NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSE LUCIO CHACON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D05-84

Opinion filed August 2, 2006.

Appeal from the Circuit Court for Polk
County; Harvey A. Kornstein, Judge.

Jose Lucio Chacon, pro se.

Charles J. Crist, Jr., Attorney General,
Tallahassee, and Danilo Cruz-Carino,
Assistant Attorney General, Tampa, for
Appellee.

CANADY, Judge.

Jose Lucio Chacon appeals the denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.850. The postconviction court summarily denied four of the five grounds for relief set forth in Chacon's motion. We affirm the denial with respect to those four grounds without further comment. The trial court denied the fifth ground—which was based on a claim of newly discovered evidence—after counsel for

Chacon informed the court at a status hearing that there was no "viable witness" to support the claim of newly discovered evidence. Because we conclude that Chacon's counsel effectively abandoned the claim, we affirm the denial of the claim of newly discovered evidence.

Chacon's claim of newly discovered evidence related to exculpatory statements contained in a letter bearing the signature of "Glenda W." The court ordered the State to show cause why Chacon was not entitled to relief on his claim of newly discovered evidence, and the State responded that it could not show cause why Chacon was not entitled to an evidentiary hearing. The court then entered an order granting an evidentiary hearing and appointing counsel for Chacon.

At the status hearing—with Chacon present—counsel for Chacon recounted his efforts to investigate the factual basis for the claim of newly discovered evidence and informed the court that there was no "viable witness for Mr. Chacon" because the person believed to be the author of the exculpatory letter had denied writing the letter and had expressed her disagreement with the exculpatory statements in the letter. Counsel further explained to the court that he had advised Chacon that it would be advisable "to withdraw his claim involving this letter."

The court then asked Chacon whether he understood what counsel had discussed with the court. Chacon responded, "Yes, I understand." The court observed that "[i]t seems like it would be useless to have a full-blown hearing on this." Chacon asked, "So how am I going to be able to prove my innocence if that is the only way." He then launched into a discussion of the proceedings at his trial and a letter from the mother of the victim—*not* the letter at issue in his claim of newly discovered evidence.

At no point in the status hearing did Chacon in any fashion express his disagreement with his lawyer's characterization of the evidence related to the claim of newly discovered evidence. Chacon did not inform the court that any witness was available to support his claim. Nor did he request that additional time be afforded to locate a witness to support the claim.

Although in this appeal Chacon has suggested that his lawyer had not correctly identified the author of the letter, Chacon made no such assertion at the status conference. Chacon certainly made clear that he had a continuing desire to prove his innocence, but he acquiesced in his counsel's concession that no testimonial support was available for the newly discovered evidence claim. Furthermore, Chacon did not express any dissatisfaction with counsel, much less express a desire to discharge counsel and obtain new counsel or proceed pro se.

Given all these circumstances, the only reasonable conclusion is that Chacon abandoned the claim of newly discovered evidence because of the lack of evidence to support the claim. See Vining v. State, 827 So. 2d 201, 214 (Fla. 2002) (holding that claim was abandoned by postconviction counsel who acknowledged that she was unable to plead the "factual predicate" necessary to prove claim). As the postconviction court recognized, it would be an exercise in futility—and a waste of judicial resources—to conduct an evidentiary hearing on the claim of newly discovered evidence after counsel's unequivocal concession that there was no evidence to support the claim. We therefore affirm the denial of Chacon's newly discovered evidence claim.

Affirmed.

ALTENBERND, J., Concurs.
SALCINES, J., Dissents with opinion.

SALCINES, Judge, Dissenting.

I respectfully dissent. The postconviction court reviewed Jose Lucio Chacon's motion for postconviction relief and concluded that ground five, alleging newly discovered evidence, set forth a facially sufficient claim for relief and that an evidentiary hearing was required. Indeed, in its response to the motion, the State conceded that an evidentiary hearing was necessary because the record before the court did not conclusively refute Chacon's allegations of newly discovered evidence. The evidence at issue was a letter signed by "Glenda W." which essentially stated that the charges against Chacon had been fabricated by Chacon's ex-wife. In his motion for postconviction relief, Chacon indicated that the letter was written by his ex-wife's cousin to a family friend who forwarded it to Chacon.

An order was entered directing that an evidentiary hearing be conducted. In preparation for the evidentiary hearing, a status conference was conducted. At that status hearing, postconviction counsel informed the court that he had hired an investigator who located "the supposed Glenda W. who lived in Alabama." Counsel stated that when he contacted the woman, she told him she had not written the letter and did not agree with its content. Counsel indicated that he needed to get a handwriting expert to examine the letter to determine if it was, in fact, written by the woman in Alabama and he also needed to conduct a video deposition of the woman. However, counsel then informed the court that he felt like "we're basically spinning our wheels" because even if it were proven that the letter had been written by the woman in Alabama, she would not be a viable witness for Chacon because she did not agree with the content of the letter. Counsel did not present any evidence other than his unsworn

statements to support his allegations. There was no testimony of witnesses or written documentation to support Chacon's counsel's assertions that the woman in Alabama was actually the author of the letter. In fact, the woman denied that she had written the letter.

The majority concludes that Chacon abandoned the claim of newly discovered evidence and acquiesced in his counsel's concession that no testimonial support was available to support his claim. However, the transcript of the status hearing reveals that counsel stated that he had called the conference to put on the record counsel's concerns about expending further resources "which will ultimately not change the outcome of what decision the Court makes in the end." Counsel informed the postconviction court that he told Chacon that it would be advisable for him to withdraw his motion. However, when questioned by the court, Chacon still maintained his innocence and did not ask to withdraw his motion. Counsel for Chacon did not thereafter tell the postconviction court that he was withdrawing the motion or otherwise abandoning the motion on behalf of Chacon.

The postconviction court did not make a finding that the motion was abandoned or withdrawn but summarily denied the facially sufficient motion without an evidentiary hearing based upon the oral representations of Chacon's counsel. In my opinion, this was error. "[I]t is fundamental that . . . representations by counsel not made under oath and not subject to cross-examination, absent a stipulation, are not evidence." State v. T.A., 528 So. 2d 974, 975 (Fla. 2d DCA 1988). When a rule 3.850 motion claiming newly discovered evidence is denied without an evidentiary hearing, a defendant's factual allegations must be accepted as true to the extent that they are not

refuted by the record. See McLin v. State, 827 So. 2d 948, 954 (Fla. 2002). An evidentiary hearing is required when the record fails to show conclusively that a defendant is entitled to no relief. Fla. R. App. P. 9.141(b)(2)(D). The postconviction court and the State both correctly acknowledged that the record did not refute the allegations of newly discovered evidence.

Further, the written order denying relief stated that Chacon's counsel had informed the court that the letter, which was the subject of the motion, "was actually written and in existence at or before the time of trial in this matter and, therefore, did not constitute 'newly discovered' evidence." The statements made by Chacon's counsel at the status hearing at times were unartfully phrased. However, it is clear from the transcript that he did not state that the June 10, 2002, letter from Glenda W. was written prior to or at the time of the 1996 trial. Instead, counsel was referencing Chacon's ex-wife's letters which had been written at the time of trial. The postconviction court's conclusion that the letter from Glenda W. was not newly discovered evidence is not supported by any evidence.

If counsel did not wish to represent Chacon any longer, he should have requested that he be allowed to withdraw and new counsel appointed. In my opinion, the postconviction court should not have summarily denied the facially sufficient motion without conducting an evidentiary hearing when nothing supported the denial. The "rule 3.850 motion remains facially sufficient to require an evidentiary hearing." See Mathews v. State, 870 So. 2d 36, 37-38 (Fla. 2d DCA 2003).

I would reverse the order denying relief and direct that an evidentiary hearing be conducted. Only after Chacon is afforded a full evidentiary hearing should we determine that due process has been satisfied.