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IN THE SUPREME COURT OF FLORIDA

CASE NO. 13-1077

MICHAEL RIVERA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a post-conviction motion without an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"1PC-R." -- record on appeal of denial of first Rule 3.850 motion;

"2PC-R." -- record on appeal of denial of first Rule 3.850 motion after remand;

"3PC-R." [Volume Title]" -- record on appeal of denial of this second Rule 3.850 motion;

"4PC-R." -- record on appeal from the denial after remand for evidentiary hearing;

"4PC-T" -- the separately paginated part of the record on appeal containing the transcripts and exhibits;

"4PC-R-Sup" - the supplemental record on appeal from the denial after remand for evidentiary hearing.

Counsel notes herein that unlike any other appeal he has ever handled before this Court, the Broward County Clerk's Office has not just separately paginated the transcripts from the pleadings, orders and other filings in the case, it has paginated the exhibits as a continuation of the transcript pagination. And to add to the confusion, the clerk's office, separately paginated the pleadings, orders and other filings contained in the supplemental record. Counsel only realized the unusual way that the record was paginated as he near completion of this brief. He

does apologize to this Court if due to the lateness of his discovery, he has failed to correct a particular citation from what appears as a "4PC-R" to what should be a "4PC-T". Hopefully, any erroneous citations will just simply be the use of "R" instead of a "T" in the citation format set forth herein.

REQUEST FOR ORAL ARGUMENT

Mr. Rivera has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. Moore, 786 So. 2d 532 (Fla. 2001) Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003). Due process dictates that this Court grant Mr. Rivera an opportunity to present oral argument. Huff v. State, 622 So.2d 982, 983 (Fla. 1993). A full opportunity to air the issues through oral argument is warranted in this case, given the seriousness of the claims involved, the stakes at issue, and this Court's opinion in Huff v. State.

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INTRODUCTION

This appeal arises after the evidentiary hearing that this Court ordered on Rivera's Rule 3.851 claims was conducted.[1] See Rivera v. State, 995 So. 2d 191 (Fla. 2008). In remanding Mr. Rivera's successive Rule 3.851 for an evidentiary hearing on his Brady, Giglio and newly discovered evidence claims, this Court addressed the question of Mr. Rivera's diligence and held:

> Importantly, the record does not conclusively refute Rivera's allegations about his diligence in pursuing these claims. In the public records litigation surrounding the filing of Rivera's initial postconviction motion, Rivera repeatedly sought information about Zuccarello. While the State alleges that it complied with Rivera's requests, the records of the prior proceedings do not clearly establish or identify what materials were turned over to Rivera. In fact, certain materials concerning Zuccarello appear to have been withheld. The records from the first postconviction proceedings suggest that Rivera's efforts to discover information about Zuccarello were repeatedly avoided by the State through its limited responses to public records requests. Based on the record before us, **the State has not sufficiently demonstrated that these claims are procedurally barred as successive**.

Rivera v. State, 995 So. 2d at 196 (emphasis added). The State took issue with this holding in a motion for rehearing filed with this Court and argued that because the public records litigation here occurred before the creation of the records repository, "it is not possible to verify that any specific document, pleading, report or piece of paper, had been given to a defendant well over

[1]The evidentiary hearing was conducted on October 2-3, 8, 9 and 10, 2012.

a decade ago. The standard imposed by the majority to 'identify what materials' were given to Rivera's first counsel in 1994 is unreasonable." (4PC-T. 1108).[2] The State argued that it was unreasonable for this Court "to require the State to ever prove more than what was available herein" (4PC-T. 1111).[3] Based upon

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[2]The motion for rehearing filed with this Court on June 27, 2008, was introduced into evidence by Rivera as an admission by the State at the 2012 evidentiary hearing (4PC-T. 671).

[3]At the evidentiary hearing, Susan Bailey, the Assistant State Attorney who had handled the numerous public records request in Rivera's case over the years testified. The only public record that was part of River's Brady claim that Bailey thought she would have disclosed in response to a public records request was the Frank Zuccarello plea offer. However, she acknowledged that she could not demonstrate that the Frank Zuccarello plea offer was in fact provided to Rivera's counsel. She acknowledged that the plea offer was contained in Zuccarello's PSI which under Florida law was confidential and not a public record (4PC-T. 743-57). "Under the public records statute, we cannot automatically turn it over" (4PC-T. 200). Indeed, Fla. R. Crim. Pro. 3.712 specifically provides that PSI "shall not be a public record." She also said the plea offer officially part of the PSI was in other files and assumed it had been copied and turned over as part of those files. Bailey opined that there was no intent to withhold the plea offer:

> Q. You inspected the materials after they were copied and made sure that document was included?
>
> A. No, I did not. But it is in too many places, as well as Zuccarello's court file in the clerk's office.
>
> Q. You're assuming it was provided?
>
> A Okay. I did not withhold it. It is in the State's file.

(4PC-T. 200). Bailey did not have a specific memory of seeing the plea offer in 1994. When asked whether she viewed the plea offer as something the State would have been obligated to disclose under Brady, she answered: "No, I wouldn't have thought

this argument the State asked this Court to vacate its opinion and affirm the summary denial of Mr. Rivera's successive motion to vacate. On November 17, 2008, this Court denied the State's motion.

Despite this Court's opinion that "the State has not sufficiently demonstrated" the public records at issue had been turned over, despite the State's concession in a rehearing filed with this Court that it could not meet the burden being imposed by this Court, and despite the testimony of the individual at the State Attorney's Office responsible for disclosing public records that there could have been a mistake in copying the records, the circuit court imposed the burden on Rivera to prove that an error in copying, which the State admitted may have happened, did in fact happen, as to the Frank Zuccarello plea offer. The circuit court did not address Rule 3.712 (4PC-R. 463).

As to the jail records showing that Zuccarello was being taken out of the jail for interviews with Fort Lauderdale police before he claimed that Rivera confessed to him (4PC-T. 1061-64),

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it was Brady at all" (4PC-T. 202). Later when Bailey was recalled, she again acknowledged that a mistake could have been made (4PC-T. 595 "There cold have been a mistake made in the copying, certainly."). She also admitted that when the materials came back from the copier, she did not verify that the plea offer had been copied and was being provided to Rivera's collateral counsel (4PC-T. 597"I absolutely did not [verify]. The plea agreement meant nothing at that time.").

the circuit court said that Rivera had not shown that the jail records could not have been obtained in 1994 or 1995 (4PC-R. 464). As to the Miami-Dade police reports identifying Zuccarello as a "CI" as of April 4, 1986 (4PC-T. 1065-75), the circuit court wrote "the incident reports and evaluation were easily discoverable since Defendant had the names and contact information of Mr. Meece, Mr. Kastrenakes, and Mr. Welsh" (4PC-R. 465).[4] In reaching these conclusions, the circuit court required Rivera to demonstrate, not just that his counsel actively sought available public records, but also that a record discovered later in time could not have been discovered sooner. In imposing this burden to prove that a particular record could not have been discovered sooner than it was the circuit court ignored this Court's ruling in Waterhouse v. State, 82 So. 3d 84, 104 (Fla. 2012). There, this Court held:

> Essentially, we must determine whether collateral counsel should be held to a different, higher standard of investigation than original trial counsel. Having considered the assertions of the State and Waterhouse, we conclude that collateral counsel should *not* be held to a higher standard. While pretrial resources are unquestionably limited, collateral counsel's resources are also not unlimited.

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[4]Rivera also pled these undisclosed documents as Brady and alternatively ineffective assistance of trial counsel under Strickland v. Washington, 466 U.S. 668 (1984). In addressing the Strickland claim, the circuit court refused to address whether trial counsel could have easily discovered this information. Clearly contrary to law, the circuit court imposed a higher investigatory burden on collateral counsel than it did on trial counsel.

82 So. 3d at 104. The US Supreme Court made clear in Strickland v. Washington, 446 U.S. 668 (1984), that it is improper to judge the reasonableness of trial counsel's investigation through the lense of hindsight:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). **A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.** Because of the difficulties inherent in making the evaluation, **a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;** that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 446 U.S. at 689 (emphasis added).

The circuit court held Rivera's collateral counsel to a higher standard than the one employed in determining the reasonableness of trial counsel, i.e., the Strickland standard. It employed hindsight in considering where a document was ultimately found to review whether there was some means for collateral counsel to have discovered it sooner. It did not look to collateral counsel's circumstances in 1994 when the collateral counsel pursued public records in order to investigate Rivera's

potential 3.850 claims. The standard that the circuit court imposed upon Rivera's collateral counsel is simply not the standard imposed upon trial counsel and the reasonableness of trial counsel's investigation. The circuit court's order violates this Court's determination in Waterhouse.

In addressing Rivera's Giglio claim, the circuit court held that it was Rivera's burden to show the testimony at issue "was false" (4PC-R. 467). Actually, the US Supreme Court case law on which Rivera relied makes it clear that the testimony must be either false or misleading to establish a due process violation.[5] Focusing only on the word "false," the circuit court ignored the alternative word "misleading."

When addressing the Brady claims, the circuit court compartmentalized and trivialized the various Brady claims made by Rivera.[6] For example, the circuit court said that a police

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[5]A prosecutor may not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957) (principles of Mooney violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993).

[6]The circuit court completely failed to address the 1995 sworn statement from Donald Mack who had been incarcerated in the Broward County Jail with Rivera, Frank Zuccarello, Bill Moyer and Peter Salerno in 1986. Mack swore that in 1986 the police had gotten him to make false statements regarding Rivera in return for assurance of help with his own case (4PC-T. 986). Mack further swore that he knew from conversations with Zuccarello,

report identifying Zuccarello as a "CI" on April 4, 1986, for both Broward and Miami-Dade law enforcement did not mean that Zuccarello was actually a confidential informant. Of course under Brady, the question isn't what the judge presiding at a collateral hearing thinks the evidence means, the question is how the defense could have used the evidence,[7] and what the jury would have been entitled to find had it heard the evidence. Kyles v. Whitley, 514 U.S. 419, 449 n.19, 453 (1995).

The circuit court did not identify those documents that law enforcement had access to and which were not disclosed to Rivera's trial counsel to and determine whether the documents contained favorable information that either trial counsel could have used or would have led him to favorable information. Smith v. Sec'y Dep't of Corrs., 572 F.3d 1327 (11th Cir. 2009). And certainly, the circuit court did not consider the undisclosed materials together in order to analyze what "[t]he jury would have been entitled to find" had it heard the undisclosed information. Kyles v. Whitley, 514 U.S. at 453. At most, the circuit court's analysis is a sufficiency of the evidence test,

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Moyer and Salerno that they too gave false statements to the police regarding Rivera in order to "catch a deal for themselves" (4PC-T. 986).

[7]This Court employed this standard in Parker v. State, 89 So. 3d 844, 866 (Fla. 2011) ("Trial counsel could have used the complete terms of the cooperation agreement . . . to impeach Johnson as to the reasons he was testifying").

which the US Supreme Court has specifically rejected as the wrong analysis. Kyles, 514 U.S. at 434 (the materiality prong of the Brady standard "is not a sufficiency of evidence test").

Indeed, the circuit court's analysis simply refused to come to grips with the fact that the State's case was premised upon the murder occurring in the blue van belonging to Mark Peters. The evidence now establishes that the blue van was not involved in the crime. The State's theory of what actually happened has been shredded. All that is left of the State's case is evidence that a crack-binging, mentally-impaired Rivera told various individuals that he used Mark Peters's blue van to kidnap Staci Jazvac. There is absolutely no physical evidence to demonstrate that Rivera's statements were of fact, not fantasy.

As to the newly discovered DNA results, the circuit court did find "it is undisputed that the DNA testing constitutes newly discovered evidence" (4PC-R. 515). The circuit court further found that "**[t]he results of the DNA analysis prove that the hair submitted at trial as being consistent with the victim's hair did not in fact belong to the victim**" (4PC-R. 515) (emphasis added). The DNA results when combined with Peters's testimony in 1995 that he was in possession of his blue van at the time of the kidnapping and murder establish that Rivera's statements regarding using the blue van were false and not a reflection of reality.

This Court made it clear that in an appeal in Rivera's circumstances involving new scientific evidence in a successive motion, the new evidence must be evaluated cumulatively with previously presented and denied constitutional claims. Indeed, this Court in Swafford v. State, 125 So. 3d 760, 775-76 (Fla. 2013), recently wrote:

> The Jones standard requires that, in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial. Jones II, 709 So.2d at 521. In determining the impact of the newly discovered evidence, the Court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." Lightbourne v. State, 742 So.2d 238, 247 (Fla.1999) (quoting Armstrong v. State, 642 So.2d 730, 735 (Fla.1994)). As this Court held in Lightbourne, **a trial court must even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal**. Id.; see also Roberts v. State, 840 So.2d 962, 972 (Fla.2002) (holding that upon remand, if the trial court determined that the testimony in a newly discovered evidence claim was reliable, the trial court must review that new evidence as well as Brady claims that were previously rejected in a prior postconviction motion because the evidence was equally accessible to the defense and there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed).

(Emphasis added). Under Swafford, the factual context in which the cumulative consideration is to be conducted is exceedingly important. That means beginning at the beginning.

Here, the State's starting point was an obscene phone call that a sexually-troubled, drug-addled Rivera made on February 7, 1986, over a week after Staci went missing, to an individual

named, Starr Peck, in which Rivera claimed that his name was "Tony" and that he had grabbed Staci, put her in the blue van, and dumped her body in Lake Okeechobee (R. 1087-90). It was this phone call that first cast suspicion in Rivera's direction. It also put the blue van front and center because the other verifiable details in the phone call were demonstrably false. Indeed, this Court in remanding this case for an evidentiary hearing indicated: "**Citing the lack of physical evidence connecting him to the crime**, Rivera contends that the trial court should have held an evidentiary hearing. **We agree.**" Rivera v. State, 995 So. 2d at 198 (emphasis added).

In denying Rivera relief, the circuit court quoted Starr Peck and others who say that Rivera indicated that he abducted Staci.[8] But as Detective Scheff testified, Rivera never told law

[8]The circuit court did not address Donald Mack's 1995 sworn statement that the police had induced him to make false statements in 1986 that Rivera had confessed to him and that he knew from conversations with Zuccarello, Moyer and Salerno, that they were making false claims about alleged statements made by Rivera in order "to catch a deal for themselves" (4PC-T. 986). The circuit court also failed to address the trial testimony of John Meham that Moyer was frequently "trying to solicit information [from Rivera] for the detectives" (R. 1761). Meham swore that Moyer told him that he was "making a deal with the State to get his time from life to whatever he got to testify" (R. 1761). Meham further swore that Moyer indicated that he and Zuccarello "got together, I guess, corroborated and was making a deal with the State for what the State wanted to hear" (R. 1761). The circuit court also failed to address the letter that Frank Zuccarello wrote Rivera on July 6, 1986, in which Zuccarello then in the Dade County Jail called Rivera "buddy," apologized for not communicating for a couple of weeks, and said "Believe me Mike. I make up for it" (4PC-T. 1030). Rivera's trial attorney, Ed

enforcement he did it, and maintained that what he said in the phone calls was fantasy (R. 1041).[9] Not one shred of physical corroboration of any of the statements that were cited by the circuit court was referenced in the order denying relief.[10]

Malavenda testified that the letter which had been in his correspondence file showed that "Zuccarello was trying to befriend, you know, Mr. Rivera. And there may have been reasons tied to law enforcement for doing that, rather than just being a friend" (4PC-T. 513).

[9]The circuit court also continued to rely upon the testimony of Zuccarello, Moyer and Salerno, despite Mack's sworn collateral statement their testimony was false. The circuit court ignored the fact that Mack's sworn statement corroborated Meham's trial testimony that Moyer and Zuccarello had "got together" to help themselves by telling the State what the State wanted to hear. The circuit court ignored the fact that despite his claim in his trial testimony that his reason for reporting Rivera's alleged statement to the police was "[b]ecause I think what he did was a sick act" (R. 1406), Zuccarello on July 6, 1986, wrote Rivera, called him "buddy," and signed the letter, "your friend, Frank" (4PC-T. 1030-31). The circuit court ignored the fact that a wealth of undisclosed documents could have impeached Zuccarello because before he claimed Rivera made any statements to him, he was working Broward and Dade law enforcement and referred to in their reports as "CI." The circuit court ignored the fact that pursuant to his undisclosed plea agreement of June 12, 1986, Zuccarello was obligated to cooperate with law enforcement and to testify when subpoenaed, even though in his trial testimony Zuccarello claimed the only reason he went to the police was because he thought what Rivera did was "sick" (R. 1406).

[10]The circuit court cited in his order to a very incredible William Moyer's testimony referencing a blue truck alleged to belong to Rivera's brother (R. 1478). However, no evidence was introduced as to the color of the truck that Rivera's brother owned, nor to its location on January 30, 1986, nor to who had possession of it at that time, nor to the results of law enforcement's analysis of it and its contents. At no time did the State suggest that Peter Rivera's truck was used in the homicide. The reason for that is that if Peter Rivera's truck was used, then Peter Rivera was the one who committed the crime.

When the proper analysis of Rivera's claims is conducted in conformity with Swafford, it is clear that Rivera is entitled to a new trial.

STATEMENT OF THE CASE

On January 30, 1986, eleven year old Staci Jazvac was last seen at strip mall near her home by a store clerk at "[a]bout 6:30, 7 o'clock" (R. 797). Her disappearance quickly became a very high profile news story in Broward County (R. 1048). Her body clad in jeans, a white nylon jacket and a white top was discovered in an empty field in Coral Springs on February 14, 1986 (R. 897-98, 913).

On February 7, 1986, before Staci's body was discovered, Starr Peck received an obscene phone call from a person saying his name was "Tony" who said he had grabbed Staci, put her in a blue van, and dumped her body in Lake Okeechobee (R. 1087-90). "Tony's" statements did not match the facts of the case - only the information that was commonly known from the news coverage (R. 1831-34). Peck reported the phone call to law enforcement. By February 12, 1986, law enforcement had concluded that "Tony" was Michael Rivera (R. 1010). Police took Rivera into custody on February 13, 1986 (R. 1013). He was questioned about Staci's disappearance and about an attempted assault on Jennifer Goetz which had occurred July 10, 1985 (R. 1370). After being questioned for several days, both before and after Staci's body

was discovered in a field in Coral Springs (R. 1051), Rivera was charged in the Goetz case. The prosecutor who handled the Goetz case was Joel Lazarus, Ass't State Attorney (R. 1922).[11]

On August 6, 1986, Rivera was charged by indictment with the first degree murder of Staci Jazvac (R. 2164). Kelly Hancock, Ass't State Attorney, the prosecutor assigned to the case, signed the indictment.[12] Rivera was found guilty on April 16, 1987, and on April 17, 1987, the jury recommended a death sentence (R. 2296, 2307). On May 1, 1987, the trial court imposed a death sentence (R. 2308-13). On direct appeal, this Court affirmed Rivera's conviction and sentence of death, while overturning the finding of the cold, calculated and premeditated aggravating circumstance. Rivera v. State, 561 So. 2d 536 (Fla. 1990).

On October 31, 1991, Rivera filed a Rule 3.850 motion pursuant to an agreement between the Capital Collateral

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[11]Lazarus's role as Rivera's prosecutor at the time of Zuccarello's plea offer in June of 1986 is significant given that the plea offer specifically identified Lazarus and his investigators as a Broward prosecutor that Zuccarello was obligated to "continue to cooperate with" (4PC-T. 746).

[12]Hancock's role as Rivera's prosecutor is thus dated to August 6, 1986, more than a month after Zuccarello's plea bargain was formally accepted in court. However, the plea offer obligated Zuccarello to continue to cooperate with Broward "detectives Presley, Argentine, Sgt. Carney" (4PC-T. 746). Zuccarello in his trial testimony indicated that "Nick Argentino" with "the Broward Sheriff's Office" was who he contacted with law enforcement about Rivera's alleged statements. He also identified the time frame of that contact as "from April '86 to about June of '86 (R. 1406, 1411).

Representative (CCR) and Governor Chiles in order to avoid a death warrant (1PC-R. 726) ("Thus, in order to avoid litigating under the exigencies imposed by a death warrant, Mr. Rivera now files this motion even though it is incomplete due to the State's failure to timely comply with Chapter 119").[13] Thereafter, Rivera's collateral counsel sought the public records over the course of years. Finally on November 2, 1994, having determined that Rivera had received the public records to which it believed

[13]Because of the crisis that led to the creation of the Overton Commission in late 1990, Governor Chiles and CCR hammered a schedule for the initiating Rule 3.850 proceedings in a multitude of cases. See In re Rule of Criminal Procedure 3.851, 626 So. 2d 198, 200 (Fla. 1993). Rivera's case was one of the cases covered by the agreement. CCR was required to file a Rule 3.850 on October 31, 1991, even before public records had been requested. In Provenzano v. Dugger, 561 So. 2d 541, 543 (Fla. 1990), this Court had recognized this as a proper way for collateral counsel to proceed. See also Jennings v. State, 583 So. 2d 316 (Fla. 1991). Under the agreement as long as Rule 3.850 proceedings were initiated on time, Governor Chiles agreed that a death warrant would not be signed for Rivera's execution until the conclusion of collateral proceedings (4PC-T. 390). Judy Dougherty was the Assistant CCR in 1991 who prepared and filed the initial Rule 3.850 motion. After Rivera's Rule 3.850 motion was filed on October 30, 1991, Ms. Dougherty began to pursue the available public records in order to amend the motion with any claims and evidence discovered in the public records. However, Ms. Dougherty resigned from CCR in 1994. Scott Braden was the Ass't CCR assigned to replace her on Rivera's case. It was Braden who reviewed the public records and amended the Rule 3.850 motion on the basis of that review (4PC-T. 301). It was Braden who served at lead collateral counsel at the evidentiary hearing conducted on that motion in April of 1995. It was Braden who thus prepared and presented Rivera's guilt phase Brady, Giglio and ineffective assistance of counsel claims that were heard then (4PC-T. 301-03). It was Braden who reviewed the public records that had been presented by the State Attorney's Office that were requested in connection with Rivera's case.

was entitled, the circuit court ordered the Rule 3.850 motion to be amended with any new claims and/or factual allegations by January 1, 1995 (1PC-R. 1279).

At a hearing on December 15, 1994, addressing Rivera's motion "to toll the time for filing [Rivera's] amended 3.850 motion" (1PC-R. 315), it was announced that lead collateral counsel for Rivera had "recently resigned" (1PC-R. 291). Scott Braden, an experienced capital collateral counsel from Oklahoma who had recently been hired by CCR, was "asked to take her place" as lead counsel for Rivera (1PC-R. 1285). Braden was permitted by the circuit court to act as lead counsel for Rivera at the December 15th hearing (1PC-R. 294). On December 21, 1994, the circuit court entered an order denying Rivera's request to toll the time for filing his amended Rule 3.850 motion (1PC-R. 1289). Accordingly, the amended motion was served on December 30, 1994 (1PC-R. 1559). Besides amending factual allegations in a number of Rivera's claims, the amended motion also included a new claim, Claim XX,[14] which was premised upon Brady and Napue v. Illinois, 360 U.S. 264 (1959) (1PC-R. 1551). It was for the preparation of the December 30, 1994, amended motion to vacate that the public records that had been obtained by CCR in Rivera's case were reviewed to determine what if any constitutional claim could be

[14]Later, it was determined that this claim was misnumbered; that it was actually Claim XXI, and that an evidentiary hearing was required on it (1PC-R. 570-71).

pled based upon those records. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); State v. Kokal, 562 So. 2d 324 (Fla. 1990).[15]

Later, the circuit court ordered a limited evidentiary hearing on guilt phase issues and summarily denied the remaining claims (1PC-R. 1205-06). The evidentiary hearing was conducted in April and May of 1995 .[16] On May 30, 1995, Rivera's counsel served memorandum of law regarding the pending issues (4PC-T. 962). In this memorandum, reference was made to the attempt to show Malavenda the sworn statement made by Donald Mack indicating that the police had made promises to him to get him to falsely claim that Rivera had confessed to him. He also stated that he knew that Zuccarello, Moyer and Salerno had falsely claimed that Rivera made admissions to them in order "to catch a deal for themselves" (4PC-T. 975, 986). Mack's sworn statement was attached to the memorandum (4PC-T. 986-87). On June 19, 1995,

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[15]Braden testified at the 2012 evidentiary hearing that his recollection was that the amended 3.850 motion was prepared after Ms. Dougherty left CCR, and that the amended motion "included the Brady claim" (4PC-T. 120). Ms. Dougherty had been "the first chair" on Rivera's case, and he replaced her as "first chair" after her departure (4PC-T. 118). "[S]econd chair on the case was Harun Shabazz. Thus under Provenzano, it was Braden's job as Rivera's lead counsel to review the public records that had been provided and determine what was contained therein that was evidence of a cognizable constitutional claim.

[16]The evidentiary hearing on Claim XXI was primarily conducted on May 10, 1995 (1PC-R. 643). At that time, the State called the trial prosecutor, Kelly Hancocl, to testify (1PC-R. 684). Without objection, Hancock was asked about Donald Mack. Hancock remembered the name Donald Mack, but was unable to say with certainty that he had not talked with him (1PC-R. 693).

the State filed a motion to strike Mack's sworn statement (4PC-T. 989). On June 22, 1995, the court denied all relief (1PC-R. 1717-21).[17] On July 3, 1995, the State filed a motion for rehearing in which it again asked the circuit court to strike Mack's sworn statement (4PC-T. 993). On August 30, 1995, the circuit court denied the State's motion for rehearing (4PC-T. 1028). Thereafter, Rivera appealed to this Court.

On appeal, this Court reversed the summary denial of the penalty phase ineffective assistance of counsel claim, but affirmed the denial of relief on all other claims. Rivera v. State, 717 So. 2d 477 (Fla. 1998). On remand, the circuit court held an evidentiary hearing on April 26-28, 2001. Following the hearing, the court denied relief, and Rivera again appealed. On September 11, 2003, this Court affirmed the denial of Rivera's penalty phase ineffective assistance of counsel claim. Rivera v. State, 859 So. 2d 495 (Fla. 2003).

Meanwhile, on September 29, 1999, Rivera had filed a second

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[17]The evidentiary hearing on Claim XXI was primarily conducted on May 10, 1995 (1PC-R. 643). However in the proceedings on April 10, 1995, trial counsel, Ed Malavenda was asked if he remembered the name Donald Mack. When collateral counsel sought to show Malavenda, Mack's sworn statement, the State objected. The court sustained the objection and would not let Rivera's counsel show Malavenda Mack's statement (1PC-R. 517). On May, 1995, the State called the trial prosecutor, Kelly Hancock, to testify (1PC-R. 684). Without objection, Hancock was asked about Donald Mack. Hancock remembered the name Donald Mack, but was unable to say with certainty that he had not talked with him (1PC-R. 693).

Rule 3.850 motion in circuit court based upon previously undisclosed information. Later, an amendment to the Rule 3.850 motion was filed on September 27, 2001, in light of the discovery of additional information that the State had previously failed to disclose. When denying relief on the penalty phase ineffective assistance claim, the circuit court failed to rule on the second Rule 3.850 or its amendment. On July 22, 2002, while Rivera's appeal of the denial of his penalty phase ineffective assistance of counsel claim was pending, this Court relinquished jurisdiction to the circuit court so that it could consider Rivera's second Rule 3.850 motion and its amendment.

During the ensuing proceedings, additional public records were disclosed, and DNA testing of evidence was ordered to be conducted. The circuit court granted Rivera leave to file one new amendment of his Rule 3.850 motion containing all of the new information disclosed and/or discovered in the course of the proceedings following this Court's remand. The amended motion was filed on January 20, 2004, and it included, among other new information, the results of the DNA testing (3PC-R., Supp. Record, 1-58). On May 10, 2005, the circuit court issued an order denying an evidentiary hearing and denying relief (3PC-R., Supp. Record, 171-80). Rivera appealed. This Court reversed and remanded for an evidentiary hearing on his claims for relief. Rivera v. State, 995 So. 2d at 198.

An evidentiary hearing was held in circuit court on October 2-3, 8, 9 and 10, 2012. An order denying all relief was entered on March 27, 2013 (4PC-R. 450). An amended order denying all relief was entered on April 3, 2013 (4PC-R. 486).[18] The second order was identical to the first except for its inclusion of notice to Rivera of his right to appeal. After Rivera's motion for rehearing was denied, he filed a timely notice of appeal (4PC-R. 524).

STATEMENT OF THE FACTS

A. RELEVANT FACTS FROM TRIAL.

Staci Jazvac, the victim, was last seen on January 30, 1986, between 6:30 and 7:00 p.m. (R. 795). When her body was discovered on February 14, 1986, she was wearing jeans, a white nylon jacket and a white top (R. 897-98, 913).

Sheriff's detectives Scheff and Amabile were assigned to the victim's disappearance on February 4, 1986 (R. 1002). The detectives spoke to Starr Peck who had received an obscene phone call from someone calling himself "Tony" on February 7, 1986 (R. 1007-08). "Tony" told Peck that he had grabbed Staci, put her in the blue van, and dumped her body in Lake Okeechobee (R. 1087-

[18]In the order denying relief, the circuit court did find "it is undisputed that the DNA testing constitutes newly discovered evidence" (4PC-R. 515). The circuit court further found that "[t]he results of the DNA analysis prove that the hair submitted at trial as being consistent with the victim's hair did not in fact belong to the victim" (4PC-R. 515).

90). At the time, Staci's body had not been located, although the case was receiving extensive news coverage. So she contacted law enforcement. Through Peck and others, the detectives came to concluded Rivera was "Tony" and they set off to contact him on February 12, 1986 (R. 1010). They located a crack-binging Rivera on February 13 and asked him to their office to talk to him about something. Rivera responded, "If I talk to you guys, I'll spend the next 20 years in jail" (R. 1012-13).

Scheff testified that when they got to the sheriff's office, he read Rivera his Miranda rights (R. 1013). Rivera was in the interrogation room for 13 hours (R. 1040). Rivera told the detectives he had sexual fantasies about young girls (R. 1014, 1015). He admitted he had made the phone calls to Peck, but denied that he had abducted or murdered Staci Jazvac (R. 1015). He said that his statement to her was fantasy (R. 1041). The detectives called in Detective Eastwood, who spent four hours talking to Rivera (R. 1016).

After talking to Eastwood, Rivera again talked to Scheff and Amabile. He said he had been fantasizing recently about raping young girls and had gone prowling various neighborhoods in Broward County looking for a vulnerable victim (R. 1018). He did this prowling in a van that he had borrowed from Mark Peters (R. 1018). He said the girls would have to be unconscious, so he would need to knock them out with ether he would get from Peters

(R. 1019). Rivera said whoever did this probably did not have very much gas in a van and did not have enough money to get more gas, so he thought the body would be found in Broward County and that the person was afraid of running out of gas with the body in the car (R. 1020). Later on February 13, Rivera spoke with Eastwood for an hour and a half or two hours (R. 1021). Then he again spoke to Scheff, Amabile and Detective Asher (R. 1021). Scheff testified that Rivera "never admitted to us or to me that he ever murdered Staci Jazvac" (R. 1041).

Scheff also testified that he had spoken to jail inmates, Donald Mack,[19] Frank Zuccarello and Peter Salerno regarding the Jazvac case and did not promise them anything regarding their sentences (R. 1035-37). Scheff claimed he did not "recall the date" that he spoke with Zuccarello about Rivera (R. 1036).[20]

In cross, Scheff testified that although Rivera admitted making phone calls regarding Staci Jazvac, the content of the phone calls was a fantasy that he had found sexually exciting (R. 1041). Rivera never admitted to the detectives that he abducted or kidnapped the victim (R. 1041).

During the trial, the State sought to link Staci to the blue

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[19]Mack gave a sworn statement in 1995 that because he was promised a deal, he gave the police a false statement saying that Rivera admitted involvement in the murder (4PC-T. 986).

[20]Later in cross, Scheff indicated that "Donald Mack and Frank Zuccarello contacted us, I guess, in March or April. I mean I am guessing" (R. 1054).

van referenced in Rivera's obscene phone call to Starr Peck, the vehicle that Rivera also told the police that he borrowed from time-to-time from Mark Peters. Indeed, the State's theory of the case was that the van was used to kidnap Staci and was where she was murdered. It became the lynch-pin for the State's case when it presented evidence to link both Rivera and Staci to the van. This evidence, a hair that an expert said could of come from Staci and a fingerprint from Rivera, was the only physical evidence that demonstrated any commonality. In the State's opening statement, the prosecutor explained:

> They also checked Mark Peters' van, and you'll hear from Howard Seiden, who is with the Crime Lab, and he's an expert in hair examination.
>
> He'll tell you he found a hair in Mark Peter's van, a long hair, I think it was like six or seven inches, and he compared that with the known hair of Staci Jazvac and that they are similar.
>
> He will not come in and say they are exactly the same and they are Staci's. You can't do that in hair. It's not like fingerprints. He'll say it is similar to Staci Jazvac's hair in the van.

(R. 715).[21] In his opening, the prosecutor noted that there

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[21]The prosecutor returned to this in his initial closing:

> What's important about Detective Edel is that he did some vacuuming for the van. He did some vacuuming and he told you where he did vacuuming.
>
> He did vacuuming where? In back of this van. As a result what does he find? He finds hair.
>
> Now they have the standards of Staci. So he sends those standards to Howard Seiden. You heard Howard

would be evidence showing that a fingerprint found in the van "is Michael Rivera's (R. 716).

Starr Peck testified that she began receiving obscene phone calls at her home in September of 1985 (R. 1083). The caller knew her name and said his name was Tony (R. 1084). He called twenty-five to thirty or more times (R. 1087). On February 7, 1986, he said he had "done something very terrible," and when Peck asked what he had done, he said, "I'm sure you've heard about the girl Staci." Peck asked, "Do you mean the eleven-year-old girl?" and he said, "Yes. I've done something very terrible. I killed her and I didn't mean to." He said he "had a notion to go out and expose myself," saw a girl getting off her bike and went up behind her. The caller said he put ether up to the girl's mouth and nose and then dragged her into the van (R. 1088). He kept saying, "I didn't mean to kill her. I really didn't mean to kill her" (R. 1088). He also said the girl "had silky shorts on" (R. 1089).[22] He said that when he dragged the girl into the van, she was dead, but he "put it in her and she

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> Seiden. **It just so happens that hair was consistent with Staci's.** He can't say and he didn't say it's a positive identification, but he says it's consistent with Staci Jazvac's hair standard.

(R. 1793)(emphasis added). In the rebuttal closing, the prosecutor again argued: "And it just so happens that a hair similar to Staci's is found in the van"(R. 1866).

[22]In fact, Staci was wearing blue jeans (R. 897-98, 913).

bled and then I put it in her anyway" (R. 1089). He said he left the body by Lake Okeechobee (R. 1090).

Julius Minery testified that he saw Rivera at an IHOP on the afternoon of Friday, January 31, 1986, and Rivera was driving a blue van (R. 1125-26).

Angela Greene testified that over a two-year period, she received over 200 obscene phone calls at the various restaurants where she worked (R. 1243-44, 1245). On February 7, 1986, the caller said, "I had that Staci girl" (R. 1244). The caller said he was wearing his pantyhose and he "put an ether rag over her face" (R. 1245). He also said "She's gone" and "They'll never find her" (R. 1245).

Dawn Soter testified that Rivera lived on the other side of her duplex and drove a light blue van (R. 1255). Soter saw Rivera with that van during the last part of January of 1986, and saw that van parked in front of Rivera's house on the morning of January 31, 1986 (R. 1256).

Sergeant Carney testified at Rivera's trial that he was the "supervisor for the homicide division" (R. 1261).[23] On February 14, Detective Amabile asked Carney to sit in on an interview with Rivera (R. 1262). Rivera said that on January 30th, 1986, he

[23]Sergeant Carney is one of three individuals with the Broward Sheriff's Office specifically named in the June 1986 Zuccarello plea offer that Zuccarello promised to continue to cooperate with in return the consideration set forth in the plea offer (4PC-T. 746).

spent the entire day and night with his brother Peter, first out mudding in a truck and in the evening at a carnival in Lauderdale Lakes (R. 1263). When he was shown a photograph of Staci Jazvac, Rivera said he recognized her, having seen her once at a Tenneco Station off of Northwest 31st Avenue in Lauderdale Lakes (R. 1266). Amabile told Rivera that Peter Rivera's work records indicated that Peter was at work on January 30th, 1986, and could not have been with his brother on that date (R. 1267). Rivera then said that he did not recall where he was on January 30th, 1986, and that he blacks out sometimes (R. 1267). He also said, "I don't remember killing Staci Jazvac. I don't remember killing Staci" (R. 1267). On February 15, Amabile received a call from Rivera, who asked to see Amabile and Carney (R. 1268). Rivera said he had thought about it very hard and was certain he was with his brother on January 30th, 1986 (R. 1268). On February 17, Amabile told Rivera he had spoken with Peter, who had said he was not with Rivera on January 30th, 1986 (R. 1268). Rivera replied that he could not recall, that he freebased cocaine and that he often blacked out (R. 1269). Once again he said he did not recall and he did not remember killing Staci (R. 1269).

Howard Seiden of the Broward Sheriff's crime laboratory testified that he compared a hair found in Mark Peters's van with a known head hair from Staci. Seiden concluded, "It's my scientific opinion that the hair 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" (R. 1305).[24]

Deputy Eastwood testified that he interviewed Rivera on February 13 (R. 1326). Rivera admitted he did make some obscene phone calls about the disappearance of Staci and told people he had abducted and killed her (R. 1327). Rivera also said that on January 30, he was at his home all evening by himself (R. 1327). Eastwood and Rivera also discussed Rivera's enjoyment of exposing himself to young girls (R. 1328). Rivera said he got to the places where he exposed himself in a van borrowed from Mark Peters (R. 1329). When Eastwood asked if Rivera had thought about how he could pick up girls or force them to have sex with him, Rivera said, "Yes." He said, "Every time I get in a vehicle, I do something terrible" (R. 1329). Rivera added, "I have thought about it. I could pick up girls and even how to force them into having sex with me, but I haven't done it" (R. 1329). Rivera said he had thought about this "[o]ften" (R. 1329). The last time he thought about this was "[t]wo weeks ago when I had the van" (R. 1330). When Eastwood asked Rivera if there was anything significant about any of the girls he exposed himself to, Rivera said, "One of them was pushing a bike" (R. 1330). At this point, Eastwood stopped the interview and advised

[24]The DNA results presented in 2012 have conclusively established that the victim was definitely not the source of any hair found in the blue van owned by Peters (4PC-R. 515).

Rivera of his constitutional rights (R. 1331). Rivera then said, "Every time I get into a vehicle, I do something terrible" (R. 1332). When pressed for details, Rivera said he did one time actually grab a young girl and pull her into some bushes (R. 1332). Rivera broke down, started to cry and said, "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 on doing what I'm going to do if you don't stop me" (R. 1333). On cross, Eastwood testified that Rivera denied abducting and killing Staci and denied knowing anything about the offense (R. 1341-43). Eastwood also clarified that Rivera's statements about dragging a young girl into the bushes were not about Staci and involved an incident which had occurred in Coral Springs (R. 1346-48).

Detective Asher of the Coral Springs Police Department described an attack which occurred in July of 1985 on a girl named Jennifer Goetz (R. 1370-71). On February 13, 1986, Asher interviewed Rivera about this attack, and Rivera admitted he had dragged Goetz into some bushes, but was scared away because someone was nearby (R. 1379).

Frank Zuccarello testified that he met Rivera in jail in April of 1986 (R. 1402).[25] Both Zuccarello's and Rivera's cases

[25]A police report that was undisclosed at the time of trial was introduced into evidence at the 2012 evidentiary hearing (4PC-T. 1065). It states that "[o]n Friday, April 4, 1986, one FRANK ZUCCARELLO (hereinafter referred to as the CI for the sake of brevity) was interviewed." A couple of paragraphs later,

had the same investigator, Eastwood (R. 1403). According to Zuccarello, Rivera said that when he was arrested, Eastwood kept pressing him about Staci Jazvac, so Rivera confessed to another case involving Jennifer Goetz hoping Eastwood would leave him alone about Jazvac (R. 1403). Zuccarello testified that Rivera said he made a big mistake in calling Starr Peck and telling her he had killed Staci (R. 1403).

According to Zuccarrello, Rivera confessed to killing Staci, saying he choked her after he had brought her to the field and things got out of hand (R. 1404). Rivera said he was going to fondle her and talked about his problem with young girls (R. 1404). Rivera said he was driving in the neighborhood when he saw Staci and was going to molest and fondle her (R. 1405). Zuccarello testified that Rivera said after he choked Staci, he dumped her in a rock pit two miles from his house (R. 1405).

Zuccarello testified that he had several conversations with Rivera over a period of time - "it was from April '86 to about June of '86 (R. 1411).[26] Zuccarello testified he notified Nick Argentine of the Broward Sheriff's Office about Rivera's

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"[t]he CI candidly admits he has not told investigators everything he knows and is holding back some information until he sees how events are shaping up." (4PC-T. 1065).

[26]The undisclosed plea offer, which was introduced at the 2012 evidentiary hearing was extended to Zuccarello in June of 1986 (4PC-T. 746); the plea was actually entered on June 12, 1986 (4PC-T. 706).

statements (R. 1406).[27] Zuccarello claimed he told Argentine about Rivera's statements because he thought it was a sick act (R. 1406).[28] Zuccarello testified no one had promised him anything (R. 1406).

Zuccarello testified that he had been sentenced to a seven-year prison term (R. 1407). He had filed a motion to mitigate his sentence, looking to reduce it by two years (R. 1407).[29] He had received no promises regarding that sentence in exchange for his cooperation in Rivera's case (R. 1407).

On cross, Zuccarello clarified that he had been convicted of 23 felonies in two separate cases, one in Broward County and one in Dade County (R. 1409). Zuccarello testified that he talked to Amabile on July 16, 1986, at which time he had 23 pending

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[27]A "Prisoner Receipt" that was undisclosed at the time of the trial was introduced at the 2012 evidentiary hearing. It indicates that Zuccarello was released from the jail to BSO agent "Nick Argentine" on April 17, 1986, at 1010 hours. Zuccarello returned at 1530 hours (4PC-T. 1063).

[28]A letter that Zuccarello (then who was then housed in a Dade County jail) wrote Rivera on July 6, 1986, was introduced at the 2012 evidentiary hearing. In this letter, Zuccarello called Rivera "buddy" (4PC-T. 1030). He indicated that he was sorry about a 15 day lockup and promised to "make up for it." The letter was signed "your friend, Frank."

[29]Even though Zuccarello in his April 6, 1987, testimony indicated that a motion to mitigate had been filed in his case, the court file from his case which was introduced at the 2012 evidentiary hearing does not reflect that an actual written motion to mitigate was filed. All that is shown that on May 8, 1987, his attorney filed a notice of hearing for May 12, 1987, on a motion to mitigate (4PC-T. 741).

felonies (R. 1415). The charges included armed robbery, burglary, armed burglary, aggravated assault, resisting arrest and home invasions (R. 1422-23). Since then he had pled guilty and been sentenced to seven years in prison in the Broward case and five years in the Dade case (R. 1410, 1419).[30] He was hoping to get his Broward sentence reduced by two years so it would be the same as the Dade sentence (R. 1410). He claimed that his testimony in Rivera's case had no bearing on what would happen with the motion to mitigate (R. 1419).[31] On redirect, Zuccarello reiterated that no promises regarding the mitigation matter but hoped someone would speak on his behalf (R. 1421).

William Moyer testified that he met Rivera around February of 1986 in jail (R. 1475).[32] One day, Rivera said to him, "I

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[30]The exhibits introduced at 2012 evidentiary hearing show that the plea was entered and Zuccarello was adjudicated guilty on June 12, 1986 (4PC-T. 706). The sentencing occurred on March 13, 1987 (4PC-T. 723). On May 12, 1987, Zuccarello's motion to mitigate his sentence was granted 4PC-T. 742).

[31]However, the undisclosed plea offer stated: "At time of sentencing, it will be requested by the State that such proceedings be held in chambers, at which time the State will bring forward all law enforcement personnel familiar with the cases and the efforts of the defendant for the Court's consideration in sentencing." (4PC-T. 747).

[32]According to Moyer's trial testimony, Rivera was "in lock-down" when Rivera first came to the jail in "February" (R. 1497). Rivera was "in lock-down" for a couple of months, "60 days" before he was allowed to mingle (R. 1483, 1498). While in "lock-down" an inmate would not be in a position to any conversations with other inmates (R. 1483). Moyer testified that Zuccarello didn't come to the pod and have access to Rivera until "maybe four or five or six months later. * * * I think Frank probably

didn't do it, but Tony did it" (R. 1476). Moyer later heard Rivera on the telephone identifying himself as Tony (R. 1476).

Moyer testified that on January 30, 1987, he was sentenced to 13 years in prison for a sexual battery involving his stepdaughter (R. 1478).[33] Moyer acknowledged that he pled "to assault on a child, sexual" (R. 1500). He had been charged with four capital felonies alleging sexual battery on a child, and a month after his taped statement against Rivera, the State dropped 3 of the charges and agreed to a 13 year sentence (R. 1490).[34]

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came around June, if I am not wrong" (R. 1498).

[33]Moyer testified that he had spoke to Det. Ambile "about two or three times" (R. 1490). On one occasion, he gave Ambile a taped statement. When asked by Rivera's counsel if he recalled that the taped statement was on December 31, 1986, Moyer responded that he did not remember (R. 1491). He was unable to recall that a month before his plea in which he pled a life charges down to 13 years he gave Ambile a taped statement against Rivera. Ambile testified that he had met with Moyer, Mack and Salerno, "throughout this past year"(R. 1566). Yet after Moyer's conversations with Ambile, Moyer remained incarcerated with Rivera gathering evidence to use against him according to his own testimony at trial: "One day on the 25th of January of '87, we were in his room talking and he had a sheet of paper with all witnesses that were going to testify against him, and we went through them and saw Frank's name on it" (R. 1478). It was then, while as a State's agent questioning Rivera, that Moyer alleged that Rivera said "Frank and the police don't know nothing. * * * He said, 'I didn't use a truck. I used my brother's blue truck'" (R. 1478).

[34]Moyer testified that he told law enforcement about Rivera's statements because what Rivera did bothered him so much that one day shortly before the State dropped 3 charges against him and agreed to a 13 year sentence, "all of a sudden I said I have to talk to somebody about it" (R. 1496).

He had a motion to mitigate that sentence pending,[35] and claimed he had received no promises but would appreciate someone coming forward to say he cooperated and testified (R. 1479).

Peter Salerno testified that he had contact with Rivera in 1986 in jail (R. 1574). One day Rivera told Salerno, "I didn't mean to kill the little Staci girl. Just wanted to look at her and play with her. I seen her on a bike and she excited me" (R. 1576). Salerno testified that when he was contacted by Rivera's prosecutor, Hancock he told him what he had heard Rivera say (R. 1578). Salerno had a pending case on which he had received a 12-year sentence, but something happened to the 12-year sentence that allowed Salerno to be released from incarceration (R. 1579).[36] According to Salerno, he was to appear in court again on January 15, 1988 (R. 1582). He did not know what the judge was going to do, but naturally hoped that the judge would be informed of his testimony against Rivera (R. 1582). But, he did not know if the State would in fact let the judge know about his cooperation and assistance (R. 1582).

The defense called John Meham to testify at Rivera's trial. He testified that he met Rivera in the Broward jail in the middle

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[35]The motion to mitigate had been scheduled to be heard after Moyer testified on April 6, 1986, at Rivera's trial. Moyer testified it was to be heard on April 16, 1986 (R. 1479).

[36]Later in cross, Salerno answered that yes that he was on probation (R. 1583).

of October of 1986 for the first time (R. 1759). Meham testified that from his experience he knew that Rivera "never talked to anybody about this case" back in the jail (R. 1760)

In November of 1986, Meham met Moyer who "was trying to solicit information for the detectives" (R. 1761). Moyer told Meham that he (Moyer) was "making a deal with the State to get his time from life to whatever he got to testify against Mike" (R. 1761). Meham asked Moyer if Rivera had ever said anything about his case. Moyer "said no." Moyer then explained that he had got together with Zuccarello to corroborate each other and make "a deal with the State for what the State wanted to hear to come in here" (R. 1761). Meham said Moyer told him this in December of 1986 before he pled his case down from life.

B. THE PREVIOUSLY RULE 3.850 MOTION PROCEEDINGS.

In the 1995 proceedings on Rivera first Rule 3.850, Mark Peters testified. Mark Peters did not testify at Rivera's trial. After Rivera's arrest in February of 1986, the police "picked [Peters] up from work three days in a row, it was either two days or three days in a row" (1PC-R. 503). The police questioned him for "many hours" (1PC-R. 503). The police impounded his van and kept it "for a couple of months" (1PC-R. 504). Peters knew that the police "were literally thinking that I was the one doing all this or whatever, you know, they were looking towards me as a suspect" (1PC-R. 504). Finally, "it was just the last straw. I

decided I didn't want to live here no more, so I moved to Orlando" (1PC-R. 504). He "moved maybe three weeks after - after I went before the grand jury" (1PC-R. 507). Peters just moved to Orlando and did not tell the police, and when testifying in 1995 didn't remember telling Rivera's attorney (1PC-R. 508). As a result, Rivera's jury did not hear what Peters had to say about January 30, 1985.

At the 1995 evidentiary hearing, Peters testified he had known Rivera about three weeks (1PC-R. 499). Rivera was doing crack cocaine. Peters did drugs with Rivera "[a] couple of times." On those occasions, Rivera did crack all day long. Peters believed that Rivera was doing drugs on January 30, 1986 (1PC-R. 499-500). Peters had let Rivera borrow his blue van; "I believe it might have been two times while I was at work" (1PC-R. 500). On January 30, 1986, Peters loaned Rivera the van "while I was at work" (1PC-R. 501). He went to work at 8 AM and Rivera dropped him off at work and [took] the van for the day" (1PC-R. 501). Peters got off work at 5 PM. Rivera had agreed to be back at that time to meet Peters (1PC-R. 501). However, Rivera was late. Rivera did not show up until "[a]bout 6:00, somewhere around 6:00, between 6:00 and 6:30" (1PC-R. 501).[37] Once Rivera

[37]Peters testified in 1995 that he was "so mad about being picked up so late from sitting in a parking lot for, you know, like an hour, hour and-a-half, I didn't really pay much attention to [Rivera's] demeanor at all" (1PC-R. 507).

arrived, Peters "[d]ropped him off at home, then I went home" (1PC-R. 502). Peters testified that the drive home from his job took "about thirty-five, maybe forty minutes" (1PC-R. 502). For the length of that ride to Rivera's home, Rivera was with Peters on January 30, 1986. After Peters dropped Rivera off, Peters did not know what Rivera did or where he went (1PC-R. 507). Peters left Rivera and drove home in his van (1PC-R. 502, 512).[38]

The State presented no evidence to rebut Peters's testimony in 1995. According to Peters's testimony from the time that Rivera arrived at Peters's job site at around 6 PM on January 30, 1986, for the rest of the night, Peters was in possession of the blue van. Indeed after dropping Rivera off between 6 PM and 7 PM at Rivera's house, Peters had sole possession of the blue van.

At the 1995 evidentiary hearing, Rivera's collateral counsel attempted to ask Rivera's trial counsel, Malavenda, about a sworn statement made by Donald Mack. The State objected, and Rivera's collateral counsel was precluded from asking Malavenda about it (1PC-R. 517). Later, collateral counsel, Scott Braden, attached the affidavit to memorandum of law that was filed with the circuit court (4PC-T. 307). Braden explained that: "We wanted to question Mr. Malavenda about Mr. Mack, what Mr. Mack said and ask him about his failure, at least, to talk to Mr. Mack and present

[38]In 1986, Peters had explained this sequence of events to the police. One of his statements occurred on February 13, 1986 (1PC-R. 511).

this evidence at trial" (4PC-T. 307). Braden wanted to ascertain if alternatively the information set forth in Mack's sworn statement was Brady material, i.e. favorable information known to the State, but not disclosed to the defense. Indeed within the memorandum of law served on May 30, 1995, Braden argued Mack's statement constituted undisclosed Brady material regarding inducements offered to inmates in the jail with Rivera to get their cooperation with the State and testimony against Rivera.

The State filed a motion to strike Mack's sworn statement on June 19, 1995 (4PC-T. 988). When the judge failed to rule on the State's motion to strike in his order denying 3.850 relief, the State on July 3, 1995, filed a motion for rehearing requesting the judge to revisit the matter and grant its motion to strike Mack's sworn statement (4PC-T. 993). On August 30, 1995, the judge entered an order denying the State's motion for rehearing (4PC-T. 309). Braden explained in his 2012 testimony that this "left the affidavit standing as part of the case" (4PC-T. 128). It was part of the basis for both Rivera's Brady claim and his ineffective assistance of counsel claim (4PC-T. 310).

In Donald Mack's sworn statement dated April 8, 1995, Mack testified that while in the Broward jail in early 1986 he came in contact with Frank Zuccarello, Bill Moyer and Peter Salerno:

> 2. Also during this period of time, I contacted the Broward County Sheriff's office because I knew that I could get a deal if I gave them information about Michael Rivera. The information that I told the police

> was false. They told me what to say about Michael Rivera's case and I was promised a deal if I cooperated.
>
> 3. I had made several statements to the police that Michael Rivera had told me that he was involved in the murder of a young girl. These statements were false. As I was giving my statements, the police gave me clues about what to say. At no time did Michael Rivera tell me about killing the girl he was accused of killing. I also know from conversations with Peter Salerno, Frank Zuccarello, and Bill Moyer that they were also given hints by the police about what to say about the case. Michael Rivera hadn't talked to any of these people about his case. Everybody at the Broward County Jail wanted to catch a deal for themselves by saying that Michael Rivera had confessed to them.
>
> 4. All of us at the Broward County Jail were reading about Michael Rivera's case in the newspaper and heard about it on the television. Most of the information all of us provided we got through television and newspapers. Even though I didn't testify at the trial, the State gave me a deal in this case for the information they told me to provide about Michael Rivera.

(4PC-T. 986-87).[39]

At the 1995 evidentiary hearing, Rivera's trial counsel testified. In his testimony, he revealed that Rivera had "continuously maintained his innocence" throughout the course of his representation of him in this case" (1PC-R. 548). Malavenda

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[39]During the 2012 testimony of Rivera's prosecutor, Kelly Hancock, was shown a statement to law enforcement that Mack gave on April 22, 1986 (4PC-T. 616). To the extent that was before the August of 1986 indictment, but while Rivera was being prosecuted by Joel Lazarus in a separate case, Hancock was asked which prosecutor would have received Mack's April 22nd statement concerning the Jazvac case. Hancock testified that he did not recall how it was handled prior to the August 1986 indictment (4PC-T. 617).

explained: "I mean, this - this is what we were dealing with, a complete innocence on his part, and an attorney that believed him" (1PC-R. 550). Malavenda wanted to present testimony from Mark Peters, but he did not know where to find him:

> Very frustrating situation. I wanted more than anybody else to get these people in here to say that Mike was not there on that particular day, and every time I tried to find somebody, that person would disappear. I mean to the point where I though, you know, somebody was making them disappear which is - - you know, I don't have anything to substantiate that, but I felt strongly about them, real strongly.

(1PC-R. 552).

At the 1995 evidentiary hearing, the State called Hancock to testify regarding Rivera's Brady claims. He testified that he had offered Zuccarello nothing in return for his testimony (1PC-R. 686). The State did elicit from Hancock that in September of 1987 he wrote a letter to an individual with the Department of Corrections at Zuccarello's request in order to help Zuccarello "to participate in this incentive program" (1PC-R. 688).[40]

On cross, he was asked about Donald Mack. He recalled the name, but didn't think he had ever talked to him (1PC-R. 693). As for Moyer and Salerno, Hancock testified that he didn't promise them anything (1PC-R. 694). He then indicated: "I cannot tell you with the detectives because I wasn't there. But my

[40]In the letter, Hancock wrote that Zuccarello "has fully cooperated and greatly assisted my office in several important investigations. I would highly recommend that Mr. Zuccarello be allowed to participate in the incentive program" (1PC-R. 688).

understanding from talking to the detectives was that they had not promised them anything either" (1PC-R. 695).

C. THE 2012 EVIDENTIARY HEARING.

1. DNA results.

In the 1995 proceedings, Dr. Terry Melton testified about mitochondrial DNA testing that she did on hairs submitted to her laboratory at Mitotyping Technology in State College, Pennsylvania in early 2003 (4PC-T. 516). She testified that she had been provided with the unknown hairs that had been introduced into evidence at Rivera's trial as having been found in the bed of the blue van and from the right front passenger's seat of the blue van (4PC-T. 531). She also testified that she had been provided known hairs from the victim in this case (4PC-T. 532-33). She was able to obtain full mitochondrial DNA profiles from the unknown hairs and from the known hair (4PC-T. 533). She compared the profiles and concluded "that the victim was excluded as the donor of these two hairs." "She was excluded. All of her maternal relatives would be excluded as well. She could not have been the donor of those two hairs." (4PC-T. 533).[41]

Later in 2003, Dr. Melton received six additional questioned

[41]Dr. Melton was specifically asked about Howard Seiden's trial testimony that the hair from the bed of the blue van was microscopically similar to the victim's known hair was consistent with her being the source of that hair. She testified that the hair from the bed of the blue van "was clearly excluded as being from the victim in the case" (4PC-T. 550).

hairs that had been found on the white knit top the victim was found wearing and from her left shoe (4PC-T. 535). At the same time, she was provided with known hairs from Rivera. After obtaining mitochondrial DNA results, she was able to conclude that the profiles from two of the hairs from the white top matched each other and could have been the victim's hairs or from a maternal relative. The third unknown hair from the white top "was very degraded" and she was only able to get "about half a normal profile" and it was "a mixture" (4PC-T. 537). In comparing those results to the profile from the victim's known hair. Dr. Melton found that "we could not exclude the victim and her maternal relatives as being in that mixture" (4PC-T. 538). When the results from the third unknown hair from the white top was compared to Rivera's mitochondrial DNA profile, "one site" was different from his known sample (4PC-T. 539). Because she found only "one site" different from Rivera's profile, she testified that "we call that an inconclusive result" (4PC-T. 540). Finally as to the three hairs from the left shoe, Dr. Melton's analysis of the mitochondrial DNA demonstrated that both the victim and Rivera were excluded as the source of those hairs (4PC-T. 540).

In early 2004, Dr. Melton received two more hairs, "both described as from the left shoe" (4PC-T. 542). After testing, Dr. Melton concluded that "[b]oth of those hairs were excluded as

coming from either victim or Mr. Rivera" (4PC-T. 542).

2. Zuccarello plea offer.

The document titled, Plea Offer; Frank Zuccarello, which was part of the confidential PSI in the clerk's file for Zuccarello's criminal case, was introduced into evidence (4PC-T. 746-47).

Ass't S.A. Bailey, who was responsible for complying with Rivera's public records requests beginning in 1994, acknowledged that the plea offer was contained in Frank Zuccarello's pre-sentence investigation (PSI hereinafter), and that the PSI was confidential: "It would have been" (4PC-T. 200). She testified that nonetheless, "I believe it was turned over" to Mr. Rivera's collateral counsel in response to a public records demand.[42] She also admitted that the copying service may have failed to copy everything she had requested to be copied: "So sure, it's possible that that was the one document they failed to photocopy."[43] (4PC-T. 201). She also acknowledged that she had no specific memory of seeing the Zuccarello plea offer when she

[42]However, Rule 3.712 specifically provides that a PSI "shall not be a public record."

[43]When Bailey was recalled to the stand, she again admitted that a mistake could have been made while preparing the materials to disclose pursuant to Rivera's public records request. "There could have been a mistake made in the copying, certainly." (4PC-T. 596). She also admitted that when she received the materials to be disclosed back from the copier, she did verify that the plea agreement had been copied and was being provided to Rivera's collateral counsel. "I absolutely did not [verify]. The plea agreement meant nothing at that time." (4PC-T. 597).

responded to Mr. Rivera's public records demand in 1994.

Scott Braden who assumed the role of lead collateral counsel on Rivera's case in December of 1994, also testified (4PC-T. 298). After the circuit court had decided that compliance with Rivera's public records requests had occurred in 1994, he ordered Rivera's pending Rule 3.850 motion to be amended by January 1, 1995, in light of all the records provided since the motion was first filed in 1991. Thus, it fell to Braden to review all of the public records that had been provided and determine what factual basis for Brady and/or any other constitutional claim was contained in those records and then plead any claims found in the amended Rule 3.850 motion in conformity with Provenzano v. Dugger, 561 So. 2d 541, 543 (Fla. 1990), and Jennings v. State, 583 So. 2d 316 (Fla. 1991). Braden testified that he reviewed all of the 119 materials that had been provided (4PC-T. 303). Further when the circuit court ordered an evidentiary hearing conducted on a number of Rivera's guilt phase issues, it fell to Braden as lead counsel to review all of the files on Rivera and prepare for the evidentiary hearing (4PC-T. 315). After obtaining Donald Mack's sworn statement and reviewing Zuccarello's trial testimony, Braden testified that he again reviewed the public records in an unsuccessful attempt to find in the public records anything showing consideration being provided or a plea deal (4PC-T. 304-07). Braden was then shown the plea

offer that was in Zuccarello's confidential PSI and asked if he had seen that document in the public records that had been provided. In October of 2012, Braden testified: "I had never seen it until yesterday" (4PC-T. 310). In fact, Braden testified that he could not find a single piece of paper in 1995 to support his claim that Zuccarello received undisclosed consideration for his testimony at Rivera's trial (4PC-T. 302). Braden testified that had he had the plea offer, he would have presented it as support of the Brady/Giglio claim that he pled and tried to prove using Mack's sworn statement.[44] (4PC-T. 313).

Suzanne Keffer also testified. She had been assigned to Rivera's case in 1998 (4PC-T. 218). Shortly before this Court remanded for an evidentiary hearing on Rivera's penalty phase Strickland claim. In late 1998, a newspaper article appeared in the Miami Herald that "indicated there was some questions regarding Mr. Zuccarello's testimony, whether he was truthful in another case" (4PC-T. 219). In light of that article, Keffer

[44]Braden explained that "[b]ased upon reviewing the trial transcripts, and it just looked like that there had been some arrangements with one of the jail-house informants. I think the one that seemed to stand out was Mr. Zuccarello." (4PC-T. 302). In his investigation, Braden located Mack who Zuccarello said in a statement was present in the jail with him when he claimed that Rivera made statements to him. Mack's sworn statement was presented to support the Brady/Giglio or alternatively the Strickland claims that Braden was then litigating. Because the plea offer would have been very supportive and probative as to the Brady/Giglio claim that he was litigating on Rivera's behalf in 1995, Mr. Braden was able to categorically state: "No, I have never seen it until yesterday." (4PC-T. 310).

made new public records requests in 1999. The requests were refused by the State Attorney's Office because it maintained that everything had been turned over in response to the requests made in 1994 (4PC-T. 221). Indeed, it is undisputed that the only time the State provided public records to Mr. Rivera's collateral counsel was in 1994. When shown the Zuccarello plea offer, Keffer testified that she had seen it for the first time, the day before taking the stand in 2012 (4PC-T. 231). Keffer also testified that under Florida law a PSI (pre-sentence investigation) "is not a public record and is available only to those persons as specified in Rule 3.712" (4PC-T. 265).

Martin McClain, was called to testify. He testified that he first became Rivera's collateral counsel in 1997 when CCR was split into three separate entities (4PC-R. 391). When he resigned from CCRC-South in late 1998, McClain left Rivera's case behind. In 2002, CCRC-South contracted with McClain to handle the appeal from the denial of the penalty phase Strickland claim (4PC-T. 394). In the summer of 2002 while preparing for an evidentiary hearing in a Dade County capital case (Dieter Riechman), McClain was given a file by another defense attorney, Valerie Jonas, that she had collected about the Dade County prosecutor involved in the Riechmann case. Jonas gave McClain the file in case it could be helpful. When going through the file, McClain saw the name Zuccarello. Because Zuccarello was

not involved in Riechmann's Dade County case, McClain set those materials aside while preparing for and doing the Riechmann evidentiary hearing in 2002.

When preparing for the April 2003 oral argument before this Court, McClain remembered to look at the Zuccarello materials that he had received the previous summer (4PC-T. 396). In the materials Jonas had given him, McClain found a copy of the Zuccarello plea offer which was introduced into evidence in 2012 (4PC-T. 398). He had never seen it before (4PC-T. 399). The plea offer was pled as evidence of a Brady/Giglio violation in a Rule 3.851 motion filed in January of 2004.

Ed Malavenda, Rivera's trial counsel, was shown the Zuccarello plea offer when he testified in 2012 (4PC-T. 491). He first indicated that he didn't recall whether he had it at the time of trial. After reviewing Zuccarello's trial testimony, Malavenda was asked if would have used the plea offer in cross of Zuccarello at trial. Malavenda answered: "Of course." (4PC-T. 493). He was then asked did the transcript show that he asked "about that document" (4PC-T. 493). Malavenda replied, "No, I did not. I didn't ask about that document." Malvenda indicated: "I don't have a memory of that document." (4PC-T. 494).

Kelly Hancock, Rivera's prosecutor, was shown the Zuccarello plea offer and testified that he had been unaware of it while he was prosecuting Rivera - "I have no recollection of this" (4PC-T.

613). Hancock noted that the plea offer in June of 1986 was before his involvement in Rivera's homicide case began (4PC-T. 619). Hancock admitted that he did not know if Zuccarello had been providing information regarding Rivera by the time of the plea offer (4PC-T. 619). When asked if he had disclosed the plea offer to Malavenda, Hancock answered, "I don't know. I don't remember seeing this. I don't know if I had it in my possession." (4PC-T. 621). He explained: "if I would have had that, I would have given it. I don't remember seeing it" (4PC-T. 622).

3. Prisoner receipts.

Four prisoner receipts from the Broward County Jail reflecting Frank Zuccarello's release from the jail to law enforcement were introduced into evidence (4PC-T. 1061-64). The first one reflected the April 1, 1986, release of Zuccarello to agents from "BSO," and specifically named Chris Presley at 14:25 hours (4PC-T. 1061).[45] Zuccarello was returned to the jail at 22:10 hours, almost 8 hours later.

The second prisoner receipt reflected the April 4, 1986, release of Zuccarello to unnamed agents of "FLPD" at 12:00 hours (4PC-T. 1062).[46] Zuccarello was returned to the jail at 21:55

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[45]Presley's name appeared in the June 1986 Zuccarello plea offer as one of the named detectives with the Broward Sheriff's Office with whom Zuccarello had been and was obligated to continue cooperating (4PC-T. 746).

[46]The date (April 4, 1986) matches the date appearing in the police report titled, Synopsis of conversation with FRANK

hours, nearly 10 hours later.

The third prisoner receipt reflected the April 17, 1986, release of Zuccarello to agents of "BSO," specifically "Dep. Nick Argentine" at 10:10 hours (4PC-T. 1063). Zuccarello was returned to the jail at 15:30 hours, over 5 hours later.[47] This would indicate that after the meeting with Argentine, Zuccarello was placed back in the Broward jail with Rivera.[48] A few days later, Donald Mack made his April 22, 1986, statement to law enforcement (4PC-T. 616), a statement that in 1995 he swore was a false statement that he gave in order to "catch a deal" (4PC-T. 986).

The fourth prisoner receipt reflected the July 17, 1986, release of Zuccarello to agents from "BSO," specifically "Phil Amabile" at 10:20 hours (4PC-T. 1064).[49] Zuccarello was returned

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ZUCCARELLO on Friday April 4, 1986 (4PC-T. 1065).

[47]In his testimony at Rivera's trial, Zuccarello indicated that "Nick Argentino" with "the Broward Sheriff's Office" was the law enforcement officer who he notified regarding Rivera's alleged statements to him (R. 1406). Later, Zuccarello testified that he spoke with "Phil Amabile" also from the Broward Sheriff's Office (R. 1407).

[48]The June 1986 Zuccarello plea offer indicated that "in return for the considerations" identified in the plea offer, Zuccarello "will continue to cooperate with . . . Argentine" with the Broward Sheriff's Office (4PC-T. 746).

[49]While in jail in Dade County, Zuccarello wrote Rivera on July 6, 1986 (4PC-T. 1030). In the letter, Zuccarello called Rivera his "buddy" and said that he would be bringing Rivera "20 packs of Marlboro" when he returned to the Broward jail "within the next two weeks, so be ready" (4PC-T. 1030). Thus by July 17, 1986, Zuccarello had been returned to the Broward jail and was placed back with Rivera shortly before Ambile took his statement.

to the jail at 14:25 hours, over 4 hours later.[50]

Ass't S.A. Bailey was shown the four prisoner receipts when she testified in 2012. Bailey stated that she did not "believe we have would have any reason to have" the prisoner receipts in the files possessed by the State Attorney's Office (4PC-T. 203-05). Bailey testified "[t]o my knowledge, I had not seen them before you presented them in your pleadings" (4PC-T. 205).

Scott Braden was shown the four prisoner receipts when he testified in 2012. He testified that he did not have the four prisoner receipts in 1994-95 when he prepared Rivera's amended Rule 3.850 motion and represented him at the evidentiary hearing ordered on the amended motion. He testified: "No question this would have been evidence I would have used. It is very much the stuff we were looking for but couldn't find" (4PC-T. 320).[51]

Suzanne Keffer was also shown the four prisoner receipts when she testified in 2012. She testified that she made renewed public records request on Rivera's behalf in 1999 (4PC-T. 221). The Broward County Jail responded to the request and indicated that "the records had been destroyed" (4PC-T. 222). Indeed, no

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[50]When he testified at Rivera's trial, Amabile was asked when he met with Zuccarello. Ambile testified; "I don't recall. I believe it may have been this past summer" (R. 1566). Zuccarello in his testimony indicated that he believed his statement to Ambile was given on July 16, 1986 (R. 1414).

[51]Braden also testified that the four prisoner receipts would have provided documentary support for Donald Mack's 1995 sworn statement (4PC-R. 320).

public records were turned over by any agency on which she had made demand for public records. Keffer testified that in her experience, she had "never received prisoner receipts" (4PC-T. 224). She stated categorically that four prisoner receipts were not available to her while she was collateral counsel for Rivera.

Martin McClain identified the four prisoner receipts as documents that he found in the file given to him by Dade County defense attorney, Valerie Jonas (4PC-T. 399). McClain testified that prior to his discovery of the four documents in the Jonas file, the prisoner receipts had not been provided any of Rivera's collateral counsel. In fact, Rivera's collateral counsel was told that the jail records regarding Frank Zuccarello had been destroyed were not available (4PC-T. 402).

Ed Malavenda was shown the four prisoner receipts when he testified in 2012. He testified that he had no memory of being provided the documents at the time of Rivera's trial (4PC-T. 495). After examining them, Malavenda indicated that had he had the documents he would have used them to demonstrate the substantial contact Zuccarello had with the State as means of impeaching his testimony (4PC-T. 496-99).

4. Police reports regarding Zuccarello as "CI"

Three typed reports by Det. Joseph Gross, MDPD, regarding Frank Zuccarello, identified within the reports as "CI", were introduced into evidence (4PC-T. 1065-75). One report was dated

April 4, 1986. It indicated that Zuccarello would be referred to within the reports as "CI for the sake of brevity" (4PC-T. 1065). This report further stated:

> The CI is currently incarcerated in the Broward County jail on charges stemming from a HIR. He has no arrangement regarding those charges at this time.
>
> * * *
>
> The CI candidly admits he has not told investigators everything he knows and is holding back some information until he sees how events are shaping up.

(4PC-T. 1065). Another report began with "April 18, 1986 Interview with Frank Zuccarello at robbery office and on location Beginning at 12:30 PM" (4PC-T. 1072).[52] These three reports discussed the extensive criminal activities of Zuccarello, clearly a career criminal, and his desire to try to work his way out of criminal liability by providing information to the police that could be used to prosecute others (4PC-T. 1065-75).

Bailey acknowledged in her testimony that these three typed reports were not in State's files (4PC-T. 206-07). She testified that the first time that she saw them were when they were attached "to various pleadings in recent years" filed on behalf of Rivera (4PC-T. 206).

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[52]Because there is a prisoner receipt for April 17th which identified Argentine with BSO as the agent taking custody, this report concerning an April 18th interview by Gross with MDPD at "the robbery office" suggests that the prisoner receipts that Rivera's collateral counsel has obtained does fully reflect Zuccarello's contact with law enforcement during the April through July, 1986, time period.

Similarly Braden testified that they had not seen any of the three typed reports in the public records that CCR had collected over the years in Rivera's case (4PC-T. 313-15). Keffer testified that the three documents were not in any of the public records that had been disclosed to CCR over the years and that were stored in Rivera case files (4PC-T. 227, 286-87).

McClain testified that three reports referring to Zuccarello as "CI" were in the Jonas file that was given to him by a defense attorney in the summer of 2002 in connection with another case he was doing in Dade County (4PC-T. 402). By luck when he went through the documents in the Jonas file he discovered the three reports which he had not previously seen and which had not been provided in any public records disclosure made by any state agency in Rivera's case.[53]

Malavenda was shown the three reports when he testified in 2012. He testified that "I do not recall seeing these" (4PC-T. 499). He testified that he new of no time that Zuccarello had been referred to as a "CI". The information in the reports was

[53]Indeed an examination of the three reports reveals that there is absolutely no letterhead, no identifiable form to the reports and no guidance as to where one would go to find the three reports in an agency's public records. Though two of the entirely typewritten reports indicated that Det. Gross wrote them, only the third report listed "MDPD Robbery" after his name. Even if that means Metro-Dade Police Department, it is unclear what file this report, which is not in the style of an official Metro-Dade police report, this report would be found in. The reports contain no case names, no cases numbers, no internal police department numbers of any kind.

significant to Malavenda as Rivera's counsel. Besides their general impeachment value, the reports would have led Malavenda to investigate and challenge the admissibility of Zuccarello's claim that Rivera made incriminating statements to him (4PC-T. 500). However because he was unaware of the three reports, the information contained therein was not used at Rivera's trial.

5. Metro-Dade jail reports regarding Zuccarello

At the 2012 evidentiary hearing eight exhibits were introduced that appeared to be Metro-Dade jail records regarding Zuccarello (4PC-T. 1079-1093). These eight exhibits included a July 27, 1987, memorandum by Cpl. Iglesias urging the denial of Zuccarello's request for gain time that referenced Zuccarello's disruptive behavior in the jail since May of 1986 (4PC-T. 1079), four incident reports regarding Zuccarello (that were dated February 23, 1987, February 20, 1987, October 20, 1986, and July 10, 1986) (4PC-T. 1080, 1082, 1084, 1092), and a disciplinary report dated October 23, 1986 (4PC-T. 1091). These exhibits documented Zuccarello, not just disruptive behavior, but his efforts to use his status as "a State witness" to intimidate jailers and other inmates so that he could gain benefit for himself (4PC-T. 1093).

McClain testified that these eight exhibits were found in the Jonas file that was given to him by a Dade County defense attorney in the summer of 2002 to be used in another capital

collateral case then set for evidentiary hearing in Dade County (4PC-T. 405). After discovering the documents in the Jonas file, McClain included them as undisclosed Brady material in the Rule 3.851 amendment that he filed in January of 2004 (4PC-T. 406).

Malavenda testified that did not have the seven exhibits concerning Zuccarello's conduct in the Metro-Dade jail that were dated before Rivera's trial in April of 1987. Malavenda testified that had he had the records, he would have investigated them and used them to impeach Zuccarello when he testified at Rivera's trial (4PC-T. 508).

6. Rios's report about Rivera's invocation of his Miranda rights.

Introduced into evidence at the 2012 evidentiary hearing was a supplemental report written by Lt. R. Rios (4PC-T. 955). The report was dated February 18, 1986 (4PC-T. 360). It addressed Rios's contact with Rivera on February 18, 1986. Rios was also called to testify at the evidentiary hearing regarding the report and the incident the report addressed. Rios indicated that Lieutenant McCann told him that the sheriff wanted him to go talk to Rivera (4PC-T. 361). Rios then arranged to meet with Rivera at 17:30 hours on February 18, 1986 (4PC-T. 955). Ambile picked Rivera up at the jail and brought him to meet with Rios. Ambile advised Rios that Rivera had waived his Miranda rights (4PC-T. 955). "About an hour and-a-half into the interview" Rivera told Rios that he wanted a lawyer. Specifically, Rivera stated: "I am

telling you I want my lawyer, like I told those two guys I want my lawyer and I want my lawyer" (4PC-T. 366). Rivera said "This is the same bullshit as before," indicating that he had already told the two guys who interrogated him previously that he was invoking his Miranda rights (4PC-T. 956).

Rios testified that later when Hancock was preparing to go to trial, he contacted Rios to ascertain if he had in fact talked with Rivera and if so had he written a report (4PC-T. 366). When Rios investigated, he found his report and all of the copies of it in the case file kept by Ambile and Scheff. They had not distributed the report (4PC-T. 367).[54] Rios went back and met with Hancock again. Rios told Hancock about the fact that after Rivera had invoked his Miranda rights and told him he had done so earlier, Rios asked Ambile and Scheff "didn't he say he wanted a lawyer" (4PC-T. 367). "They just looked at each other, said no, he didn't say that."

McClain testified that after a newspaper story had appeared

[54]Rios's testimony in this regard is shocking. The lead detectives on Rivera's case, Scheff and Amabile, hid Rios's report from the trial prosecutor. Evidence that can be used by the defense to impeach "the reliability of the investigation" conducted by the police, is Brady material. Kyles v. Whitley, 514 U.S. 419, 446 (1995). If they were willing to withhold Rios's report because it indicated that Rivera claimed he had told them he wanted an attorney, they would be willing to withhold from the promises made to jailhouse informants. Indeed if they were willing to keep a police report away from the trial prosecutor, what wouldn't they have been willing to do in order to obtain a conviction.

about Rivera's case in 2002, he first had a conversation with Rios who was mentioned in the newspaper story (4PC-T. 407).[55] It was after he had talked with Rios, that Rios then sent him the February 18, 1986, supplemental report concerning Rivera's invocation of his Miranda rights. McClain testified that he recognized the value of the report and what Rios had to say and pled Rios and his report in the amended Rule 3.851 motion filed in January of 2004.

Malavenda was shown Rios's supplemental report when he testified in 2012. Malavenda then testified that he did not recall knowing that "Rios understood that Mr. Rivera had invoked his right to counsel with Ambile and Scheff" (4PC-T. 505).

7. Polygraph reports regarding Zuccarello.

Two reports regarding polygraph exams that had been given to Zuccarello in 1986 were introduced into evidence in 2012. The first report was written by Rios regarding a polygraph exam he gave Zuccarello on June 21, 1986, in Miami, concerning the Joyce Cohen homicide (4PC-T. 957). In his testimony in 2012, Rios explained that in 1986 while working for the Broward Sheriff's Office, he had an independent business in which he did polygraph examinations (4PC-T. 368). Rios identified his June 24, 1986,

[55]Rios in his testimony confirmed that his recollection was speaking with McClain about ten years prior after a newspaper article had appeared mentioning Rios in a discussion of Rivera's case (4PC-T. 381-82).

report about the polygraph he gave Zuccarello. "The main issue under consideration was whether or not Mr. Zuccarello took an active part in the Stanley Cohen homicide (4PC-T. 957). Rios indicated that the examination lasted "[n]ine, ten hours or more" (4PC-T. 369). It took that long because Zuccarello kept changing his story after Rios concluded that his answers to key questions showed deception. The exam ended when Zuccarello asked to "not be further polygraphed" (4PC-T. 960).

The other report was a portion of a continuation sheet on Miami Police Department letterhead. It included details of a polygraph examination administered to Zuccarello on June 7, 1986, at the "Homicide Office" (4PC-T. 1076). The polygraph was to address Zuccarello's truthfulness as to his statements "in the Cohen homicide" in Dade County. The report indicated that the examiner "Det. Ilhardt said that Frank Zuccarello in is opinion showed deception in all areas regarding the information he gave us regarding the Cohen homicide" (4PC-T. 1077). In fact, the examiner opined that Zuccarello participated in the homicide and was withholding information.

McClain testified that he first obtained the Rios polygraph report after speaking with Rios in 2002 (4PC-T. 407). McClain testified that he first obtained the Miami Police Department continuation sheet when he found it in the Jonas files that were provided to him in the summer of 2002 while he was preparing for

a Dade County evidentiary hearing. In that file, he discovered the continuation sheet which reflected Zuccarello's last minute maneuvering to get the plea offer and formally accept on June 12, 1986 (4PC-T. 404).

Malavenda testified that the information contained in the polygraph reports that Zuccarello had likely participated in the Cohen homicide was significant undisclosed evidence. Malavenda had no information that Zuccarello was facing "potential criminal liability for a homicide" (4PC-T. 510). Malavenda testified he would have wanted to explore the motivation that law enforcement suspicions of his participation in the homicide gave Zuccarello to curry favor with the State (4PC-T. 510).

8. Fantigrassi and Holmes affidavits.

At the 2012 evidentiary hearing, Rivera introduced the 1999 affidavit of Captain Tony Fantigrassi as newly discovered evidence. The affidavit did not exist at the time of Rivera's trial. McClain testified that the affidavit was attached to "the Joyce Cohen supplemental motion to vacate a Rule 3.850 motion, which I found in the Valerie Jonas box" (4PC-T. 408). McClain obtained the Jonas file in the summer of 2002. Rivera's collateral counsel pled Fantigrassi's statement that Zuccarello had admitted lying in the Hodek case in the amended Rule 3.851 motion that he filed when the DNA testing was concluded and he was directed to submit all of the new information in one amended

motion filed in January of 2004 (4PC-R-Sup. 33).

The Fantigrassi affidavit revealed that on July 1, 1988, Fantigrassi spoke with Zuccarello about information that he had provided law enforcement implicating an individual named Lamberti in the Hodak homicide that occurred in August of 1984. In the July 1st meeting, Zuccarello "admitted to [Fantigrassi] that he had lied and had falsely implicated Donald Duck Lamberti in the Hodak homicide" (4PC-T. 1095). Fantigrassi concluded his affidavit saying that "[i]t is my opinion that Frank Zuccarello is an untrustworthy witness who should not be believed under oath or otherwise" (4PC-T. 1100-01).

Rivera also introduced the 1999 affidavit of Warren Holmes as newly discovered evidence. McClain testified that it too had been attached to the Cohen supplemental 3.850 motion that was in the Jonas files he received in the summer of 2002 (4PC-T. 408).

Holmes's affidavit revealed that on June 26, 1986, he was requested to perform a polygraph exam on Zuccarello (4PC-T. 1102).[56] According to Holmes, the polygraph he conducted was limited to four armed robberies and the information Zuccarello had provided the police in those four cases. Holmes reported

[56]Considering this information Holmes provided regarding his June 26, 1986, polygraph on Zuccarello, along with Rios's June 24, 1986 report about the polygraph he gave Zuccarello on June 21, 1986, along with the information in Def. Ex. 24 that "Ilhardt" conducted a polygraph on Zuccarello on June 7, 1986, it is apparent that in the course of 19 days in June of 1986, Zuccarello took and failed three polygraph examinations.

that Zuccarello "refused to submit to a polygraph test regarding the Cohen homicide" (4PC-T. 1102). Holmes reported that one of the detectives who had brought Zuccarello to Holmes for the testing, pulled Holmes aside and stated that he knew Zuccarello, he's using these guys, he doesn't know anything about the Cohen case. Holmes said it was obvious to him that Zuccarello was lying. He later met with two prosecutors and told that "it was so obvious that Zuccarello was a con artist and a liar that it would be remarkable that the State would rely upon the testimony of such an individual" (4PC-T. 1103).

9. **Zuccarello's July 6, 1986, letter to Rivera.**

Rivera also introduced Zuccarello's July 6, 1986, letter to Rivera at the 2012 evidentiary hearing (4PC-T. 1030). The return address on the envelop was to a Dade County jail (4PC-T. 1033). Malavenda testified that the letter was in his trial file from when he tried Rivera's case in 1987 (4PC-T. 511). Malavenda testified that had the undisclosed impeachment evidence of Zuccarello been provided to him, he would have been able to use Zuccarello's letter to show that "Zuccarello was trying to befriend, you know, Mr. Rivera. And there may have been reasons tied to law enforcement for doing that, rather than just being a friend" (4PC-T. 513).

SUMMARY OF ARGUMENT

1. The circuit court erred in its diligence ruling. It

failed to conduct the analysis required by this Court's opinion remanding for the evidentiary hearing. The circuit court did not require that the State to prove that in responding to collateral counsel's request for public records that it actually delivered every single sheet of paper to counsel that it had determined should be disclosed. The circuit court in its analysis also erroneously used a diligence standard to measure collateral counsel's conduct by that was higher than the standard applied to determine the reasonableness trial counsel's performance. This was contrary to this Court's ruling in Waterhouse v. State, 82 So.3d 84 (Fla. 2012). The circuit court also seemingly ignored the record from 1994 that conclusively demonstrated the diligence of Rivera's collateral counsel in trying to obtain public records that might contain information that could be useful in presenting Rule 3.850 claims on behalf of Rivera.

2. At Rivera's trial, Zuccarello's testimony that no one "had promised [him] anything" and his only reason for coming forward was his belief that what Rivera "did was a sick act" was allowed to go uncorrected by the State, despite the Zuccarello's acceptance of a plea offer that required him to "continue to cooperate with . . . Argentine [and] Sgt. Carney . . . and other law enforcement offices." In accepting the plea offer, Zuccarello agreed "to testify at all proceedings in which he is subpoenaed." In return, the plea offer promised Zuccarello that

his sentence was to be considered by a judge, "the State will bring forward all law enforcement personnel familiar with the cases and the efforts of the defendant for the Court's consideration in sentencing." Zuccarello's testimony at Rivera's trial was extremely misleading and created the false impression that Zuccarello gained nothing by coming forward, no promises had been made to him and he was under no obligation to testify. This violated due process under Alcorta v. Texas, 355 U.S. 28 (1957), and Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993). The State is required to show beyond a reasonable doubt that Zuccarello's misleading testimony had no effect on the outcome of Rivera's trial and penalty phase.

3. The State withheld material and exculpatory information from Rivera, and/or trial counsel unreasonably failed to discover it. In addition to the Zuccarello's plea offer, a wealth of other favorable information was in the State's possession, yet did not get presented to the jury either because the State failed to honor its obligation under Brady v. Maryland or because counsel failed to fulfill his obligations under Strickland v. Washington. When all of the favorable evidence in the State's possession or in counsel's possession is considered cumulatively as is required, confidence in the reliability of the verdict is undermined and Rule 3.851 relief must issue.

4. Hair found in Mark Peters's van was introduced into

evidence at Rivera's trial and expert testimony was presented that the hair found in the van was consistent with the victim's hair. DNA testing has now conclusively revealed that the hair found in the van did not come from the victim. Other hairs found on the victim's body have also been tested. None of these hairs were shown to come from Rivera, as to one hair the result was officially inconclusive. This constitutes newly discovered evidence properly presented in the 3.851 motion. In deciding whether a new trial is required, the newly discovered evidence must be considered cumulatively with all of the other evidence from trial, previous collateral proceedings, even with evidence that would otherwise be procedurally barred, in determining whether cumulatively the DNA evidence and the other favorable evidence discovered in the course of the collateral proceedings would probably lead to an acquittal at a new trial, i.e. a reasonable juror would have a reasonable doubt as to guilt.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's findings of historical fact. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN ITS RULING THAT DEFENDANT FAILED TO ESTABLISH THAT HE EXERCISED DUE DILIGENCE.

In its order denying Rule 3.851 relief, the circuit court finds that Rivera "failed to establish that he exercised due diligence" (4PC-R. 492). In this section of its order, the circuit court, without addressing or citing this Court's jurisprudence concerning what constitutes due diligence in Rule 3.851 proceedings, concluded that:

> the 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/or 1995 amendments to his initial motion.

(4PC-R. 502).[57] The circuit court's analysis failed on a couple

[57]Despite the seeming broad scope of this finding that Rivera failed to show due diligence, the circuit court subsequently in the order stated: "It is undisputed that the DNA testing constitutes newly discovered evidence" (4PC-R. 515). In reaching this conclusion, the circuit court did not explicitly address Rivera's due diligence. However, it would seem implicit that as to the DNA testing due diligence was found.

In Swafford v. State, 125 So. 3d 760, 776 (Fla. 2013), this Court found that new scientific evidence presented there constituted newly discovered evidence much like the DNA testing results do here. In addressing whether the newly discovered evidence warranted the grant of Rule 3.851 relief, this Court in Swafford explained that:

> In determining the impact of the newly discovered evidence, the Court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." Lightbourne v. State, 742 So.2d 238, 247 (Fla.1999) (quoting Armstrong v. State, 642 So.2d 730, 735 (Fla.1994)). As this Court held in Lightbourne, **a trial**

of fronts.

First, the circuit court confused evidence supporting a claim with the claim itself. The fact that Rivera did allege in the amended motion to vacate at issue in the 1995 evidentiary hearing that the State failed to disclose that Zuccarello received consideration for his assistance in its prosecution of Rivera does not automatically establish a lack of due diligence as to evidence that existed that supported the claim, but which Rivera's collateral counsel had failed to discover back then. Contrary to the circuit court's analysis, the issue is not whether Rivera had some basis for raising a Giglio claim, a Brady claim or a Strickland claim in 1995. Under this Court's

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> **court must even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal.**

Swafford, 125 So. 3d at 776 (emphasis added). As a result, the circuit court's finding of lack of diligence as to the rest of the evidence that Rivera presented at the 2012 evidentiary hearing does not preclude its consideration when deciding whether the newly discovered evidence in the form of the DNA testing warrants a new trial. Under Swafford, it all must nonetheless be considered in deciding whether Rivera is entitled to a new trial. Certainly here, the circuit court did not conduct the analysis that Swafford requires. That issue will be addressed in Argument III, infra.

In the meantime in structuring this brief, it seemed that the appropriate way to proceed is to first address the due diligence aspect of the circuit court's order. And then address Giglio, Brady and Strickland before turning to the newly discovered evidence claim and Swafford v. State. The order in which the issues are addressed in no way implies that Rivera is not confident that under Swafford he is entitled to a new trial.

jurisprudence, the issue is whether counsel exercised due diligence as to specific bits of information or evidence that would have supported the claim, not whether the claim was presented in a prior proceeding.

This is clear from this Court's opinion in Lightbourne v. State, 742 So.2d 238 (Fla. 1999). There, Lightbourne had presented a Brady claim in a 1989 Rule 3.850 motion. An evidentiary hearing was conducted on the claim in 1990. In 1994, a successive Rule 3.850 motion on the basis of a witness's affidavit that provided additional support and corroboration of the Brady claim previously pled and litigated. The identity of the witness had been known in 1990 at the time of the evidentiary hearing, but Lightbourne's collateral counsel was unable to locate the witness until 1994. This Court reversed the circuit court's order procedurally barring Lightbourne from presenting the witness in 1994 in support of the Brady claim first pled in 1989. Lightbourne v. State, 742 So.2d at 245. As this Court explained in Lightbourne, the issue was whether Lightbourne's collateral counsel had exercised due diligence in trying to locate the witness who was not found until 1994.

Second, the circuit court failed to evaluate collateral counsel's performance from his or her point of view at the time. The circuit court's analysis thus failed to follow this Court's ruling in Waterhouse v. State, 82 So.3d 84 (Fla. 2012). There,

this Court held that due diligence does not require perfection - indeed it does not require more of collateral counsel than is required of trial counsel under Strickland v. Washington, 466 U.S. 668 (1984):

> Essentially, we must determine whether collateral counsel should be held to a different, higher standard of investigation than original trial counsel. Having considered the assertions of the State and Waterhouse, **we conclude that collateral counsel should not be held to a higher standard**. While pretrial resources are unquestionably limited, collateral counsel's resources are also not unlimited. Thus, **requiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an equally onerous burden on collateral counsel**, with little chance of discovering helpful or useful information.

Waterhouse v. State, 82 So. 3d at 104 (emphasis added). The US Supreme Court in Strickland explained the standard that was to be used for measuring the reasonableness of trial counsel's investigation:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). **A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time**. Because of the difficulties inherent in making the evaluation, a **court must indulge a strong presumption that counsel's conduct falls**

> **within the wide range of reasonable professional assistance**; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689.

The circuit court completely ignored the fact that Ms. Dougherty's efforts to obtain public records in 1994 are of record. Indeed, Bailey acknowledged Dougherty's efforts to gather all the public records she could. This Court in remanding for an evidentiary hearing noted: "In the public records litigation surrounding the filing of Rivera's initial postcoviction motion, Rivera repeatedly sought information about Zuccarello." Rivera, 995 So.2d at 196.[58] Thus, the record conclusively established Dougherty's actions in pursuing all available public records.[59] The record also conclusively

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[58]The circuit court order denying 3.851 relief completely ignored this Court's finding that "Rivera repeatedly sought information about Zuccarello."

[59]The circuit court clearly missed this Court's finding that Dougherty's efforts to obtain public records was of record and documented in the court file. Instead, the circuit court in disregard of this Court's opinion stated: "Fatal to Defendant's argument that he has exercised due diligence in raising these claims, is the fact that he has not presented any witnesses to rebut Ms. Bailey's testimony" (4PC-R. 500). Moreover, the circuit court's statement demonstrated a clear failure to understand that Bailey's testimony actually demonstrated and corroborated the record which conclusively showed Dougherty's diligent efforts on Rivera's behalf to obtain public records. What the circuit court obviously erroneously conflated is evidence of collateral counsel's diligence on behalf of Rivera and Bailey's diligence in making sure the public records being disclosed actually reached collateral counsel. It was the latter

demonstrated that Dougherty resigned from CCR and ceased to represent Rivera at the beginning of December of 1994. Since the circuit court in November of 1994 had ordered Rivera's Rule 3.850 motion to be amended with any new claims and/or factual allegations by January 1, 1995 (1PC-R. 1279), it fell to Braden, Dougherty's replacement to review the public records and present Rivera's claims based on the public records in the amendment due on January 1, 1995. See Provenzano v. Dugger; Jennings v. State.

Because of Dougherty's departure, Braden asked for a delay of the January 1, 1995, deadline. His request was denied as the record clearly demonstrates (1PC-R. 1289). The circumstances that Braden faced in December of 1994 was reviewing the public records that had been provided in order to prepare an amended Rule 3.850 motion raising Rivera's claim arising from the public records. Under Provenzano and Jennings, it fell to Braden to review the public records that had been provided and determine what was there to use on behalf of Rivera. Thus, it was in that capacity that Braden was called to testify as to whether the materials supporting the Giglio, Brady and Strickland claims that were pled in the amended Rule 3.851 motion in January of 2004, were included in the public records that were provided in 1994.

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issue which this Court indicated warranted factual development. Rivera v. State, 995 So.2d at 196 ("the records of the prior proceedings do not clearly establish or identify what materials were turned over to Rivera").

This Court indicated in the opinion remanding for the evidentiary hearing that "the records of the prior proceedings do not clearly establish or identify what materials were turned over to Rivera." Rivera v. State, 995 So.2d at 196.[60] It was this issue that this Court's opinion indicated warranted factual development. Indeed, Braden was the collateral counsel who was in the absolute best position to testify as to the content of the public records because he reviewed those records in 1994-95 when presenting claims based on their content.

Keffer was called to testify regarding her review of the public records that were disclosed in 1994 and maintained in Rivera's files at CCRC-South. Her testimony also addressed the issue that this Court had indicated warranted factual development, i.e. what materials Rivera actually received in 1994 in response to his efforts to obtain public records. Similarly, McClain was called to testify whether the documents that he found in the file given to him by Valerie Jonas were in the public

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[60]Clearly, the circuit court ignored this Court's statement in this regard when it stated in its order denying relief: "although Defendant called Mr. Braden to testify, his testimony was not relevant to the issue of due diligence, since he admitted that the bulk of the work was done by Ms. Dougherty prior to leaving the office in December, 1994" (4PC-R. 500). Further, the circuit court ignores the fact that Braden did not just sit and review the public records, he actually went out and investigated. He found Donald Mack and obtained and affidavit from him regarding Zuccarello's efforts to cash in on the law enforcement's willingness to reward anyone would testify that Rivera made incriminating statements.

record materials provided to Rivera in 1994. His testimony also addressed the issue that this Court had found to warrant facutal development.

The circuit court's analysis erroneously imposed upon Rivera a burden to prove matters not in his control, i.e. whether mistakes were made within the State agencies when providing his counsel with requested public records. Indeed, this was addressed by this Court's decision remanding. Rivera v. State, 995 So.2d at 196. This Court held with a showing of diligence because the record demonstrated extensive "public records litigation surrounding the filing of Rivera's initial postconviction motion [and that] Rivera repeatedly sought information about Zuccarello," it became the State's burden to "sufficiently demonstrate that these claims are procedurally barred." In other words, this clearly meant that it is the State that must prove that each individual piece of paper meant to be disclosed as a public record was in fact disclosed and placed in collateral counsel's hand.[61] The State's motion for rehearing filed with this Court on June 27, 2008, clearly demonstrates that

[61]Even if an envelop containing the public records being disclosed fell open while in transit with a postal carrier, and documents fell and did not reach collateral counsel, such an accident cannot defeat counsel's diligence in seeking the public records in the first place. Where collateral counsel demonstrates that he was diligent in the pursuant of public records, his diligence cannot be undone by a faulty envelop or a negligent postal carrier.

it understood this aspect of this Court's opinion and asked for the Court to reconsider. (4PC-T. 1108) ("[I]t is not possible to unequivocally verify that any specific document, pleading, report or piece of paper, had been given to a defendant well over a decade ago. The standard imposed by the majority to 'identify what materials' were given to Rivera's first counsel in 1994 is unreasonable."). This Court denied the State's motion and left "the standard" in the opinion intact.

Indeed, a showing by collateral counsel that he sought all of the available public records must place the burden upon the State to demonstrate that each page of the public records that were supposed to be disclosed actually was actually contained in the packet of material that reached collateral counsel. Rivera's collateral counsel had no control over whether the person in charge of disclosing the public records had a bad day and made a mistake, or that the copying service charged with making copies of the records erred in copying the records that were ultimately sent to collateral counsel. Rivera cannot be held accountable for error on the part of a state agency, nor can he be required to prove that an error occurred when neither he nor his counsel can possibly know what happened inside the state agency.[62]

[62]The creation of the records repository in the late 1990's was done in order to avoid the problem and provide each and every state agency with the means of proving what pieces of paper were actually provided when complying with a public records request. The fact that the State had not yet created the records

Rivera's diligence simply cannot be at issue when it comes to whether due to oversight, mismanagement, neglect or even bad faith, documents are left out of an agency's packet of public records that actually reaches his counsel. Neither Rivera nor his collateral counsel were in a position to open a package containing public records being disclosed by an agency and know whether something was left out, let alone how or why it was left out. Rivera and his counsel were entirely dependent on others when it came to whether all of the public records were actually physically transferred to them.

As to the Zuccarello plea offer, the only documentary evidence presented by Rivera at the 2012 proceeding that the State contended had been disclosed to Rivera in 1994, the circuit court ignored Susan Bailey's testimony. She took the stand and testified that, while she thought it unlikely, it was possible that plea offer was not in the copied public records that reached Rivera's collateral counsel.

Specifically, Bailey acknowledged that the plea offer was contained in Frank Zuccarello's PSI, and that the PSI was confidential - "It would have been." (4PC-T. 200). Despite acknowledging that plea offer was not a public record under Rule

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repository when the public records were being provided to Rivera's collateral counsel in 1994 can defeat a showing that records were requested and an admission by the State that it is possible that mistakes were made and some documents meant to be disclosed were not disclosed.

3.712, Baily testified that nonetheless, "I **believe** it was turned over" to Rivera's collateral counsel in response to a public records demand. She was asked, You're assuming it was provided?" She responded, "Okay." (4PC-T. 200). Bailey then testifed: "So sure, it's possible that that was the one document they failed to photocopy."[63] (4PC-T.201). She testified that she had no specific memory of seeing the Zuccarello plea offer at the time that she responded to Mr. Rivera's public records demand in 1994.[64] She also did not verify that everything meant to be copied by the copier was in fact copied and physically delivered to Rivera's collateral counsel (4PC-T. 597).

Thus, three attorneys who had served as Rivera's collateral counsel and in that capacity had reviewed the public records disclosed by the State in 1994 testified that Zuccarello plea offer, as well as every other document that was set forth as a

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[63]Bailey testified at one point that a mistake could have been made will preparing the materials to disclose pursuant to Mr. Rivera's public records request. "There could have been a mistake made in the copying, certainly." (4PC-T. 596).

[64]As to the Zuccarello plea offer, Bailey testified she did believe that the State had a duty to disclose it under Brady (4PC-T. 202). Her testimony contrasted sharply with Hancock's testimony. When shown the plea offer, he testified: "I don't remember seeing this." (4PC-T. 621). But, he testified that if he had it he would have provided it to Rivera's trial counsel: "So if I would have had that, I would have given it. I don't remember seeing it. Did I give it to Mr. Malavenda? If I didn't have it, I wouldn't have given it to him." (4PC-T. 622). When asked: "Had you seen it, would you have disclosed it to the defense," Hancock replied: "Sure." (4PC-T. 226).

basis for the claims in Rivera's 2004 amended motion to vacate, was not, and were not, in the public records provided to Rivera's collateral counsel in 1994. This testimony addressed the very issue this Court indicated in its 2008 opinion warranted factual development.

The evidence presented by the State consisted of Bailey testifying that "believed" she disclosed the Zuccarello plea offer that was part of Zuccarello's PSI even though Rule 3.712 specifically provided that a PSI is not a public record. She "believed" she disclosed the plea offer, even though she had no memory of actually seeing the plea offer in 1994. She repeatedly acknowledged that mistakes could have occurred. She testified that she did not verify what documents were actually copied and sent to Rivera's collateral counsel.

The circuit court's conclusion that the Zuccarello plea offer was procedurally barred is clearly erroneous under this Court's opinion in Rivera v. State, and under its decision in Waterhouse v. State. The record clearly demonstrated that Rivera diligently sought public records in 1994. The record does not conclusively establish that the Zuccarello plea offer was in fact provided in public records that the State provided in response.

As to all of the other records that Rivera pled in his amended motion to vacate filed in January of 2004 and that he introduced into evidence at the 2012 evidentiary hearing, the

State presented no evidence and made no claim that those records had been disclosed in 1994 when "Rivera repeatedly sought information about Zuccarello." Rivera v. State, 995 So.2d at 196. Yet despite the fact that the evidence presented by Rivera as to those records were not provided in 1994 was uncontested, the circuit court nonetheless ruled that everything was procedurally barred.

Instead contrary to this Court's holding in Waterhouse v. State, the circuit court imposed an obligation on Rivera to prove not just diligence, but that there was nothing that could have been done in 1994 to obtain the records and documents that were discovered serendipitously years later. Under the standard adopted in Waterhouse, the issue is whether given what collateral counsel knew at the time, i.e. in 1994, were reasonable efforts made to investigate Rivera's constitutional claim.

The circuit court in a brief reference to Rios's 2012 testimony wrote that Rivera "did not provide any explanation as to why Lieutenant Rios's testimony . . . could not have been presented during the litigation of his postconviction motion" given that Dougherty had at one point issued a subpoena on Rios and then released Rios from subpoena. But again, this demonstrates that the circuit court had not read either this Court's opinion in Rivera v. State or in Waterhouse v. State. Diligence is concerned with the reasonableness of counsel's

efforts to investigate, not with proving that a particular piece of evidence discovered later, could not have been discovered sooner. The circuit court failed to review Dougherty's actions from her point of view in 1994. At that time, she did not know that Rios would say that Scheff and Amabile withheld Rios's police report from Hancock and kept it from reaching the State Attorney's files. Rios was just one of many police officers who Dougherty subpoenaed to a public records hearing and released when told by the agency's attorney that all the public records would be provided. This is very similar to the circumstances at issue in Waterhouse where a witness's name appeared in public records disclosed by the State, and collateral counsel seeing no indication that the witness had anything useful to say did not interview the witness. However, years later the witness was interviewed and provided useful information. This Court found counsel there was diligent, specifically ruling that collateral counsel was not obligated to contact every witness whose name was known absent some information from the State that the witness had relevant information. Waterhouse v. State.

As to the Broward jail prisoner receipts for Zuccarello, the circuit court explicitly stated: "there was no showing that such records could not have been requested and obtained in 1994 or 1995" (4PC-R. 501). Of course, that is clearly not the issue under Waterhouse, as explained supra. Moreover, Keffer testified

that when she requested records from the jail, she was told that the records had been destroyed. She also testified that in her experience she had never before been provided prisoner receipts.

As to the Dade County jail records, the circuit court said "the incident reports and evaluation were easily discoverable" (4PC-R. 502). However, absolutely no evidence was presented that those jail records were easily discoverable. But of course, the ease of discovering a particular document is not the issue as to diligence. As explained in Waterhouse, collateral counsel's resources are limited and he must make choices about what to pursue when he does not know what information will be found. The question under Waterhouse is whether collateral counsel was diligently working on Rivera's behalf. Here, collateral counsel had no specific reason to believe that undisclosed impeachment evidence was contained in Dade County jail records. Moreover, the jail records at issue here were not obtained from the Dade County jail; there was nothing before the Court to indicate that any particular public records request would have led to the production of the documents that McClain found in the Jonas file.

Despite concluding that Rivera had not shown diligence as to any of the records and documents he introduced into evidence, the circuit court made no effort to address the police reports written by Det. Gross. An examination of his reports (4PC-T. 1065-75) shows there is absolutely no indication of where those

reports might be found. And the State offered no evidence of what State agency possessed those reports and in what file name or number one would use in order to obtain a copy. This Court has never held that counsel had to be clairvoyant to be diligent.

Thus, the circuit court's conclusion that Rivera "had failed to establish that he exercised due diligence cannot stand as it is contrary to the opinion in Rivera v. State, it is contrary to Waterhouse v. State, and it is not supported by the record nor by the evidence presented. Thus, the merits of Rivera's claim are properly before this Court.

ARGUMENT II

RIVERA WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT WHEN THE PROSECUTION PERMITTED FALSE AND/OR MISLEADING EVIDENCE TO BE PRESENTED AND GO UNCORRECTED TO RIVERA'S JURY.

At Rivera's trial, the State called Frank Zuccarello (R. 1402). Zuccarello testified that he first met Rivera in the Broward County Jail in April of 1986 (R. 1402). During the next two months, Zuccarello testified that he had spoken with Rivera on a number of occasion about Rivera's case. Zuccarello testified that he spoke with Rivera "[a]t least" "fifteen, sixteen different times" (R. 1417). Zuccarello also indicated that one of the discussions with Rivera occurred the day that

Zuccarello "went to the grand jury" (R. 1417).[65]

Zuccarello testified that he contacted Nick "Argentino" with the Broward Sheriff's Office (R. 1406). Zuccarello explained that he told Deputy "Argentino" what Rivera had told him "[b]ecause I think what he did was a sick act" (R. 1406). The prosecutor then asked, "Had anyone at that point promised you anything?" Mr. Zuccarello answered, "No" (R. 1406).[66] Rivera's counsel asked in cross, "And you say that the State of Florida has not made any deals with you regarding your testimony here today?" (R. 1410). Zuccarello indicated that he had motion pending in his Broward case to mitigate his sentence (R. 1410).[67] Zuccarello indicated that his testimony at Rivera's trial would have no bearing on whether his sentence was reduced (R. 1419).

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[65]Zuccarello was more than vague in terms of specific dates as to when conversations occurred with Rivera and as to when he spoke to law enforcement about his conversations with Rivera.

[66]Of course when "at that point" was is unclear since Zuccarello would not pinpoint when his conversation with Argentine occurred. He merely indicated that his conversations with Rivera where in the April-June 1986 time frame (R. 1411).

[67]After Rivera's conviction was obtained, Zuccarello's motion to mitigate was granted on May 12, 1987, and his sentence was reduced to five years and a three year mandatory minimum was deleted (4PC-T. 742). The file from Zuccarello's case was introduced into evidence at the evidentiary hearing. There is no motion to mitigate in the file demonstrating the basis for the motion, nor any record of what occurred between March 13, 1987, when the sentence was imposed and May 12, 1987, when the sentence was reduced to explain what occurred during that 60 day period the led to the decision to reduce Zuccarello's sentence; other than of course, Rivera's trial the first half of April of 1987.

At the 2012 evidentiary hearing, the written plea offer to Zuccarello that was contained in his confidential PSI was introduced into evidence (4PC-T. 746). The court file from Zuccarello was introduced in its entirety. It shows that the plea offer was accepted on June 12, 1986, and he was adjudicated guilty (4PC-T. 706).[68]

The plea offer which Zuccarello accepted provided in pertinent part:

> III. **In return for the considerations show above, the defendant will continue to cooperate with**: Florida Department of Law Enforcement (lead agent: Steve Emerson); **Broward Sheriff's Office (detectives Presley, Argentine, Sgt. Carney)**; Ft. Lauderdale Police Department (detective Potts); **ASA's Lazarus** and Pyers, and their investigators; and other law enforcement offices.
>
> The defendant will, in his cooperation, be giving statements, which will be tested by polygraph as to their veracity; **the defendant will further agree to testify at all proceedings in which he is subpoenaed** and the defendant will testify honestly.
>
> * * *
>
> VI. **At time of sentencing, it will be requested by the State such proceedings be held in chambers, at which time the State will bring forward all law enforcement personnel familiar with the cases and the efforts of the defendant for the Court's consideration in sentencing.**

(4PC-T. 746-47) (emphasis added)

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[68]The file also shows that an order was entered June 9, 1986, to transport Zuccarello back to Broward County from the "Dade County Jail" where he was then incarcerated (4PC-T. 709).

As this Court succinctly noted when it remanded Rivera's case for an evidentiary hearing:

> **Zuccarello testified at Rivera's trial that he notified law enforcement officers about statements that Rivera made to him simply because "I [thought] what he did was a sick act."** Zuccarello repeatedly denied being promised anything for his testimony and **repeatedly denied that any deal had been made.** Broward County sheriff's officers corroborated this testimony; Detectives Philip Amabile and Richard Scheff both testified that they never promised Zuccarello anything. While Zuccarello testified that he was convicted of multiple felonies in two separate cases and that he had a plea agreement, **he never testified about the specific terms, conditions, or consideration for his plea agreement. Furthermore, Zuccarello never testified that he was cooperating in the investigations of home invasion robberies or other homicides.**

Rivera v. State, 995 So. 2d at 196.[69]

The circuit court denied Rivera's Giglio claim saying:

> 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 Hodek 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.

(4PC-T. 507). First, the circuit court failed to acknowledge that Zuccarello's testimony was that the first cop he told about his conversations was Argentine; that is who Zuccarello went to

[69]The Florida Supreme Court describes Zuccarello as "the State's star witness at trial. Rivera v. State, 995 so. 2d at 196.

according to his testimony to discuss Rivera's case. The phrase used in the plea offer was "will continue to cooperate." That phraseology clearly meant that Argentine was someone with whom Zuccarello had been cooperating, and that a condition of the plea offer was that Zuccarello would continue to cooperate with Argentine. Second, the plea agreement also required Zuccarello to continue to cooperate with "Sgt. Carney" who testified at Rivera's trial regarding his work in Rivera's case. Carney specifically testified: "I'm a supervisor for the homicide division" (R. 1261). Just because a circuit court states that it finds "black is white" does not make it so. The plea offer required Zuccarello to continue to cooperate with Argentine and Carney. Zuccarello testified that he went to Argentine with his information about Rivera. The plea offer did not exclude that cooperation from any other cooperation given to Argentine and say that Zuccarello was not obligated to continue to cooperate with Argentine in the Rivera case. The plea offer required Zuccarello to "continue to cooperate" with Argentine and Carney. The circuit court efforts to misread the plea offer are contrary to basic contract law. The plea offer means what it said.

Second, the circuit court in its order tried to use the testimony of Bruce Raticoff to breathe ambiguity into otherwise clear contractual language. Raticoff was called by the State to testify at the 2012 evidentiary hearing. Raticoff was retained

by Zuccarello in 1986 to represent him (4PC-T. 628). Previously, Raticoff had prosecuted Rivera when he worked at the Broward County State Attorney's Office. He was called as a witness on April 17, 1987, by the State at Rivera's trial regarding his prosecutions of Rivera (R. 1928). Raticoff testified about two separate cases in which he acted as prosecutor; one, a burglary with intent to commit a battery on a female, the other, an indecent assault on a female child (R. 1929).[70]

Despite his role to act as Zuccarello's attorney in 1986, Raticoff acknowledged that he did not know what was going on between Zuccarello and law enforcement.[71] When shown Def. Ex. 21 which was dated April 4, 1986, and referred to Zuccarello as "C/I", Raticoff indicated that he was unaware of the document as well as the documents contents: "no one contacted me about this. I was completely unaware" (4PC-T. 648). When shown Def. Ex. 22

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[70]When asked about whether it would have posed a problem for him if he had known Zuccarello was giving cooperating with the State in Rivera's prosecution, Raticoff said: "Would it? I don't know the answer to that" (4PC-T. 660).

[71]In his testimony, Raticoff confirmed the information that appeared in the polygraph reports that Rivera introduced - that Zuccarello faced criminal liability in the Cohen case, but skated from it through immunity. In fact, Raticoff revealed that Zuccarello faced the death penalty for his role in the Cohen case, but for his immunity (4PC-T. 647). As Malavenda testified, Zuccarello when testifying at Rivera's trial did not indicate he faced criminal liability in a homicide (4PC-T. 509). Malavenda testified that he recalled having no information that Zuccarello had been involved in a homicide, but would have used such information had he known of it (4PC-T. 510).

with its lengthy recitation of cases in which Zuccarello was involved and discussing with police, Raticoff testified; "I had no personal knowledge of any of these other cases" (4PC-R. 649). He agreed that he was unaware of the extent of Zuccarello's contact with law enforcement. Raticoff testified; "I was aware Frank was cooperating." (4PC-T. 650). Raticoff testified: "**Was he trying to get the best deal he could? Obviously, the more he solved, the better the deal would be, yes**." (4PC-T. 651) (emphasis added).[72] Raticoff explained that before the entry of the plea on June 12, 1986, "Frank did not have his plea deal set in stone yet. I am sure he was negotiating it. That was Frank." (4PC-T. 651). Raticoff admitted that he was not aware of what Frank was doing to get a better deal.

Raticoff was shown Zuccarello's testimony about his contact with Argentine. Raticoff did not know about the contact and did not know whether it occurred before or after the plea was entered (4PC-T. 652). "I have no knowledge of any of that." (4PC-T. 653). Raticoff indicated that he did not draft the plea offer and did not know why the various names that Zuccarello was required to continue to cooperate with were set forth (4PC-T. 653). Raticoff testified that he did not know if Rivera's case

[72]The circuit court failed to address this testimony, which is of course the crux of Rivera's claim. Zuccarello stood to get a better deal the more cases he could "solve" for the police. And that is precisely what he was doing in reference to Rivera's case, trying to get himself a better deal.

was included in the plea offer: "I can't sit up here, testify Mr. Rivera's case was included in that plea. It was something never discussed." (4PC-T. 655). Raticoff acknowledged that he did not know what discussion about Rivera's case occurred between the police and Zuccarello. In fact Raticoff testified as follows:

> Q. Were you familiar with every time Mr. Zuccarello was taken out of the jail to talk to law enforcement?
>
> A. 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 or out of jail.
>
> What they did, where he was, where they went.
>
> * * *
>
> Q You didn't want to know what cases they were talking about?
>
> A. **I didn't want information that law enforcement had in an investigation**, have something happen to the target of that investigation and be said Mr. Zuccarello'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**.

(4PC-T. 659) (emphasis added).[73]

Mr. Raticoff also testified that he did not know if

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[73]Clearly, Raticoff engaged in willful ignorance. Not only did he not know in which cases Zuccarello was cooperating with the police, he did not want to know. In fact, he requested that he not be informed. In such circumstances, his intentional ignorance of what Zuccarello was doing for the police in order to get a better deal cannot be used as the circuit court did to conclude that Rivera's case was not covered by the plea offer.

Zuccarello had been sent into the jail as a confidential informant:

> Q. Have you had occasion to have the State use a confidential informant in jail to get a statement from a defendant?
>
> A. Of course.
>
> Q. Do you know whether that happened here?
>
> A I have no knowledge. No. Never any discussions about that between law enforcement. No, I don't know that happened.
>
> Q. No discussion with you?
>
> A. Correct.
>
> Q. You don't know if there was a discussion between Zuccarello and law enforcement?
>
> A. Absolutely couldn't answer that question.
>
> * * *
>
> Q. You don't know when he, Mr. Zuccarello gave law enforcement any information about Mr. Rivera?
>
> A. No.
>
> Q. In terms of if it was before or after the plea?
>
> A. I have no idea

(4PC-T. 666-67).

Zuccarello's testimony was deliberately misleading. He claimed that he was testifying because what Rivera did was sick, yet his own attorney has now testified about Zuccarello's true motivation before the plea offer was formally extended and accepted: "**Was he trying to get the best deal he could?**

Obviously, the more he solved, the better the deal would be, yes." (4PC-T. 651). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993). This deliberate deception and obfuscation that occurred here violated Rivera's right to due process. Under Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003), it is the State's burden to prove this due process violation harmless beyond a reasonable doubt. Under the facts here, the State cannot meet this burden.

Zuccarello's testimony was key to the State's guilt phase case; it was also key to its penalty phase case. Zuccarello's deliberate obfuscation of why he was testifying was used by the State to argue that he was credible. It taints not just his case, but the testimony of law enforcement officers who aided and abetted the deception. Rule 3.851 relief must issue. Rivera is entitled to a new trial, and to a new penalty phase.

ARGUMENT III

RIVERA WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE.

At the 2012 evidentiary hearing, Rivera introduced a plethora of documents that were in the State's possession at the

time of trial and which contained evidence and information favorable to Rivera within the meaning of Brady v. Maryland, 373 U.S. 83 (1963). Rivera also presented the testimony of Rios who testified that the lead detectives on the case withheld his police report from Rivera's prosecutor. The documentary evidence that was not disclosed by the State includes the Zuccarello plea offer that he accepted on June 12, 1986. This written plea offer was not disclosed at the time of trial or in the numerous collateral proceedings in Rivera's case.

The State also did not disclose Broward County Jail "Prisoner Receipts" which showed Zuccarello was released to law enforcement officers numerous times, and specifically provided the dates of his contact with Argentine and Ambile. Also undisclosed was a document written by Miami law enforcement entitled, "Synopsis of conversation with FRANK ZUCCARELLO on Friday, April 4, 1986." According to this "Synopsis," Zuccarello was working as a confidential informant for Dade and Broward law enforcement by April 4, 1986, before he met Rivera and before he reported any alleged statements by Rivera to "Nick Argentine." Another withheld document entitled, "April 18, 1986, Interview with Frank Zuccarello" and written by Det. Gross of the Metro Dade Police Department also referred to Zuccarello as a "CI."

These documents would have been beneficial to trial counsel in 1987. They establish that Zuccarello was working with law

enforcement in Dade and Broward Counties as early as April 4, 1986, in order to make his deal better, as his attorney, Raticoff testified to in 2012. Clearly, he received considerable consideration for his "assistance," contrary to his testimony at Rivera's capital trial, contrary to his own testimony at Rivera's trial. The undisclosed information impeaches not just Zuccarello, but also law enforcement's investigation and conduct throughout this case. Kyles v. Whitley, 514 U.S. 419, 446 (1995)("Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.").

These previously undisclosed documents contain information that would have been favorable to Mr. Rivera at his trial. For example, the documents establish that before Zuccarello was placed with Rivera, he was already listed in a police report as a C/I. It is also clear from the prisoner receipts and Zuccarello's July 6, 1986, letter to Rivera that, even after going to the police to give evidence against Rivera, he was placed back in jail with Rivera so that he could continue to have contact with him and try to talk with Rivera on behalf of the

State. Clearly, in those resulting conversations that he had with Rivera, Zuccarello was an undisclosed agent for the State interviewing Rivera in a custodial setting without complying with the Sixth Amendment. As such, Zuccarello's testimony was inadmissible under the Sixth Amendment.

Zuccarello was a professional snitch. He gave police information in over 29 home-invasion robberies and more than two murder cases including the Staci Jazvac case. During 1986, Zuccarello was shuffled back and forth between Dade and Broward County for his testimony in all these cases. Zuccarello was himself charged with 23 felonies including kidnapping, armed robbery and aggravated assault. If convicted on these charges, he faced the rest of his life in prison. His lawyer, Raticoff, testified in 2012, that Zuccarello also faced capital charges in the Cohen case in Dade County, and a possible death sentence. The jury did not know and did learn that Zuccarello was impicated in a homicide and faced a possible death sentence. The jury did not know about the plea offer obligating Zuccarello to cooperate with law enforcement and testify when subpoenaed.

The State's entire case, without the testimony of Zuccarello, hinged on the circumstantial evidence found in the van.[74] Had the jury known the extent of Zuccarello's involvement

[74]The defense was that Michael Rivera had difficulty distinguishing fact from fantasy and that the obscene phone calls made by Tony, his alter-ego, reflected his fantasies and his need

with law enforcement, his credibility with the jury would have been destroyed. Indeed, Zuccarello gave deliberately deceptive testimony trying to hide from the jury his true motivation. The undisclosed information did more than just impeach Zuccarello - it impeached law enforcement and the techniques used and its willingness to countenance false or misleading testimony. As a result, the failure to disclose casts the case in a whole new light and undermines confidence in the outcome of the trial. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State, 894 So. 2d 161 (Fla. 2004).

An undisclosed supplemental report by Rios dated 02/18/86 provided details of Rios's conversation with Rivera at 17:30 on Tuesday February 18, 1986. During the conversation, Rivera "started yelling and screaming 'you can't hold me here any longer, I want my Lawyer now.' 'This is the same bullshit as before.'" Rios testified at the 2012 proceeding that the lead detectives withheld his report from the prosecutor. This constitutes undisclosed impeachment of the credibility of law enforcement's techniques in its investigation.

To the extent that the State now defends on an argument that trial counsel knew or should have known of the undisclosed and

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to grab attention. It was the alleged statements to Zuccarello that were more detailed than any others attributed to Mr. Rivera that combined with the hair evidence was used by the State to counter the defense's fantasy contention.

unpresented evidence, then trial counsel rendered ineffective assistance. Due to the circumstantial nature of the State's case at trial, it was important for the defense to attack the credibility of the jailhouse informants and police officers that testified against Rivera. If trial counsel knew or should have known of information pertaining to the extent of the favors bestowed upon Zuccarello, but failed to cross-examine Zuccarello about those favors, then his performance was unreasonable. If reasonable investigation could have led to the information discussed here, counsel's failure to conduct reasonable investigation was deficient performance.

In evaluating the prejudice flowing from the State's failure to disclose these documents and the information presented at the evidentiary hearing, or arising from trial counsel's unreasonable failure to discover, a cumulative analysis must be undertaken. Parker v. State, 89 so. 3d 844 (Fla. 2012). This cumulative analysis requires cumulative consideration of not only these documents, but also other favorable or exculpatory information that did not reach the jury because it either was not disclosed by the State, was unreasonably not discovered by the defense, or is new evidence that neither the State nor the defense knew about at the time of trial. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996). When the proper cumulative analysis is conducted and synergistic

effect of the undisclosed evidence is examined and understood, it is clear that confidence is undermined in the reliability of the outcome and that a new trial is warranted.[75]

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[75]Cumulative analysis must also consider the impact the exculpatory information regarding Zuccarello would have had in impeaching the other snitches and their motives. Peter Salerno, who also testified to vague admission by Rivera, was also a professional snitch, testifying for the state and federal government numerous times. Salerno, aka Pierre Cardin, claimed at Rivera's trial that Rivera confessed the murder to him. Like Zuccarello, Salerno testified that no promises were made to him in exchange for his testimony (R. 1579). Salerno testified that he had pled guilty to charges in Broward County and received a 12 year sentence (R. 1579). He further testified that despite the 12 year sentence he had traveled to the courthouse on his own to testify, making it clear he was not in custody (R. 1582). He testified that he would be appearing before the sentencing judge again on January 15, 1988, but that he had no expectation that testifying against Rivera would be of any assistance in regards to his sentence (R. 1583).

In fact on May 27, 1986, Salerno had pled guilty in Broward County to count I (battery in the course of an armed burglary) of a three count information. The two other counts were nolle prossed by Ass't State Attorney Springer. Springer advised the judge "that he is cooperating, the State will not be opposed to anything presented to you for mitigation later on." Salerno received his 12 year sentence in July of 1986. On January 15, 1987, the State appeared and waived its objection to Salerno's untimely motion to modify sentence. Salerno's counsel stated that, "It was the understanding at the time there was substantial cooperation which was proposed to the court of Mr. Cardin [Mr. Salerno] in certain past matters, and present matters, and future matters." In light of Salerno's continuing cooperation, Salerno's attorney proposed that Salerno receive a "5 year probationary period." Present at this proceeding were representatives from a multitude of law enforcement offices. A representative of the sheriff joined in a request by the various law enforcement agencies in requesting that Salerno be released from jail to facilitate his cooperation. The sheriff's representative stated, "I'd like to have him for several years actually, to talk to him." The judge stated, "I'm going to leave the sentence alone, but what I will do is vacate or postpone or whatever the magic word is, the remainder of the sentence for one year. Let him go out and work with those gentlemen and then

Cumulative consideration requires consideration of Donald Mack sworn's statement as well as the trial testimony of John Meham who both swore that the testimony of the three jailhouse informants was false, and largely corroborated by Zuccarello's plea offer and Zuccarello's attorney's acknowledgment that prior to the June 12, 1986, guilty plea, Zuccarello was out there trying to make his deal better by solving cases for the police.

The cumulative analysis must also consider the results of the DNA testing which was conducted in 2003 and established that the hair that had been found in the blue van and introduced into evidence did not in fact come from the victim. In investigating the case, sheriff's deputies collected dark hairs found on the victim's white knit top and left shoe. In an affidavit dated February 24, 1986, Amabile discussed these hairs to support issuance of a search warrant to obtain hair from Mr. Rivera. DNA testing conducted in 2003 on eight of these hairs has established

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let's see what he does or doesn't do. If he does well and they come in and say you did well, and they make further recommendations, I'll be happy to listen." On January 15, 1988, Salerno appeared before the same judge. The parties stipulated to a 30 day continuance for Salerno to finish his work. Later that day Salerno was arrested on burglary charges in Palm Beach County. Springer was quoted in a news account as telling the judge at a subsequent hearing, "You got burned, we all got burned by Mr. Salerno." The judge reimposed the 12 year sentence. On March 25, 1988, Salerno moved for mitigation of his sentence because of his extensive work for law enforcement. On April 30, 1988, Salerno wrote Springer requesting help on a sentence reduction saying, "I hope you will consider the (Stacey Jacvick [sic]) case for Kelly Hancock A.S.A."

that Rivera was definitely not the source of seven of these hairs, while the analysis of the eighth hair was inconclusive.

The DNA testing on the hair introduced at trial shows that the offense did not occur as the State claimed in Mark Peters's blue van, particularly when the test results are considered with the testimony of Mark Peters. Considered cumulatively, the DNA evidence and Peters's testimony show that the offense did not occur in the van, refuting an essential part of the State's case.

Cumulative consideration of all of the undisclosed and/or unknown evidence seriously calls into question the veracity not only of Zuccarello's testimony, but also that of Salerno and Moyer. The undisclosed evidence also impeaches the testimony of the Broward Sheriff's Officers involved in the case, including Scheff, Amabile and Eastwood.

In its order denying Rivera's 3.851 relief, the circuit court failed to properly evaluate the exculpatory value of each bit of undisclosed evidence as required. Smith v. Sec'y Dep't of Corrs., 572 F.3d 1327 (11th Cir. 2009). It also failed to conduct the requisite cumulative analysis which must included all of the undisclosed evidence and the synergistic effect of the undisclosed evidence together, along with evidence that did not reach the jury due to counsel's ineffectiveness and any newly discovered evidence. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996).

When the proper analysis is conducted it is clear that confidence in the guilty verdict cannot stand. It is also clear that confidence in the jury's death recommendation cannot stand. Rule 3.851 relief is required. Rivera is entitled to a new trial and a new penalty phase.

ARGUMENT IV

THE RESULTS OF DNA TESTING CONSTITUTE NEWLY DISCOVERED EVIDENCE THAT MUST BE EVALUATED CUMULATIVELY WITH ALL NEW EVIDENCE PRESENTED IN COLLATERAL PROCEEDINGS THAT THE JURY DID NOT HEAR.

As to the newly discovered DNA results, the circuit court did find "it is undisputed that the DNA testing constitutes newly discovered evidence" (4PC-R. 515). The circuit court further found that "**[t]he results of the DNA analysis prove that the hair submitted at trial as being consistent with the victim's hair did not in fact belong to the victim**" (4PC-R. 515) (emphasis added). The DNA results when combined with Peters's testimony in 1995 that he was in possession of his blue van at the time of the kidnapping and murder show that Rivera's statements regarding using the blue van were false and not a reflection of reality.

This Court made it clear that, in an appeal involving new scientific evidence in a successive motion, the new evidence must be evaluated cumulatively with previously presented and denied constitutional claims. Swafford v. State, 125 So. 3d 760, 775-76 (Fla. 2013). There, this Court wrote:

> The Jones standard requires that, in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial. Jones II, 709 So.2d at 521. In determining the impact of the newly discovered evidence, the Court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." Lightbourne v. State, 742 So.2d 238, 247 (Fla.1999) (quoting Armstrong v. State, 642 So.2d 730, 735 (Fla.1994)). As this Court held in Lightbourne, **a trial court must even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal**. Id.; see also Roberts v. State, 840 So.2d 962, 972 (Fla.2002) (holding that upon remand, if the trial court determined that the testimony in a newly discovered evidence claim was reliable, the trial court must review that new evidence as well as Brady claims that were previously rejected in a prior postconviction motion because the evidence was equally accessible to the defense and there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed).

(Emphasis added).

Here that means that in evaluating whether to grant Rivera under the controlling standard set forth in Swafford v. State, the DNA results regarding the hair that was found in the blue van and was introduced into evidence are just the starting pointing. In addition, this Court is required to look at the evidence presented at trial by the defense, the exculpatory evidence presented by Rivera at the 1995 evidentiary hearing whether found to be procedurally barred or not, and the exculpatory evidence presented by Rivera at the 2012 evidentiary hearing whether found to be procedurally barred or not. This Court is then required to consider all of the evidence that would be admissible at a new

trial and consider it cumulatively "so that there is a 'total picture' of the case and 'all of the circumstances of the case.'" Swafford v. State, 125 So.3d at 775. So that means of course consideration of the DNA results establishing that the hair in the blue van was not from Staci. Howard Seiden's testimony would not be admissible at a new trial, and the prosecutor would not be able to rely upon his testimony in either his opening or closing.

Mark Peters would testify at a retrial. His testimony that he was in possession of the blue van at the time that Staci disappeared would be heard by the jury. This would demonstrate that Rivera's obscene phone call to Starr Peck contained verifiably false information, and it would show that the phone call was not a confession, but it was made for the reasons obscene phone calls are usually made, to derive some pleasure out of shocking the recipient of the call. It would also show all of the evidence regarding the blue van and statements by Rivera regarding a blue van were not relevant and could not support a theory that the blue van was used to kill Staci.[76] Further, the State's evidence about the smell of ether from Staci's body during the autopsy and its suggestion that paint thinner in the

[76]It would also show that Peters informed the police that he had possession of the blue van at the relevant time period, and that the police chose to ignore him because it did not fit with their narrative. Indeed, Ambile in testifying that Peters told him in his statement that Rivera had borrowed the van on January 30, 1986, had hidden from the jury the truth that Peters said he had the van at the important point in time.

van was the source of the smell would be rendered inadmissible.

Further, Zuccarello's acceptance of his plea offer would be admissible to show that his testimony, that he came forward because he believed what Rivera did was sick, was false. The July 6, 1986, letter he wrote to Rivera would also come in. Indeed, admissible evidence would also include the testimony of Zuccarello's attorney that before he got the plea in early June of 1986, Zuccarello was out there trying to solve cases for the police in order to get a better deal.[77] This would demonstrate that Zuccarello lied in his testimony regarding his motive. His credibility would be destroyed by both the fact that he lied about his motive and by the revelation that his motive was self-interest. Indeed, Zuccarello's attorney revealed in 2012 that Zuccarello faced prosecution on a homicide and was looking at a possible death sentence. This fact which was not presented in 1986 would be presented at a new trial. Certainly, Captain Fantigrassi, whose affidavit was admitted into evidence in 2012, would be called at a retrial to testify about Zuccarello's actions in the Hodek case and his lack of credibility.

In addition, the trial testimony of John Meham regarding Zuccarello, Moyer and Salerno and how they were falsely

[77]In addition the prisoner receipts would be admitted to show when it is documented that Zuccarello was taken from the jail by law enforcement. Also the Dade County jail records would be admissible. As would the police reports referring to Zuccarello as a "C/I".

implicating Rivera to gain benefit for themselves would take on new relevance. In this regard, Donald Mack would be called to testify at a retrial regarding his knowledge of how law enforcement got him to make a statement falsely claiming that Rivera confessed to the murder, and how he knew that Zuccarello, Moyer and Salerno were all falsely claiming that Rivera confessed the murder in order to catch a deal for themselves. Further, the court files in the criminal cases involving Moyer and Salerno would be admissible in a retrial. These records were pled in Rivera's 3.851 motion (PC-R-Sup. 28-29).[78]

When all of the new evidence identified within this brief is considered with the DNA results and this Court looks at the total picture, it is clear that Rivera would probably be acquitted at a new trial, and certainly would not get a death sentence. Accordingly, a new trial and a new penalty phase must be ordered.

CONCLUSION

In light of the foregoing arguments, Mr. Rivera requests that this Court vacate his conviction and/or sentence of death and remand for a new trial and/or new penalty phase.

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[78]Not only would all of this be admissible to demonstrate that Zuccarello, Moyer, and Salerno were motivated by self-interest despite their testimony to the contrary, and in fact falsely claimed that Rivera had confessed to them, this evidence would also impeached law enforcement's techniques in building its case against Rivera. In addition Rios's testimony would be admissible regarding the efforts by Ambile and Scheff to hide his police report from the prosecutor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail to Celia Terenzio, Assistant Attorney General at her primary email address, capapp@myfloridalegal.com , on this 3rd day of June, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Respectfully submitted,

/s/ Martin J. McClain

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