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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1077

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

REPLY 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.

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OVERVIEW OF APPELLANT'S CASE AND STATE'S ANSWER BRIEF ARGUMENT IN RESPONSE AND REBUTTAL ARGUMENT

What is most noteworthy about the State's Answer Brief is what is left out, skipped over and ignored, i.e what the State does not address. Accordingly, Mr. Rivera herein identifies those matters and discusses their significance.

A. State's 2008 motion for rehearing.

While the State seeks to focus attention on the testimony of Susan Bailey, an Assistant State Attorney with the Broward State Attorney's office, regarding her handling of public records request in 1994, it ignores the position that it took in the motion for rehearing filed with this Court after the issuance of the 2008 opinion remanding for an evidentiary hearing. In Rivera v. State, 995 So.2d 191, 196 (Fla. 2008), this Court wrote:

> 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.

(Emphasis added). This Court required the State to prove that each document meant to be disclosed as a public record was in fact disclosed and provided to collateral counsel.

The State objected to this ruling in its June 27, 2008,

motion for rehearing. It asked this Court to reconsider the requirement of the State to prove that the documents at issue had in fact been provided. In its rehearing motion, the State objected to the burden of proof imposed on it by this Court:

> Appellee asserts that because the public records litigation in this case occurred well before enactment of Fla. R. Crim. Pro. 3.852, and the advent of the repository, it 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**.

(4PC-T. 1108) (Def. Ex. 35 at 5) (emphasis added).[1] The State's

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[1] The State's June 27, 2008, motion for rehearing was introduced into evidence at the hearing below as Def. Ex. 35. The records repository referenced in the motion was created in order to provide a way for the State to create a record of what had been disclosed and carry its burden of proof. Its creation was not a means of relieving the State of its burden of proof in pre-repository cases as the State argued in its rehearing motion. See Medina v. State, 690 So.2d 1241, 1252 (Fla. 1997) (Anstead, J., dissenting, joined by Shaw and Kogan, JJ.) ("It is undisputed at this point [in successive under warrant motion to vacate] that the State possessed evidence that implicated Joseph Daniels in the murder and failed to disclose this evidence to the defendant. In fact, and incredible as it now appears, the record actually demonstrates that the State represented on the record in earlier postconviction proceedings that absolutely everything in its files was furnished to the defendant."); Roberts v. State, 678 So.2d 1232, 1235 (Fla. 1996) (in a successive under warrant motion to vacate, this Court found "error as to the public records issue. Roberts claims that the State obstructed his efforts to depose witnesses regarding public records and withheld other public records."); White v. State, 664 So.2d 242, 245 n.3 (Fla. 1995) (Anstead, J., dissenting, joined by Shaw and Kogan, JJ.) ("Among the other issues raised by appellant [in successive under warrant motion to vacate], and that presently stands unrebutted, is one that claims the state has, until this week, withheld substantial evidence that would have been helpful to the defense. Included within that evidence, just ordered to be

motion for rehearing shows that the State read the plain language in this Court's opinion as imposing a burden of proof on the State that it alleged was "unreasonable" and should be reheard by this Court. Specifically, the State argued that the burden imposed by this Court was one that would be impossible to meet:

> Of course counsel did not and presumably **could not with any specificity identify each and every document turned over in 1994.** * * * However, counsel was able to represent that the file she turned over did contain the documents listed. Consequently, **to require the State to ever prove more than what was available herein is unreasonable** and not supported by the case law.

(4PC-T 1111) (Def. Ex. 35 at 8). This Court denied the State's motion and left the "standard" intact; a standard that the State called "unreasonable" and said it "could not" meet.

The State in its Answer Brief ignores and does not address the language in this Court's opinion remanding for the evidentiary hearing that it objected to as "unreasonable."[2] The State in its Answer Brief ignores and does not address its June 27, 2008, motion for rehearing, which was introduced into evidence as Def. Ex. 35. The State's refusal to address either

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produced by the trial court under the public records law, are statements by witnesses that appear to vary from the testimony and evidence presented at trial.").

[2] As to the Answer Brief's Table of Cases shows, Rivera v. State, 995 So.2d 191 (Fla. 2008), is cited only twice in the entirety of the 70-page brief, and on neither occasion does the State reference the burden of proof that this Court imposed on the State nor its objection to that burden of proof in its motion for rehearing as unreasonable and impossible to meet.

this Court's opinion or its own motion for rehearing objecting to the burden this Court imposed upon the State is an effort to avoid the significance of Bailey's testimony that she could not prove that the Zuccarello plea offer was turned over to Mr. Rivera's collateral counsel in 1994. Bailey testified that she could not in fact show that the Zuccarello plea offer was provided to Rivera's collateral counsel (4PC-T. 596-97).

Bailey admitted that the plea offer was part of Zuccarello's PSI which under Florida law was and is confidential and thus 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." Bailey did try to deflect, noting that the plea offer, a part of the PSI, was located in various other files. Yet, Rule 3.712 is quite clear that the contents of a PSI are simply not public records.

Despite admitting that the plea offer as part of the PSI was confidential and not a public record, Bailey testified that she **assumed** it had been copied and turned over as part of the various files in which it appeared because she did not write in her cover letters that it had been withheld (4PC-T. 200).[3] Yet, Bailey

[3] The State also ignores Bailey's testimony that she first began working on capital collateral cases within the State Attorney's Office in 1994 (4PC-T. 566). Thus when she responded to public records request made on behalf of Mr. Rivera in May of 1994, it was when she first started handling capital collateral

admitted in her testimony 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."); (4PC-T. 594) ("I wouldn't have paid attention to it back then. It held no importance back then, other than it had Frank Zuccarello's name on it.").

Bailey's testimony ultimately rested on her assumptions that the Zuccarello plea, which meant nothing to her at the time and which she admittedly did not verify was actually disclosed, was nonetheless disclosed. This testimony did not and could not meet the burden of proof that this Court imposed and that the State in its motion for rehearing had objected to and argued should not be imposed. The State in its Answer Brief refuses to address Bailey's testimony in light of the burden of proof this Court imposed that the State objected to as "unreasonable" in its 2008 motion for rehearing.

B. Mr. Rivera's Brady/Giglio/Strickland claim is not dependent on whether there was a "deal" for Zuccarello's testimony or whether he was formally a "confidential informant.

A central premise of the State's Answer Brief is its

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cases (4PC-T. 567). She would not have had an established practice when she first started responding to public records requests in capital cases.

contention that Mr. Rivera's Brady/Giglio/Strickland claim[4] is dependent on a factual finding that there was a "deal" for Zuccarello's testimony against Mr. Rivera and that Zuccarello was formally a confidential informant. However, the State never once cites a case holding that to establish a Brady claim, a Giglio claim, and/or a Strickland claim that proof of a "deal" or proof of formal "confidential status" is a necessary element and must be proven.[5] The State also ignores the actual basis of Mr. Rivera's claim recognized by this Court in its opinion remanding.

Instead, the State relies on Bruce Raticoff's testimony as

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[4] The State in its Answer Brief omits any reference to or acknowledgment of the fact that Mr. Rivera alternatively pled his claim to include an ineffectiveness claim under Strickland v. Washington, 466 U.S. 668 (1984).

[5] The Eleventh Circuit made it clear in Smith v. Sec'y Dep't of Corrs., 572 F.3d 1327, 1343 (11th Cir. 2009), that neither a "deal" nor formal "confidential informant" status was necessary to establish a violation of Brady v. Maryland, 373 U.S. 83 (1963). In Smith, the Eleventh Circuit found that an undisclosed prosecutor's note that a State's witness had called and advised that he was "concerned that his daughter was going to accuse him of sexual abuse committed while she was a minor" was discoverable under Brady. Smith, 572 F.3d at 1343. The Eleventh Circuit explained that the note showed that the witness "did have a new reason to curry favor with the prosecution." Id. As a result, "[t]he note could have served to impeach an important prosecution witness". Id. There was no requirement that Smith had to establish that the State had to have agreed to a deal for the undisclosed note to constitute Brady material. There was no requirement that Smith had to show that the witness was a confidential informant for the note to constitute Brady material. In Smith, the Eleventh Circuit found that the undisclosed evidence could have been used to impeach a State's witness by showing "he had a motive" for assisting the State, as well as showing undisclosed contact with the prosecutor.

to whether there was a "deal" and whether Zuccarello was a "confidential informant." While stating Raticoff was Zuccarello's attorney in 1986, the State omits important facts about Raticoff. First, Raticoff had prosecuted Rivera when he worked at the Broward County State Attorney's Office (4PC-T. 628). In fact, he was called as a witness on April 17, 1987, by the State at Mr. Rivera's trial regarding his earlier prosecutions of Mr. Rivera (R. 1928). In 1987 at Mr. Rivera's trial, Raticoff testified about two separate cases in which he had prosecuted Mr. Rivera: one, a burglary with intent to commit a battery on a female; the other, an indecent assault on a female child (R. 1929).

In 2013, Raticoff testified that he was unaware of "anything regarding Mr. Rivera and Mr. Zuccarello" (4PC-T. 660). When asked whether it would have posed a problem if he had known that Mr. Zuccarello had been given evidence against Mr. Rivera given that he had prosecuted Mr. Rivera and was called as a witness against Mr. Rivera at his 1987 trial, Raticoff responded: "I don't know" (4PC-T. 660).

Raticoff also testified that he was unaware of Zuccarello's contact with law enforcement in April of 1986, as shown in Def. Exs. 21, 22, and 23 (4PC-T. 647-50). These exhibits detailed law enforcement's meetings with Zuccarello in April of 1986 and the information he provided about crimes committed by numerous individuals. These exhibits refer to Zuccarello as a confidential

informant (4PC-T. 648). Raticoff testified that law enforcement had not contacted him regarding its April 1986 meetings with Zuccarello (4PC-T. 648) ("no, they had, no one contacted me about this. I was completely unaware."). Moreover, Raticoff "never debriefed Frank" (4PC-T. 649).[6] Raticoff testified that he was not "aware of everything [Zuccarello] was doing" in terms of trying get benefit for himself from the law enforcement (4PC-T. 651). Raticoff testified he had no knowledge of Zuccarello's contact with Det. Argentine regarding Mr. Rivera (4PC-T. 652-53). Raticoff testified that he did not draft the plea offer and did not know why Argentine's name was identified as someone with whom Zuccarello was obligated to continue to cooperate (4PC-T. 653-54). Raticoff then testified:

> Q. Would [Zuccarello's] testimony in the Richitelli case have been covered by the plea agreement?
>
> A. Absolutely. Any testimony in any case he gave.
>
> Q. Would Mr. Rivera's case be included?
>
> A. If it was contemplated in the plea, I'm sure it would be included.
>
> I can't sit up here, testifying Mr. Rivera's case was included in that plea. It was something never discussed.

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[6] It was at this point that Raticoff did state: "If I had, it would be subject to attorney/client privilege" (4PC-T. 649). At no point in his testimony did Raticoff indicate that Zuccarello had waived attorney-client privilege. Thus, it is unclear whether Raticoff was omitting attorney/client privileged matters from his testimony.

Q. Never discussed with you?

A. Right, That's correct . . .

Q. Do you know what discussion occurred between the police officers and Mr. Zuccarello?

A. No. I can't testify to that.

(4PC-T. 655).

As to the phrase "confidential informant," Raticoff stated:

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 discussions with you?

A. Correct.

Q. You don't know if there was a discussion between Mr. Zuccarello and law enforcement?

A. Absolutely couldn't answer that question.

(4PC-T. 666-67).[7] Raticoff testified that **his lack of knowledge was intentional** on his part:

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

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[7] Raticoff testified that he had heard rumors that "Zuccarello was taken to his grandmother's house for dinner one night. Basically, that, you know, Frank was solving crimes; and the police were being nice to Frank. They took him out to get hair cut." (4PC-T. 667-68). However, Raticoff did not inquire and did not know if the "rumors" of benefit were true (4PC-T. 668).

> 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).[8] Omitted from the State's Answer Brief is the fact that **Raticoff testified that he was intentionally unaware of what went on between Zuccarello and law enforcement as to Mr. Rivera.**[9]

Raticoff did reveal important impeachment that Mr. Rivera's jury did not know. In April of 1986, Zuccarello faced numerous life sentences in Broward County and a death sentence in Miami-

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[8] Raticoff was in fact a witness called by the State at Mr. Rivera's trial regarding his prosecution of Mr. Rivera.

[9] Worse than omitting reference to Raticoff's intentional ignorance of Zuccarello's ongoing cooperation with the police, the State falsely asserts in its Answer Brief: "Raticoff would not let Zuccarello 'cooperate' without the benefit of a bargain." (Answer Brief at 50). For this, the State cites 4PC-T. 651. But, there Raticoff was asked: "Were you aware of everything [Zuccarello] was doing?" Raticoff answered: "No, I was not."

Dade County (4PC-T. 646-47) ("Yes, he was. The ultimate criminal liability. He was facing the death penalty, possibly."). The State omits reference to this and ignores the fact that Mr. Rivera's jury was not advised of the potential criminal liability Zuccarello faced in April of 1986 when he began providing the State with accounts of statements purportedly made by Mr. Rivera.

Ignoring Raticoff's testimony during cross as detailed here, the State asserts:

> Based on the record evidence as well as **Raticoff's unequivocal and unrebutted testimony**, the trial court properly concluded that Zuccarello's testimony against Rivera was not predicated on any plea and Zuccarello was never a confidential informant. The factual predicate for Rivera's Brady/Giglio [claim] was never proven and therefore the claim was properly denied on the merits.

(Answer Brief at 53).[10] Besides misreporting Raticoff's testimony, the State ignores the fact that the Brady/Giglio/ Strickland claim was premised upon specific documents that were identified in the motion to vacate and introduced into evidence.

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[10] This use of the words "unequivocal" and "unrebutted" to describe Raticoff's testimony is particular baffling. Raticoff testified on cross that he did not know whether Zuccarello was a confidential informant nor whether he had a "deal" with law enforcement as to Mr. Rivera. Raticoff did testified that, to his knowledge, Zuccarello was not a confidential informant and had not agreed to testify against Mr. Rivera. But, Raticoff readily conceded that there was much regarding Zuccarello and his contact with law enforcement that **he, Raticoff, did not know, and did not want to know**. Raticoff clearly stated that he did not know what if anything was worked out between Zuccarello and law enforcement regarding Mr. Rivera's case in the April-May 1986 time period when Zuccarello faced a death sentence and several life sentences in the multiple criminal cases pending against him.

As to those documents and Mr. Rivera's claims premised upon them, this Court wrote when remanding 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. In sum, Rivera asserts that Zuccarello's testimony suggested that he was simply acting as a good citizen who was appalled at Rivera's conduct, and he was not connected with law enforcement in any way. Zuccarello was impeached at trial only about his criminal record, and was not impeached about his connection with law enforcement or his personal incentive and gain for testifying against Rivera.**
>
> In contrast to this trial testimony, Rivera's postconviction filings assert that Zuccarello had an extensive involvement with law enforcement agencies at the time of Rivera's trial. **The documents on which Rivera relies to support his postconviction claims reveal that Zuccarello was communicating with law enforcement officers about various criminal investigations before, during, and after his incarceration with Rivera at the Broward County Jail. He was in contact with law enforcement officers and prosecutors concerning investigations in Dade and Broward counties about multiple home invasion robberies and at least two other homicides. Moreover, he allegedly received a plea offer requiring him "to testify at all proceedings in which he is subpoenaed" and providing that "[a]t the time of sentencing [of Zuccarello] ... 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." In another of the filings Zuccarello is described as a police confidential informant.**

Rivera v. State, 995 So.2d at 196 (emphasis added).

Mr. Rivera's Brady/Giglio/Strickland claim was not premised upon a "deal" or on formal "confidential informant" status. The claim was premised upon a false or misleading portrayal of Zuccarello as "a good citizen who was appalled at Rivera's conduct [who] was not connected with law enforcement in any way." Rivera v. State, 995 So.2d at 196. The claim was premised upon the existence of extensive evidence impeaching testimony given by Zuccarello. Id. ("the State's star witness"). The claim was that the impeachment was not heard by the jury because it was either undisclosed by the State or unreasonably undiscovered and unused by Mr. Rivera's trial counsel.

As to the claim actually presented, Raticoff's testimony is pretty conclusive as to whether Zuccarello was accurately portrayed as "a good citizen who was appalled at Rivera's conduct [who] was not connected with law enforcement in any way." Rivera v. State, 995 So.2d at 196. 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).[11]

[11] Mr. Rivera's jury was entirely unaware of Zuccarello's circumstances and motive to curry favor with the State. Smith v. Sec'y Dep't of Corrs., 572 F.3d at 1343 ("evidence of motivation to testify, especially for key prosecution witnesses, is

The State omits reference to this important testimony, which demonstrates that the picture Zuccarello painted of himself at trial was false and/or misleading. Rivera v. State, 995 So.2d at 196 ("**Zuccarello's testimony suggested that he was simply acting as a good citizen who was appalled at Rivera's conduct, and he was not connected with law enforcement in any way.**").

The State also omits reference to the most important aspect of the testimony from Mr. Rivera's trial prosecutor, Kelly Hancock. When he was shown the Zuccarello plea offer, Hancock testified that he had been unaware of it while he was prosecuting Rivera - "I have no recollection of this" (4PC-T. 613). He noted that the plea offer in June of 1986 was before his involvement in Rivera's homicide case began (4PC-T. 619). At that time, Mr. Rivera's prosecution was being handled by Joel Lazarus who was also prosecuting Zuccarello (4PC-T. 618).[12] Hancock admitted that he did not know if Zuccarello had been providing information regarding Rivera by the time of the June 1986 plea offer (4PC-T. 619). When asked if he had disclosed the plea offer to Malavenda,

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impeachment evidence that must be disclosed"). To the extent that trial counsel knew or should have known of this impeachment, his failure to present it was deficient performance. Smith v. Wainright, 799 F.2d 1442, 1444-45 (11th Cir. 1986).

[12] The August 1986 indictment against Mr. Rivera in the Jazvac showed Hancock as the prosecutor by that time. Hancock identified his September 3, 1986, letter in which he indicated that there was much work to do in Mr. Rivera's case and asked the sheriff for the assistance of Scheff and Amabile (4PC-T. 614).

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) (emphasis added). Thus, Hancock did not dispute that the plea offer itself was Brady material that he would have disclosed had he known of it.

The State does include one brief reference to the 2012 testimony by Ed Malavenda, Rivera's trial counsel (Answer Brief at 54). The State then immediately asserts that the transcript of Zuccarello's trial testimony shows that he discussed the plea agreement (Answer Brief at 54). However, as this Court wrote when remanding for the evidentiary hearing:

> 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 (emphasis added). Thus, this Court has already held that Zuccarello's reference to a plea agreement in his trial testimony is not dispositive of Mr. Rivera's Brady/Giglio/Strickland claim.

Further when shown the Zuccarello plea offer in 2012, Malavenda first indicated that he didn't recall whether he had it at the time of trial. After reviewing language in the plea offer, Malavenda was asked if would have used the language in the plea

offer in his cross of Zuccarello if he had known of it. Malavenda answered: "Of course." (4PC-T. 491-93). He was then asked whether the transcript of Zuccarello's testimony showed that he had asked "about that document" (4PC-T. 493). Malavenda replied, "No, I did not. I didn't ask about that document." Malvenda then indicated: "I don't have a memory of that document." (4PC-T. 494).

Similarly, Malavenda testified that he had no memory of the prisoner receipts, but would have asked about them had he possessed them at trial, particularly the one showing Zuccarello met with Argentine on April 17, 1986, given that Zuccarello had testified that he first discussed Mr. Rivera with Argentine (4PC-T. 499) ("if had this and saw he talked to Nick Argentine, I would have questioned him about the content.").

Malavenda also testified that he was unaware of the police reports that referenced Zuccarello as a confidential informant on April 4, 1986 (4PC-T. 499-500). Malavenda stated that had he known that on April 4, 1986, police had referred to Zuccarello as a confidential information he would have used that information.

Malavenda also testified that he did not recall having or knowing about the police report showing that Deputy Rios had understood that Mr. Rivera had invoked his right to counsel with Scheff and Amabile. (4PC-T. 505). Malavenda also 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, if 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).

Finally, Malavenda testified that he had no information that Zuccarello was involved in a homicide or had been charged in a homicide, or that, as Def. Ex. 2 reflects, on June 24, 1986, Zuccarello "admit[ted] his participation in the [Cohen] murder, saying he was to collect $10,000 for his part in the murder." (4PC-T. 509, 959-60). At Mr. Rivera's trial, Zuccarello omitted any reference to a homicide charge when discussing the charges he had faced (4PC-T. 509). This Court specifically referenced this omission from Zuccarello's testimony when remanding for the evidentiary hearing. Rivera v. State, 995 So.2d at 196.

As this Court noted in remanding for the evidentiary hearing, Mr. Rivera's Brady/Giglio/Strickland claim is that:

> [Zuccarello] 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**. In sum, Rivera asserts that Zuccarello's testimony suggested that he was simply acting as a good citizen who was appalled at Rivera's conduct, and he was not connected with law enforcement in any way. Zuccarello was impeached at trial only about his criminal record, and was not impeached about his connection with law enforcement or his personal incentive and gain for testifying against Rivera.

Rivera v. State, 995 So.2d at 196 (emphasis added). The State's position that to prevail Mr. Rivera was required to prove

Zuccarello had a "deal" or was formally recognized as a "confidential informant" is simply contrary to law and to this Court's opinion remanding for the evidentiary hearing. Moreover, the State misrepresents the evidence below as to the wealth of impeachment evidence that either was not disclosed by the State or unreasonably not discovered and used by the defense that would have shown Zuccarello's testimony was false and/or misleading.

C. Mr. Rivera's claim was alternatively pled and alternatively argued as a violation of Strickland v. Washington, 466 U.S. 668 (1984).

No where in its Answer Brief does the State address the fact that Mr. Rivera's claim was alternatively pled as a Strickland violation. The Table of Cases appearing in the Answer Brief does not show a single citation to Strickland. The issues listed in the Table of Content includes no reference to ineffective assistance of counsel or Strickland. In the Argument section of the Answer Brief, the State argues that Mr. Rivera's claim lacks merit in its discussion of "Issue II" (Answer Brief at 45-58). Nowhere within the its argument on Issue II does the State address Strickland ineffectiveness, Mr. Rivera's alternative basis for his claim.

When this Court remanded, it wrote:

> Rivera also asserts that the tial court erred in summarily denying his claim that the State withheld material, favorable information in violation of Brady or that trial counsel unreasonably failed to discover and present exculpatory evidence in violation of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,

80 L.Ed.2d 674 (1984).

Rivera v. State, 995 So.2d at 195.[13] Thus, this Court clearly recognized that Mr. Rivera's claim was/is alternatively pled as an ineffectiveness claim under Strickland.

On remand after the evidentiary hearing, Mr. Rivera stated in his closing argument:

> The alternative allegation that information and evidence establishing a Giglio and/or Brady violation gives rise to a Strickland claim comes into play if the State challenges Mr. Rivera's trial counsel's diligence. If there is a lack of diligence on Mr. Rivera's part which defeats the Giglio and/or Brady claims because of the actions or inactions of Mr. Malavenda in the course of the trial proceedings, that lack of diligence would constitute deficient performance within the meaning of Strickland. *See* State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

(4PC-R. 370).[14]

In State v. Gunsby, this Court was presented with a Brady claim and an alternatively pled Strickland/newly discovered evidence claim. As to the Brady claim, this Court wrote: "Regarding the first issue, no question exists that Brady violations occurred when the State failed to disclose the criminal records of two key witnesses." Gunsby, 670 So.2d at 923. This Court then turned to the newly discovered evidence claim,

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[13] In a dissenting opinion, Justice Wells also wrote about Mr. Rivera's alternatively pled Strickland claim. Rivera v. State, 995 So.2d at 205-06.

[14] The State did not address Strickland in its closing argument submitted after the evidentiary hearing as Mr. Rivera noted in his reply closing argument (4PC-R. 430).

alternatively pled as a Strickland violation. As to this claim, this Court held:

> We do find some merit in the State's argument that much of this evidence does not meet the test for newly discovered evidence. Newly discovered evidence is evidence that must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of the evidence by the use of diligence. Jones v. State, 591 So.2d 911, 916 (Fla.1991). For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Id. at 915. In the face of due diligence on the part of Gunsby's counsel, **it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel** as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (to establish ineffective assistance of counsel, a defendant must show that (1) counsel performed outside the broad range of competent performance and (2) the deficient performance was so serious that the defendant was deprived of a fair trial).

Gunsby, 670 So.2d at 923-24 (emphasis added). Thus under Gunsby, if as to a newly discovered evidence claim under Jones v. State, 591 So.2d 911 (Fla. 1991), there is an absence of diligence on counsel's part, his performance was deficient under Strickland. The same logic applies to both Brady and Giglio claims.

In Smith v. Wainwright, 799 F.2d 1442, 1444-45 (11th Cir. 1986), "issues arose as to whether Smith's attorney had possession of the prior statement of Smith and, by failing to use it for impeachment, rendered ineffective assistance to his client

or whether the state had failed to disclose the statement in spite of the mandate of Brady v. Maryland." However when it was determined that "there had not been a Brady violation but that counsel's representation had been inadequate," habeas relief issued and a new trial was ordered. To the extent that either a Brady claim or a Giglio claim is defeated by a want of diligence on the part of trial counsel, the want of diligence establishes that counsel's performance was deficient under Strickland.[15]

When denying relief in its 2013 order, the circuit court recognized that the claim had been alternatively pled as

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[15] In Mitchell v. State, 595 So.2d 938 (Fla. 1992), the defendant pled that exculpatory evidence was not presented to the jury either because the State failed to disclose it or because defense counsel unreasonably failed to discover it. When the State convinced the circuit court that it had disclosed the exculpatory evidence, the circuit court considered whether trial counsel's negligence in pursuing and presenting the exculpatory evidence undermined confidence in the jury's verdict, i.e. the second prong of Strickland. On appeal, this Court affirmed the circuit court's denial of relief as to the guilt phase and its determination that penalty phase relief was warranted.

Similarly in Hildwin v. Dugger, 654 So.2d 107, 108 (Fla. 1995), the defendant pled in his Rule 3.850 motion that "the State withheld exculpatory evidence or, alternatively, trial counsel was ineffective for failing to discover that evidence." This Court affirmed the denial of the Brady claim saying "five witnesses testified that the State's entire file was made available to defense counsel. The record simply does not support Hildwin's Brady claim." Hildwin, 654 So.2d at 109. This Court then addressed the claim under Strickland and stated: "assuming without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence, we do not believe Hildwin has demonstrated a reasonable probability that the outcome of the trial proceedings would have been different had this evidence been presented." Hildwin, 654 So.2d at 109. However, this Court did grant relief under Strickland as to the penalty phase.

ineffectiveness under Strickland. However contrary to State v. Gunsby, Smith v. Wainwright, and Hildwin v. Dugger, the circuit court denied the claim and found fault with pleading the claim alternatively as ineffectiveness under Strickland:

> Finally, **this Court finds that Defendant did not show any deficient performance by trial counsel for failure to discover the suppressed materials.** Defendant merely alleged in a conclusory fashion that to the extent trial knew or should have known about the favors bestowed upon Zuccarello but failed to cross-examine Zuccarello about those favors, he rendered deficient performance. Defendant also makes the conclusory allegation that to the extent reasonable investigation could have led to the suppressed information, trial counsel's failure to conduct reasonable investigation amounted to deficient performance.

(4PC-R. 476)(emphasis added).[16] Ultimately, the circuit court wrote: "Defendant's claim that counsel's deficient performance undermines confidence in the outcome of the trial is merely conclusory and must be rejected" ($PC-R. 477).[17]

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[16] The circuit court relied on one case to support its assertion that Mr. Rivera's Strickland claim was conclusory in nature. The case cited, Foster v. State, 810 So.2d 910, 915 (Fla. 2002), involved an ineffectiveness claim based upon an alleged failure "to discover and litigate the exclusion of pregnant women and women with small children during voir dire." Id. It did not involve a fully pled Brady/Giglio claim, alternatively pled as a Strickland claim if trial counsel knew of should have know of the evidence supporting the Brady/Giglio allegations.

[17] The circuit court relied on one case to support its assertion that in his alternatively pled Brady/Giglio/Strickland claim, Mr. Rivera pled prejudice under Strickland in a conclusory fashion. The case cited, Jones v. State, 998 So.2d 573, 584 (Fla. 2008), involved a penalty phase ineffectiveness claim premised upon trial counsel's failure to call readily available mental health experts. As to it, this Court found the failure to assert anything more than "a blanket assertion" that the result would

In this regard, the circuit court was apparently unaware that the prejudice prong of Strickland is in fact the materiality prong of a Brady claim. Kyles v. Whitley, 514 U.S. 419 (1995). The materiality arguments under Brady and Kyles that Mr. Rivera made regarding the evidence that was not heard by his jury are his prejudice prong arguments under Strickland regarding the same evidence that was not heard by the jury. See Parker v. State, 89 So.3d 844 (Fla. 2011).[18]

In his Initial Brief in the pending appeal, Mr. Rivera summarized Argument III in the following fashion:

> 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.

(Initial Brief at 61). Within the body of Argument III as to

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have been different had the expert testimony been presented was conclusory and insufficient. The claim in Jones was not a fully pled Brady/Giglio claim, alternatively pled as a Strickland violation. Indeed, this Court's remand found that the claim was fully pled and an evidentiary hearing was required. Rivera v. State, 995 So.2d at 196.

[18] In his closing argument to the circuit court, Mr. Rivera specifically wrote that "the alternatively pled ineffective assistance of counsel claim [] was premised upon the same evidence and information that supported the Giglio and Brady claims." (4PC-R. 369).

deficient performance, Mr. Rivera wrote:

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

(Initial Brief at 92). As to prejudice, Mr. Rivera wrote:

> 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.

(Initial Brief at 92-93) (emphasis added). Mr. Rivera then went through the exculpatory evidence that was required to be included the prejudice analysis (Initial Brief at 93-96). See Parker v. State, 89 So.3d 844 (Fla. 2011).

Despite the fact that Mr. Rivera has pled and argued the Brady/Giglio claim alternatively as a Strickland claim, the State omits any reference to or argument concerning Mr. Rivera's alternative claim that to the extent that counsel knew or should have known or should have discovered the exculpatory evidence that was not heard by the jury, trial counsel was ineffective within the meaning of Strickland. The State's omission is significant because of its argument that Mr. Rivera has not shown diligence as to his Brady/Giglio claim. As explained infra, this omission allows the State to sidestep whether trial counsel's alleged want of diligence establishes Strickland ineffectiveness.

D. State's argument that Mr. Rivera was not diligent is an unacknowledged or unwitting concession that Mr. Rivera's trial counsel was not diligent and thus rendered deficient performance.

The State in advancing its argument that Mr. Rivera was not diligent does not address the alleged lack of diligence as it relates to whether trial counsel was effective within the meaning of Strickland. This Court recognized in Waterhouse v. State, 82 So.3d 84, 104 (Fla. 2012), that the standard of care imposed upon collateral counsel is no higher that the one imposed on trial counsel under Strickland:

> 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).[19]

Most of the information that the State relies on to argue Mr. Rivera was not diligent because collateral counsel possessed it, should have had it or should have known about it was equally available to Malavenda, trial counsel. Therefore if, as the State argues, collateral counsel was not diligent, then Malavenda was also not diligent and, under State v. Gunsby, his performance was deficient within the meaning of Strickland.

First as to the Zuccarello plea offer, the State asserts in its Answer Brief that:

> Although trial counsel, Malavenda, stated at the hearing that he does not remember seeing the actual plea agreement before, it is clear from the record recounted above that Zuccarello discussed its existence at trial. Additionally, **Ms. Bailey noted that the plea agreement which was entered into in June of 1986 was placed in Zuccarello's court file immediately thereafter and therefore, in the public domain ten months before Zuccarello testified against Rivera.**

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[19] In its two, brief efforts to shrug off Mr. Rivera's reliance on Waterhouse in his Initial Brief (Answer Brief at 24, 41), the State shows a refusal to understand that a determination that collateral counsel was not diligent under Waterhouse must mean that trial counsel rendered deficient performance if he had access to the same information that collateral counsel allegedly possessed and which resulted in the finding of a lack of diligence on collateral counsel's part.

(Answer Brief at 54) (emphasis added).[20]

Later, the State specifically argues that trial counsel was not diligent as to the plea offer:

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

(Answer Brief at 57). To the extent that this Court agrees with the State that Malavenda failed to exercise due diligence, he rendered deficient performance under the Strickland standard. Smith v. Wainwright, 799 F.2d 1444-45.

The State also relies heavily upon the September 18, 1986, deposition of Det. Gross in the Broward County prosecution of Scott Richitelli which was introduced into evidence at the 2012 hearing (4PC-T. 841-93). This deposition was transcribed on October 3, 1986, and put in the court file in State v.

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[20] The State introduced a certified copy of the Broward Courty circuit court file in State v. Zuccarello, Case No. 86-3288 CF-B (4PC-T. 676-757). Within that file, a Presentence Investigation appears with the signatures by Department of Corrections personnel dated July 2, 1986 (4PC-T. 756). Within the PSI, the Zuccarello plea offer appears (4PC-T. 746-47). In its Answer Brief, the State argues that the PSI "had been in the court file since July of 1986, almost one year prior to Zuccarello's testimony in this case" (Answer Brief at 43).

Richitelli, Case No. 86-7879 CF10 (4PC-T. 582). In its Answer Brief, the State notes numerous references in this deposition to Zuccarello's plea, his cooperation with numerous law enforcement agencies including Miami-Dade police, his efforts to barter information for consideration in a plea deal, his transport from jail for interviews in April 1986. The Gross deposition also references Gross's April 4th synopsis of Zuccarello's statements and cooperation (Answer Brief at 30). Gross's deposition was conducted eight months before Mr. Rivera's trial. The State's argument that collateral counsel was not diligent in digesting and understanding the contents of Gross's deposition applies with equal force to Malavenda. If collateral counsel did not exercise due diligence, neither did Malavenda, and he therefore rendered deficient performance within the meaning of Strickland.

The State similarly argues that the jail prisoner receipts showing the dates and time April and July of 1986 that Zuccarello was allowed to leave the jail in the care and custody of certain police officers, specifically including Argentine and Amabile could have been "easily discoverable in 1994" (Answer Brief at 43). No evidence is cited for this proposition. However under the State's argument if those jail records could easily been discovered in 1994, they could have even been more readily discovered in late 1986 or early 1987 before Mr. Rivera's trial. If collateral counsel failed to exercise due diligence, then for

exactly the same reasons also Malavenda failed. As a result, Malavenda's performance was deficient under Strickland. Smith v. Wainwright, 699 F.2d at 1444-45.

The State also argues that the Miami-Dade jail incident reports could have been discovered by collateral counsel because of their knowledge of Zuccarello's incarceration in the Miami-Dade jail. In Malavenda's possession was a letter that Zuccarello wrote to Mr. Rivera on July 6, 1986, while Zuccarello was being held at the Miami-Dade jail (4PC-T. 511, 1030-33).[21] Given that Malavenda had the Zuccarello letter in his possession (a letter showing that on July 6, 1986, Zuccarello was held in a Miami-Dade jail), if the State's argument that collateral counsel should have known to get the Miami-Dade jail records is accepted, then Malavenda similarly did not exercise due diligence as to the Miami-Dade jail records and thus rendered deficient performance under Strickland. Smith v. Wainwright.

Every argument made by the State that collateral counsel failed to exercise due diligence applies with equal force to trial counsel, Malavenda.[22] Under Waterhouse v. State, collateral

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[21] The return address on the envelop was identified by Malavenda in his 2012 testimony as the address he knew to be a jail facility in Miami-Dade County (4PC-T. 511).

[22] There is one document on which the State does not argue a lack of due diligence. This is the Rios polygraph exam during which Zuccarello admitted participation in the Cohen homicide (4PC-T. 957-60). Zuccarello was charged with the Cohen homicide and faced a death sentence according to Raticoff. Yet on June 24, 1986, Rios with the Broward Sheriff's Office administered a

counsel is not held to a higher standard or required to exercise more diligence than is required of trial counsel. To the extent that this Court accepts the State's argument that collateral counsel failed to exercise due diligence and accepts the circuit court's conclusion in this regard, then it is apparent that Mr. Rivera's trial counsel similarly failed exercise due diligence and as a result rendered deficient performance under Strickland.

E. Zuccarello's July 6, 1986, letter to Mr. Rivera which was in Malavenda's possession at the time of trial.

The State totally ignores Zuccarello's letter to Mr. Rivera dated July 6, 1986 (PC-T. 1030-33). Malavenda testified that he had this letter in his correspondence file (4PC-T. 511). The letter was introduced into evidence. It provides:

July 6, 1986

> Mike,
>
> Hey buddy! What's up? I ment [sic] to write early but I've been to lasy [sic]. I'm real sorry about those (15 days) lockup. Believe me Mike. I make up for it. You want to bat for me and one [sic] someone does that I don't forget. Those phone numbers for long distace call

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polygraph of Zuccarello on behalf of the Miami Police Department. During the exam, Zuccarello admitted actively participating in the homicide. Rios's report detailing this was sent to the Miami Police Department. The argument that the State makes regarding Rios's report is "Zuccarello's statements regarding the Cohen murder would not have been admissible at trial" (Answer Brief at 55). Alternatively, the State argues that the report "was confidential and a part of an ongoing investigation." The State's position is contrary to the Eleventh Circuit's decision in Smith v. Sec'y Dep't of Corrs., 572 F.3d at 1343 ("evidence of motivation to testify, especially for key prosecution witnesses, is impeachment evidence that must be disclosed").

> that guy gave us don't work. I couldn't use them but I did get you about 20 packs of Marlboro. Also I got something else for my buddy. Every day (Mon-Fri) I got therapy for my back. When I saw the x-ray of my back I couldn't believe it. That Sgt. Fred Flintstone watch what he does when I get back. I bet he's as nice as can be. I should be back within the next two weeks so be ready. Hope Randy's O.K. and Rodney. Well buddy I'm gonna go play spades with my other buddy. His name is Mike and he's just like you he don't take no shit and we stick together. I told him all about you. We kick ass in spades here. Well buddy see you when I get back. Take care.
>
> Your Friend
> Frank

(4PC-T. 1030-31). Malavenda testified that had he police reports referring to Zuccarello as a confidential informant, the letter would have been useful to use at trial (4PC-T. 512). The letter demonstrates an effort on Zuccarello's part "to befriend" Mr. Rivera. It would be consistent with Zuccarello's wanting to obtain information on behalf of law enforcement (4PC-T. 513). Thus, this letter must be part of the prejudice prong/materiality analysis of Mr. Rivera's Brady/Giglio/Strickland claim.

F. Donald Mack's sworn statement regarding his contact with the Broward County Sheriff's Office and with Frank Zuccarello, Peter Salerno and Bill Moyer in 1986.

In its Answer Brief, the State also ignores the Donald Mack affidavit dated April 8, 1995, in which 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). This affidavit was introduced into evidence during the 1995 proceedings as evidence of undisclosed Brady information or unreasonable undiscovered Strickland information that inducements were offered to inmates in jail with Rivera as an incentive for their assistance to the State (4PC-T. 310). Mack's affidavit, although ignored in the Answer Brief, must be evaluated cumulatively with Mr. Rivera's current Brady/Giglio/ Strickland claim. Parker v. State, 89 So. 3d 844 (Fla. 2011).

G. John Meham's trial testimony as part of the defense's case.

In its Answer Brief, the State ignores the trial testimony of John Meham. The defense called Meham to testify that he first

met Rivera in the Broward County jail in the middle of October of 1986 (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 talked 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).[23] Meham said Moyer told him this in December of 1986 before he pled his case down from life.[24]

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[23] The State, while ignoring both Mack's affidavit and Meham's trial testimony, attaches significance to collateral counsel's reference in collateral proceedings in 1995 to Zuccarello as a confidential informant (Answer Brief at 38). In light of both Mack and Meham, the reference to Zuccarello as a confidential informant was premised upon the evidence of record in 1995 and on a Brady/Strickland claim was premised. However, the fact that there is corroboration of Mack and Meham in 2012 evidence which the State possessed in 1995, but chose not to mention shows that when denying a Brady violation the State in 1995 did not comply with the dictates of Banks v. Dretke, 540 U.S. 668, 694 (2004) (State's misrepresentation that it had complied with its Brady obligations constituted "cause for [defendant] failing to investigate").

[24] The circuit court when addressing the newly discovered DNA evidence referred to Moyer's testimony about a blue truck, which was not consistent with the State's case that a blue van was used in the homicide (4PC-R. 517). In doing so, the circuit court ignored Meham's testimony that directly challenged Moyer's testimony as made-up in order to gain benefit and ignored Donald Mack's affidavit which also impeached Moyer's credibility.

H. Mark Peters's 1995 testimony.

Generally ignored by the State in its brief is Mark Peters's 1995 testimony that at the time of the homicide he, Peters, was in possession of the blue van in which the State argued Mr. Rivera committed the murder.[25] This testimony as noted by this Court refuted the State's theory at trial that the homicide was committed in Peters's blue van. Peters's testimony is not considered or referenced at all in any kind of a cumulative prejudice analysis of the Brady/Giglio/Strickland claim as this Court directed when remanding. Worse however in Argument III and **completely contrary to Peters's testimony**, the State asserts as fact: "Rivera was in possession of a blue van at the critical time of Staci's disappearance. Rivera admitted that he used a van to abduct Staci." (Answer Brief at 67). The State then says that this evidence shows the DNA evidence would not have mattered.[26]

This Court ordered Peters's testimony (he "was in possession

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[25] The only reference to Peters's testimony that the undersigned can find in the Answer Brief is contained in a quote from the portion of the circuit court's order addressing the DNA evidence (Answer Brief at 59).

[26] In fact, the DNA evidence corroborates and confirms Peters's testimony that he had possession of the blue van at the time of the homicide, and thus Rivera did not have the blue van and could not have committed the murder in the blue van. This in turn establishes that every single aspect of Mr. Rivera's hypothetical of how the murder occurred was wrong and clearly made up in response to the continuous interrogation that Mr. Rivera, a crack addict, endured as he was going through withdrawal from his latest crack binge.

of the van at the time of the crime") to be considered cumulative with the new evidence. Rivera v. State, 995 So.2d at 198. The State's analysis did not to comply with this Court's directive.

I. The standard for evaluating newly discovered evidence claims set forth in Swafford v. State, 125 So. 3d 760 (Fla. 2013).

Omitted from the Answer Brief is any reference to Swafford v. State and the standard set forth therein for evaluating newly discovered evidence which Mr. Rivera set forth in detail in his Initial Brief (Initial Brief at 96-98).[27] The standard set forth in Swafford was not employed by the circuit court (4PC-R. 516-20).[28] See Hildwin v. State, 141 So.3d 1178 (Fla. 2014). This Court must "review the trial court's application of the law to the facts de novo." Swafford, 125 So.3d at 767-68.

CONCLUSION

Based upon the record and the arguments presented herein and in his Initial Brief, Mr. Rivera respectfully urges the Court to reverse and grant Rule 3.851 relief.

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[27] Swafford v. State does not appear in the Answer Brief's Table of Authorities.

[28] The circuit court did not consider any of the evidence favorable to Mr. Rivera presented in 1995 or 2012 other than DNA results which it discounted along with Peters's testimony when relying on the heavily impeached and unreliable testimony of Moyer which was even inconsistent with the State's theory of the case. Neither Meham's trial testimony, nor Mack's sworn affidavit was considered. No consideration was given the overwhelming impeachment of Zuccarello which also demonstrated the unreliable manner in which the State's case was constructed. Kyles v. Whitley, 514 U.S. at 446 (undisclosed evidence could have been used to "attack[] the reliability of the investigation.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply brief motion has been furnished by email service to celia.terenzio@myfloridalegal.com, the primary email address given for opposing counsel, Senior Assistant Attorney General, Celia Terenzio, on December 15, 2014.

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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