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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-1077

MICHAEL RIVERA,

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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

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PRELIMINARY STATEMENT

Appellant, Michael Rivera, Defendant below, will be referred to as "Rivera" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record from these postconviction proceedings will be by "PCR," along with Volume number; reference to the direct appeal will be by "ROA." References to any of the prior postconviction records will be designated by Case No. 86,528 and opinion; *Rivera v. State*, 717 So. 2d 477 (Fla. 1998) and Case No. SC01-2523 opinion: *Rivera v. State*, 859 So. 2d 495 (2003). Rivera's initial brief will be notated as "IB."

STATEMENT OF THE FACTS

The following additions and clarifications are needed as Rivera's Statement of the Facts is incomplete and inaccurate. Susan Bailey has been counsel of record in this case since 1994, and as counsel, responded to Rivera's public record requests in 1994 and 1995. (PCR-Vol. XIV at 186; Vol XVIII at 566). Before creation of the records repository and upon receiving public records demands, in this or in any other case, Ms. Bailey's practice was to review every document in the file before making it available for copying. If any document was exempt from disclosure, Ms. Bailey would remove it from the file before it was sent to be copied. Upon receipt of the copied file, Ms. Bailey would make sure the copied file was in the order in which

it was sent out to be copied and then she would send the copied file to CCRC along with a cover letter. The cover letter included a description of the file enclosed, i.e. the defendant's name and case number. Additionally, if there were any documents that were withheld, Ms. Bailey would identify the specific document, and reference the legal reason for the claimed exemption. Therefore the only items listed in the correspondence were those items that were claimed to be exempted. Every other piece of paper was copied and turned over. (PCR-Vol. XIV at 199-201; Vol. XVIII at 570-581 590, 593).

Rivera's counsel in 1994 was Assistant Capital Collateral Counsel, Judith Dougherty. Included in her public records demands in this case, was the request for all case files in which Frank Zuccarello was listed as a witness, victim or defendant. (PCR-Vol. XX at 758-768). In response to the request, Susan Bailey sent to Ms. Dougherty, files on numerous defendants including Zucarello's co-defendants; Tom Joslin, Scott Richitelli, Jay Richitelli, and Anthony Caracciollo. None of these defendants were specifically identified in the requests from CCRC, but because in each of them, Frank Zuccarello was listed as a state witness, their files were turned over. (PCR-Vol. XVIII at 574-587). In total, pursuant to Rivera's public records request, the Broward State Attorney's Office turned over the criminal files on the following individuals: Donald Mack,

Scott McGuire, Frank Zuccarello, Anthony Caraciolla, Charles Brown, William Moyer, Mark Bizell, Peter Salerno, Tom Joslin, Scott Richitelli, Jay Richitelli. (PCR-XVIII at 566-581 Vol. XX 758-768).

The criminal files of Zuccarello that were turned over to Rivera in 1994 included case nos. 84-381; 85-4911; 86-3841; 86-3602; and 86-3288. (PCR-Vol. XVIII at 774-580; Vol. XX 759-760). In Case nos. 84-381 and 85-4911 the FCIC criminal history and prosecutors notes were the only items withheld. (PCR-Vol. XVIII at 574). The remainder of the files were copied and sent to CCRC. (PCR-Vol. XVIII at 574, 576, 579). Nothing was claimed as exempt from Zuccarello's files in Case nos. 86-3841; 86-3602; and 86-3288. (PCR-Vol. XX at 759-760).

The criminal file of Anthony Caraccilolo case no. 86-8238 was turned over. The only items withheld were the NCIC and FCIC reports. Everything else was turned over. (PCR-Vol. XVIII at 575).

The criminal file of Scott Richitelli, case no. 86-7879 was sent to CCRC. The only items withheld were the prosecutor's notes. (PCR-Vol. XVIII at 582). The remainder of the file was copied and sent to CCRC.

The criminal file of Jay Richitelli, case no. 86-7879 was turned over to CCRC. The only items withheld from that file were the criminal history and prosecutor's notes. (PCR-Vol. XVIII at

587, Vol. XX at 761, 765-766). The remainder of the file was copied and sent to CCRC.

The criminal file of Tom Joslin, case no. 87-13573 was turned over. The only items withheld were the prosecutor's notes. The remainder of the file was copied and sent to CCRC. (PCR-Vol. V at 581; Vol. XX at 761).

Ms. Bailey identified numerous documents that were included in the files listed above and sent to CCRC in 1994. She testified that Zuccarello's original plea deal was located in Zuccarello's file case no. 86-3602. (PCR-Vol. XVIII at 577-578; Vol. XX at 776). The plea was also contained in two separate places in Zuccarello's court file i.e. one standing alone, and the other was attached to Zuccarello's own PSI. (PCR-Vol. XIV at 200-201; Vol. XX at 746-747). The fourth copy of the plea was located in the file of Jay Richitelli. (PCR-Vol. XIV at 172, 198, 200-201; PCR-Vol XVIII at 585, Vol. XX at 776). The only item listed as exempted in the those files was the criminal history. (PCR-Vol. XX at 761-766).

The following exchange took place regarding whether Ms. Bailey was certain that the plea was contained in the public records that were turned over in 1994:

QUESTION. Do you know for certain whether it was disclosed in 1994?

ANSWER. Yes, I do.

QUESTION. How do you know that?

ANSWER. Because if this plea document is found in one of the Richitelli files, which your office demanded, it is still within that file.

I did not withhold it as exempt, on the document I sent to Judith Dougherty, listing the cases.

Upon my review and preparation for this case and through the years, that document is there, has been there. And it was not taken out.

This document, the plea offer, is also in, I believe it is Frank Zuccarello's PSI.

QUESTION. Was that, it was confidential, was it not?

ANSWER. It would have been. I believe it was turned over. Judge Ferris ordered it to be turned over years ago. It is the defendant's own PSI. We, of course, expect that ruling from the Court.

Under the public records statute, we cannot automatically turn it over.

This document is found in several other places that was provided to CCR in public records in 1994.

QUESTION. You inspected the materials that were copied and made sure that document was included?

ANSWER. No I did not.

But it is in too many places, as well as Zuccarello's court file in the clerk's office.

QUESTION. You're assuming it was provided?

ANSWER. Okay I did not withhold it. It is in the State's file.

Our copy company, we haven't had any problems. It is there now. They didn't insert it there.

So sure, it's sure possible that that was the one document they failed to photocopy. But it is in I believe it is in one of Richitelli's cases as well as the PSI and Zuccarello's court file.

(PCR-Vol. XIV at 200).

In subsequent testimony Ms Bailey again testified:

Of course, Mr. Zuccarello's own files were sent.

Specifically in 86-3602 CF10, this is the original document, plea offer, Frank Zuccarello, which has been introduced as State's that's Defense Exhibit, the plea offer?

QUESTION. The plea offer is State's 7.

ANSWER. This is, the original is located in that file. I know it is the original. It has the gold State of Florida seal on top. And photocopies would be black.

This is the original. That document was in Mr. Zuccarello's file 86-3602 CF.

As I have indicated, nothing was withheld from that file. That document was absolutely sent within that case file to Ms. Dougherty and her investigator.

(PCR-Vol. XVIII at 578).

QUESTION. The question is as to State's 7, the plea offer.

ANSWER. It is over here. Yes.

QUESTION. As to State's 7, do you recall verifying it was in the materials that were mailed?

ANSWER. When I sent them to CCR in 1994?

QUESTION. Yes.

ANSWER. No, I wouldn't have paid attention to it back then. It held no importance back

then, other than it was Frank Zuccarello's name on it.

However, as mentioned earlier today, it is in at least two files, two of the state attorney files.

QUESTION. You didn't have an intent to withhold it?

ANSWER. Absolutely not.

QUESTION. You are not able to testify under oath that it was in the materials that were mailed to CCR?

ANSWER. Like I said, I can a mistake. I didn't make it twice. That plea offer is in two files, at least one Frank Zuccarello file and I think Jay Richitelli file. I didn't make a mistake and not send in this [sic] both cases. No. It was in there.

(PCR-Vol XVIII at594-595).

Ms Bailey also testified that Zuccarello's plea was referenced in several places in those same files. In the Jay Richitelli file, previously turned over, are an exchange of letters between Richitelli's lawyer, Howard Greitzer, and ASA Joel Lazarus wherein Zuccarello's plea is mentioned twice. In fact at the conclusion of the letter dated August 18, 1986 is a notation that a copy of the plea was attached therein. (PCR-Vol. XVIII at 585-586; PCR-Vol XX at 781, 783).

In both Jay and Scott Richitellis' files is the deposition of Detective Joseph Gross of the Metro-Dade Police Department. (Vol. XX at 841-889). In the deposition, Gross describes Zuccarello had someone who was providing certain information,

but was holding back on other information as Zuccarello was attempting to work a good plea deal for all of his cases in Dade and Broward counties. (PCR-Vol. XX at 850). Gross stated that Zuccarello's lawyer, Bruce Raticoff, was working out the details of Zuccarello's plea. (PCR-Vol. at 857, 876-879).

Detective Gross stated that Zuccarello, provided information on home invasion robberies. (PCR-Vol. XX at 850). Zuccarello had been taken "out on location," from jail on April 4th and 18th 1986. (PCR-Vol. XX at 851-855, 863, 864, 889). Gross mentioned that he transcribed the contents of those meetings with Zuccarello so he could disseminate that information to other law enforcement agencies. (PCR-Vol. XX at 846-847, 849). Detective Gross also made reference to Anthony Caracciollo's and Zuccarello's possible involvement in the Cohen murder. Zuccarello was involved in twenty-nine home-invasion robberies and provided information on forty-six different cases. (PCR-Vol. XX at 850, 852-855, 888). Gross identified the prosecutor in the Stanley Cohen murder case as Miami-Dade ASA John Kasternakes. Included in the Jay Richitelli file is a letter from Miami-Dade ASA Kasternakes to Broward ASA Lazarus regarding Zuccarello's assistance in criminal cases in Miami. (PCR-Vol. XX at 770-771)

Bailey also testified that contained in the records turned over in 1994 was documentation of Zuccarello's

cooperation/alleged CI status. As noted above, the files of Jay and Scott Richitelli, Anthony Caracciollo and Tom Joslin were all turned over because Zuccarello was listed as a witness in those cases. (PCR-Vol. XVIII at 566-586, Vol XX at 758-768).

Additionally, Bailey identified several praecipes for witnesses in several cases which contain Zuccarello's name and his address is listed as c/o Steve Emerson FDLE agent in Miami; Zuccarello was also the subject of a transport order from Ft. Myers jail to Broward to testify against Joslin. (Vol. XVIII at 580-587; Vol. XX at 772, 774, 778, 785, 788). Additionally a letter contained in the Jay Richitelli file, from Broward ASA Lazurus to the defendant's lawyer Howard Geitzer which included the following:

I know of no confidential informant in your client's case; at the time of the report, Mr. Zuccarello was referred to as an informant, but that is not now the case. I believe deposition of Agent Emerson will confirm this.

(PCR-Vol. XX at 781).

Also included in Scott Richetelli's file was the transcript of a bond hearing wherein Steve Emerson, special agent at FDLE testified about Zuccarello's assistance to the state in several cases. Zuccarello willingly wished to testify against various co-defendants. Emerson referenced discussions he had with Zucarello on April 4, 1986. (PCR-Vol. XX at 894, 930-932,934).

State witness Bruce Raticoff, Zuccarello's former defense attorney, testified about the terms of the plea received by Zuccarello. (PCR-Vol. XIX at 633, 650). Raticoff testified that he represented Zuccarello throughout the relevant time period, 1985-1986, and that representation included all of Zuccarello's pending charges in Broward and Dade counties. Raticoff stated that he was Zuccarello's lawyer regarding any/all charges (PCR-Vol. XIX at 628, 645, 646, 660). He explained on direct examination:

QUESTION: Mr Raticoff, this great deal you were able to obtain for your client, Frank Zuccarello, was there any consideration or mitigation given to the, did you negotiate that on the condition Frank Zuccarello testify against Michael Rivera?

ANSWER: Absolutely not.

(PCR-Vol XIX at 641).

Later on Raticoff testified:

QUESTION: The preferential treatment Frank Zuccarello was receiving in the Dade County jail, if he was receiving any, had nothing to do with the Michael Rivera case?

ANSWER: Nothing whatsoever, no, to my knowledge.

(PCR-Vol XIX at 643).

QUESTION: You said, in this case, your client, Frank Zuccarello, was never a confidential informant?

ANSWER: Never documented as a confidential informant. He never acted as a confidential informant.

(PCR-Vol. XIX at 663).

QUESTION: Also, one more question on that, State's 7, the plea, Paragraph 4, when it mentions homicide, that refers to the Cohen homicide as well as the Hodek murder?

ANSWER: Correct.

QUESTION: Not Michael Rivera?

ANSWER: Absolutely not. Never discussed. Never mentioned.

(PCR-Vol XIX at 663).

Raticoff explained that Zuccarello was the target of an investigation into home invasion burglaries in Dade and Broward counties. (PCR-Vol. XIX at 646, 628-629). Zuccarello implicated himself in the Cohen murder and his cooperation therein was the crux of the deals he received. (PCR-Vol. XIX at 628-629, 630-631, 639, 640, 645, 655-656, 663). The Cohen case had gone cold, and no arrests had been made. Zuccarello emerged as the key to the case. That was why the plea deal was very generous. (PCR-Vol. XIX at 630, 646).

The plea required Zuccarello to provide information regarding the Cohen murder, home invasion burglaries in Broward and Dade in which he was a participant along with his co-defendants, and the Hodek murder investigation. (PCR- Vol. XIX at 631-634, 655-656).

Raticoff and Zucarello were approached by the State about the plea. (PCR- Vol. XIX at 632). Raticoff participated in the plea deal but he did not draft the agreement. He discussed the terms

of the deal with Zuccarello. Those terms included Zuccarello's cooperation in cases in which he was a participant. (PCR- Vol. XIX at 633). He explained that the mention of homicides in paragraph 4 of the plea referred to the Cohen case and the Hodeck case. This language was added by the state because they did not want Zuccarello to use this agreement to obtain immunity and escape from prosecution in any other murder not yet known in which Zucarello was a participant. (PCR-Vol XIX at 634). Zuccarello received transactional immunity in the Cohen case. (PCR- Vol. XIX at 634, 647).

Raticoff explained that he was unaware of the content of the information actually given by Zucarello to law enforcement in fulfillment of the plea. (PCR- Vol. VI at 631-632). He explained that it was his practice to never get involved in the "nuts and bolts" of the information being exchanged because:

QUESTION: Were you familiar with every time Mr. Zuccarello was taken out of jail to talk to law enforcement?

ANSWER: No I requested not to be informed. That was the nuts and bolts I talked about earlier. Part of his plea. I don't want to get involved. I don't want to be a witness. I don't know about his movements in and out of the jail. What they did, where he was, where they went.

QUESTION: Applied to what cases they were talking about?

ANSWER: Absolutely.

QUESTION: You didn't want to know what cases they were talking about?

ANSWER: I didn't want to know what information that law enforcement had in an investigation, have something happen to the target of that investigation and be said that Mr. Zucarello's lawyer was the only one that knew, so he must have—I didn't want to be in that position. I felt that it was between law enforcement and my client.

(PCR- Vol. XIX at 659 647). Raticoff secured the terms of the plea and it was up to his client to fulfill it. (PCR-Vol XIX at 651).

Raticoff stated that Nick Argentine was listed in the plea agreement because at the time of the plea, Argentine was a burglary detective. In fact all the law enforcement personnel mentioned in the plea were investigating the cases in which Zuccarello was required to offer information. (PCR- Vol. XIX at 652, 654).

Raticoff's reiterated that Zuccarello's knowledge regarding the Stanley Cohen murder was why he received favorable treatment in Miami. (PCR- Vol. XIX at 643). Raticoff explained that the ASA referenced in the documents from the Miami-Dad jail and police department was not a Broward State Attorney; it was then Miami-Dade prosecutor John Kastrenakes. (PCR-Vol XIX at 642, 643, Vol. XXI at 1076-1093).

Raticoff unequivocally stated that Rivera's case was not a part of the plea agreement, and Rivera's name was never

mentioned in connection with the plea agreement he brokered. (PCR-Vol. XIX at 633, 635, 640, 641, 655, 663.) In fact, Zuccarello had already been convicted and sentenced pursuant to the plea agreement prior to his testimony in this case. There was no provision in the plea agreement that would have permitted the state to withdraw the plea after Zuccarello's sentencing. (PCR-Vol. XIX at 654).

Raticoff explained that if Rivera's case was contemplated in the plea, it would have been mentioned in the plea. It was never discussed. (PCR-Vol. XIX at 655). Likewise, any preferential treatment Zuccarello may have received while incarcerated in Miami-Dade had nothing to do with Rivera's case, but with the Cohen homicide. (PCR-Vol. XIX at 641, 643). Raticoff filed a motion on Zuccarello's behalf to mitigate his sentence from seven years to five years. (PCR-Vol XIX at 641). That motion to mitigate was not predicated on the condition that Zuccarello testify against Rivera in this case.

Raticoff also testified that Zuccarello was not, is not, and never has been a confidential informant and was never documented as a confidential informant. (PCR-Vol XIX at 662-63, 664-665). Had he been so, law enforcement would have had to document him as one and obtain Raticoff's permission because he was Zuccarello's attorney. (PCR-Vol XIX at 648). If Zuccarello was

a "CI", Raticoff would have been aware of that. (PCR-Vol. XIX at 648, 662-663, 665)

Raticoff had never seen the synopsis written by Detective Gross of the Metro-Dade Police Department nor the memorandum wherein Zuccarello is referred to as a "CI". When shown the document, he opined that the term was used for sake of brevity only otherwise Zuccarello would have been referred to as a number. (PCR-Vol. XIX at 661-664). Had Zuccarello been a "confidential informant" his name would not have appeared on any document, and Zuccarello's name did so appear. (PCR-Vol. XIX at 662-663). Raticoff stated that regardless of the term used "CI" in the synopsis prepared by Gross, he took exception to any suggestion that he was a confidential informant because that would have had to been discussed with him and it never was. (PCR-Vol XIX at 664-665).

The state also presented the testimony of Kelly Hancock, the prosecutor in this case. Hancock testified that he did not offer Zuccarello anything in exchange for his testimony against Rivera.¹ (PCR-Vol. XIX at 604-613, 625). Hancock promised Zucarello nothing at all. (PCR-Vol. XIX at 609-610). Hancock was not a party to the plea and Zuccarello was not cooperating with Hancock. (PCR-Vol. XIX at 612-613).

¹ Hancock testified at the first evidentiary hearing that he was the only prosecutor in this case. (*Rivera v. State*, 717 So. 2d 477 (Fla. 1998); Case No. 86,523 at 560, 695).

Rivera presented the testimony of Susan Keffer, of CCRC and former postconviction counsel for Rivera from 1998 through 1999. She testified that the basis for Rivera's 2004 *Brady/Giglio* claims only appear in the information she received in 1998 and 2002. On cross-examination, Ms. Keefer repeatedly testified that she was not claiming that the information identified through Ms. Bailey was not contained in the files turned over in 1994-1995, but that she simply did not have a specific recollection of any particular document from twelve years ago. (PCR-Vol. XIV at 236, 239-240, 245-246, 250-251; PCR-Vol XV at 289-291). At one point during cross examination the following exchange occurred:

QUESTION: Certainly from all of these documents, you knew Frank Zuccarello was cooperating with law enforcement?

ANSWER: I knew he was a witness in many cases.

QUESTION: That's the extent of your knowledge?

ANSWER: Until we, you have to keep in mind; I began working at CCRC in June of 1998. I reviewed all of these documents. As of October 1st, 1998, while we knew Mr. Zuccarello had been a witness we didn't know his credibility was being called into question. We didn't know the extent of the favor he was receiving from law enforcement. We didn't know, the documents didn't indicate that Mr. Zuccarello was a liar.

(PCR-Vol. XIV at 251).

When pressed further on the fact that there were fourteen references/documents in Rivera's possession regarding Zuccarello's involvement with law enforcement, Keefer further admitted:

I never said I missed them, Ms. Bailey. I said I don't have an independent recollection some 13, 12 how ever [sic] many years later of those specific documents. What I do know is I know who Frank Zuccarello was. I knew he testified in many cases. When I started working, within two, three months, I had the article, October 1st, 1998 article, indicating that Mr. Zuccarello is not credible. That was the starting point. Whether that prompted me to look at the public records or if I began as a part of my process, I knew Frank Zuccarello was a part of this case.

QUESTION: You relied upon a newspaper article in reinvesting [sic] Frank Zuccarello, rather than go to the documents that were already in your pub [sic] records files?

ANSWER: No that's not what I said. I said the article, first of all, is different than those documents that you showed me. Those documents list Mr. Zuccarello's name and list him as a witness in some defendant's case. That's all the information that is in there. Those documents do not tell me Mr. Zuccarello, everything we pled in the 3.850 I pled, they do not tell me in the Cohen case, in Miami, his credibility was beginning to be questioned, that in fact they believed he had fabricated his story, that he was receiving favor from various law enforcement agents. That information is not in a witness list, as far as I can see.

QUESTION: When did Frank Zuccarello testify in the Joyce Cohen case?

ANSWER: Sitting here today, I don't recall that off the top of my head.

QUESTION: October 26, of 1989?

ANSWER: I don't recall that. If the record in the Cohen case reflects that, that may be.

QUESTION: Didn't Frank Zuccarello testify in the Rivera case April 13, 1987?

ANSWER: If that is what is reflected in the record, I don't have that independent recollection of the dates now.

QUESTION: Frank Zuccarell's testimony in another case, in another county, two-and-half years later, a newspaper article based upon that is what prompted you to begin to file pleadings in the Rivera case?

ANSWER: To begin to ask for additional records yes.

QUESTION: Without knowing what you already had?

ANSWER: I am not saying I didn't know what I already had. I said I don't have an independent recollection of those files.

(PCR-Vol. XV at 289-291).

Marty McClain was also called to testify on behalf of Rivera. On cross-examination, Martin McClain, Rivera's lead counsel from 1997-1998 and then from 2001 till the present, admitted that his office possessed Frank Zuccarello's court file since 1994. (PCR-Vol. XVI at 422). McClain admitted that the

deposition of Detective Gross contained in the Scott Richitelli file would have been very useful and failure to present this amounted to ineffective assistance of counsel. (PCR-Vol. XV-XVI at 337-438, 444). McClain was confronted with the extensive references to Zuccarello as a witness in numerous cases, including the fact that Zuccarello had to be contacted through FDLE special agent Steve Emerson. McClain admitted that his predecessor Judith Dougherty knew all of this and that was the premise of the public records requests in 1991 and 1994. (PCR-Vol XVI at 451-457).

And although the information does indicate that Zuccarello was cooperating with police, McClain stated that none of the information would have supported the claim that Zuccarello was a confidential informant for the police. (PCR-Vol. XVI at 444). McClain testified that the information he received from Valerie Jonas, i.e., a synopsis by Detective Gross regarding his conversations with Zuccarello; (PCR-Vol. XXI at 1065-1075) prison receipts indicating that Zuccarello was taken from the jail on four separate occasions; (PCR-Vol XXI at 1061-1064; a polygraph report by Mr. Rios; (PCR-Vol. XXI at 957-960); and correspondence generated from the Metro-Dade Police Department in Miami regarding Zuccarello's disruptive behavior in jail, (PCR-Vol. XXI at 1076-1093) was the only evidence Rivera possessed since 2002 that supported the claim that Zuccarello

was a confidential state agent. (PCR-Vol. XVI at 462-466, 470-477).

Rivera also presented the testimony of Scott Braden, his attorney in 1994-1995, who litigated the first motion for postconviction relief. Braden admitted that the bulk of the work had been done by Ms. Dougherty prior to his representation of Rivera and that he and Dougherty worked together briefly before her departure. (PCR-Vol. XV at 299-300) Mr. Braden did not remember what information his agency possessed pursuant to the public records requests generated by Ms. Dougherty yet he acknowledged that the office was provided with files on a number of other individuals. He did not specify the names of the individuals. (PCR-Vol. XV at 302, 303). He simply commented that he and the investigator "tried to interview all of them." (Id.) With reference to the cases requested wherein Zuccarello was a witness, Braden stated:

We tried, our effort was to try and see if we can find something that would indicate there had been some sort of deal, so to speak, with Mr. Zuccarello for his testimony.

(PCR-Vol. XV at 303).

The remainder of Braden's testimony was focused on his legal opinion regarding "the importance" of various defense exhibits which "prove" that Zuccarello was a confidential informant and

he was receiving significant favorable treatment for his testimony in Rivera's case. He opined that Detective Gross's reports, the Broward jail receipts, the Miami jail incident reports and the Rios polygraph results of Zuccarello from the Cohen murder investigation's would have all been very helpful in establishing the claim presented in 2004. (PCR-Vol. XV at 302, 306-315, 316-327, 337, 340-341).

Former Broward Sheriff Department Lieutenant Robert Rios also was called by Rivera. When shown Rivera's Defense Exhibit I which purported to be a report written by him, Rios disputed its accuracy and emphatically stated that he did not question Rivera any further once he invoked his right to remain silent. Additionally, Rios denied ever eating Pizza with Rivera and he said that he never typed his reports. (PCR-Vol. XV at 375) Rios also stated that Detectives Amabile and Scheff indicated to Rios that Rivera did not invoke his right to remain silent during questioning. (PCR-Vol. XV at 367).

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I -The record supports conclusively, the trial court's determination that Rivera did not exercise due diligence during litigation of his initial motion for postconviction. Consequently Rivera's *Brady/Giglio* claim is procedurally bared in this successive motion.

Issue II - The trial court's factual findings that State witness Frank Zuccarello did not provide false testimony at trial because his testimony therein was not offered as part of any plea deal was supported by the record. Additionally, the evidence presented below also demonstrated that Zuccarello was not a confidential informant. Therefore the State did not withhold any exculpatory evidence from Rivera.

Issue III - The newly discovered DNA result that a hair found in the van used to transport the victim did not belong to the victim was not material and did not entitle Rivera to a new trial.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND THAT THE *BRADY/GIGLIO* CLAIM RAISED IN THIS SUCCESSIVE AND UNTIMELY MOTION WAS PROCEDURALLY BARRED.

This appeal follows the remand ordered previously by this Court, wherein it was determined that the record did not conclusively refute Rivera's claim that he did exercise due diligence in an attempt to present this claim in the initial motion for post conviction relief. *Rivera v. State*, 995 So. 2d 191, 196 (Fla. 2008). Therefore this case was remanded for a determination regarding Rivera's due diligence as well as resolution on the merits of the following claims: the state knowingly permitted false or misleading testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972); the State withheld material and favorable information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and newly discovered evidence in the form of DNA evidence now establishes that the hairs found in the van did not match that of the victim Stacy Jazvac. *Id* at 196-198.

Following the evidentiary hearing, the trial court denied relief on all the claims. With respect to whether Rivera had satisfied his burden and demonstrated sufficient due diligence to overcome the procedural bar, the trial court found as follows:

This Court finds that Defendant has failed to establish due diligence. The evidence presented during the evidentiary hearing and the postconviction record demonstrate that Defendant was in possession of information and documents that would have allowed him to bring these claims in his 1994 and 1995 amendments to his initial motion.

(PCR-Vol. III at 502).

Rivera claims that the trial court's ruling was erroneous in light of *Lighthouse v. State*, 742 So. 2d 238 (Fla. 1994) and *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012). He explains that because the record conclusively established that former counsel Judy Dougherty, made public record requests involving Zuccarello, his responsibility to exercise due diligence was satisfied. **IB at 65-67.** And now the State bore the burden to conclusively prove which specific pieces of paper were claimed to have been turned over and were they actually turned over pursuant to the public records demands in 1991-1994.

Rivera's legal claim must be rejected as a veiled and futile attempt to dispute the factual findings made by the trial court below. Moreover, Rivera's reliance on *Lightbourne* and *Waterhouse* are misplaced as the facts therein are wholly distinguishable. As will be detailed below, the trial court correctly placed the burden on Rivera to overcome the procedural bar and the record supports completely the factual findings that Rivera was in possession of a plethora of information needed to

present the *Brady/Giglio* claim during litigation of his initial motion for postconviction relief. In fact, the evidence adduced below clearly established that Rivera was in possession of information that was either identical to or corroborative of information he alleged was withheld in violation of *Brady*. Consequently, the trial court correctly found the claim to be procedurally barred.

The law is clear that it is Rivera who must establish that the basis for his claim "was not known or could not have been known" at the time of his first collateral challenge. *Zeigler v. State*, 632 So. 2d 48, 51 (Fla. 1993). Rivera's "burden shifting" argument is an incorrect statement of the law. *Foster v. State*, 614 So. 2d 455, 458 (Fla. 1992) (requiring defendant to demonstrate a justification for failure to raise new claims in a successive motion).

Regarding Frank Zuccarello's alleged plea deal for his testimony in this case along with Zuccarello's cooperation with law enforcement, state witness Broward Assistant State Attorney Susan Bailey, unequivocally demonstrated that Rivera was in actual possession of and/or had notice of significant information since 1994 regarding Zuccarello's plea deal, and his extensive assistance to law enforcement in both Dade and Broward counties. The amount of information turned over to Rivera in 1994-1995 was so extensive, Rivera's witnesses ultimately

conceded that they possessed numerous files documenting Frank Zuccarello's cooperation with police. (PCR-Vol XIV at 251, Vol XVI at 451-457; Vol. XV at 289-219).

The documentation presented by Ms. Bailey during her testimony included copies of all her correspondence with Rivera's former counsel which detailed precisely what files were turned over and what documents, if any, were withheld during the public records litigation. (PCR-Vol XIV at 199=201; XVIII at 570-581, 590; Vol. XX at 759-768). In total, pursuant to Rivera's public records request, the Broward State Attorney's Office turned over the criminal files on the following individuals: Donald Mack, Scott McGuire, Frank Zuccarello, Anthony Caraciolla, Charles Brown, William Moyer, Mark Bizell, Peter Salerno, Tom Joslin, Scott Richetelli, Jay Richeitelli. (PCR-Vol XVIII at 566-581 Vol. XX at 758-768).

Ms. Bailey testified that Zuccarello's files were specifically requested and that is why they were turned over. Additionally, the files of the Jay Richitelli, Scott Richitelli, Tom Joslin, and Anthony Carrociola were turned over because Rivera had requested all files of criminal defendants wherein Zuccarello was a witness. (PCR-Vol. XVIII at 574-587). The criminal files of Zuccarello that were turned over to CCRC in 1994 included

case nos. 84-381, 85-4911 86-3841 86-3602 and 86-3288.² (PCR-Vol. XVIII at 774-580; Vol. XX 759-760). The only information listed as an exemption in Case nos. 84-381 and 85-4911 were the FCIC criminal history and prosecutors notes. (PCR-Vol. XVIII at 574). The remainder of the file was copied and sent to CCRC. The plea agreement appeared in Zuccarello's case no. 86-3602. The State claimed no exemptions in that file. (PCR-Vol. XVIII at 574, 576, 579). The remainder of Ms Bailey's testimony included specific details regarding what specific items were withheld pursuant to a statutory exemption from the remaining files, i.e., those of Zuccarello's co-defendants, in which Zuccarello was listed as a witness (PCR-Vol. XVIII at 575, 581, 582, 587; Vol. XX at 761, 765-766).

In summary, Ms. Bailey identified numerous documents that were included in the files listed above and sent to CCRC in 1994. She testified that Zuccarello's original plea deal was located in Zuccarello's file case no. 86-3602 which had been turned over and in fact nothing was withheld from that file. (PCR-Vol. XVIII at 577-578; Vol. XX at 776). That plea was also located in two separate places in Zuccarello's court file i.e. one standing alone, and the other was attached to Zuccarello's own PSI which was also in the court file. (PCR-Vol. XIV at 200-201; Vol. XX at

² These case numbers correspond to the cases included in Zuccarello's plea deal; 85-4911CF; 86-3841CF; 86-3602CF; and 86-3288CF. (PCR-Vol. XX at 776-777).

743-747). The fourth copy of the plea was located in the file of Jay Richitelli which had been turned over. (PCR-Vol. XIV at 172, 198, 200-201; Vol XVIII at 585, Vol. XX at 776). Consequently, the State's evidence proved that **two separate copies** of Zuccarello's June 1986 plea agreement were included in the files turned over, and **two additional copies** of the plea were included in Zuccarello's court file which were in the file since June of 1986. (PCR-Vol. XX 746, 776-777).

Also, within the files turned over in 1994-1995, are numerous references to Zuccarello's plea. For instance on August 8, 1986, Howard Grietzer, the attorney for Jay Richitelli, Zuccarello's co-defendant, sent a letter to Broward prosecutor Joel Lazarus, stating:

Further I have not been provided with any information or statement pertaining to Frank Zuccarello and/or Michelle Slattery, both of whom **I believe have entered pleas in Broward County and have agreed to testify.**

(PCR-Vol XX at 783) (emphasis added). In response on August 18, 1986, ASA Lazarus replied:

A copy of Zuccarello's plea agreement is enclosed.

(PCR-Vol XX at 781) (emphasis added). The plea is also mentioned several times in the deposition of Detective Joe Gross of the

Metro-Dade Police Department.³ (PCR-Vol. XX at 850, 865, 877, 878). That deposition was a part of the state attorney file for Scott Richetelli which had been turned over to Rivera in 1994. (PCR-Vol. XX at 842-893). Gross also identified defense attorney Bruce Raticoff as the lawyer who was working out the details of Zuccarello's plea. Therefore in addition to possessing copies of the plea agreement, the files in Rivera's possession following the public records requests contain no less than seven references to the existence of Zucarello's plea.

The same files are also replete with information regarding Frank Zucarello's cooperation with numerous other law enforcement agencies. For instance Zucarello is listed as a State witness in the discovery documents in the cases of Anthony Caraciollo; Jay Richitelli, Scott Richitelli, and Tom Joslin. And his name appears in those witnesses lists as "in care of FDLE special agent Scott Emerson". (PCR-Vol. XVIII at 580-587; Vol. XX at 772, 774, 778, 785, 788).

Additionally, the letter mentioned above from Broward ASA Lazarus to Jay Richitelli's lawyer, Howard Geitzer, included the following:

I know of no confidential informant in your client's case; at the time of the report, **Mr. Zuccarello was referred to as an informant**, but that is not now the case. **I**

³ This is the same Detective Gross who authored the documents included in Rivera's exhibits.

believe deposition of Agent Emerson will confirm this.

(PCR-Vol. XX at 781) (emphasis added). Also included in the correspondence exchange between Geitzer and Lazarus are references to Detective Gross of the Metro-Dade Police Department FDLE agent Emerson; Detective Kallman from Pembroke Pines Police Department. (PCR-Vol. XX at 781-784).

In his deposition, Detective Gross mentioned on at least three occasions, that Zuccarello was providing certain information to police, but was holding back on other information in an attempt to work a good plea deal for all of his cases in Dade and Broward counties. And that Zuccarello's lawyer, Bruce Raticoff, was working out the details of Zuccarello's plea. (PCR-Vol. XX at 850, 857, 876-879). Zuccarello was, according to Gross, "taken out on location," from jail on April 4th and 18th, 1986 to provide information regarding home invasion robberies. (PCR-Vol. XX at 851-855, 863, 864, 889). **These dates coincide with the prison receipts relied upon by Rivera to support his claim that Zuccarello was an informant for law enforcement.** (PCR-Vol. XXI at 1061-1064).

Gross mentions that he drafted a synopsis of Zuccarello's statements and transcribed the contents of those meetings with Zuccarello so he could disseminate that information to other law enforcement agencies. (PCR-Vol. XX at 846-847). **The synopsis is**

one of the documents relied upon by Rivera in these proceedings to "prove" Zuccarello was a confidential informant. (PCR-Vol. XVI at 462-466, 470-477; Vol XXI at 1065-1075).

The detective also references Anthony Caracciollo and Zuccarello as possible suspects in the Cohen murder; and Gross identified the Miami-Dade ASA, as John Kasternakes, who was the prosecuting attorney in that case. In all, Gross testified that Zuccarello was involved in twenty-nine invasion robberies and provided information on forty-six different cases. (PCR-Vol. XX at 850, 853-855, 888).

Included in the Jay Richitelli file is a letter from Kasternakes to ASA Lazarus regarding Zuccarello's assistance in criminal cases in Miami. (PCR-Vol. XX at 770-771). Gross also mentions Miami-Dade ASA, John Kasternakes, who was prosecuting the Cohen murder.

Also included in Scott Richetelli's file turned over in 1994-1995, was the transcript of a bond hearing wherein Steve Emerson, FDLA special agent, testified about Zuccarello's cooperation with law enforcement in multiple cases as Zuccarello willingly wished to testify against various co-defendants. Emerson referenced discussions he had with Zuccarello on April 4, 1986. (PCR-Vol. XVIII at 583, Vol. XX at 894, 930-932, 934). **Again that date coincides with the date on one of the prison receipts upon which Rivera relies in support of his claim that**

Zuccarello was an informant for law enforcement. (PCR-Vol. XXI at 1061-1064).

On appeal, Rivera attempts to negate the importance of this information in two ways. First, he argues that the State did not prove that this information was indeed properly copied and turned over to Rivera because Ms. Bailey could not specifically guarantee that she knows through personal knowledge that the plea agreement or any other specific document was actually copied by the copy company twenty years ago. Rivera speculates that a mistake could have been made by the copy company. Ms. Bailey acknowledged that mistakes could be made, however it's illogical to assume that that the copy company failed to copy the document/s at every location in which they appeared. Translated to this case, that would mean that the copy company made the identical copying mistake not once but twice regarding the plea. As Ms. Bailey stated, one copy of the plea agreement may have been miscopied or lost, but not a second one as well. She emphatically stated that she was certain that the information was indeed turned over because all the documents mentioned in her testimony and admitted at the hearing were in the SAO files and have been in the files for all these years and have not been removed by her. (PCR-Vol at XIV at 200; Vol XVIII at 578).

Consequently, for this Court to determine that the State's evidence was insufficient to prove that Rivera had in his possession Zuccarello's plea or information to prove its existence, it must be assumed that in addition to losing both copies of the plea agreement, all other **multiple references** to the plea that appear in the numerous documents detailed previously would also have been mistakenly not copied. Rivera's argument is illogical and implausible.

Second Rivera also attempts to diffuse the significance of the information already possessed since 1995 through both Susan Keffer, and Martin McClain.⁴ Keffer insisted that the basis for Rivera's 2004 *Brady/Giglio* claims only appear in the information revealed through a newspaper article in 1998. She stated that none of this information turned over pursuant to public records in 1994 was relevant because none of it contained **an opinion** by someone that Zuccarello was a liar. (PCR-Vol. XIV at 251, 289-291). Keffer, conceded that CCRC was aware in 1994 that Zuccarello testified in a number of other cases, yet she explained that it was permissible for counsel to ignore those

⁴ Because neither Keefer nor McClain represented Rivera in 1991-1994, their excuses regarding why the claim was not fully litigated in the initial postconviction motion are irrelevant. (PCR-Vol. XIV at 251, Vol XV at 289-291; Vol. XIX at 412). Neither witness shed any light on the activities and/diligence of the attorneys who in fact represented Rivera in 1994. Consequently their testimony is of little relevance to the question of counsel's due diligence in 1994.

files and assume they contained nothing relevant regarding Zuccarello, the jailhouse snitch, until a newspaper reporter decided to investigate the Cohen murder in Miami several years after that trial. (PCR-Vol. XIV at 226, Vol XV at 289). Notwithstanding that CCRC was already in possession of the plethora of information regarding Zuccarello's plea, and his extensive involvement with law enforcement, Keefer described the 1998 article as the starting point in the investigation of Zuccarello.⁵ At one point during cross examination the following exchange occurred:⁶

QUESTION. Certainly from all of these documents, you knew Frank Zuccarello was cooperating with law enforcement?

ANSWER. I knew he was a witness in many cases.

QUESTION. That's the extent of your knowledge?

ANSWER. Until we, you have to keep in mind; I began working at CCRC in June of 1998. I reviewed all of these documents. As of October 1st, 1998, while we knew Mr. Zuccarrello had been a witness we didn't know

⁵ Keefer concedes that at the very least, the basis for the claim was "available" in 1998-1999. Yet, Rivera waited until 2004 to present this claim. On that basis alone, this claim is procedurally barred as untimely.

⁶ Keefer repeatedly testified that she was not claiming that the information contained in the State exhibits was not in CCRC's possession, but that she simply did not have a specific recollection of any particular document from twelve years ago. (PCR-Vol. XIV at 236, 239, 240, 246, 250, 251, Vol. XV at 289-290).

his credibility was being called into question.

We didn't know the extent of the favor he was receiving from law enforcement. **We didn't know, the documents didn't indicate that Mr. Zuccarello was a liar.**

(PCR-Vol. XIV at 251(emphasis added)). Keffer's explanation is legally insufficient to establish the requisite due diligence.⁷

Marty McClain's attempt to discount the information already possessed by Rivera since 1994 was equally unavailing. He testified that between 1991 and 1994, CCRC made public records demands based on their knowledge that Zuccarello had testified in other cases. (PCR-Vol. XVI at 452-457). McClain insisted that **he personally** did not see a copy of the plea before he obtained it from Valerie Jonas in 2002, but he admitted that his office was given all of the information presented by Susan Bailey.⁸ However, McClain felt that this information did not support the

⁷Moreover, the contents of the newspaper articles referenced by Keffer focus on Zuccarello's participation in the trial of Joyce Cohen. The information in the article included: reference to the leniency given to Zuccarello; reference to the fact he had been involved in numerous home invasion robberies; reference to the fact that he failed numerous polygraph examinations regarding the Cohen murder; reference to his plea deals in Miami and Broward Counties; and a reference to his interviews with Detective Gross and Special Agent Emerson. *Rivera v. State*, 859 So. 2d 495 (Fla. 2003); Case No. SC01-2523 at (PCR 323-339). This "new" information did not provide any additional information in support of the *Brady/Giglio* than the information that Rivera possessed since 1994-1995.

⁸ Mr. McClain did admit that Detective Gross's deposition was significant as it did support a potential *Brady* claim based on the information contained therein. (PCR-Vol. XVI at 437-438).

claim being made in these proceedings, because the information presented and detailed by Ms. Bailey did not include any characterization of Zuccarello as a "confidential informant", nor did it make any connection between Zuccarello and Broward sheriff deputy, Nick Argentine. McClain stated that without that information, there was no "CI" claim. (PCR-Vol. XVI 437-438).

McClain's explanation is meritless. As detailed above, the deposition of Detective Gross is replete with information regarding Zuccarello's involvement with multiple law enforcement agencies. Next, Mr. McCain's claim that Rivera was not in possession of any information regarding Zuccarello as a "CI" is factually incorrect. Since 1994, Rivera has possessed the correspondence from Assistant State Attorney, Lazarus to defense attorney Greitzer, discussing Zuccarello's possible status as a confidential informant. (PCR-Vol. XX at 781) Therein appears the following:

I know of no confidential informant in your client's case; at the time of the report, **Mr. Zuccarello was referred to as an informant** believe deposition of Agent Emerson will confirm this.

Obviously, this information was sufficient to have prompted an investigation into the potential claim regarding Zuccarello's alleged status as a "CI". Yet, Rivera did no investigation into this potential claim until he reviewed the "synopsis" authored

by Detective Gross. This in spite of the fact that already in his possession was a detailed account by the same Detective Gross regarding Zuccarello's cooperation with numerous law enforcement. As with all the other information Rivera alleges was withheld, the "synopsis" is nothing more than corroboration of information already possessed by Rivera.

Other misstatements and insufficient excuses were made by Scott Braden, Rivera's attorney in 1994-1995, who litigated the first motion for postconviction relief. Braden was called as a witness in spite of the fact that he admitted that the bulk of the work had been done by Ms. Dougherty prior to his representation of Rivera. (PCR-Vol. XV at 300). Scott Braden's testimony is best characterized as establishing CCRC's complete lack of diligence in 1991-1994. With respect to the information turned over by the Broward State Attorney's Office in 1994, Braden offered no testimony to rebut the record evidence and testimony of Susan Bailey regarding CCRC's possession of same. Mr. Braden did not remember what information his agency possessed pursuant to the public records requests generated by Ms. Dougherty, yet, he acknowledged that the office was provided with files on a number of other individuals. (PCR-Vol. XV at 302, 303). He simply commented that he and investigator "tried to interview all of them." (Id.) With reference to the cases requested wherein Zuccarello was a witness, the sum and

substance of Braden's testimony regarding the diligence or more accurately the lack of diligence of his office was as follows:

We tried, our effort was to try and see if we can find something that would indicate there had been some sort of deal, so to speak, with Mr. Zuccarello for his testimony.

PCR-Vol. XV at 303-304). The remainder of Braden's testimony was focused on his "legal" opinion regarding the importance of various defense exhibits which "prove" that Zuccarello was a confidential informant and he was receiving significant favorable treatment for his testimony in this case. He opined that Detective Gross's reports, the Broward jail receipts, the Miami jail incident reports and the Rios polygraph results of Zuccarello from the Cohen murder investigation's would have all been very helpful in establishing the claim now presented. (PCR-Vol. XV at 302, 308-315, 316-327, 337, 340-341; Vol. XXI at 1061-1093).

And finally, the State asserts that the record on appeal⁹ from that 1995 collateral litigation contains conclusive proof that Rivera was in possession of the information, and therefore, he was required to more fully pursue this claim at that time. First, Braden's co-counsel Harun Shabaaz repeatedly referred to Zuccarello as a confidential informant throughout the public records hearings in 1994-1995. (Vol. II ROA at 51-87, 1-284).

⁹*Rivera v. State*, 717 So. 2d 477 (Fla. 1998) Case No. 86,528.

Second, the amended postconviction motion filed in December of 1994 included Claim XX which alleged in part as follows:

CONFIDENTIAL INFORMANTS

At trial, one of the state's key witnesses was Frank Zuccarello, a professional informant. Mr. Zuccarello had testified many times previously in exchange of lenient or favorable treatment.

(*Rivera v. State*, 717 So. 2d 477 (Fla. 1998); Case No. 86,528 at PCR 1553).

Third, attached to Rivera's amended motion in 1995 were four letters. The first was a letter written by ASA John Kastrenakes, from the Miami Dade State Attorney's Office, who prosecuted the Stanley Cohen murder. Therein, Mr. Kastrenakes writes to Commissioner Wainwright of the Florida Department of Corrections as follows:

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

After Mr. Zuccarello was sentenced in January of 1987 to the aforementioned prison term, he was brutally attacked at the South Florida Reception Center because of his

testimony as a cooperating state witness. There at his request, **I transferred Mr. Zuccarello back to the Dade County Jail (ICDC) where other cooperating witnesses are housed.**

Rivera v. State, 717 So. 2d 477 (Fla. 1998); Case No. 86,528 at PCR 1553). (emphasis added).¹⁰ On this point, the trial court made the following findings based on the previous postconviction record:

In addition, attached as Appendix B to Defendant's amendment to his initial postconviction motion, filed January 3, 1995, there are several letters that make reference to Zuccarello's incident reports while incarcerated in the Miami-Dade County Jail. These reports constitute the basis for Corporal Ingelsia's memorandum regarding Zuccarello's behavior while in that jail. The first letter in Appendix B, dated July 7, 1987, is from Assistant State Attorney Kasternakes who expressed his concern that Zuccarello was not receiving his gain time while housed at the Miami-Dade County Jail. The next letter, dated July 20, 1987, is a response from Phillip Welsh, Classification Services Coordinator, informing Mr. Kasternakes that Zuccarello was credited with 600 days basis gain time for his five (5) year sentence, and soliciting from jail officials periodic progress reports regarding Zuccarello. The third letter, dated August 4, 1987, is a response from Jerry Meece, Director of Operations for the Miami-Dade Jail to Mr. Welsh, informing him that the jail staff had submitted incident reports and an evaluation of Zuccarello's activities. The letter reflects that the same information was sent to Mr. Kasternakes. The memorandum written by Corporal Ingelsias, dated July 28, 1987, which Defendant alleges would have been essential to impeach Zuccarello at trial reflects that Corporal Ingelsia wrote the report in response to a request for input

¹⁰ The claim was denied following an evidentiary hearing. That denial was upheld on appeal without comment. *Rivera v. State*, 717 So. 2d 477 (Fla. 1998).

regarding the award of gain time for Zuccarello. These documents clearly show that Defendant was in possession of information regarding Zuccarello's incident reports and evaluation when he filed his amended motion in 1996. Furthermore, the incidents reports and evaluation were easily discoverable since Defendant had the names and contact information of Mr. Meece, Mr. Kasternakes, and Mr. Welsh.

(PCR-Vol III at 501-502).

And finally, although Braden gave significance to the polygraph report and corresponding letter from Robert Rios, (PCR-Vol.XXI at 955-960, the record shows that the same Robert Rios had spoken to CCRC in 1994 as evidenced by the fact that he was subpoenaed to testify at the public records hearing on September 23, 1994. Instead of testifying, Judith Dougherty decided not to call him and released him from that subpoena during the hearing. (Rivera II ROA at 178). No explanation has been provided by Rivera regarding that release.

Based on the facts outlined above, Rivera's reliance on *Waterhouse, supra* is of no moment. The discrete issue addressed therein involved whether collateral counsel can reasonably rely on the veracity of a police report wherein law enforcement has discounted the usefulness of information included in the report. 8s So. 3d at 104. This Court determined that because of limited resources of collateral counsel, due diligence does not require postconviction attorneys "to verify every detail and contact every witness in a police report," and instead they are

permitted to rely on the assurance of law enforcement regarding that information. *Id.*

As detailed above, that is not the circumstances herein. This is not a situation where counsel was influenced not to pursue a course of action do to the actions of law enforcement. Instead it has been shown that Rivera possessed potential useful information and did nothing with it until a "newspaper reporter" questioned the veracity of a state witness years later regarding testimony given in another unrelated case. Rivera's inaction was not predicated on any state action and Rivera does not receive "a pass" from his inertia.

Nor does *Lightbourne* offer any relief to Rivera. Therein the evidence established through postconviction counsel McClain, that his office had been looking for a particular witness, Emanuele, since the time of the first postconviction motion was litigated but to no avail. *Lightbourne*, 742 So. 2d at 246. The State offered nothing in rebuttal *Id.* Again the situation presented herein is completely different. McClain admits to possessing most the information included in the public records turned over by the State in 1994-1995. Rivera's argument is simply that the information already possessed was not relevant to the *Brady* claim. *Lightbourne* does not offer any support for that argument and therefore its applicability herein has not been established.

In summary, Susan Bailey's testimony, her correspondence with Rivera's former counsel in 1994, in conjunction with the information contained in the files that were turned over clearly established that the underpinnings of this *Brady/Giglio* claim were in Rivera's possession since 1994. The evidence presented below conclusively demonstrates that Rivera was in possession of **multiple copies** of Zuccarello's plea¹¹; he was in possession of numerous discovery documents; transcripts; and correspondence which formed the basis for the potential *Brady/Giglio* claim. The record below supports the trial court's finding that the basis for the claim was available in 1994. (PCR-Vol. III at 33-60).

The prison receipts (PCR-Vol XXI at 1061-1064) were easily discoverable in 1994 as the "out on location" rides with Zuccarello were mentioned/discussed by Gross and Emerson in the documents already possessed. The Miami jail incident reports (PCR-Vol. XXI at 1076-1093) were discoverable as they were

¹¹ Counsel attempts to absolve himself from any duty to look at the court file by claiming that because, one of the four copies of the plea agreement was attached to the PSI, he would not have been able to see the agreement. This is a red herring as the plea agreement was not withheld from the court file regardless of whether it was or was not attached to the PSI. Ms. Bailey testified that Judge Ferris ordered it to be turned over and this document was disclosed. (PCR-Vol. XIV at 200). It had been in the court file since July of 1986, almost one year prior to Zuccarello's testimony in this case. *Pittman v. State*, 90 So. 2d 794, 807 (Fla. 2012) rejecting *Brady* claim that PSI contained favorable information that was withheld by the state as Defendant made no effort to secure the PSI).

specifically identified in correspondence that was attached to Rivera's amended motion in 1994. Moreover, the files turned over in 1994-1995 contain many references to ASA John Kasternakes of the Miami-Dade state attorney's office. The polygraph results and report of Detective Rio (PCR-Vol. XXI at 995 960) were also discoverable as Rios was prepared to testify for CCRC at the public records hearing held in 1994.

Additionally, Rivera possessed the names of numerous individuals; Detective Gross of the Metro-Dade Police Department, Miami FDLE agent Steve Emerson, Zuccarello's attorney Bruce Raticoff, Broward ASA Joel Lazurus, Miami-Dade ASA John Kastrenakes, defense attorneys who represented Zuccarello's co-defendants, and Miami Dade jail personnel, all of whom would have led to the information Rivera now claims was unavailable to him in 1994. Under Rivera's theory, a lawyer does not have to investigate a possible *Giglio/Brady* claim regarding the truthfulness of a jailhouse snitch until someone offers a **personal opinion** about the veracity of that witness. It was counsel's responsibility to recognize the legal significance of the mountain of information already possessed by Rivera since 1994. It is not the law that the claim and supporting evidence be handed to counsel. Due diligence requires counsel to demonstrate that he researched the claim.

The trial court's conclusion that this claim was procedurally barred is correct. Relief must be denied. *Reichmann v. State*, 996 So. 2d 298, 305 (Fla. 2007) (finding that defendant failed to meet his burden that claim could not have been raise previously as previous records demonstrate that counsel was aware of the facts in support thereof); *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003) (precluding relitigation of *Brady* claim as defendant did not demonstrate that "new evidence" claim could not have been raised in first motion for postconviciton relief); *Cf. Rogers v. State*, 782 So. 2d 373, 379 (Fla. 2001) (finding that second detailed confession which allegedly led to information did not satisfy due diligence of *Brady* as defendant was aware of first confession which although was not as detailed as second clearly required defense to depose author of confession).

ISSUE II

TRIAL COURT PROPERLY DENIED RELIEF FINDING THAT THE STATE DID NOT PRESENT FALSE OR MISLEADING TESTIMONY IN VIOLATION OF *BRADY V. MARYLAND/GIGLIO V. UNITED STATES*

Frank Zuccarello, one of three inmates who testified that Rivera had admitted to them that he had killed Staci Jazvac, told the jury that his testimony was not based on any promises by the State, nor was it conditioned on any plea that Zuccarello had negotiated previously. (ROA Vol. VIII at 1406, 1407). Rivera alleges that the testimony was false because Zuccarello did have a plea deal and the terms of that deal encompassed his testimony

herein. Rivera also claims that the State knew of this information, withheld it, and permitted the false testimony before the jury in violation of both *Brady v. Maryland*, 373 US 83 (1963) and *Giglio v. United States*, 405 US 50 (1972). Additionally, Rivera alleged the State intentionally withheld the fact that Zuccarello was a "confidential informant" for law enforcement. As noted elsewhere, Rivera was granted an evidentiary hearing by this Court based on the several documents attached to his postconviction motion. *Rivera v. State*, 995 So. 2d 191, 196-197 (Fla. 2008).

Ultimately, the trial court denied relief finding that Rivera failed to prove that the previously negotiated plea from June of 1986 encompassed Zuccarello's April of 1987 testimony in this case. Likewise, the trial court determined that Rivera also failed to prove that Zuccarello was ever a "CI." With respect to the plea deal, the trial court made the following explicit factual findings:

Based on the testimony presented during the evidentiary hearing, the Court concludes that Zuccarello's plea agreement did not include Defendant's case, but was premised on his cooperation in the home invasion robberies, the Cohen homicide, and the Hodeck homicide. The fact that the plea agreement had a clause requiring Zuccarello to continue to cooperate with certain law enforcement officers, including Detective Nick Argentine with the Broward Sheriff's Office, does not support the inference that Zuccarello's plea agreement included his testimony against Defendant. As explained by Mr. Raticoff, the detectives listed in the plea agreement,

including Detective Argentine, were at the time with the burglary and home invasions unit and Zuccarello was required to continue to cooperate with them in order to discharge his obligations under the plea to provide truthful information about the home invasion robberies. Defendant's jury was aware that Zuccarello received a great plea agreement because Zuccarello testified that he pled guilty to twenty-three (23) felonies in two separate cases and received a five (5) year sentence for the crimes committed in Miami-Dade County and seven (7) year sentence for the crimes committed in Broward County. The jury was also aware that Zuccarello had a motion for mitigation of sentence pending in Broward Court, hoping to reduce his sentence to five (5) years.

For the reasons set forth herein, this Court finds Defendant's Giglio claim without merit because there was no evidence presented that Zuccarello's plea agreement was premised on the condition that Zuccarello testify against Defendant, nor was there any evidence that Zuccarello's testimony was false.

(PCR-Vol III at 507-508).

Rivera takes issue with the trial court's findings complaining that the trial court improperly ignored Rivera's interpretation of the actual plea agreement. Additionally, he complains the court failed to give the appropriate weight to certain testimony of State witness Bruce Raticoff, and improperly gave too much weight to other portions of Raticoff's statements. **IB at 81, 83-85.** Rivera's argument is improper and his "rendition" of the testimony is inaccurate. The trial court's findings are supported by the record and must be upheld on appeal. *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004) (deferring to factual findings of trial court as they are supported by substantial and

competent evidence); *Knight v. Dugger*, 574 So. 2d 1066, 1073 (Fla. 1990) (explaining that trial court's role is to resolve conflicts in the evidence and those findings will be upheld as long as they are supported by the record); *Griffin v. State*, 114 So. 3d 899, 905 (Fla. 2013) (upholding trial court's finding that no promise for immunity was made in exchange for testimony as lower court was responsible to make all credibility determinations and resolve all conflicts in the evidence).

Although he was afforded an evidentiary to prove his allegations, Rivera presented **no witnesses** who possessed any direct knowledge regarding the terms of Zuccarello's plea deal. Instead he relied solely on the documents attached to his motion and simply asked the witnesses to speculate regarding the meaning of various documents.

In contrast, the State presented Frank Zuccarello's former trial lawyer, Bruce Raticoff, who had personal knowledge regarding the terms of the plea as he was responsible for negotiating that agreement. (PCR-Vol. XIX at 633, 650). Raticoff represented Zuccarello throughout the relevant time period which included disposition of all of Zuccarello's pending charges in Broward and Dade counties. (PCR-Vol. XIX at 628, 646, 660). Raticoff's testimony was clear, Zuccarello's testimony against Rivera was not a condition of his plea agreement. Rivera's case was not a part of the plea agreement, and Rivera's name was

never mentioned in connection with the plea agreement.¹² (PCR-Vol. XIX at 633, 635, 640, 641, 655, 663). Rivera's claim that the evidence proves otherwise is simply false.

In 1984-1986, Zuccarello was a target of law enforcement's investigations into numerous home invasion burglaries in Dade and Broward counties. During that time it became known to law enforcement in Miami that Zuccarello possessed personal knowledge regarding the unsolved Stanley Cohen homicide case in Dade County. Raticoff, explained that his client ultimately was the beneficiary of a great plea for his Broward and Dade cases because of his cooperation in the Cohen case. (PCR-Vol. XIX at 628-629, 630-631, 639, 640, 643, 645, 655-656). (PCR-Vol. XIX at 628-629). Zuccarello's cooperation with law enforcement as negotiated by Raticoff, only included the following very specific cases: the Cohen murder, the Hodeck murder, and all home-invasion robberies in which Zuccarello was a participant

¹² River argues that because by the terms of the plea Zuccarello was required to cooperate with Detectives Carney and Argentine, that provides sufficient connection to this case because at the time of trial, Detective Carney was a supervisor in the homicide division, and therefore, Rivera's case must have been included in the plea deal. **I.B. at 82.** However at the time the plea was entered, Sgt. Carney was not in the homicide division, but was in major crimes. (ROA 1261-1262). Likewise Detective Nick Argentine, was also in the robbery/major crimes unit, and not the homicide unit. (PC-ROA 652, 654 ROA 1262). (ROA 1262). In contrast, the lead detective in Rivera's case was Detective Amabile, and his name is not mentioned in the plea agreement. (PCR-Vol. XX at 776).

and in which any of his co-defendants participated. (PCR-Vol XIX at 631-634, 655-656).

Raticoff explained that his client was motivated to get the best plea deal possible and therefore, the more crimes he solved the better the deal would be.¹³ Raticoff would not let Zuccarello "cooperate" without the benefit of a bargain. (PCR-Vol XIX at 651). And, Raticoff made it very clear that it was he who was negotiating the deal and Zuccarello's cooperation with law enforcement was within the parameters of the bargain. Zuccarello was assisting law enforcement in the Cohen investigation as well as numerous home invasion robberies in Miami-Dade and Broward counties. (PCR-Vol.XIX at 628-631, 639, 640, 645, 655, 663).

During the time Zuccarello was cooperating with law enforcement Raticoff testified that he intentionally did not become aware of the content of the information provided by Zuccarello to law enforcement, nor when and how that information was disseminated. Raticoff's "hands off" approach was to ensure that he was never going to be in a position of having to testify about the substance of his client's conversations with law

¹³ According Detective Gross of the Metro-Dade Police Department, and author of several exhibits relied upon by both parties, Zuccarello had information on over forty home-invasion robberies and he participated in at least thirty of those crimes. (PCR-Vol. XX at 850, 852-855, 888).

enforcement.¹⁴ (PCR-Vol. XIX at 647, 659). He explained that his role was to secure the plea, and his client, Zuccarello was required to meet his obligations under the deal.

Notably the timing of the plea itself demonstrate that Zuccarello's testimony against Rivera was not predicated upon the plea. Zuccarello entered into the plea deal on June 12, 1986 and was sentenced on March 13, 1987, a month prior to his testimony in this case. (PCR-Vol XIX at 637, 40) Raticoff confirmed that there was absolutely no incentive for Zuccarello to provide testimony against Rivera based on that plea, as he already received the benefit of his bargain, i.e., a seven year term for all his Broward charges. There was no provision in the plea agreement that would have permitted the state to withdraw the plea after sentencing. (PCR-Vol. XIX at 654).

The State also presented the testimony of Kelly Hancock, the prosecutor in this case. Consistent with his testimony at the previous evidentiary hearing, Hancock testified that he did not offer Zuccarello anything whatsoever in exchange for his testimony against Rivera. (Vol. XIX at 613, 625). Hancock did not participate in its negotiations. (PCR-Vol. XIX at 612-613).

¹⁴ Rivera argues that Raticoff's "willful ignorance" proves that Raticoff was unaware of the cases in which Zuccarello was providing information, and therefore the assumption must be that Zuccarello's cooperation in Rivera's case was a part of the plea deal. Rivera's speculation is not supported by any evidence whatsoever. Raticoff was unequivocal in his testimony regarding the terms of the plea that Raticoff negotiated.

Equally without merit is Rivera's claim that Zuccarello was a "CI" for the state. Again Rivera failed to present testimony from any witness with direct knowledge regarding this claim. The trial court found as follows:

The testimony presented during the evidentiary hearing clearly established that Zuccarello's plea agreement did not include his testimony at Defendant's trial and that Zuccarello was not a CI. In fact, the April 4, 1986 synopsis of the conversation with Zuccarello identifies him by name and specifies that he is referred to as a CI for the sake of brevity. Similarly, the April 18, 1986 report identifies Zuccarello by name and specifies that he will be alternatively referred to as a CUI.

PCR-Vol. III at 510). The evidence presented at the evidentiary hearing supports the trial court's findings. Raticoff was the only witness presented who possessed personal knowledge regarding Zucarrello's alleged "CI" status. Raticoff testified that Zuccarello was **never** a confidential informant. If he had been, Raticoff would have been aware of that. (PCR-Vol. XIX at 648, 662-663, 665). When shown the Defense exhibits, i.e., synopsis and report by Detective Gross, wherein the term "CI" was used, Raticoff stated that the report indicated that the term "CI" was used for brevity. Also, Raticoff explained, if Zuccarello were truly a "CI" he would have been referred to as a number and not by name. (PCR-Vol. XIX at 661-664). In fact, within all of the information relied upon by both the State and

Rivera, Zuccarello's identity was never hidden; his name appears everywhere.¹⁵

Based on the record evidence as well as Raticoff's unequivocal and un rebutted testimony, the trial court properly concluded that Zuccarello's testimony against Rivera was not predicated on any plea and Zuccarello was never a confidential informant. The factual predicate for Rivera's *Brady/Giglio* was never proven and therefore the claim was properly denied on the merits. *Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2009) (finding that trial court rejected properly *Brady* claim as defendant failed to present witness to prove existence of exculpatory evidence); *Conahan v. State*, 118 So. 3d 718, 730 (Fla. 2013) (upholding denial of relief for alleged *Brady* claim, finding that defendant failed to present evidence in support of claim that a tape recording existed and it was withheld by the state); *Jones v. State*, 998 So. 2d 573, 581 (Fla. 2008) (affirming denial of *Brady/Giglio* as trial court credited testimony of state witnesses that no promises were made to witness in exchange for testimony).

Moreover the existence of the plea agreement was in fact known at trial as the benefits Zuccarello had received previously were

¹⁵ The record on appeal from the initial motion for postconviction relief reveals that Zuccarello was attacked while in the jail in Miami because he was a snitch and had to be moved to a facility that housed other cooperating witnesses. *Rivera v. State*, Case No. 86,528 at 1563 opinion *Rivera v. State*, 717 So. 2d 477 (Fla. 1998).

disclosed to the jury. The jury knew the fact that Zuccarello received an exceptional plea deal. The jury knew that Zuccarello pled guilty to twenty-three felonies and received a five year sentence in Miami and a seven year sentence in Broward. The jury knew that Zuccarello spent only three weeks in prison and the remainder of the time was spent in the Broward county jail. The jury was also told that Zuccarello would only serve about half of his sentence even though he was convicted of multiple crimes. The jury also knew that Zuccarello was seeking the reduction so that his Broward sentences would coincide with his five year sentence in Miami, as his motion to mitigate his sentence from seven years to five years pending at the time of his testimony. (ROA Vol. VIII at 1402-1427).

Although trial counsel, Malavenda, stated at the hearing that he does not remember seeing the actual plea agreement before, it is clear from the record recounted above that Zuccarello discussed its existence at trial. Additionally, Ms. Bailey noted that the plea agreement which was entered into in June of 1986 was placed in Zuccarello's court file immediately thereafter and therefore, in the public domain ten months before Zuccarello testified against Rivera. The State did not knowingly or otherwise present any false testimony, nor did the state withhold any information regarding Zuccarello's plea deal or status as a "CI". *Pagan v. State* 29 So. 3d 938, 947-948 (Fla.

2010) (finding that evidence known to the defense previously cannot be considered *Brady* material); *Hendrix v. State*, 908 So. 2nd 42, 425 (Fla. 2005) (finding that witness's cooperation with law enforcement previous to testimony not significant as jury was told that witness was seeking a lighter sentence in exchange for testimony).

With respect to the remaining items presented at the evidentiary hearing in support of his *Brady* claim, Rivera failed to demonstrate that the items were either withheld, available, or admissible at a retrial. First, the memorandum by Corporal Ingelsia detailing Zuccarello's jail behavior was created on July 28, 1987, three months after Rivera's trial, and therefore, could not have been withheld or discoverable before trial. (PCR-Vol. XXI at 1079).

Second, the polygraph results and report of Robert Rios that pertain to Zuccarello's statements regarding the Cohen murder would not have been admissible at trial. (PCR-Vol. XXI at 1076-1077). *Sochor v. State*, 883 So. 2d 766, 787 (Fla. 2004) (reaffirming evidentiary rule that polygraph tests are inadmissible without consent of both parties). Additionally, Rivera has not demonstrated that the information regarding the Cohen investigation was even available for his trial as the information was confidential and a part of an ongoing investigation. (PCR-Vol. XXI at 957-960).

In fact, any of the information being collected and developed in Miami regarding the Cohen murder would not have been discoverable at that time. Detective Gross, at his deposition in September of 1986 in the Richitelli case, refused to answer any questions regarding the Cohen murder investigation. (PCR-Vol XX at 876-877). Rivera did not establish how that information would have been available to him. See *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003) (rejecting argument that is State is required to provide information regarding ongoing investigations of any particular case regardless of relevancy or materiality of that information); *Rogers v. State*, 782 So. 2d 373, 379 (Fla. 2001) (refusing to hold that police reports etc. on unrelated cases in other jurisdictions should be considered in the State's possession for *Brady* purposes).

In the alternative, any information regarding Zuccarello's plea and cooperation with law enforcement was readily available had Rivera conducted a minimal level of investigation. As noted, the plea deal was located in the court file and that certainly provided a starting point upon to which to investigate further. More important, it was accessible to Rivera and therefore not withheld in violation of *Brady*. Rivera would have certainly discovered the plea and all the cases in which Zuccarello was a cooperating witness. In those files, are the names of law enforcement and their testimony, which would certainly led to

the prison receipts etc. Rivera has not shown otherwise. Relief was properly denied. *Stewart v. State*, 801 So. 2d 59, 70 (Fla. 2001) (rejecting *Brady* claim where jail records were equally available to anyone who wished to subpoenae them); *Pittman v. State*, 90 So. 2d 794, 807 (Fla. 2012) rejecting *Brady* claim that PSI contained favorable information that was withheld by the state as Defendant made no effort to secure the PSI).

Likewise his sub-claim under *United States v. Henry* 447 U.S. 264 (1980) also was denied properly by the trial court. (PCR-Vol III at 513). Rivera presented no evidence to demonstrate that Zuccarello was a state agent during the time he was speaking with Rivera.¹⁶ There was no evidence presented that Zuccarello was instructed to "take notes" or "keep his ears and eyes open," as alleged by Rivera. There was no evidence that Zuccarello was placed in a cell near Rivera. Rivera failed to present a factual basis for this claim. Compare *Johnson v. State*, 44 So.3d 51 (Fla. 2010) (explaining that prosecutor's notes and admissions

¹⁶ In further support of his *Henry* claim, Rivera argued that Lieutenant Rios in fact violated Rivera's rights under *Miranda v. Arizona* 384 U.S. 436 (1963), alleging that the officer continued to speak with him after Rivera invoked. However, the evidence does not support that allegation. Detective Rios clearly disputed the accuracy and emphatically stated that he did not question Rivera any further once he invoked his right to remain silent. Rios denied ever eating Pizza with Rivera and he said that he never types his reports. (Vol. XV at 375-377, XX-Vol. 955-956.) The trial court rejected this claim based on Rios' testimony. (PCR-Vol. III at 512).

at hearing supported finding that inmate, whose cell was moved closer to defendant, was a state agent as he was instructed to pay attention and document conversations with defendant). The denial of Rivera's claim must be affirmed. *Hendrix v. State*, 908 So. 2d 412, 423-424 (Fla. 2005) (rejecting *Brady* claim that jailhouse snitch was a "CI" as evidence did not establish that witness received a deal for his testimony); *Ferrel v. State*, 29 So. 3d 959, 977 (Fla. 2010) (rejecting *Giglio* claim as defendant failed to demonstrate that testimony given at trial was false).

ISSUE III

THE TRIAL COURT DENIED RIVERA A NEW TRIAL ON HIS CLAIM THAT NEWLY DISCOVERED DNA EVIDENCE DEMONSTRATING THAT A STRAND OF HAIR FOUND IN THE VEHICLE USED TO TRANSPORT THE VICTIM DID NOT BELONG TO HER

Rivera claims that newly discovered DNA evidence entitles him to a new trial because the results prove his innocence. The newly discovered evidence is the DNA result following the testing of hair that was found in the van believed to be used by Rivera to abduct and transport Staci Jazvac. At trial the jury was told that the strand of hair, found in the van Rivera used to transport the victim Staci Jazvac, could have belonged to Staci. (Rivera I ROA at 1305). The DNA testing done now conclusively reveals that the hair found was not that of the victim. However, that DNA result did not include the identity of the source of the hair. Rivera argued below that the new results

proved that he never had any contact with the victim and therefore, he did not commit the murder. Rivera mischaracterized completely the significance of the DNA evidence. The trial court rejected Rivera's argument and in part explained as follows:

Clearly, the expert's testimony at trial and the prosecutor's comments regarding the impossibility of making a positive identification regarding the hair emphasized the limited probative value of the hair evidence offered at trial. It is also relevant for this Court's analysis that the hair from the bed of the van was not made a feature of the State's case and that the jury already knew the hair found on the victim's body did not belong to Defendant. This, the fact that DNA testing shows that the Defendant was not the source of the hair found with the victim's body is merely cumulative to the evidence presented at trial and does not prove that the Defendant did not commit the murder. When analyzed against this background, the newly discovered DNA evidence does not carry enough weight to warrant a new trial, since it does not establish Defendant's innocence.

Even considering the newly discovered DNA evidence together with the testimony of Mark Peters during the 1995 evidentiary hearing and with the alleged *Brady* material, the evidence is not of such a nature that it would probably produce an acquittal at trial or a different sentence. As noted by the Supreme Court of Florida, "neither Peters' deposition nor his live testimony would have provided Rivera with an alibi for the crucial time after 7 P.M. the proximate time when the victim was murdered." Rivera II, 717 So. 2nd at 483. Furthermore, the jury heard testimony from William Moyer that Defendant told him he had used his brother's blue truck, not the truck Zuccarello and the detectives knew about. (ROA Vol 8 at 1478). As already discussed above, the suppressed documents are either inadmissible on retrial or have limited impeachment value, like Zuccarello's plea agreement, and that there is no reasonable probability that the outcome would be different.

(PCR-Vol. III at 516-517). Following that analysis the trial court went on to detail the extensive overwhelming evidence of Rivera's guilt that remains un-rebutted regardless of the DNA evidence. (PCR-Vol. III at 517-521). The trial court's findings are supported by the record and its legal analysis/conclusions were correct. *Jones v. State*, 591 So. 2d 911 (Fla. 1991); *Cf. Reed v. State*, 875 So. 2d 415 (Fla. 2004) (noting with approval the trial court's finding that evidence which established the presence of hair that is consistent with the defendant's hat is less significant than evidence establishing a positive identification of the defendant's hat); *Preston v. State*, 970 So. 2d 789 (Fla. 2007) (finding that DNA evidence that pubic hair on defendant's belt was not that of the victim, was insufficient to warrant a new trial).

Relevant to the trial court's analysis was that the nature of the DNA evidence was not the "smoking gun" that destroyed the state's case, nor was it evidence that proved Rivera's innocence. *Compare Hildwin v. State*, 2014 WL 2882689 (Fla. June 26, 2014) (reversing for new trial where newly discovered DNA evidence proves the identity/presence of the victim's boyfriend, which supported the defendant's theory that the boyfriend was the killer and it disproved the state's claim that the boyfriend did not contribute the biological material). At best as pointed out by the trial court, it only rebutted a piece of evidence

that the jury already knew had limited value. The court's analysis is supported by the record as follows.

State witness Howard Seiden testified that the hair **could** have belonged to Staci. (Rivera I ROA at 1305). As noted by the trial court, the jury was never told that the hair was that of Staci. In fact the jury was well aware of the limited value of this evidence. Seiden stated on direct examination:

A. It's my scientific opinion that the hair found from the bed of the van could be concluded as being a source from the victim, item number five, which was the head hair sample of the victim.

Q. And when you say could be, is there ever a positive identification in reference to hair?

A. With respect to hairs, I don't think of it as a fingerprint. It's not unique, so it's not to the exclusion of everyone else.

Hairs do not contain enough microscopic characteristics to be able to exclude everyone else on a hair match.

Q. But it was your determination it could have originated from the source of Staci Jazvac.

A. Oh, certainly. Yes sir.

(ROA Vol. VII at 1305). On cross examination, the jury was again told of the very limited value of hair analysis/comparison:

Q. Now these hairs that you've found, hairs don't possess a sufficient number of unique individual microscopic characteristics to be positively identified as having originated from the particular

person, to the exclusion of all others; isn't that correct?

A. That's correct.

Q. And isn't it true that when you prepare a report on hair analysis, you specifically put that paragraph in all your reports?

A. Yes, sir. In fact, where I was trained with the FBI in a training school, they in fact recommended putting that on there.

Q. Now you agree that no—that there isn't the same fingerprint? You can't find the same fingerprint on different people; right?

A. Well, I am not an expert in fingerprints, but from my layperson's knowledge in that and what I know from common knowledge, finger prints are unique.

Q. As far as hair is you can find the same similar characteristics on different people; right?

A. I would imagine if you were to go out and make a comparison on a hair, there's a good chance that the next guy you pick down the street might have the same similar characteristics or you might have to go through the whole State of Florida or Broward County to find it.

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

Consequently, the significance of the DNA was limited because unlike other DNA findings, it did not affirmatively prove anything; it simply negated one possible circumstantial piece of evidence. It merely established that the hair did not belong to the victim. It did not demonstrate that Rivera did not kill

Jazvac, which would be contrary to his numerous admissions otherwise, nor did it demonstrate that Staci Jazvac was not in that van.¹⁷

The remainder of the trial court's analysis focused on the overwhelming evidence of Rivera's guilt. (PCR-Vol. III at 517-521). That un-assailed evidence was as follows. Michael Rivera, consistently admitted to five separate people that he killed Staci Jazvac. On February 7, 1986, before Staci's body was found, he called Star Peck, a former work colleague. Rivera had been calling Peck since September of 1985. He admitted to her that he abducted and killed Staci. He grabbed her from behind as she was getting off her bike and he dragged her into a van. (Rivera I at 1086-1091). In all his previous calls to Peck he never mentioned killing anyone. His demeanor this time was different than any other call. (ROA at 1083-1107).

On that same night, Rivera called Angela Green. She too had received calls from Rivera in the past. This time the call was different. (ROA at 1246). He told Angela that he "had Staci" and that she was gone and would never be found. He stated that he was wearing his pantyhose during the attack. (ROA at 1242-1247). Years later when confronted with the fact that he admitted this crime to both Peck and Green, Rivera

¹⁷ The jury already knew that the evidence was in conflict regarding which van Rivera used that night to abduct and kill Staci Jazvac. (PCR-Vol. III at 517).

attempted to explain away his admissions by saying that they were sexual fantasies.

While in jail, Rivera confessed to three different inmates that he killed¹⁸ Staci Jazvac; Frank Zuccarello (Rivera I ROA at 1402-1422); William Moyer (Rivera I ROA at 1474-1499); and Peter Salerno (ROA at 1574-1580). Rivera admitted to attacking Jennifer Goetz, but that someone came and scared him away. Rivera also told one of the inmates that he made a big mistake in trusting Star Peck. (ROA at 1402-1408).

During his discussions with the police, Rivera made various incriminating statements. For instance when Rivera was taken into custody and brought to the sheriff's office for questioning, he stated, "If I talk to you guys, I'll spend the next twenty years in jail." (ROA at 1011-1012). Rivera told Detective Scheff that he fantasized about murdering a young girl. (ROA at 1015). Rivera also admitted to Scheff that he borrowed a friend's van and would drive around neighborhoods looking for young girls, and that he would render them unconscious. (ROA at 1017-1019). Scheff asked Rivera where they would find Jazvac's body and he said it was his belief that

¹⁸ He confessed to choking Staci Jazvac. The medical examiner testified that she died through asphyxiation which was caused by either choking or the presence of ether. (ROA Vol. V at 869-70, 1413-1414).

it would be found locally. (ROA at 1020). Staci's body was found the next day in Coral Springs. (ROA at 1026).

Once arrested Rivera was turned over to Detective Eastwood for questioning. He told Eastwood that he was home alone at the time of Staci's abduction. (ROA at 1327). Rivera admitted to Eastwood that he liked to expose himself to young girls and he did so in the Coral Springs area numerous times. Coral Springs was a desirable location because there was less of a chance of getting caught. (ROA 1328-1329). Rivera told Eastwood that he fantasized about raping young girls. (Rivera I ROA at 1330). When asked if there was anything special about any of the girls that he had exposed himself to, he said that about two weeks earlier, one of the girls was pushing a bike. (ROA at 1330-1331). Rivera was then given his *Miranda* warnings. (ROA at 1331). He admitted to doing terrible things when he got into a vehicle. Rivera broke down and stated, "Tom, I can't stop myself. I can't control myself. Either kill me or put me in jail, because I'm going to keep doing what I'm doing if you don't stop me." (ROA at 1332-1333). Eastwood told Rivera that he thought Rivera had killed Staci, and he asked where he put the body. Instead of denying that he committed the crime, Rivera responded, "Tom, I can't tell you." I don't want to go to jail. They will kill me for what I have done." (Rivera I

ROA at 1333). Rivera continued crying and the interview was stopped. (ROA at 1337).

Rivera also spoke to Sgt. Carney. When asked where he was the night Staci disappeared, Rivera said that he was out with his brother all night. (Rivera I ROA at 1263). He was then asked if he had ever met Staci Jazvac or if he had ever seen her. He responded that he had never seen her. (Rivera I ROA at 1263). A short time later, Rivera was told that they had found Staci and it was possible to detect fingerprints on the body. They further stated that if his fingerprints were on the body it could mean only one thing. (Rivera I ROA at 1264). Rivera responded that he thought the police did have fingerprints. Also there was a notable change in his demeanor when he was told about the possibility of fingerprints. (Rivera I ROA at 1266). At that point he asked to see a photograph of Staci. Rivera then stated that he had seen her once before at a gas station in Lauderdale Lakes. When pressed again, he admitted that he had seen her on one other occasion although he could not remember when. (Rivera I ROA at 1264-1265).

In addition to the multitude of incriminating statements, collateral crime evidence was also introduced. Jennifer Goetz testified that in July of 1985, she was attacked on her way home from summer camp. She was grabbed from behind and pulled off the sidewalk. She was told to shut up or she would be killed.

She was turned over on her stomach and she passed out. She woke up naked with a bag over her head. Her attacker was in his mid-twenties with dark curly hair. (Rivera I ROA at 1453-1464).

This evidence overwhelmingly established Rivera's guilt. It demonstrated that Rivera lied on two occasions regarding his whereabouts on the night of Staci's disappearance. It established that Rivera was within one block of where Staci's bike was found around the time she was abducted. When confronted with the possibility that his fingerprints could be detected on the body, he changed his earlier statement that he had never seen the victim before, and instead he admitted that he had seen her on two separate occasions. Furthermore, specific details provided by Rivera to different people were corroborated by the physical evidence. For instance, Rivera admitted that Staci was walking her bike when he abducted her. That is consistent with the evidence. Staci's bike was found in sugar sand, a substance that would make riding a bike impossible. There were pantyhose found at the crime scene. Rivera admitted to wearing pantyhose on many occasions, including the night he abducted Staci. The medical examiner testified that Staci had bruises on her head. Rivera admitted that he dragged her into the van. Rivera was in possession of a blue van at the critical time of Staci's disappearance. Rivera admitted that he used a van to abduct Staci. This overwhelming evidence clearly

establishes that Seiden's testimony regarding the hair was harmless error beyond a reasonable doubt. *Cf. Reed v. State*, 875 So. 2d 415 (Fla. 2004) (noting with approval the trial court's finding that evidence which established the presence of hair that is consistent with the defendant's hat is less significant than evidence establishing a positive identification of the defendant's hat) (emphasis added); *Preston v. State*, 970 So. 2d 789 (Fla. 2007) (finding that DNA evidence that pubic hair on defendant's belt was not that of the victim, was insufficient to warrant a new trial). Relief was denied properly.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the trial court's order denying Rivera's successive post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was sent via electronic mail to: Martin McClain Esq. at martymcclain@earthlink.net on August 14, 2014

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CERTIFICATE OF FONT COMPLIANCE

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

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