduct. Such claims are properly raised in a rule 3.850 motion based on newly discovered evidence if the evidence reveals previously unknowable facts constituting a valid claim for relief. *See*

McCray v. State, 933 So. 2d 1226, 1226 (Fla. 1st DCA 2006) (finding that "while appellant framed the issue of one of prosecutorial misconduct, it is clear that his real claim is one of newly discovered evidence" and remanding for an evidentiary hearing to evaluate the credibility of the victim's affidavit recanting his trial testimony); *Brown v. State*, 960 So. 2d 890, 891 (Fla. 4th DCA 2007) (reversing summary denial of 3.850 motion and remanding for an evidentiary hearing, noting that "because we review Brown's claim as one based on newly discovered evidence, we need not resolve whether he is also entitled to relief for prosecutorial misconduct"). Therefore, claims of newly discovered evidence of prosecutorial misconduct are evaluated and reviewed under the same standard as newly discovered evidence.

In this case, Mr. Nordelo submitted a rule 3.850 motion based on a claim of newly discovered evidence arising from Lopez's affidavit. In his sworn statement, Lopez revealed the identity of his true co-perpetrator for the first time, and he exonerated Mr. Nordelo. (R. 47; App. 1b). The affidavit also revealed information about the white car that evidenced prosecutorial misconduct. (R. 47; App. 1b). Based on these revelations, Mr. Nordelo established a facially sufficient claim of newly discovered evidence.

Mr. Nordelo sufficiently pleaded the due diligence prong on his claim of newly discovered evidence stemming from a codefendant's confession. Where the

newly discovered evidence stems from a codefendant's confession, the due diligence prong is sufficiently pleaded if the movant alleges the novelty of the evidence and the reason for the codefendant's unwillingness to confess earlier. *See Roundtree v. State*, 884 So. 2d 322, 323 (Fla. 2d DCA 2004) (finding due diligence was sufficiently pleaded where codefendant admitted he refused to give new evidence earlier because of state coercion); *Kendrick v. State*, 708 So. 2d 1011 (Fla. 4th DCA 1998) (holding that due diligence was sufficiently pleaded where codefendant alleged that he refused to give exculpatory information sooner due to concern that it would increase his sentence); *Barrow v. State*, 940 So. 2d 1235, 1236, 1238-9 (Fla. 5th DCA 2006) (due diligence sufficiently pleaded where movant explained he could not obtain new information earlier due to codefendant's right against self-incrimination and continued unwillingness to talk "after his judgment and sentence became final").

First, Mr. Nordelo alleged that Lopez ***willingly*** provided his patently exculpatory testimony totally exonerating Mr. Nordelo and identifying the true co-perpetrator for the ***first time*** in 2007 in the form of the affidavit—thereby establishing the novelty of the evidence. (R. 36). Second, Mr. Nordelo alleged that when previously asked to testify, Lopez ***refused*** to testify and remained unwilling to do so because of a fear that his plea agreement could be altered—

thereby establishing the inability of Mr. Nordelo and his counsel to gain Lopez's cooperation and testimony at an earlier date. (R. 36, 47, 65-67; App. 1b).

Mr. Nordelo also sufficiently pleaded the probability prong. The probability prong is sufficiently pleaded if the movant provides facts showing how the new evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Davis*, 26 So. 3d at 526 (quoting *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998)). In his motion, Mr. Nordelo alleged that the store clerk's testimony against him was questionable given his memory loss after the robbery, the well-documented limitations in uncorroborated eyewitness identification testimony especially in traumatic circumstances, and the procurement of the photo identification long after the robbery occurred. (R. 37-39); *see* Interim Report of the Florida Innocence Commission to the Florida Supreme Court at 10 (reporting that eyewitness misidentification is the "single greatest cause of wrongful convictions" in Florida). Mr. Nordelo stated that this was the *only* properly admissible evidence against him at trial. (R. 37). The availability of Lopez's testimony that another man, not Mr. Nordelo, had actually assisted him in the robbery obviously would have undermined what was, at best, highly vulnerable identification testimony by a traumatized store clerk.

Moreover, based on the newly discovered fact that the white car had been stolen after the robbery, Mr. Nordelo alleged that the prosecutor must have known

that the car Officer Pino stopped Mr. Nordelo in could not have been the one supposedly seen by the store clerk. (R. 42-43); *see Pittman v. State*, 36 Fla. L. Weekly S337 (Fla. June 30, 2011) ("To establish a *Giglio*[7] violation, it must be shown that (1) the prosecutor presented false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material."). Had the prosecutor disclosed to Mr. Nordelo or his counsel prior to trial the fact that the white car had been stolen and that this had occurred after the robbery, Mr. Nordelo's counsel could have cross-examined Officer Pino about the two different cars and impeached his credibility, seriously damaging the State's case against Mr. Nordelo. *See Wyatt v. State*, Nos. SC08-655, SC09-556 at 25-26 (Fla. July 8, 2011) (listing elements of a *Brady*[8] claim, requiring the defendant to "show that (1) favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced."). Although the district court on direct appeal held that admission of the evidence about the white Ford Taurus was harmless error, this was based solely on the district court's consideration of this testimony as inappropriate collateral evidence of other bad acts (the high-speed chase). The district court had no occasion to consider, and did not consider, how the

[7] 405 U.S. 150 (1972).

[8] 373 U.S. 83 (1963).

availability of exculpatory information about the theft of the car would have aided the defense immeasurably in attacking the credibility of the State's case and the impact this would have had on the outcome of the trial.

These alleged facts establish that introduction of exculpatory testimony by Lopez, the identification of the actual co-perpetrator, plus the opportunity to impeach the police officer for giving misleading testimony, would have fatally weakened the State's fragile case against Mr. Nordelo and would have in all likelihood produced an acquittal. At the pleadings stage, Mr. Nordelo pleaded sufficient facts to support both the due diligence and probability prongs, thereby presenting a facially sufficient claim of newly discovered evidence.

C. The District Court's Decision in Conflict

Nevertheless, the district court affirmed the trial court's summary denial of Mr. Nordelo's rule 3.850 motion. The district court reached its conclusion in two ways. First, it determined that Mr. Nordelo's claims of newly discovered evidence was "invalid on its face." (App. 7a). Second, it determined that Mr. Nordelo's claims of newly discovered evidence were "conclusively refuted by the record," even though it determined that the trial court did not need to attach record excerpts supporting this conclusion. (App. 6a-7a). The district court essentially determined that Mr. Nordelo either failed to plead the due diligence prong or that his due diligence allegations were conclusively refuted by the State's allegations in lieu of

actual record excerpts. The district court did not even consider or address Mr. Nordelo's claim of newly discovered evidence of prosecutorial misconduct based on the district court's twin rationales for rejecting Lopez's affidavit. These alternative rationales are legally incorrect.

According to the district court, in the first instance, Mr. Nordelo's newly discovered evidence claims were facially invalid and legally insufficient. Mr. Lopez's affidavit could not be considered newly discovered evidence because "the court allowed [Mr. Nordelo and his counsel] to speak with [Lopez] after his plea was accepted and before Nordelo's trial began." (App. 4a). The district court similarly concluded that Lopez's explanation of why he did not come forward sooner was "nonsensical," based on its understanding of what happened between Lopez's plea and Mr. Nordelo's trial. (App. 5a).

But as alleged in Mr. Nordelo's motion, in Lopez's affidavit, and at the January 15 hearing, Mr. Nordelo's trial counsel asked Lopez to testify, and he refused. In these three sources, Mr. Nordelo explained that Lopez remained unwilling to testify until he was confident that his plea deal was not in jeopardy. In combination with the allegations supporting the novelty of this evidence, these facts were sufficient to plead due diligence. *See Roundtree*, 884 So. 2d at 323; *Kendrick*, 708 So. 2d 1011; *Barrow*, 940 So. 2d at 1236, 1238-9; *cf. Davis*, 26 So. 3d at 528-29 (noting that the evidentiary burden is lower when a defendant alleges

claims of newly discovered evidence at the pleading stage than when proving these claims at an evidentiary hearing).

In fact, this Court has acknowledged that "post-trial confessions from codefendants" who did not testify at trial can be newly discovered evidence "in the sense that the evidence was not known at the time of trial and could not have been known by the use of due diligence." *Hunter*, 29 So. 3d at 262-263. As a practical matter, until Lopez stepped forward with his affidavit only recently, neither Mr. Nordelo nor his trial counsel had any indication that Lopez would be willing to testify honestly and fully about the true circumstances of the armed robbery many years ago. To the contrary, Lopez had previously refused to do so.

Alternatively, the district court concluded the trial court's summary denial was proper because Mr. Nordelo's claims were "conclusively refuted by the record: the State presented overwhelming evidence of Nordelo's guilt during the trial, including the victim's identification of both defendants from photo lineups with one hundred percent certainty." (App. 7a). The district court likewise relied upon what was ostensibly in the "record" to determine that Mr. Nordelo had an opportunity to speak with Lopez before trial and to determine that Mr. Nordelo never disputed testimony at trial that he was the driver of the white car—all supposedly rendering Lopez's affidavit either "nonsensical" or "inherently incredible." (App. 5a, 7a).

However, there was no record on appeal from which the district court could have made these determinations. There was no trial transcript provided to the trial court, as had been promised by the State, and the State did not attach any record excerpts to its response to Mr. Nordelo's rule 3.850 motion. The district court, therefore, must have relied on the bare allegations in the State's response, but the State's allegations cannot substitute for the trial court's attachment of actual, specific excerpts from the trial record. *Cf. Pullum v. State*, 893 So. 2d 627, 628 (Fla. 2d DCA 2005) (reversing summary denial of claims where trial court adopted State's response to show cause order and determined claims were without merit "in light of the overwhelming evidence presented by the State at trial").

Even had the State submitted the entire trial transcript, the trial court still was required "to attach those specific parts of the record that directly refute each claim raised." *Hoffman v. State*, 571 So. 2d 449, 450 (Fla. 1990); *see also Pullum*, 893 So. 2d at 628 (requiring trial court on remand to "attach those ***specific*** portions of the record refuting the claims along with the trial court's supporting rationale") (emphasis in original); *cf. Thompson v. State*, 626 So. 2d 967, 968 (Fla. 1st DCA 1993) (reversing and remanding where trial court denied newly discovered evidence claim based on evidence of guilt at trial but failed to provide record or trial transcript on which denial was based; "absence of such precludes the possibility of meaningful review on appeal").

The district court went one step further, however. In a display of circular reasoning, the appellate court concluded that the trial court ***did not need*** to attach trial record excerpts to its summary denial, because the rule 3.850 motion was both "legally insufficient" ***and*** "conclusively refuted by the record," which of course had not been attached to the trial court's order. (App. 7a). This decision simply cannot be reconciled with the requirements this Court set out for considering rule 3.850 motions.

Florida Rule of Appellate Procedure 9.141 governs the appellate court's review of a trial court's summary denial of a rule 3.850 motion. Under this rule, an appellate court must reverse summary denial of a rule 3.850 motion and remand for an evidentiary hearing or "other appropriate relief" unless "the record shows conclusively that the appellant is entitled to no relief." Fla. R. App. P. 9.141(b)(2)(D). Given the centrality of the record to this review process, where no record is specifically referenced in or attached to a trial court's order of summary dismissal, the appellate court must reverse and remand with an order for the trial court to either hold an evidentiary hearing or attach the relevant portions of the record that refute the claim. *See Dunbar v. State*, 916 So. 2d 925, 925 (Fla. 1st DCA 2005) (reversing trial court's summary dismissal of newly discovered evidence claim where the order lacked record attachments and remanding for the trial court to either hold an evidentiary hearing or attach records that conclusively

refute the claims); *Padron v. State*, 769 So. 2d 432, 433 (Fla. 2d DCA 2000) (reversing trial court's summary dismissal of newly discovered evidence claim where many of the record attachments cited by the court in its order were not attached and remanding for reconsideration of the motion); *Simon v. State*, 997 So. 2d 490, 492 (Fla. 4th DCA 2008) (reversing and remanding summary dismissal claim in rule 3.850 motion for trial court's failure to attach court records).

Reversal is required in such circumstances because the record is critical to meaningful appellate review. *See Roberts*, 678 So. 2d at 1236; *Dunbar*, 916 So. 2d at 925. Therefore, when the trial court fails to include record attachments or references, the appellate court can only review the motion for facial sufficiency. Without record attachments or references, it is impossible for the appellate court to determine whether allegations in the motion are conclusively refuted and thus whether the motion was properly dismissed without an evidentiary hearing. This is especially true when the newly discovered evidence is in the form of recanted testimony, exculpatory testimony, and codefendant confessions. Summary denial is rarely the proper remedy if the trial court needs to assess the credibility of the new testimony. *Murrah v. State*, 773 So. 2d 622, 623 (Fla. 2d DCA 2000) (reversing trial court's summary denial of a claim of newly discovered evidence in the form of videotaped recantations of trial witnesses and remanding to either

attach portions of the record conclusively refuting the claims or for an evidentiary hearing).

On the face of its decision, therefore, the district court completely ignored the only three ways, set out in *Jacobs*, that a trial court may properly dispose of a rule 3.850 motion. Instead, it allowed the trial court to deny a rule 3.850 motion ***without*** attaching a single record excerpt, on the rationale that the motion was invalid on its face. But it reached its conclusion about the facial insufficiency of the rule 3.850 motion by purporting to look at a record that was not provided to it.

The district court reached this result by engaging in its own credibility determination about Lopez's affidavit and Mr. Nordelo's allegations regarding due diligence. The appellate court, however, was required to accept as true, in their entirety, Mr. Nordelo's allegations in his motion and the clarifications of his counsel at the preliminary January 15 hearing. *See McLin*, 827 So. 2d at 955-56 (finding that because there was no evidentiary hearing to determine the credibility of an eyewitness who submitted a sworn statement that defendant was not present at the murder and named a different perpetrator, the trial court incorrectly determined that the affidavit was "probably untruthful" and conflicted with this Court's standard that an evidentiary hearing is required unless the allegations are conclusively refuted by the record, and remanding for an evidentiary hearing); *Reed v. State*, 903 So. 2d 344, 345 (Fla. 1st DCA 2005) ("Because there was no

evidentiary hearing to determine the truthfulness of appellant's allegations, both the trial court and this Court must accept those allegations as true. Instead the trial court made a credibility determination. Accordingly, we reverse the summary denial of appellant's claim . . . ."); *see also Simon*, 997 So. 2d at 492.

If the district court determined that Mr. Nordelo's claims on their face were legally insufficient, it should have remanded to the trial court with leave for Mr. Nordelo to amend his motion rather than using that determination as a justification for not requiring record excerpts with the summary denial order. *See Spera v. State*, 971 So. 2d 754 (Fla. 2007). When a court finds a 3.850 motion legally insufficient, it "abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion" in good faith. *Spera*, 971 So. 2d at 761. For that reason, upon review of a trial court's summary denial of a 3.850 motion, if the appellate court finds the claims to be insufficiently pleaded, it ***must*** reverse with instructions to permit the defendant an opportunity to amend the claims in good faith. *See Ferris v. State*, 996 So. 2d 228 (Fla. 1st DCA 2008) (reversing summary dismissal of facially insufficient claim in rule 3.850 motion and remanding for trial court to give defendant an opportunity to amend); *Rosa v. State*, 27 So. 3d 230, 231 (Fla. 2d DCA 2010) (reversing summary dismissal of facially insufficient claim in rule 3.850 motion and remanding for trial court to strike with leave to amend); *Neal v. State*, 984 So. 2d 1276, 1277 (Fla. 5th DCA 2008) (reversing summary

dismissal of facially insufficient claim of newly discovered evidence where defendant failed to properly allege due diligence and remanding for trial court to strike claim with leave to amend). In fact, the State conceded on appeal that Mr. Nordelo was at least entitled to leave to amend. (*Ans. Br.* at 7).

Otherwise, if the rule 3.850 motion is facially valid, there could be no justification, under the decisions of this Court and of other district courts, to have affirmed the trial court's summary denial without requiring record excerpts from the trial record. At all events, Mr. Nordelo properly pleaded his newly discovered evidence claims and is entitled to an evidentiary hearing. The district court could not deprive him of that evidentiary hearing by claiming his motion was facially invalid, but not giving him leave to amend to assert further allegations of due diligence; and then by claiming that his claims were conclusively refuted by the record, when in fact there was no record. The decision in this case is in error and in conflict. It must be quashed.

The district court's credibility "findings" were not only procedurally improper but were patently inadequate to justify the summary disposition of Mr. Nordelo's motion. The district court believed that Lopez's affidavit was inherently incredible because Lopez said he was the driver of the white Ford Taurus while there was ostensibly evidence at trial that Mr. Nordelo was driving the vehicle at the time of their arrest. The affidavit establishes without dispute, however, that

Lopez stole the car, and it is hardly inherently incredible that he drove it at various times after he stole it. A discrepancy about the immaterial fact concerning who was driving the car at the time of the arrest for this collateral offense twenty years ago hardly undermines Lopez's testimony about whether Mr. Nordelo had anything to do with the armed robbery the day before.

Likewise, the district court's ridicule of Lopez's assertion that he refused to testify favorably for Mr. Nordelo until he had completed his agreed-upon sentence for fear of losing his plea deal with the State cannot substitute for actual fact findings based on testimony at an evidentiary hearing. The notion that persons caught up in the criminal justice system might distrust the State or harbor a fear that crossing the State or thwarting a conviction of another defendant might result in unwanted consequences or even retribution by the State is anything but nonsensical. Very few, if any lay persons, let alone criminal defendants, would presume to know all the "loopholes" the State might invoke if unhappy with their actions.

The fact remains, Mr. Nordelo stated a facially sufficient claim for post-conviction relief and should have been given a hearing to prove it, or at a minimum an opportunity to amend his motion to deal with any deficiencies the trial court perceived.

CONCLUSION

For the foregoing reasons, the decision of the district court below should be quashed, and the trial court's order should be reversed. This Court in turn should either remand for an evidentiary hearing on Mr. Nordelo's claim of newly discovered evidence or permit Mr. Nordelo an opportunity to amend his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this third day of August, 2011, true copies of the foregoing brief and the attached appendix have been served by first-class mail to Nicholas Merlin, Assistant Attorney General, **Counsel for Respondent**, Criminal Appeals Unit, 444 Brickell Avenue, # 650, Miami, Florida 33131; and Marco Nordelo, **Petitioner**, Charlotte Correctional Institute, 33123 Oil Well Road, Punta Gorda, Florida 33955-9701.

CERTIFICATE OF FONT AND TYPE-SIZE

I hereby certify that the foregoing brief was generated by computer using Microsoft Word with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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