

**Third District Court of Appeal**  
**State of Florida, January Term, A.D. 2008**

Opinion filed February 20, 2008.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D07-1117  
Lower Tribunal No. 98-32726C

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**Javon Mason,**  
Appellant,

vs.

**The State of Florida,**  
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Javon Mason, in proper person.

Bill McCollum, Attorney General, and Lane Hodes, Assistant Attorney General, for appellee.

Before SUAREZ, CORTIÑAS and SALTER, JJ.

PER CURIAM.

Javon Mason appeals from an order summarily denying his motion to withdraw his plea made pursuant to Florida Rule of Criminal Procedure 3.850(b)(1). On appeal from a summary denial, this Court must reverse unless the postconviction record, see Fla. R. App. P. 9.141(b)(2)(A), shows conclusively that the appellant is entitled to no relief. See Fla. R. App. P. 9.141(b)(2)(D).

We reverse the trial court's summary denial of Mason's newly discovered evidence claim and remand because the record fails to conclusively refute Mason's motion for relief. An evidentiary hearing is thus needed to resolve the credibility of Mason's allegation of actual innocence. See Barrow v. State, 940 So. 2d 1235 (Fla. 5th DCA 2006). If an evidentiary hearing is not conducted below, an appellate court must accept the defendant's factual allegations as true to the extent they are not refuted by the record. McLin v. State, 827 So. 2d 948 (Fla. 2002); Foster v. State, 810 So. 2d 910, 914 (Fla. 2002). At the ensuing evidentiary hearing, it will be Mason's burden to show why neither he nor his trial counsel could not have learned earlier about the co-defendants' exculpatory testimony through the exercise of due diligence, and what the specific nature of the exculpatory evidence is. Barrow v. State, 940 So. 2d 1235 (Fla. 5th DCA 2006). Further, the trial court will have to resolve whether the evidence is of such a character that it would probably produce an acquittal on retrial. Id.

Because the record now before us fails to make the required showing, we reverse the order and remand for an evidentiary hearing or other appropriate relief. If the trial court again enters an order summarily denying the postconviction motion, the court shall attach record excerpts conclusively showing that the appellant is not entitled to any relief.

Reversed and remanded for further proceedings.