IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-99

JUAN DAVID RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of postconviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited 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;

"PC-R. ___" -- record on instant appeal to this Court;

"Supp. PC-R. ___" -- supplemental record on appeal to this Court;

"T. __" Transcript of hearings in the instant appeal.[1]

References to other documents and pleadings will be

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[1] The transcripts are presented in separately bound volumes, which are separately paginated by the various court reporters. The master index of the transcripts does not accurately correspond with the actual number of pages in the transcripts, so the court reporter's pagination has been used.

The transcripts of the evidentiary hearing, held on April 5, April 6, April 7, and April 12, 1999 are contained within volumes 10, 11, 12, and 13 respectively. The Huff hearing held on March 13, 1999 is contained within Volume 3, and the public records hearing held on December 6, 1996 is contained within Volumes 3 and 4.

self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Rodriguez 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. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Rodriguez, through counsel, accordingly urges that the Court permit oral argument.

CERTIFICATE OF FONT

Appellant hereby certifies that this brief is typed in 12 point Courier font.

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STATEMENT OF THE CASE

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of conviction and sentence under consideration.

Mr. Rodriguez was charged by indictment dated May 3, 1989 with first degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault and attempted murder in the first degree. He pled not guilty.

Mr. Rodriguez' trial was held in January, 1990. A jury returned a verdict of guilty on all counts and recommended a death sentence by a vote of twelve to zero.

On March 28, 1990, the trial court imposed the death sentence on Count I, a life sentence on Count II, fifteen years on Count III, fifteen years on Count IV, life on Count V, five years on Count VI and a life sentence on Count VII. A sentencing order, was entered on the same date.

This Court affirmed Mr. Rodriguez' convictions and

sentences on direct appeal. Rodriguez v. State, 609 So. 2d 493 (Fla.1992). The United States Supreme Court denied certiorari on October 4, 1993.

On September 12, 1994, over a year before the two year deadline for his Rule 3.850 motion, Mr. Rodriguez filed his initial Rule 3.850 motion. The State served a response on July 17, 1995. On October 4, 1995, Mr. Rodriguez filed an amendment to his Rule 3.850 motion. The State responded on April 2, 1996. Following public records litigation, Mr. Rodriguez filed further amendments on July 31, 1997, and March 13, 1998. Following a Huff hearing, the lower court granted a very limited evidentiary hearing. The hearing was restricted to mental health issues relating to Mr. Rodriguez' mental retardation, and did not address the numerous mitigating factors arising from Mr. Rodriguez' social and cultural background. Similarly, Mr. Rodriguez was not afforded the opportunity to present evidence as to his claim that the trial court had signed a sentencing order prepared by the State, and thus not afforded Mr. Rodriguez an independent

weighing of mitigation at his penalty phase. No hearing was granted on any of Mr. Rodriguez' claims relating to his guilt phase. The hearing was held on April 5,6,7, and 12, 1999. The lower court denied relief by order dated November 29, 1999 whereupon Mr. Rodriguez timely filed a notice of appeal.

SUMMARY OF THE ARGUMENTS

1. The lower court erred in denying Mr. Rodriguez a new penalty phase. There was evidence presented at the limited evidentiary hearing that showed that trial counsel unreasonably failed to investigate and present evidence of Mr. Rodriguez' mental retardation, brain damage and other mental health issues. Mr. Rodriguez was afforded constitutionally deficient representation by his counsel and inadequate mental health expert assistance. This evidence was not rebutted by State witnesses. Relief should be granted.

2. The lower court erred in summarily denying Mr. Rodriguez' claims relating to non statutory family

background and cultural mitigating circumstances at the penalty phase. Trial counsel was ineffective for failing to investigate a plethora of non statutory mitigation, including, inter alia, evidence of abuse, poverty, neglect, and trauma from Mr. Rodriguez' immigration experience, together with the fact that the trial court did not conduct an independent weighing of the little mitigation that was in fact presented, and signed a sentencing order that was prepared by the State. Mr. Rodriguez should be afforded a new evidentiary hearing on these issues and thereafter granted a new penalty phase.

3. Mr. Rodriguez is entitled to a full evidentiary hearing on all the claims relating to the guilt phase of his capital trial raised in his Rule 3.850 motion. Mr. Rodriguez pleaded specific detailed claims for relief, including claims of ineffective assistance of counsel, Ake and Brady claims which are legally sufficient and are not refuted by the record.

4. Mr. Rodriguez has been denied access to the files and records in the possession of certain state agencies

which pertain to his case. The trial court erred by refusing to hear Mr. Rodriguez' motion to compel production of supplemental public records, by ignoring the provisions of the then new Fla. R. Crim. P. 3.852, and by denying Mr. Rodriguez the opportunity to amend his Rule 3.850 motion accordingly.

5. The trial court was biased and prejudiced throughout Mr. Rodriguez' capital trial, resentencing and post conviction proceedings. This is indicated, inter alia, by his signing of a sentencing order prepared by the State and by his ex parte communication with the State during postconviction.

6. Constitutional error occurred during the jury instructions and trial counsel was ineffective for failing to object. These errors include, including the majority verdict instruction, the burden shifting instruction, the Caldwell error, the improper doubling of aggravating circumstances, and the automatic felony aggravating circumstance.

7. The prosecutor urged the jurors during his closing

argument at penalty phase to sentence Mr. Rodriguez to death on the basis of inflammatory, improper comments and numerous impermissible aggravating factors.

8. Florida's death penalty statute denies Mr. Rodriguez his right to due process of law and constitutes cruel and unusual punishment on its face and as applied to this case.

9. Due to omissions and inaccuracies in the record on appeal of Mr. Rodriguez' capital trial, neither this Court, nor any future reviewing court could conduct full review to determine the extent to which Mr. Rodrigueez' constitutional rights were violated.

10. The Rules prohibiting Mr. Rodriguez from interviewing jurors are unconstitutional and juror misconduct occurred.

11. Impermissible victim impact was considered in sentencing Mr. Rodriguez to death.

12. Because of cumulative error, Mr. Rodriguez did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments.

ARGUMENT 1

THE LOWER COURT ERRED IN DENYING MR. RODRIGUEZ A NEW PENALTY PHASE AFTER THE LIMITED EVIDENTIARY HEARING

A. INTRODUCTION

> The Court in part grants defendant's request for an evidentiary hearing. Said hearing shall be limited to claims of ineffective assistance of counsel set forth in claims 3 and 8 of the 3rd amended motion for rule 3.850 relief. The issue defined is the question of mental retardation at the penalty phase.

(PCR. 2354)(emphasis added).

The lower court granted an evidentiary hearing only on the failure of trial counsel to investigate and present mental health mitigation relating to Mr. Rodriguez' mental retardation at Mr Rodriguez' penalty phase. No hearing was granted on any other aspect of Mr. Rodriguez' claims that his trial counsel was ineffective at his penalty phase, nor was a hearing given on any other issue relating to Mr. Rodriguez' penalty phase.

At the evidentiary hearing Mr. Rodriguez presented

testimony from Mr. Rodriguez' trial attorney, Scott Kalisch, which, when taken with the trial record, showed that Mr. Kalisch did not commence investigation into Mr. Rodriguez' mental condition until after the guilt phase was over; that he accepted the recommendation of the prosecutor as to the appointment of an expert to evaluate Mr. Rodriguez; that although he thought Mr. Rodriguez was not very intelligent, he did not obtain neuropsychological testing despite the recommendation by the state recommended clinical psychologist; that he did not obtain any formal assessment of Mr. Rodriguez' intelligence quotient; and that he did not attempt to investigate Mr. Rodriguez' family history in Cuba. Mr. Rodriguez also presented the testimony of a Board Certified neuropsychologist, Dr. Ruth Latterner, which supported his contention that Mr. Rodriguez is mentally retarded, has organic brain damage, and that these factors support a finding that Mr. Rodriguez was under extreme mental and emotional disturbance at the time of the incident, and that he was unable to appreciate the criminality of his

conduct or conform it to the law.

The State attempted to counter Mr. Rodriguez' evidence by the testimony of Dr. Leonard Haber, a clinical psychologist who had briefly examined Mr. Rodriguez immediately prior to his penalty phase. Dr. Haber did not perform any neuropsychological testing and did not administer any formal intelligence testing. Furthermore, he neither requested, nor was supplied with background information about Mr. Rodriguez' early life in Cuba. Based on his limited examination, Dr. Haber agreed that Mr. Rodriguez had low intellectual functioning and thought that there might be a possibility of brain damage. However, without further investigation, he opined that the statutory mental health mitigating circumstances did not apply because Mr. Rodriguez had "street smarts" The lower court chose to accept the findings of Dr. Haber in supporting his conclusion that Mr. Kalisch was not ineffective regarding Mr. Rodriguez' penalty phase, despite the fact that Dr. Haber's opinion had swayed dramatically between the time of Mr. Rodriguez' trial and

the evidentiary hearing.

However, as noted supra, the scope of the evidentiary hearing was severely limited so that no evidence of non statutory mitigation from family members, teachers or cultural experts was admitted. Such evidence would not only have supported Mr. Rodriguez' mental retardation and brain damage and the concomitant statutory and non statutory mental health mitigation, but also would have provided valuable insight into Mr. Rodriguez' background of, inter alia, poverty, abuse, neglect and cultural adaptation that could and should have been presented to his sentencing jury. Even standing alone, the record of the evidentiary hearing does not support the lower court's conclusion that Mr. Rodriguez' trial counsel was not ineffective.

When taken with the additional penalty phase error alleged by Mr. Rodriguez but summarily denied by the lower court, it is clear that Mr. Rodriguez should be granted a new penalty phase.

B. TRIAL COUNSEL'S FAILURE TO

INVESTIGATE AND PRESENT MENTAL HEALTH MITIGATION

> I was not impressed with this gentleman's street smarts. I have seen street smart individuals, and this was not street smart.

(T. 236, Volume 10)(emphasis added).

In Strickland v. Washington, 466 U.S. 668 (1984); to establish a Sixth Amendment violation, a defendant must establish (1) deficient performance, and (2) prejudice. Id. at 687. Recently, the United States Supreme Court in Williams v. Taylor, 120 S.Ct. 1495 (2000), reemphasized the continuing vitality of the Strickland test and reiterated what the standards are with respect to capital cases and how they are to be properly applied.[2] The Supreme Court makes it clear that Mr. Rodriguez "had a right--indeed a constitutionally protected right--to

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[2]The Supreme Court granted relief to Mr. Williams, the first time the Court has granted relief on the basis of ineffective assistance of counsel as to the penalty phase of a capital case. As demonstrated at the hearing Mr. Rodriguez' case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the Williams decision.

provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams, 120 S.Ct. at 1513. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524. See also id at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." Id.

It is abundantly clear that Mr. Kalisch failed to conduct the "requisite, diligent" investigation into Mr. Rodriguez' background to unearth available and plentiful mitigation. Williams, 120 S.Ct. at 1524. Trial counsel's

failure to investigate caused the adversarial process to collapse completely at Mr. Rodriguez' penalty phase. The trial record itself reflects that, despite having over a year to prepare and investigate for the penalty phase, no adequate mental health investigation was conducted. Only after the jury had found Mr. Rodriguez guilty did counsel attempt to obtain evidence of mental health mitigation.

Mr. Rodriguez was tried during January 1990, and found guilty of first degree murder on January 31, 1990 (R.221-222). Yet it was not until February 7, 1990, a week after the guilty verdict, that trial counsel Scott Kalisch filed a "Motion to Retain an Independent Psychiatric Examiner". (R.228-229). This delay, in and of itself, constitutes ineffective assistance. See Blanco v. Singletary, 943 F. 2d at 1501-02. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." Id. See also Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), in which Mr. Deaton's trial counsel was found ineffective for

failing to investigate mitigation evidence until after the conclusion for the guilt phase. Mr. Deaton's trial counsel had testified at the Rule 3.850 evidentiary hearing that it was his practice not to prepare for penalty phase until the guilt phase was over. This Court granted relief because counsel's "shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id The same considerations apply equally to Mr. Rodriguez' case.[3]

On February 27, 1990, Dr. Haber completed an evaluation of Mr. Rodriguez, and on the same day was deposed by Assistant State Attorney John Kastrenakis. [4]See PCR. Supp. 633-686. It is clear from the transcript of

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[3] In Mr. Rodriguez' case, especially, the complexity of the case and the logistical aspects of investigating, procuring and presenting foreign national witnesses rendered it crucial that the penalty phase investigation be commenced as early as possible and not just at the commencement of the penalty phase.

[4] Admittedly, Mr. Kalisch requested and was granted another continuance of the penalty phase. However, the reason for this continuance was not to prepare for Mr. Rodriguez' penalty phase, but rather to allow Kalisch to work on a personal injury case in Puerto Rico. (R.230-231).

the deposition that Mr. Kalisch had never previously spoken with Dr. Haber and had no idea of either the scope of his evaluation or his conclusions and recommendations.

> [by Mr. Kalisch] My problem is I have never spoken to Doctor Haber and I don't know what Mr. Rodriguez told Doctor Haber, and based on that I don't know what I should advise Doctor --Excuse me, I mean Mr. Rodriguez, to do regarding what I believe to be a privilege between a client and a lawyer.

(PCR. Supp 638)(emphasis added). Mr. Kalisch was apparently so preoccupied with an out-of-state personal injury case that he was unable to make the time to either telephone or meet with Dr. Haber, his own mental health expert, prior to the state's deposition.

Mr. Kalisch's evidentiary hearing testimony both clarified and exacerbated the omissions by trial counsel reflected in Mr. Rodriguez' trial record. In addition to being manifestly unprepared for the penalty phase, he was simply unqualified to be conducting a complex capital trial and penalty phase unaided:

> [by Mr. Strand] Had you had any experience whatsoever in preparing a

> capital penalty phase?
>
> [Mr. Kalisch] No, I did not, no.
>
> Q. Had you attended any C.L.E.'s or anything like that?
>
> A. No, I did not, no.
>
> Q. Did you receive this training in law school relating to mental health mitigation for a capital case?
>
> A. No, I did not, no.

(T.203, Volume 10).

In addition, both the trial record and Mr. Kalisch's evidentiary hearing testimony made clear that Mr. Rodriguez had exhibited numerous bizarre behaviors throughout the trial proceedings. However, while Mr. Kalisch had observed numerous instances of Mr. Rodriguez' odd behavior before and during his trial proceedings, he had no clear idea of how that behavior might be symptomatic of a mental condition pertinent to mitigation:

> [by Mr. Strand]..Was Mr. Rodriguez your average client or was he different?

> [Mr. Kalisch] In what respect?
>
> Q. In his involvement in his own defense.
>
> A. He was on the low scale of a person who would become involved in his own defense. There are some clients who become very actively involved in their own defense, and others not involved in the defense at all.
>
> He was on the low scale of people who are involved in their defense.
>
> We didn't talk about the facts of the case or the upcoming trial.
>
> <u>He tried me a few times by some of the things he did, the way he acted, so my memory of Mr. Rodriguez is that he is a person who didn't really take an active part in his own defense</u>.
>
> Q. <u>Did he seem concerned that he may get the death penalty</u>?
>
> A. <u>No, he did not seem concerned</u>.
>
> Q. <u>Did that seem unusual to you</u>?
>
> A. <u>Well, that was my first death penalty case, and it certainly did seem unusual that somebody could be that blase about it, but he seemed blase about it</u>.

(T.212, Volume 10)(emphasis added).

* * *

> Q. Do you recall when Mr. Rodriguez was actually sentenced to death?
>
> A. Yes, I do, yes.
>
> Q. Could you describe his reaction?
>
> A. I believe, if I remember correctly, he was, let's see. He reacted by making a statement, making a gesture that was flippant, I mean, insofar as my opinion. That's what I remember.
>
> Q. Did this seem unusual to you?
>
> A. Yes.

(T.215 Volume 10)(emphasis added).

In addition, the trial record reflects, and Mr. Kalisch confirmed in his evidentiary testimony that Mr. Rodriguez exhibited unusual courtroom behavior:

> [Mr. Kalisch] Well, the record reflects that Mr. Cassidy (sic) pointed out the fact that the defendant would sleep in his chair, not pay attention, sleep, do things that were unusual.
>
> I believe that anyone would have to come to that conclusion.
>
> [by Mr. Strand] In your experience, is that unusual in your representation of

criminal defendants?

A. I thought it unusual, yes.

(T.212, Volume 10). Furthermore, on cross examination Mr. Kalisch admitted that he had some doubts about Mr. Rodriguez' ability to function normally. When asked it Mr. Rodriguez possessed "street smarts", Mr. Kalisch responded emphatically:

> I was not impressed with this gentleman's street smarts. I have seen street smart individuals, and this was not street smart.

(T.236, Volume 10)(emphasis added).

The sheer eccentricity of Mr. Rodriguez' behavior and demeanor in and out of the courtroom should have put Mr. Kalisch on notice that further investigation into Mr. Rodriguez' mental condition was warranted. Indeed, based on Dr. Haber's report, Mr. Kalisch requested and was granted an EEG examination. However, trial counsel failed to follow up the other recommendation provided by Dr. Haber - that neuropsychological testing be performed.

When counsel is aware, or should have been aware of a

client's mental health problems, reasonably effective representation requires investigation and presentation of independent expert mental health mitigation testimony at the penalty phase. See, e.g., Rose v. State, 675 So. 2d 567, 572 (Fla. 1996)(finding deficient performance for failing to investigate client's mental health background); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988)(once counsel is on notice of a client's mental health problems, failure to investigate by obtaining independent experts' opinions on applicability of statutory mental health mitigating factors is "so unreasonable as to constitute substandard representation, the first prong of the Strickland test"); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984)(failure to conduct proper investigation into client's mental health background when mental health is at issue is relevant to claim of ineffective assistance of counsel); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)(notice of mental problems "should be enough to trigger an investigation as to whether the mental health condition of the defendant was

less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong" such that "he may still deserve some mitigation of his sentence").[5]

Mr. Kalisch failed to investigate the connection between Mr. Rodriguez' outlandish conduct and his severe impairments. He failed to conduct full investigation into Mr. Rodriguez' brain damage and mental retardation. His failure to follow up on these glaring clues as to Mr. Rodriguez' mental retardation, low intellectual functioning, and brain damage was in part a result of his profound ignorance of mental health principles as they relate to capital litigation. This, again is demonstrated by his evidentiary hearing testimony:

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[5]The Eleventh Circuit Court of Appeals has also held that failure to investigate and present mental health mitigation constitutes the ineffective assistance of counsel. Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988); Thompson v. Wainwright, 787 F.2d 1447, 1450-51 (11th Cir. 1986).

[by Mr. Strand] Have you ever had any experience in representing someone who have (sic) mentally retarded before?

[Mr. Kalisch] Not that I recall no, no.

Q. What about organic brain damage?

A. No, I don't believe I ever did represent somebody with organic brain damage.

Q. Have you ever had to work with the Diagnostic and Statistical Manual of Mental Disorders in your legal career?

A. No, I have not.

Q. Have you ever opened it up?

A. No, I have not.

Q. Would it be fair to say you do not know diagnostic criteria for mental or brain disorders?

A. No.

Q. Would you know what to look for?

A. No, not really.

Q. In your law school, did you have training, they taught you that?

A. No, and I spent a few years i law school. I don't remember ever studying

> that specifically, no.

(T.213, Volume 10)

The effect of Mr. Kalisch's ignorance concerning mental health principles was further compounded by his failure to investigate Mr. Rodriguez' available family and cultural background, both in Cuba and Florida. Had he done so, Mr. Kalisch would have discovered a wealth of information which would have corroborated Mr. Rodriguez' mental retardation and brain damage as well as providing non statutory mitigation in its own right. Counsel has a duty to conduct an investigation for possible mitigation evidence. _See_ _e.g_ _Rose v. State_, 675 So.2d 567 (Fla. 1996), _Freeman v. State_, 25 Fla. L. Weekly S451(Fla. 2000). The duty to conduct a reasonable investigation is not lifted merely because the defendant was born and raised overseas. However, the lower court found that Mr. Kalisch was not ineffective for failing to investigate Mr. Rodriguez' family background in Cuba.

> This is not well taken on two counts. First, the defendant would not talk to Mr. Kalisch about his family in Cuba,

> and second, in the two years prior to the trial, Mr. Kalisch would not have been permitted entry to Cuba anyway.

(PCR.2724)

The trial court's finding is erroneous on both counts. First, the law is clear that even if Mr. Rodriguez had been unwilling or unable to supply details of his family, Mr. Kalisch was under a duty to investigate it anyway. See Deaton v. State, 635 So. 2d 4 (Fla. 1994). Second, the court's finding that Mr. Kalisch would not have been granted entry to Cuba is factually incorrect and refuted by the record. Mr. Kalisch's evidentiary hearing testimony shows clearly that he had not even considered the possibility of conducting any investigation into Mr. Rodriguez' background in Cuba, but had simply assumed that he would not be granted permission by the Cuban authorities to travel to Cuba to interview family members and others:

> [by Mr. Strand] Now, did you interview any of or family members in his hometown in Cuba?
>
> [Mr. Kalisch] No, I did not.

> Q. And were you able to do that at that time?
>
> A. I don't know. I didn't make a request to go to Cuba.I had thought at that time we were not able to go down to Cuba.

(T.212 Volume 10)

The record of the trial reflects that Mr. Kalisch did not investigate the possibility of obtaining travel documentation, nor did he seek the lower court's assistance in gaining access to the potential Cuban witnesses. As a result of this, he was unable to prepare the background materials that would further have rebutted the state's contention of Mr. Rodriguez' "street smarts". A wealth of information supporting the diagnoses of brain damage and mental retardation was discovered by post-conviction counsel. (See PCR. Supp 542-582).

This information was available to trial counsel. Had he interviewed the numerous potential mitigation witnesses in Cuba, Mr. Kalisch would have gained valuable insights into Mr. Rodriguez' mental health background. Armed with this information, he would have been able to discuss the

utility of intelligence testing and of a complete neuropsychological evaluation to an appropriately qualified mental health professional, and been able to provide collateral background material to aid the expert in the formulation of his opinion.

The State contended and the lower court found that Mr. Kalisch's decision not to present mental health mitigation was strategic, based on the fact that he did not want Mr. Rodriguez' prior convictions to be set before the jury. However, no tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Kalisch's trial "strategy" was based on ignorance and as such constituted ineffectiveness. See Eutzy v. Dugger, 746 F. Supp 1492, 1499 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990) (quoting Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986)

Mr. Kalisch specifically testified that had he known that Mr. Rodriguez was mentally retarded and suffered form brain damage, he would have presented that information to the jury:

> [by Mr. Strand] If, at the time of Mr. Rodriguez' penalty phase, when you were dealing with Dr. Haber, if he would have provided you with testing results that indicated that Mr. Rodriguez had an IQ of 64, or maybe a little less, and that on all neuropsychological tests it showed that he suffered from brain damage, would you have presented that to the jury?
>
> [Mr. Kalisch] Most likely, if the score level indicated mental retardation. I don't know that right now.
>
> Q. It's a --let's say hypothetically, <u>below 70 ia considered mentally retarded. Would you have presented that to the jury</u>?
>
> A. <u>More than likely, yes. I think that I should know that</u>.

(T. 210, Volume 10)

Given his lack of education or experience in capital litigation, Mr. Kalisch was unusually reliant on the findings of Dr. Leonard Haber, the clinical psychologist

appointed by the trial court after Mr. Rodriguez' guilt phase. To this extent, Mr. Kalisch's effectiveness in representing Mr. Rodriguez was impaired by Dr. Haber's omissions as detailed infra. However, without having conducted any research into likely areas of mental health investigation, and without having conducted any adequate investigation into Mr. Rodriguez' family history in Cuba, Mr. Kalisch was in large part responsible for Dr. Haber's constitutionally inadequate evaluation. Furthermore, he failed to follow up on either Dr. Haber's professional opinion that neuropsychological testing should be administered to Mr. Rodriguez, or to follow up on Dr. Haber's disclaimer of opinion as to Mr. Rodriguez' intelligence level. Dr. Haber had recommended both an EEG and neuropsychological testing. Mr. Kalisch only obtained an EEG performed by Dr. Noble David.[6] Evaluation by a

[6] Dr. Haber testified in his deposition that an EEG would not necessarily identify brain damage and that neuropsychological testing would be the recommended course of action. See PCR. Supp.242-282. Dr. Latterner confirmed Dr. Haber's recommendation when she testified that a normal EEG in no way proves the absence of brain

qualified neuropsychologist would have been able to ascertain with precision the type of brain damage suffered by Mr. Rodriguez, and provide a detailed scientific explanation as to the effects of this damage on Mr. Rodriguez' functioning. In addition, the battery of tests performed by a neuropsychologist would have included intelligence testing which would have disclosed and quantified Mr. Rodriguez low intellectual functioning. Without neuropsychological testimony, the jury were deprived of information that was vital to their sentencing determination, and Mr. Rodriguez was deprived of a reliable sentencing proceeding.

Even considering the fact that Mr. Rodriguez was apparently unable or reluctant to assist in his defense, this did not vitiate Mr. Kalisch's responsibility to investigate. Blanco v. Singletary. See also Rose v. State, 675 So. 2d 567, 571 (Fla. 1996).

Mr. Kalisch's performance at the penalty phase was

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damage. See T.126 Volume 10.

constitutionally deficient according to the standard set by Strickland v. Washington, 466 U.S. 668 (1984). Mr. Kalisch offered no reasonable tactical decision for these omissions. There can be no reasonable strategy for not fully investigating Mr. Rodriguez' mental health history in advance of the penalty phase. Moreover, there is no reasonable strategic decision for the lack of investigation into Mr. Rodriguez' prior family and mental health history. Even if Dr. Haber's evaluation had been constitutionally adequate, Mr. Kalisch was under an obligation to follow up his recommendations fully. He did not, and thus was ineffective.

C. DR. HABER'S CONSTITUTIONALLY INADEQUATE EVALUATION

> I would not want to give an estimate as to his intelligence because I know the right way to do this is to administer a formal intelligence test and given some time it could be done

(Deposition of Dr. Leonard Haber, PCR-Supp 655)(emphasis added). Mr. Rodriguez was afforded constitutionally inadequate assistance by Dr. Leonard Haber, in

contravention of Ake v. Oklahoma, 470 U.S. 68 (1985). The record of the trial proceedings itself indicates that much that should have been done was not in fact done. Following trial counsel's "Motion to Retain an Independent Psychiatric Examiner" (R.228-229), Dr. Leonard Haber, a clinical psychologist, was appointed and conducted an evaluation of Mr. Rodriguez (through a Spanish speaking interpreter) on February 22 and 27, 1990. He subsequently furnished a report to the Court and was deposed by the state attorney. Dr. Haber did not testify at Mr. Rodriguez' penalty phase. Dr Haber had however noted in his report that:

> Mr. Rodriguez' lack of education and poor performance on the Bender Gestalt Motor Test raised the possibility that he may be suffering an organic brain syndrome. The presence or absence of such a disorder is best made following a complete neurological and neuropsychological test examination.

(Report of Dr. Leonard Haber, PCR.Supp. 319)(emphasis added). However, trial counsel failed to retain or request a neuropsychologist, thus no neuropsychological

testing was performed prior to Mr. Rodriguez' penalty phase. Similarly, Dr. Haber's 1990 deposition reflects that he neither performed nor requested any psychoeducational or intelligence testing on Mr. Rodriguez. When asked if he would describe Mr. Rodriguez as a reasonably intelligent person, to which his response was:

> I would--<u>I would have trouble describing him as reasonably intelligent, and I wouldn't even try to estimate his intelligence</u>. I would say he's able to read and write.
>
> * * *
>
> <u>I would not want to give an estimate as to his intelligence because I know the right way to do that is to administer a formal intelligence test which given some time could be done</u>.
>
> * * *
>
> <u>He may be less than average intelligence</u>.

(PCR. Supp. 665)(emphasis added).

Moreover, Dr. Haber, had neither requested nor was provided with any background materials concerning Mr.

Rodriguez' family history, educational background and medical history, without which he admitted a complete evaluation could not be performed. As noted supra, in 1990, Dr. Haber had explicitly declined to form an opinion as to Mr. Rodriguez intelligence level because neither he nor anyone else had administered any intelligence testing to Mr. Rodriguez at that time.

At the evidentiary hearing, Mr. Rodriguez presented compelling testimony from a qualified mental health expert who administered both intelligence and neuropsychological tests to Mr. Rodriguez. She testified to the existence of statutory mental health mitigating factors, as well providing nonstatutory mitigating factors. These tests were exactly what Dr. Haber had in 1990 suggested should be done, but were never followed up on.

The testimony of Dr. Ruth Latterner, a Board Certified neuropsychologist, was that she evaluated Mr. Rodriguez in Spanish in September 1995. (T.114, April 5, 1999). She explained first how her psychoeducational and intelligence

tests showed that Mr. Rodriguez fell within the lowest percentile of intellectual functioning within the population:

> [Dr. Latterner] Well, the IQ test is used in assessing neuropsychological functioning. But first I gave him the IQ test, the WAISR with some subtests in Spanish; then as a double check on that, because he is a bilingual individual with some cultural Spanish and educational Spanish, I administered the Woodcock Brief Cognitive Cluster which is, what it does is like it's a brief intellectual test to double check the Wechsler, the WAISR or Wechsler IQ test.
>
> [by Mr. Strand] Is a WAISR test a standard type test used through the years or something special?
>
> A. It's standard.
>
> Q. And what were the results of the WAISR test?
>
> A. His verbal IQ was 67, his performance IQ was 65, and his full scale IQ was 64 which is at the first percentile.
>
> Q. And you said that the complete IQ was what 60..?
>
> A. The full scale IQ was 64.

> Q. 64. And you said the first percentile, the first percentile of what?
>
> A. The first percentile of all individuals form the normative pool at the individual's age.
>
> Q. So in plain English, that would mean that 99 percent--
>
> A. 99 percent did better than he did.

(T.118, Volume 10). Dr. Latterner explained that Mr. Rodriguez' WAIS-R scores placed him in the mildly mentally retarded range:

> [by Mr. Strand] Is there a cut off of the number as of when someone is mentally retarded?
>
> [Dr. Latterner] <u>Yes, below 70 is mentally retarded</u>.
>
> Q. <u>And Mr. Rodriguez scored 64</u>?
>
> A. <u>Yes</u>.
>
> Q. And you said that would be mild mental retardation?
>
> A. Yes. It's called mild mental retardation, or educable mentally (sic) retardation.
>
> Q. And how a person like Mr. Rodriguez' mild mental retardation, would his

intellectual impairment be readily noticeable to an individual without any training?

A. No. A mild or educable mental retardation is not noticeable if an individual presents with adequate social skills.

(T.139, Volume 10)(emphasis added).

Dr.Latterner further testified that further intelligence tests were consistent with and corroborated her WAIS R findings. She also stated that the consistency of the test results, as well as her own clinical judgment showed that Mr. Rodriguez was not malingering to achieve a low score. In fact, according to Dr. Latterner's testimony, Mr. Rodriguez was attempting to appear more intelligent than he actually was.

[by Mr. Strand] So, in your expert opinion, would an individual who had not taken that test, would they be able to tell?

[Dr. Latterner] Small parts of each test correspond to each other. No.

Q. And is that how you could determine whether they are faking it, or malingering?

> A. That's one of the ways
>
> Q. Okay. Now additionally, is there anything else you did to keep an eye out for malingering?
>
> A. My clinical judgment. My clinical impression is probably the most important.
>
> In my opinion, this individual wanted very much to be positively perceived. He wanted to--he had a great investment in appearing right. So that he often was motivated not so much to succeed on the task but to be positively perceived by me, or, I suppose, any authoritative adult, so that I thought he was trying very hard to do well.
>
> And the fact is that he denied all problems, even some that were very apparent.

(T.120 -1211, Volume 10)(emphasis added).

In addition to intelligence testing Dr. Latterner conducted a standard neuropsychological battery of tests which determined that Mr. Rodriguez suffered severe organicity. She explained the effects of Mr. Rodriguez' brain damage on his functioning:

> [Dr. Latterner] Well, his impairment is on the areas which are categorized by the testing.

> In other words, he has some memory impairment. He has language impairment. He has difficulty in concentration. <u>But his most significant impairment is his function limit of the higher cortical, that and reasoning problems involving judgment and organizational capacities</u>.
>
> * * *
>
> [by Mr. Strand] Could you describe Mr. Rodriguez' impairment? If you were to put an adjective on it, is slight? Horrendous?
>
> A. <u>In my opinion, it fits the category of severe</u>.

(T.131, Volume 10)(emphasis added).

Dr. Latterner further testified that in addition to the standard batteries of examinations, she reviewed numerous background materials, including summaries of interviews conducted during postconviction investigation with family members and school teachers in Cuba. She also conducted a clinical interview with Mr. Rodriguez. She testified that all of this material further corroborated her opinions as to Mr. Rodriguez' functioning.

The State contended, and the lower court found that

> When cross examined about adaptive

> functioning [Dr. Latterner] conceded that a person whose IQ was less than 70 would not be retarded if they are not impaired in adaptive functioning. She further admitted that some of the defendant's adaptive ability was higher than his IQ indicated.

(PCR. 2723).

* * *

> ..low IQ does not mean mental retardation. For a valid diagnosis of mental retardation under DSM IV, there must be deficits in the defendant's adaptive functioning. All the evidence points to no deficits.

(PCR. 2724). The trial court's finding is factually incorrect and is not borne out by the record. Dr. Latterner specifically testified that Mr. Rodriguez met the criteria set forth by the DSM IV for deficient adaptive functioning:

> [Dr. Latterner] The explanation says the following--<u>at least two of the following areas need to be impaired--and impaired meaning they are referring to the standard expected for his or her age, for his or her cultural group</u>.
>
> These are the areas: Communication, self care, home living, social/interpersonal skills, use of

> community resources, self direction, functional academic work, leisure, health and safety.
>
> * * *
>
> The communication skills, which is language, verbal and non verbal language, but verbal language in particular fell below the normal range.
>
> Functional academic skills also fell below the normal range.

(T.143, Volume 10). The DSM definition clearly does not prelude individuals having higher adaptive functioning in some areas. The criteria for adaptive functioning, as stated by Dr. Latterner and defined by the DSM IV requires at least two areas to be impaired. Based on Dr. Latterner's testimony, Mr. Rodriguez fulfilled these criteria. The State's attempt, ratified by the trial court, to impose an additional prong to the definition - that all areas of adaptive functioning must be impaired for a diagnosis of mental retardation - is not contained within the DSM and is refuted by the evidence.

As a result of her complete evaluation of Mr.

Rodriguez, Dr. Latterner also opined that Mr. Rodriguez was under the influence of an extreme mental and emotional disturbance at the time of the offense, a statutory mental health mitigating factor. (T. 134-135, Volume 10). Dr. Latterner also was of the opinion that Mr. Rodriguez' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense, another statutory mitigating factor. (T. 135, Volume 10).

Furthermore, Dr. Latterner's testimony supported a plethora of non statutory mental health mitigation. For example, his mental retardation and low intellectual functioning, his organic brain damage, and his impulsivity and poor memory functioning all should have been considered by the sentencing jury, in addition to the statutory mitigating factors.

At the evidentiary hearing, the State attempted to refute Dr. Latterner's conclusion, through the testimony of Dr. Haber. Dr, Haber relied solely on his 1990 evaluation. (T.329, Volume 12). He did not have any

notes from the 1990 interview. He relied on his memory of seeing Mr. Rodriguez nine years earlier.[7]

Dr. Haber's 1999 testimony represents a notable swing from his opinion in 1990 as expounded in his report and deposition. Dr. Haber testified that his own nine year old subjective mental status examination definitively showed that Mr. Rodriguez was not mentally retarded.

This is in marked contrast to both his 1990 report and deposition in which he stated that he could not estimate Mr. Rodriguez' intelligence without testing. In fact, at a capital evidentiary hearing in 1990 Dr. Haber testified that he was not sure as to the range of intelligence quotients that constitutes possible mental retardation. Even had proper testing been administered, Dr. Haber would have lacked the psychoeducational

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[7] Interestingly, although Dr. Haber was able to remember a single forensic interview out of thousands, he was unable to remember the name of any capital jury trial or post-conviction hearing where he testified on behalf of the defense. Although he testified he had appeared on behalf of capital defendants the names of the defendants or the defense attorneys involved eluded him. See e.g. T.342, Volume 12.

expertise to form an opinion as to Mr. Rodriguez' mental retardation in 1990, since he appeared confused about even the basic cutoff points in IQ level which are a necessary element in establishing mental retardation.[8] Furthermore, Dr. Haber had performed no tests which would confirm or disprove that Mr. Rodriguez' adaptive functioning was impaired to the level of mental retardation. In addition, as Mr. Kalisch had testified, Dr. Haber was given no background information from family members, neighbors, schoolteachers, etc., relating to Mr. Rodriguez'

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[8] Dr. Haber testified in the Rule 3.850 evidentiary hearing in the case of State v. Sonny Boy Oats, in May 1990, just four months after he examined Mr. Rodriguez. The transcript of that hearing reflects that at that time, Dr. Haber was not aware of the basic DSM definition of mental retardation.

> [Dr. Haber] 67 is borderline mentally deficient and 70 is borderline intelligent.
>
> * * *
>
> The cutoff is 70-80 or 71-80. I don't recall.
> (T.338, 7 April 1999).

upbringing in Cuba.[9] Dr. Haber's views as to Mr. Rodriguez' "street smarts" were based solely on his cursory and subjective interview, nine years before through a bilingual interpreter, rather than on objective test data, and family background materials. Dr. Haber's evidentiary hearing testimony did not refute Dr. Latterner's test results and diagnoses of mental retardation and brain damage, which supported findings of statutory and non-statutory mental health mitigating circumstances. Only in hindsight did Dr. Haber feel confident in excluding mental retardation as a diagnosis for Mr. Rodriguez. In essence, Dr. Haber's view as modified for the 1999 hearing, was that no intelligence testing was necessary because Mr. Rodriguez was not mentally retarded - an oxymoron by any logical analysis.

Dr. Haber's report had recommended that both neuropsychological testing and an EEG be performed as a

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[9] Dr, Haber testified that he did not recall if he had been supplied with materials from Mr. Kalisch.

result of his finding of preliminary signs of brain damage. The evidentiary hearing testimony reflects that while the EEG was performed, the neuropsychological testing was not. (T.297, Volume 12). Furthermore, Dr. Haber stated that he was not and is not a neuropsychologist and did not conduct a neuropsychological battery of tests.(T. 342, Volume 12)

Again, Dr. Haber's opinions vary dramatically with hindsight. In 1990 he recommended testing which would have identified the degree and severity of Mr. Rodriguez' brain damage and his cognitive impairments. In 1999, he announced definitively that the brain damage he postulated was not such as to provide the basis for statutory mental health mitigating circumstances.

In summary, the evaluation as performed by Dr. Haber was superficial, and totally inadequate to provide a basis for his opinion that no statutory mental health mitigating circumstances applied. The lower courts' order stating that "the defendant's claims that the testimony of Dr. Latterner overcomes[Dr.Haber's] conclusions are noting

short of absurd" (PCR.2724), is refuted by the trial record. Dr. Latterner simply extended and performed the objective tests which Dr. Haber recommended but was not qualified to perform and did not perform in 1990. As a result, Mr. Rodriguez was denied his constitutional right to a competent mental health evaluation at his capital penalty phase, which would have established the existence of statutory and non statutory mitigating factors. None of the additional testimony solicited by the State at the evidentiary hearing bolstered Dr. Haber, and Dr, Latterner's opinion remains unrefuted. The State failed to rebut Mr. Rodriguez' mental retardation, low IQ, and brain damage. Had this evidence been presented to the jury, a life sentence would have ensued.

D. PREJUDICE

In addition to deficient performance, Mr. Rodriguez also established prejudice, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a

probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. If "the entire postconviction record, viewed as a whole and cumulative of []evidence presented originally, raise[s] 'a reasonable probability that the result of the [] proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams v. Taylor, 120 S.Ct. 1495, 1516 (2000).

Mr. Rodriguez has established prejudice, as confidence in the jury's death recommendation is undermined by counsel's deficient performance. There is more than a reasonable probability that had counsel properly investigated his client's mental health status, properly prepared and utilized mental health expert testimony, including neuropsychological and psychoeducational testing, the result would have been different. Compelling statutory and nonstatutory mitigating evidence would have been available, as Mr. Rodriguez demonstrated at the evidentiary hearing, yet it was not presented at trial.

The testimony presented at the evidentiary hearing showed that a plethora of statutory and non statutory mitigating mental health factors were available to Mr. Kalisch, but due to his failure to investigate, they were never heard by the jury. When the jury was deciding Mr. Rodriguez' fate, they did not know he was mentally retarded, with an IQ in the lowest percentile of the population, or that he was brain damaged. These facts, combined with the fact that the state allowed the codefendant to plead guilty to second degree murder and all of the non-statutory mitigation listed, would have ensured the result would probably have been different. The record establishes that Mr Rodriguez was suffering from extreme emotional and mental disturbance at the time of the crime, and that his ability to conform his conduct according to the law was substantially impaired. It established his mental retardation, his low intellectual functioning, his organic brain damage, his impulsivity, his poor memory, his poor judgment, his educational impairment and his communication difficulties. Had Mr.

Kalisch presented such mental health evidence, the jury would have recommended a life sentence.

Furthermore, the evidence offered by mental health professionals would have been further buttressed, had the jury been presented with evidence pertaining to Mr. Rodriguez' family background and childhood in Cuba.[10] Such evidence would also have shown that Mr. Rodriguez suffered from an impoverished childhood, that he was exposed to toxic chemicals while young, that his mother was malnourished during pregnancy, that he was severely physically abused as a child, that he was constantly taunted by other children, that he was hyperactive, that he was physically uncoordinated, that many family members were mentally ill and/or deficient, and that he was abandoned by his parents. All of these factors

[10] The scope of the evidentiary hearing was narrowly defined to mental health issues only. In practical terms however, it is impossible to disentangle family history issues from mental health issues neatly. Mr. Rodriguez was thus deprived of his rights by the failure of the lower court to grant a full evidentiary hearing on ineffective assistance of counsel.

corroborate and support the findings of Dr. Latterner as to the mental health mitigation. Again, the jury was entitled to hear this evidence, without which its sentencing determination was not reliable. Mr. Rodriguez was afforded ineffective assistance by Mr. Kalisch by Mr. Kalisch's failure to investigate and present those mitigating circumstances. Mr. Rodriguez' sentencing hearing was not a full and fair hearing.

The lower court's analysis of the prejudice element is clearly erroneous. First of all, the lower court stressed that the mental health evidence presented by Mr. Rodriguez at the evidentiary hearing was inconsistent with the facts of the crime (PCR. 2724). Even if the facts of the case were exactly as portrayed by the State at Mr. Rodriguez' trial, this sweeping conclusion is not borne out by the reocrd. However, as Mr. Rodriguez pleaded in his Rule 3.850 motion there are significant issues relating to Mr. Rodriguez' guilt phase which require evidentiary development and which the lower court summarily denied. <u>See</u> Argument 3 <u>infra</u> Had a full evidentiary hearing been

afforded Mr. Rodriguez on all claims requiring factual development, the lower court's statement would have been refuted.

Furthermore, the lower court notes in its order denying Rule 3.850 relief that:

> In a career of more than 20 years the undersigned has never before or since witnessed a jury when being polled after the guilt phase shouting their "yeas" so loudly that spectators entered the courtroom to see what was going on

(PCR.2726)

Again, the opinion of the jury as to Mr. Rodriguez' guilt is irrelevant since it in no way diminishes the prejudice caused by Mr. Kalisch and Dr. Haber's failures at penalty phase. The lower court's analysis is factually incorrect, and the analysis based on irrelevant predicates. The lower court's analysis of the jury's reaction at Mr. Rodriguez' guilt phase is especially flawed, given the numerous instances of strange or unusual courtroom behavior deminstrated by Mr. Rodriguez. Mr. Rodriguez' apparent disregard for the proceedings, his sleeping

through portions of the trial cannot but have fostered a particularly negative impression of Mr. Rodriguez on the part of the jury. It was thus imperative that the jury be offered an explanation of his beahavior to dispel this negative impression, as well as to "have influenced the jury's appraisal of his moral culpability."(Williams v. Taylor,120 S.Ct. 1495 at 1515). Had the jury been offered an plausible explanation of Mr. Rodriguez' courtroom behavior in terms of his mental impairments, a different result may well have arisen.

The cumulative effects of the evidence presented and that which was summarily denied means that neither the lower court nor the jury would have been free to ignore the evidence of mitigation presented by Mr. Rodriguez at the evidentiary hearing, had it been presented at trial. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved").

Mr. Rodriguez need not establish his claim by a

preponderance of the evidence; rather the standard is less than a preponderance. Williams, 120 S.Ct. at 1519 ("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ..."). A proper analysis of prejudice also entails an evaluation of the totality of available mitigation--both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515.[11]

This Court has long held that the mere fact that trial counsel presented a small amount of testimony at a penalty phase does not constitute a grounds for denial of relief to Mr. Rodriguez. This Court has not hesitated to

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[11] To this must be added the available evidence of non mental health mitigation pleaded but summarily denied by the lower court.

determine that a capital defendant received ineffective assistance of counsel despite the presentation of some mitigation at the time of trial. For example, in State v. Lara, 581 So. 2d 1288 (Fla. 1991), this Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. In this case defense counsel did no penalty phase mitigation investigation. He did minimal interviews. He obtained no documents. He didn't talk to his own mental health expert. He merely put Mr. Rodriguez' wife on the stand cold and asked if Mr. Rodriguez was a good father and husband. The jury was left to decide Mr. Rodriguez' fate in a vacuum. The result would have been different if the jury had known the totality of the of Mr. Rodriguez' wretched life and impairments Prejudice has clearly been shown.

In Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), this

Court granted penalty phase relief to a capital defendant who had been convicted of a strangulation murder and received a unanimous jury recommendation for death. There, this Court noted that at the penalty phase, trial counsel did present "some evidence in mitigation at sentencing" which was "quite limited." Id. at 110. n.7. Nonetheless, this Court granted relief, finding that "[a]t his 3.850 hearing, Hildwin presented an abundance of mitigating evidence which his trial counsel could have presented at sentencing." Id. at 110. This evidence included two (2) mental health experts, who testified to the existence of mental health mitigating factors, as well as a number of nonstatutory mitigating factors. Id. This Court found that Mr. Hildwin did not receive an adversarial testing at the penalty phase despite the presentation of some evidence at the penalty phase, despite a 12-0 death recommendation, and despite the existence of four (4) aggravating circumstances. In Rose v. State, 675 So. 2d 567 (Fla. 1996), this Court also granted penalty phase relief to a capital defendant when

the record reflected that "counsel never attempted to meaningfully investigate mitigation" and did not hesitate to find prejudice:

> In short, Rose has demonstrated, largely without dispute, that there was substantial mitigation present and available in this case and was not investigated or presented by defense counsel. In fact, the trial court, in subsequently sentencing Rose after the penalty phase in question, found no mitigating circumstances to have been established by the defense.

Id. at 572.

Mr. Rodriguez was prejudiced by counsel's failures notwithstanding the existence of aggravating factors. In cases such as Mr. Rodriguez', where trial counsel failed to present available substantial mitigation, this Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, 675 So. 2d 567 (Fla. 1996); (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented [at the penalty phase]); Hildwin v.

Dugger, 654 So. 2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla, 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). This Court has also granted relief based on penalty phase ineffective assistance of counsel when the defendant had a prior murder conviction. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994). The same considerations should apply to Mr. Rodriguez. Relief should be granted.

ARGUMENT 2

SUMMARY DENIAL OF THE NON MENTAL HEALTH PENALTY PHASE CLAIM

A. INTRODUCTION

> ....the graphic description of [Mr. Rodriguez'] childhood, filled with abuse and privation....might well have influenced the jury's appraisal of his moral culpability.

(Williams v. Taylor,120 S.Ct. 1495 at 1515) (emphasis added).

The lower court erred in not allowing full evidentiary development of Mr. Rodriguez' penalty phase ineffective assistance of counsel claim and other claims relating to Mr. Rodriguez' penalty phase. The lower court granted an evidentiary hearing limited to the question of mental retardation at the penalty phase of the trial only (PCR.2534), but summarily denied the remainder of Mr. Rodriguez' penalty phase claims. In particular, the court did not allow evidentiary development of facts that could have been discovered by trial counsel relating to evidence

of non-statutory mitigation, especially evidence of abuse, neglect and poverty. The court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

The lower court's denial of the major part of Mr. Rodriguez' penalty phase claims flies in the face of the clear requirements of the law. It makes no use of the record or files in this case to show conclusively that Mr. Rodriguez is not entitled to relief. It thus ignores the express requirements of Rule 3.850 and the substantial and unequivocal body of case law from this Court holding that courts must comply with the Rule.

B. THE FAMILY, SOCIAL AND CULTURAL MITIGATION

There existed and exists a wealth of non-statutory mitigating evidence that the lower court should have heard, both as non statutory mitigation in its own right and as further support for the conclusions of Mr. Rodriguez' mental health expert. Mr. Rodriguez was not afforded the opportunity of putting on evidence from family members and other individuals who could have shown his abusive, poverty stricken and neglected early life. This in turn would have provided further proof of Mr. Rodriguez' allegations that he was afforded ineffective assistance of counsel at his penalty phase, and that the resultant prejudice from these deficiencies was overwhelming. Mr. Rodriguez was simply not afforded the opportunity to show the compelling mitigation arising from Mr. Rodriguez' wretched life history that was readily available from family members, friends, teachers and cultural experts.

This evidence was available simply by interviewing Mr. Rodriguez' family in Cuba and elsewhere, yet counsel unreasonably and without a strategic reason failed to

investigate, prepare, and present it. Counsel failed to exercise due diligence to discover this information.

Had this information been presented, Mr. Rodriguez' sentencing judge and sentencing jury would have learned of Mr. Rodriguez' traumatic history which demonstrated both that he was incapable of committing the acts alleged by the State, and mitigated the role, if any, he had in the death of Mr. Saladrigas. There is a reasonable probability that had this information been presented, the result of Mr. Rodriguez' trial and sentencing would have been different.

Juan David Rodriguez, known as David, was born June 26, 1956 to Antonia Lopez and Raul Rodriguez in a caretaker's shack outside the tiny sugar cane processing town of San Germán, Cuba. In the extreme poverty which led to Cuba's 1959 revolution, those living in the rural, eastern region of Cuba suffered the worst of all. The *campesinos* of this area were well-known as being the poorest people in the country and thus were the biggest supporters of the revolution. A long day's drive and a

world away from the glitz of Havana, David's family - like other *campesinos* of eastern Cuba - had no school to attend nor money for medical care. No matter how hard they worked, there was never enough money for even the basic necessities.

With her great aunt serving as mid-wife, Antonia gave birth to David in her mother's dirt-floored shack with neither running water nor electricity. Even before David was born, the family knew something would be wrong with Antonia's baby because she had gotten so skinny during her pregnancy. For them, that was a sign of a defect in the fetus. But there was nothing Antonia could do about it. With no money, she never saw a doctor or received any of medical advice whatsoever during her pregnancy. There were no vitamins nor was there any effort to eat the right foods because the right foods did not exist for the poor people of Cuba. Antonia felt lucky to get enough beans and rice to ward off hunger. With no pre-natal care or advise, Antonia did not know of the dangers of alcohol to the unborn fetus. She freely drank straight shots of rum

at parties while she was pregnant with David.

Next door to where Antonia was living while she was pregnant with David, were about forty 55-gallon drums containing an extremely toxic chemical used to fumigate the sugar cane fields. Antonia and her family complained of the strong smell of the chemical as it leaked from the containers into the soil the tanks were stored on. Later, during Hurricane Flo in 1963, these tanks of toxic chemicals broke open and mixed with the water that rose to waist level and filled David's house for four days. The tanks just floated away and were never replaced.

David's mentally slow father, Raul, was not around for the birth of his son. Antonia's relationship with Raul, her common-law husband, had deteriorated to the point that they did not live in the same house. After their first child, Elisa, was born in 1955, Antonia did not want anymore children. But within months she became pregnant with David and found herself not only with an unwanted pregnancy but with the realization that Raul was crazy. Unable to cope with a man who had the mentality of a child

combined with irrational fits of jealousy, Antonia fought and argued with Raul during her entire pregnancy with David. Raul, obsessed with Antonia, would not allow Antonia to dance at a party or talk to other men. After becoming pregnant with a third child by this man, Antonia finally told slow-thinking Raul that she had enough. She had tried to guide him and teach him the proper way to behave but finally had run out of patience. Raul was crushed, begging Antonia to let him stay. Finally, with tears in his eyes, Raul told his wife, "I guess I'm not the man of your life."

Though Antonia had to live with her mother, with no means to support her three children, she felt she had put up with Raul's bizarre behavior for long enough. In addition to Raul's mental slowness, he was hyper-active. Raul was never able to sit still long enough to have a conversation. He was constantly jumping up - going in one door and out another. One minute he'd be extremely nervous and agitated, the next minute he'd be solemn and uncommunicative. Raul also drank as much alcohol as he

could get his hands on which to made him talk non-stop.

Raul came from a family with a history of mental illnesses. Though too poor and isolated to ever even consider seeking help for their mental problems, several members of Raul's family needed psychiatric care. Raul's mother, in addition to being a hypochondriac, drove her family crazy with her non-stop rambling and constant worrying about everything - "Who's in that car that's going by? What do they want? What are they doing? Where are they going? Look at that! What happened there?" She could go on for hours, worrying about nothing. She took Valium and whatever other pills she could find for her "nerves" but nothing seemed to do the trick. Raul's mother loved to cause problems and fights in the house by continually needling family members with comments about things she knew would bother them. When she wasn't causing problems between people in the house, Raul's mother complained non-stop about her imaginary diseases and medical problems. Every doctor in town knew her. "I'm going to the doctor," she'd state. "No, mama, you don't

need to go." "Yes, I'm going." "No, mama, please don't go." Back and forth until she walked out the door. Raul and his brothers and sisters felt like they were going crazy living with their mother. Raul's alcoholic father would take off from the house and disappear for months at a time.

Many of Raul's family members, including grandparents, brothers, sisters, and nephews are mentally ill. Some are described as "nervous", others are as described as "psychiatric cases."

Though Raul was mentally slow, little David had bonded with his father. When Raul left, David cried and cried for him. As he got older, David always asked for his father and could not understand why he never came to visit him. Raul, taking revenge on Antonia for kicking him out, never came back to see David until he was school age. Even then, Raul would not visit on a regular basis. He'd stop by every couple of years. Raul never treated David as a son or took care of him as a father should. During David's entire life he never had a father figure to guide

him.

In addition to being abandoned by his father, David was also abandoned by his mother which made him very sad. With three small children and no husband, Antonia had to work - first as a janitor in the school and later as a waitress in a small cafeteria. She left her children to be raised by their grandparents while she moved back into the house of the woman that had raised her - her grandmother Justina. When Antonia was a little girl, her grandmother Justina would tell Antonia's mother that Antonia had a hard brain. Justina would try to teach her how to read and write in the house but Antonia didn't have much capacity to learn or understand. She just wasn't very smart, Justina would say.

Knowing that her parents already had too many living expenses without taking on her three children, Antonia struggled to make enough money to clothe her children. She worked night and day at the cafeteria, rarely having much time to spend with her children. And when she was with them, she was tired. The family was so poor that if

one of her kids had shoes, the other ones didn't. Her children, like the others at the house, had no toys. David would play baseball with a crushed tin can. As hard as she worked, Antonia could never catch up.

From the time David was a baby, his family could see signs of his mental retardation. He was slower to learn how to walk and talk than the rest of the children. One of his eyes was crossed and he had a crooked smile. Once David did learn to walk, he could not sit still. David was hyperactive - running in one door and out another. He was either extremely agitated and nervous or he would sit alone staring into space while sucking on the back of one hand while massaging his ear with the other - a habit his family could not break, no matter how many times they slapped his hand - until he started smoking as a teenager. David was afraid of everything. He'd start crying when anybody raised their voice. Family members started pointing out that David was just like his father. His ears even stuck out the same way. But despite the signs of mental retardation, there was no mental health expert

to take David to. In fact, as a baby and toddler David was never seen by any type of doctor. There simply was no money. Also, raised by his grandparents in a large family who struggled to get enough food to eat and shoes on everyone's feet, there really was not much interest in trying to figure out what was wrong with David. They just left him to grow up. Family members now wonder if David could have been saved had he received psychiatric treatment as a child.

When David started school at the age of about six, his teachers could see that they had a child with severe mental problems. In addition to being mentally retarded, David could not sit still or pay attention to what was going on in the classroom. He was constantly out of his chair - running to the window, running to look out the door, pinching or wrestling with his classmates. He would bend up his notebook, write on his hand, eat the eraser off his pencil, shave the paint off the pencil with a pocket knife, and bite the tip of the lead off so he could jump up and sharpen the pencil over and over again. While the rest of the students were

copying the lessons off the chalkboard, David's notebook was totally blank while he stared out the window, unable to comprehend what was going on.

One of David's teachers scolded his mother Antonia, who was working as the school janitor, for hitting David because he was not doing well in school. David just did not have the mental capacity to follow what was going on. No matter how much he was beaten, David could not learn.

David's second and third grade teacher took a special interest in David. Even with 36 students in one room, ranging from grades one to six, this teacher saw that David needed a lot of extra help. To keep him from jumping up and running around the classroom, she put David's chair right up next to hers at the front of the class. The teacher also stayed at David's grandmother's house some nights rather than going back into town. At the house, she spent hours working with David trying to get him to understand. She told him that if he could just learn a little bit the other kids at school would stop making fun of him - stop calling him "stupid" and "idiot".

But no matter how much she and David both tried, David did not advance. He could not even sit still for her lessons. By the end of third grade, David could barely write his name - some of the letters were too large, others were too small. David couldn't read - in fact he couldn't recite the alphabet without getting some of the letters reversed. He tried to count on his fingers but always made mistakes. But in those days, no matter how little a student had learned, he was not held back a grade. David kept getting bumped up to the next class despite his not making passing grades.

During recesses, David did not have the coordination to play with the other kids. He couldn't throw or catch a ball. David also lacked the desire to compete. When it came time to picking teams, David was always the last one picked. Nobody wanted him because he did not even try to win the game.

David always had to be watched or he would put himself in danger - climbing up trees, trying to ride bulls, or jumping on any horse he could find. Once he tied himself

to a cow and the cow took off running - dragging David right behind him. Another time David climbed to the roof, draped a sheet over his shoulders and was ready to jump - thinking he could fly. Fortunately an uncle caught him in time. David was impulsive - he would act without thinking. He couldn't differentiate between what was dangerous and what wasn't. Everyone was afraid he would kill himself. He was constantly being told, "Don't do this," and "Don't do that." David never seemed to be able to slow down - he did everything fast. Watching David was a full-time job that everyone was getting tired of doing.

Unfortunately for David, there were no special schools or programs for mentally retarded children like there are today. There were no psychologists to send him too. Today, David's teachers insist they would have sent him to a school for mentally retarded children.

At home, David's life was not any better. The kids in the neighborhood called him "bobo" (stupid) and made fun of him for being retarded. David, the "bobo" was the one they always made go chase after the ball when it was

thrown out of range. But David never complained, he just went after the ball. He didn't even understand that they were making fun of him. Even David's own family constantly yelled at him, "You're crazy." He was seen as the "headache of the family" because somebody needed to watch him every second or he would disappear or hurt himself. Every time they turned around, David was gone and somebody would have to go look for him.

David's grandmother put her son, David's Uncle Eloi, in charge of disciplining the boy. Uncle Eloi, a huge, powerful man who liked to drink, resented that he had to spend so much time looking for David. When he finally did find the boy he let loose on him with a leather belt or a thick rope used to tie up the animals - strapping him in the face, neck, wherever the strap landed. He'd push David into a corner or throw him down and kick him in the head from room to room. David screamed and tried as best he could to protect his face. Sometimes David was naked when he was beaten, sometimes he was dressed. Uncle Eloi also liked to grab David by the hair and smash his head into

the wall. Uncle Eloi would explode with all the anger and resentment he felt toward this retarded boy, his face red with rage. He'd scream at David as he beat him over and over again - "You bastard - I'm going to kill you! You crazy idiot!" Uncle Eloi whipped David until he was too tired to continue or until David's grandfather would pull him off, afraid that Uncle Eloi actually would kill David.

David's grandfather would also take the belt to him. When David saw his grandfather, he ran. The times David visited his mother at his great-grandmother Justina's house he'd get hit too. Justina was known for her extreme punishments. She used to make David kneel on a piece of tin in which she had made little puncture holes. Each puncture created a spike which stood up to torture David when he had to kneel on it. Great-grandmother Justina also liked to take a vine covered with stickers and use it to whip David's legs. Antonia, also having received this punishment as a child, used it on David as well. For not studying, both Antonia and Uncle Eloi punished David by

having him kneel on the dirt floor behind the door, which was full of little pebbles. David would cry and cry until they let him finally get up.

Nobody else in the family - or even in the neighborhood - received as many beatings and punishments as David did. Nobody seemed to understand that David simply could not control himself. Though he tried to be good, he did not know how. David was often punished for things that were beyond his control - such as not learning in school or forgetting to get something on one of the constant errands he was sent on. He'd get hit if he got home late or if he left without permission. He'd get hit for riding two on a horse or for getting his clothes dirty.

One time Uncle Eloi, after beating David with the belt, tied him to a tree, naked, because he had taken off with his cousin to go swimming in a lake. The cousin did not get beaten or tied to the tree because his father stood up for him. David had no father to protect him.

In addition to being hit in the head by Uncle Eloi,

David also suffered head injury after head injury because he was so clumsy that he constantly walked into doors and walls. David almost always forgot to duck as he went through a low doorway and bumped his head. David also liked to box, but because of his lack of coordination he often was the recipient of the majority of the hits to the head. He'd come home with bruises all over his face or a bloody nose.

One of David's worst head injuries was when he fell off a horse and landed on his head. Family members found him lying on the ground unconscious, his head covered with blood. One of David's uncles revived him by pounding on his chest. Afterwards, family members saw a big change in David. He was even slower and stupider than before.

Because David was so simple-minded, his family had put off for years teaching him how to ride a horse because they were afraid he'd hurt himself. In the rural area where they lived, most kids had learned to ride a horse by age eight. It was a necessity - nobody had cars. Riding a horse was the only means of transportation for most

people. Children were taught to ride at an early age so they could do errands for the family. Living in the countryside, somebody always needed to be sent into town to pick up supplies or deliver a message. Finally, David was taught to ride a horse because they needed him to help with the errands. But he kept getting on backwards - facing the horse's tail. He loved to make the horse go as fast as he could, riding the horse backwards and thinking he was flying in an airplane. David, sent by his grandmother, would deliver milk to one of his aunts every morning on horseback. He'd drop off the milk, get on the horse backwards and take off as fast as he could with her screaming at him, "David, you're crazy! You're going to kill yourself!" She'd watch him go, expecting any minute to see him fall, until he was out of sight.

David could only be sent on the simplest of errands. He was the easiest of the children to send because he never talked back or said no when somebody told him to go. But he could not be trusted to do it right. If the errand involved more than one stop, David would almost always

forget part of it. When asked to pick up three items, David would come back with one or two. He'd be beaten for forgetting and sent back again. Often he would have to be sent back a third time because of something he forget. For David, very simple orders were too complex for his mind. He could not even handle simple chores around the house. His uncles would go over and over with him how to cut the grass or give water to the animals. But David would do everything too fast and missed cutting half the grass or did not give the animals enough water. Even when that was pointed out to him, he didn't seem to comprehend what he had done wrong.

Meanwhile, in school David was doing so poorly that it was decided he should just learn how to work. At about age nine, David was sent away to live in a work camp/school called Las Mercedes, where he picked coffee during the day and studied - when he could - at night. In reality, the focus was on work, not schooling. David did not come home nor did his family visit him on weekends. Occasionally - perhaps once every six months - his mother would go to see

him. The work was so hard and grueling that David escaped after about a year. Nobody knows how he got home but David just showed up at the house one day covered with a scabies-type rash. He told his family that he didn't want to go away again but they said he had to - there was no other choice. Since he was not smart enough to study, he had to work.

David was sent to another work camp called Guaro. He would come home on vacations but when David was away, nobody missed him. Everyone had just wanted him to go away. Things were a lot more peaceful at the house when David wasn't around - it was one less pressure on everyone. David never felt the warmth from a family that a child needs because it was almost impossible to be close to this hyperactive child who couldn't sit still. Everyone just wanted to push him away.

When David came home on vacations, he was still expected to go on errands for the family. Sometimes, these errands were dangerous for him because the other kids not only made fun of him for being retarded, but beat

him up. One group of boys in particular would attack David every time they saw him. Even though David was 12 or 13 years old and these boys were several years younger, David never stood up for himself and fought back. The little boys would attack him, hitting him and ripping his clothes until David finally managed to get away. He'd run as fast as he could and arrive home scared and sweaty. "You're a coward," his mother told him.

While David was away at one of the work camps, his mother re-married. David felt jealous and hurt when he found out. Antonia moved in with her new husband and they began to make a family. The two children that Antonia had with her new husband were not sent away as David had been, but stayed with their mother.

At the age of about 13, David returned home and announced that he was going to Havana to work on the Cuban Fishing Fleet - state-run fishing boats that travel all over the world. His family didn't try to stop him. They thought that at least he'd be able to bring in some money to help the family and that maybe he'd change.

David went to Havana on his own and stayed with his aunt when he wasn't out on the fishing boats. Normally, boys had to be sixteen to join the fleet but David told them that he was an orphan. David seemed to do well on the boats. He followed orders well and did what he was told. He'd be gone for up to 18 months at a time. When he got back from a trip, he was so used to the rocking sea that he couldn't sleep until he took the Valium his aunt gave him. He would wake up in the middle of the night, scared to death.

David would come home from these trips with bizarre gifts for his family and friends. He seemed to forget that Cuba had a tropical climate and would bring clothes for his sisters and cousins made of heavy fabric with long sleeves and high necks. The colors were always red, white or blue and nothing matched. He brought them red boots that zipped up to the knee. He once brought a set of dishes in which nothing matched, though the patterns were similar. David, upon arriving home, would start giving away all the money he earned as well as all the clothes he

bought. A few days later, he'd have nothing left. David had never seemed to understand the comparative value of things. As a child, he once traded his grandfather's horse for a bicycle. Now as a teenager, he would trade an expensive tape recorder for a pair of pants. His family was amazed that David could not differentiate between the value of the two items.

For David, every one was his friend. He couldn't tell who was good and who was bad. He could never hurt anyone. Even as a child, he had never been one to pick on the littler kids. David would never even fight back when other kids picked on him. As David grew into a teenager, he did not lose his childish ways. He still invented stories, like a child does, that were so outrageous that nobody believed them. Yet he told them with full sincerity, expecting them to be believed. If he saw a burro on the way home, he'd make up a story about it. David's friends would come over to the house, laughing about the stories David told them. David also would invent names for himself. At one point he started

calling himself William. David lived in a world of fantasy.

Nor did David outgrow his inability to have a normal conversation. If somebody was talking to him about one subject, David would interrupt and start talking about a totally different subject. Or he'd just get up and leave in the middle of a conversation. David would also pretend he understood what people were telling him, when later, they would see he hadn't understood a word of it. Sometimes, talking to David was like talking to the air.

David seemed to fall in love every time he turned around. His family criticized him for bring home a different girl each time they saw him. In their culture, it wasn't correct to bring a girl home to meet your family unless you were going to marry her. But David didn't understand that. Every time the fishing boat would stop, David would have to be told not to go too far away from the boat. They knew he was forever falling in love.

On one trip to Spain, David fell in love with a Spanish girl named Margarita. When the boat took off, David was not on it. He stayed in Spain for about a month and then went to the Cuban embassy and turned himself in, blind as a child would be as to what would happen to him after - from Cuba's point of view - he had "defected" to Spain. Nobody in their right mind, David's family says, would turn themselves in. Any normal Cuban in those days knew that he would be put into prison on treason charges for defecting. Anyone who defected and wanted to re-enter Cuba was suspected of meeting with the CIA and being a spy. But David didn't think about that. For him it was a total surprise when he was put into handcuffs and taken to jail after his plane landed in Cuba. David was charged with a "Crime Against the Integrity and Stability of the Nation," for abandoning the fishing boat. The trial lasted a day and David was convicted and sentenced to prison. Officials said he should have known better. David was a model prisoner. Because of his good behavior he was given passes to go out and be with his family on

the holidays. In 1979, with very little of his sentence left to serve, David was offered the opportunity to leave prison - provided he also leave Cuba and immigrate to the United States as part of a wave of immigration referred to as the Mariel boat lift. David's family tried to talk him out of going. They wanted him to understand that he'd never be able to come back to Cuba - that this was not just another adventure like working on the fishing boats. But David did not seem to understand. In December of 1979, he left Cuba, along with Marlene, a woman he had just married after meeting her in a park, and arrived in Miami.

Marlene was not in love with David. She had married him so that she could come to the United States. But David was in love with Marlene. In Cuba he had tried to win her love by buying her gift after gift. Marlene thought David was nice but she could see that he was not a normal person.

When David and Marlene arrived in the United States, the dynamics of their relationship changed. Marlene found

herself in a strange country without any family and decided to stay for awhile with David because she was afraid to be alone in a place where she couldn't even speak the language. David was a good worker and made some money painting houses. He supported Marlene and she grew dependent on him economically. She also began to feel sorry for him. David had a mental deficiency. He was always so nervous and confused. He could never sit still, he'd watch TV standing up. Sometimes when Marlene explained things to David he didn't understand. David was constantly stumbling into things, even running into walls and closed doors. He seemed to always have a bump somewhere on is head from knocking it into a door frame.

David was irrationally jealous. He didn't want Marlene to wear shorts or talk to other men. Once when a neighbor bought an apple for Marlene, David was confused and became so jealous that Marlene told him that she couldn't take it anymore - she was leaving. David locked himself in the bathroom and tried to commit suicide by hanging himself. She was able to cut the rope away from

his neck but David was already unconscious. He spent that whole night crying. David was so terrified that Marlene would leave him that he started leaving pieces of rope around the house just to remind her that if she left, he'd kill himself.

Marlene didn't know what to do. She'd never seen a man that cried so much. Every time they got into an argument he'd cry. And David kept trying to kill himself. Once she saw him cutting his chest with glass. Another time he had all of her pictures laid out, had cut himself and was saying, "I love you." It got to the point where Marlene was afraid to leave David because she was afraid he really would kill himself. She didn't want to have to live with that on her conscience the rest of her life.

David's life had become more out of control than ever since he moved to the United States. In Cuba he had never seen cocaine - he didn't even know what it was. But in Miami, David met people who led him into the world of drugs. Mentally unequipped, David didn't know the dangers of cocaine. Somebody told him to try it and he did.

David has always been a follower, not a leader. He would never have used drugs had he not met the people that led him into it. Unable to say no, David started going off for days at a time to use cocaine, then came home to Marlene, crying and begging forgiveness. She always knew when he was high because he'd come home and ask if she wanted him to clean the refrigerator.

Marlene worries that the child she had with David also suffers from some of the same mental problems as David. He's not doing well in school and constantly falls and runs into doors and walls. He's so hyperactive that Marlene began taking him to a psychologist. She believes it's a genetic problem from David's family.

Clearly, David is not the only one in his family with mental health problems. His sisters, Elisa and Virgen, both suffer from extreme anxiety and nervousness. Virgen, who also sucked her hand and rubbed her ear as a child, has sought psychiatric care including prescribed medication. She goes from the extremes of being very nervous to being quiet and depressed. Virgen had a

difficult time learning in school and feels that she is not very intelligent. More than once, Virgen has contemplated suicide.

David's father, uncles, cousins and grandparents, and at least one nephew also suffer from many of the identical symptoms that David has. This evidence is compelling, and shows that David suffers from a number of hereditary conditions which further impair his functioning.

Furthermore, compelling evidence was available as to Mr. Rodriguez' difficulties adapting to life in the United States following his forced immigration from Cuba. Had trial counsel consulted with cultural experts he would have discovered further valuable mitigation that would have supported and expanded the testimony available from family members. Trial counsel was ineffective for failing to retain the services of a cultural expert[12] to

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[12] Counsel for non-English speaking clients should fully evaluate cultural defense issues as they relate to all phases of the criminal litigation. See, Mak v. Blodgett, 754 F. Supp. 1490 (9th Cir. 1991) (Trial counsel's penalty phase performance was deficient where counsel failed to present in mitigation the testimony of a cultural anthropologist concerning defendant's assimilation difficulties, which could have helped to explain both defendant's involvement in crime and apparent lack of emotion at trial.) See also Mak v. Blodgett, 970 F.2d

explain (1) the impoverished conditions of Cuba, Mr. Rodriguez' home country; (2) immigration to an industrialized country and its ensuing feelings of physical and psychological displacement,[13] including loss of family, friends, food, country, culture, and language; (3) the migration experience; (4) immigrating to a foreign land and the difficulty in adaptation to the host country, including, but not limited to lack of language skills, lack of familiarity with cultural norms and values, and lack of information about the social system in the host country [14]; (5) psychological and/or psychiatric disorders resulting from migration, including, but not limited to depression, anxiety, somatization, and Post Traumatic Stress Disorder[15]; (6) the degree of psychosocial stress

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614 (9th Cir. 1992).

[13] Cervantes, Posttraumatic Stress in Immigrants From Central America and Mexico, 40 Hospital and Community Psychiatry, 615 (1989)

[14] Id. at 616.

[15] Id. at 616.

experienced by an immigrant, including psychosocial stressors for individuals associated with ethnic minority status, language differences, lower socioeconomic and educational levels[16]; (7) immigrant's experience with investigators, police, military, and authority figures in the country of origin; (8) cultural norms in the country of origin regarding disclosure of personal information including a history of physical, emotional, and sexual abuse and mental retardation[17]; (9) cultural norms in the country of origin regarding class status and interaction with authority figures, including attorneys[18]; (10)

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[16] Cervantes, Psychological testing for Hispanic Americans, Applied and Preventive Psychology 209, 216 (1992).

[17] There is a heightened level of politeness and sense of privacy regarding questions relating to one's family and community history when discussing such matters with a perceived stranger. In many cultures, one does not readily divulge personal information to a foreigner, including a lawyer. Committee for Health Rights in Central America, Political Asylum: A Handbook for Legal and Mental Health Workers, 39.

[18] Id, at 40. "With authority figures -- one's patron, landowner, lawyer, policeman, immigration official, anyone but your peers -- one does not speak too loudly, and sometimes one is even supplicant; you never

expectations to say and do things to please others, irrespective of the truth or of one's personal desires[19]; (11) legal system in the country of origin; (12) unfamiliarity with law and misconceptions regarding the legal system[20]; (13) assist in jury selection, particularly as it relates to other Hispanic cultures and their prejudicial attitudes against Cubans and the prejudicial attitudes present between Cubans. A full hearing on these mattes, as evidence of mitigation its own right, is warranted.

C. THE SENTENCING ORDER CLAIM

In Mr. Rodriguez' case, the State Attorney's file contains an unsigned version of the sentencing order that Judge Carney signed when he sentenced Mr. Rodriguez to death. The unsigned order is in the same typographical font as the many other motions and pleadings filed by the

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disagree or argue with authority figures. . . ."

[19] Id. at 40.

[20] Id. at 41.

State. It is clear that the State, at the direction of Judge Carney (after some communication that occurred off-the-record), drafted the sentencing order in this case. An evidentiary hearing is warranted on this issue. Card v. State, 652 So. 2d 344, 345 (Fla. 1995).

Trial counsel failed to object to the State's preparation of the sentencing order in this case and to the ex parte contact that occurred in the preparation of the sentencing order. For trial counsel to acquiesce to this occurrence is a fundamental violation of Mr. Rodriguez' rights. Trial counsel never obtained permission or a waiver from Mr. Rodriguez to allow the State to prepare the sentencing order.

A judge's most solemn duty when dealing with a death penalty case is to conduct an independent evaluation of the evidence, the aggravating and mitigating factors, and give great weight to the jury's sentencing verdict. In fact, this is one of the bedrock principles of death penalty jurisprudence. In Proffitt v. Florida, 428 U.S. 250 (1976), the Supreme Court explained that, in response

to <u>Furman v. Georgia</u>, 408 U.S. 238 (1972), the Florida legislature adopted a new statutory scheme providing that if a defendant is found guilty of a capital offense, "a separate evidentiary hearing is held before the trial judge and jury to determine his sentence." <u>Id</u>. at 248. Following a decision by the jury as to the recommended sentence, "[t]he trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant." <u>Id</u>. at 250. In carrying out the constitutional obligation under <u>Proffitt</u> to assess the appropriateness of the death penalty, the Supreme Court was very specific in explaining that in order to be constitutional, a death sentence must be the result of a considered and sober weighing process by the trial judge:

> The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the defendant. He must, <u>inter alia,</u>

> consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. <u>To answer these questions, . . . the sentencing judge must focus on the individual characteristics of each homicide and each defendant</u>.

<u>Id</u>. at 251-52 (emphasis added).

This Court has repeatedly condemned the practice of trial courts delegating to the State the preparation of sentencing orders in capital cases. In <u>Patterson v. State</u>, 513 So. 2d 1257 (Fla. 1987), this Court expressly held:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of

> the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weight the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261. See also Riechmann v. State, 25 Fla. L. Weekly S163 (Fla. 2000)

It was error for the lower court to summarily deny this issue.

D. CONCLUSION

Mr. Rodriguez' life history reflects a childhood of abuse, neglect, poverty and cultural difficulties. The case is very similar to both Ragsdale v. State, 720 So. 2d 203 (Fla. 1998) and Arbelaez v. State, 28 Fla. L. Weekly S586 (Fla. 2000), which this Court remanded to the lower court for evidentiary development, not only on trial counsel's failure to present mental health expert testimony but also for failing to introduce evidence of his family history of abuse: This Court noted

> As in Ragsdale, Arbelaez contends that testimony was available to show that is life was marked by abuse and deprivation, that he suffered from a lifetime of drug abuse, and that he suffered from mental illness and epilepsy and tried repeatedly to commit suicide, yet no witnesses were called by trial counsel to present this testimony.

(Arbelaez v. State, 28 Fla. L. Weekly S486) Mr. Rodriguez should be afforded a similar opportunity to present evidence of his lifetime of abuse, neglect and poverty. The record of Mr. Rodriguez' capital proceedings "does not conclusively demonstrate that the mitigation evidence defense counsel failed to present was cumulative" Freeman v. State, 25 Fla. L. Weekly S451, citing Rose v. State, 675 SO.2d 567 (Fla. 1996).

The prejudice that results from the failures of trial counsel is yet further exacerbated by the fact that the sentencing order was prepared by the State. Following complete evidentiary development, Mr. Rodriguez should be afforded a new penalty phase. An evidentiary hearing on this issue is warranted

ARGUMENT 3

SUMMARY DENIAL OF MR. RODRIGUEZ' GUILT PHASE ISSUES

A. INTRODUCTION

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted", Witherspoon v. State 590 So.2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief", Rodriguez v. State, 592 So.2d 1261 (2nd DCA 1992). See also Brown v. State, 596 So.2d 1025, 1028 (Fla.1992).

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining

whether the motion conclusively shows whether [Mr. Rodriguez] is entitled to no relief." Gorham v. State, 521 So.2d 1067, 1069 (Fla; 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-3) Fla. 1087). Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla 1989).

Mr. Rodriguez has pleaded substantial factual allegations relating to the guilt phase of his capital

trial. These include ineffective assistance of counsel, Brady and Ake violations which go to the fundamental fairness of his conviction. "Because we cannot say that the record conclusively shows [Mr. Rodriguez] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing", Demps v. State, 416 So.2d 808, (Fla. 1982).

Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So.2d 1250, (Fla. 1987) O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Rodriguez has alleged facts relating to the guilt phase, which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

B. THE BRADY ISSUE

The State's theory of its case against Mr. Rodriguez was that Mr. Rodriguez needed money in order to satisfy a previous bail bond. The State contended that Mr. Rodriguez was introduced to co-defendant Ramon Fernandez (also known as "Pipo") by Carlos Ponce (also known as "Tata") and that "Tata" asked "Pipo" to allow Mr. Rodriguez to use his car as collateral for the bond money. The State further contended that Pipo demanded his car back from Mr. Rodriguez and because of this Mr. Rodriguez came up with a plan to rob the business of Alberado Saladrigas. The State also asserted that Mr. Rodriguez planned a home invasion of the Ralph Leiva residence. The State repeatedly stressed to the jury that Mr. Rodriguez was the "main conductor" of the plan and repeatedly instructed the other co-defendants on how to commit the crimes. The State emphasized that the other co-defendants were young and Mr. Rodriguez was older and wiser and was their leader. The State told the jury "The defendant was there to teach them what to do. Now, the defendant had

more kids to work with. He had five or six other kids to plan the next caper." "It is the defendant that comes up with the plan" (R. 549). Throughout the entire proceedings, the State told the jury that Juan David Rodriguez was the leader and planner of the crimes.

The picture the jury received was that Mr. Rodriguez was the master mind of this crime. However, it was actually another person, "Tata", who was the linchpin, organizer and perpetrator of the crimes. Tata was himself a middle ranking member of a sophisticated and well organized professional gang of thieves. It was "Tata's" role to locate suitable targets for the gang's attentions, and to plan, organize and execute the raid.

" Tata", in cahoots with an associate of the victim, who knew the victim's routine, and schemed the attack on the victim's business. Nevertheless, despite the evidence of Tata's linchpin role, Tata has never been apprehended for this offense. The State knew of the facts that undermined their case, yet chose to suppress them in order to ensure a conviction for Mr. Rodriguez.

The State knew that Juan Rodriguez was not the planner of the crime. The information was not revealed to defense counsel, and none of it reached the jury or the trial court. Instead, the State presented testimony it knew or should have known was false, and used that testimony to convict Mr. Rodriguez and sentence him to death. At the Huff hearing held on March 13, 1998, counsel for Mr. Rodriguez argued that this information had come from the witnesses who had testified at trial, including the State's star witness, Ramon Fernandez, aka "Pipo". As counsel noted:

> Now, the information that we have gotten is from the witnesses themselves. Ramon Fernandez is one individual that, in fact would testify at an evidentiary hearing that what he testified to in front of the jury is not what happened and Mr. Fernandez is probably the most important witness in the trial.
>
> Mr. Fernandez is the witness the State put on to say I was with one David Rodriguez at the murder and at the trial I testified that I saw him shoot the guy, shoot the victim. What he would testify to is, in fact, he didn't see who did it and that in fact, it could have been Mr. Ponce. Mr. Ponce is the

> man who Mr. Montalvo who wasn't allowed to testify identified as the person who was there. So that's what we're alleging. And that he did this at the urging of the State's agents.

(T.68-69, Volume 6)

If the information the State had regarding Tata had been provided to the defense, it would have made a difference in trial strategy and the choice of possible defenses. To the extent trial counsel should have discovered this information he was ineffective

This information was not disclosed to the defense and never reached the jury or the trial court. Had this information been disclosed, defense counsel would have used it to discredit the testimony of State witnesses and the theory of the State's case. This case involves more than a simple violation of Brady v. Maryland, 373 U.S. 83 (1963). Relief is warranted.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

a. Failure to investigate and prepare for trial

Counsel failed to adequately investigate the case. In

particular counsel failed to instigate adequate expert investigation into Mr. Rodriguez' mental condition and competency to stand trial. A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, and to ensure that the client is not denied a professional and professionally conducted mental health evaluation. See Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). However counsel failed to investigate Mr. Rodriguez' mental health background despite the fact that his mental state was relevant to his competency to stand trial, his ability to make a knowing, intelligent and voluntary waiver of his constitutional rights, and his capacity to form the requisite intent for the crimes charged. This error permeates all critical aspects of the trial and cannot be harmless. Relief should be granted.

Trial counsel failed to investigate and interview numerous witnesses who would have offered valuable testimony to support the defense case. Even when he was aware of the existence of such witnesses, trial counsel made no effort to prepare them for trial, or even to determine their availability.

Trial counsel was ineffective for failing to list an essential defense witness or properly request a continuance of the guilt-phase portion of the trial to procure the attendance of this witness. Trial counsel deposed Mr. Jose Montalvo, who was listed as a witness on the state's discovery list. At deposition Mr. Montalvo testified that the victim gave him the following description his of assailant: "a little fat one" (R. 155). This description was inconsistent with another statement made by the victim that was overheard by a Metro Dade Officer at the crime scene, and tends to show that Mr. Rodriguez was not the perpetrator of the crime.

Mr. Montalvo was personally served with a stand-by subpoena for Monday, January 22, 1990, and was not

contacted by trial counsel until January 29, 1990 (R. 173). At that time, trial counsel learned that Mr. Montalvo was unavailable to testify. Defense counsel advised the trial court of Mr. Montalvo's unavailability and requested that relevant portions of Mr. Montalvo's deposition be admitted into evidence.

Trial counsel was deficient because he failed to list Mr. Montalvo as defense witness, pursuant to Rule 3.220(d)(1), Fla.R.Crim P., nor did he request properly a continuance of the trial proceedings. As a result, the trial court did not permit the introduction of Mr. Montalvo' deposition. Trial counsel's deficient performance prejudiced Mr. Rodriguez and 3.850 relief is warranted.

Immediately prior to the commencement of trial, the State informed trial counsel of its willingness to accept a guilty plea from Mr. Rodriguez to second degree murder with a sentence of life imprisonment with a three year minimum mandatory term to run concurrent with his state and federal probation violations. Trial counsel was

ineffective for adequately informing Mr. Rodriguez of the State's offer. Moreover, trial counsel was ineffective for failing to discover that Mr. Rodriguez was incapable of understanding the nature and consequences of the offer. Trial counsel also failed to effectively challenge the State's theory that Mr. Rodriguez planned the robbery of Mr. Saladrigras and the home invasion of Ralph Leiva. Trial counsel was ineffective for failing to discover that Mr. Rodriguez was incapable of forming the plan.

Trial counsel was rendered ineffective due to the State's failure to disclose evidence. Trial counsel was also ineffective for failing to object to the presence of the lead detective, Detective Castillo, at the State's table throughout the trial.

b. Failure to request a severance

Trial Counsel was ineffective for failing to request a severance of offenses, pursuant to Fla.R.Crim.P. 3.152(a)(1). Mr. Rodriguez was originally charged along with five (5) co-defendants with offenses stemming from an unsuccessful home invasion robbery and shooting (R. 1-7).

At a much later date, Mr. Rodriguez was charged alone, by indictment, with the instant case and the home invasion offenses, pursuant to Fla.R.Crim.P., 3.150(a).

Trial counsel failed to request a severance of the offenses stemming from the home invasion, pursuant to Fla.R.Crim P. 3.152(a)(1), which permits the defendant to file a motion for a severance of offenses when two (2) or more offenses are improperly charged in a single indictment or information.

Trial counsel's failure to request a severance of the above-mentioned offenses resulted in the misuse of evidence by contaminating the judge and jury's consideration of the separate murder case.

Counsel's ignorance of the law was deficient performance which prejudiced Mr. Rodriguez. Johnson v. Singletary, 612 So.2d at 576.

c. Failure to object

Defense counsel failed to properly object to the victim's sister-in-law's offer of identification testimony of the victim. During the guilt phase, the state called

the victim's sister-in-law, Lupe Saladrigas, as a witness. The prosecutor, referring to State's Exhibit 2-P for identification showed the witness a Florida Driver's License containing a photograph of the victim and had her identify it to the jury (R. 615-616).

The only objection made by trial counsel to this identification testimony was as to relevance (R. 616), not the well-established rule in Florida that a member of the deceased victim's family may not testify for purposes of identifying the victim where other non-related, credible witnesses are available. Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981); Lewis v. State, 37 So.2d 640, 643 (Fla. 1979).

Mr. Rodriguez was prejudiced by trial counsel's deficient performance because Mr. Rodriguez was not "assured as dispassionate a trial as possible" through trial counsel's failure to "prevent the interjection of matters not germane to the issue of guilt." See Adan v. State, 453 So.2d 1195, 1196 (Fla. 3rd DCA 1984). Trial counsel was also ineffective for failing to properly

preserve the issue for appellate review. See Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990); Craig v. State, 510 So.2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

The trial court instructed the jury on expert witnesses as follows:

> Expert witnesses are like other witnesses, with one exception. The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 1683-1684) (emphasis added). Defense counsel did not object to this instruction.

The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing

Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction here permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. In addition to judging his credibility, the jury was permitted to judge his expertise. That determination belongs solely to the judge. Trial counsel's failure to object, without tactic or strategy, performance was ineffective.

D. THE AKE CLAIM

Mr. Rodriguez' evidentiary hearing on his Rule 3.850 was strictly limited to mental health issues relating to his penalty phase. However, Mr. Rodriguez' mental retardation, brain damage, and cultural impediments were critical to rebut the State's case the Mr. Rodriguez was a criminal mastermind. The fact that this assistance was not offered Mr. Rodriguez in his guilt phase is substantially prejudicial.

Furthermore, Mr. Rodriguez' mental state was also relevant to his waiver of his rights, to his capacity to

form the requisite intent for the charged offenses, and his ability to assist counsel in his own defense. Counsel's failure to ensure that Mr. Rodriguez gained proper mental health assistance from qualified mental health professionals was deficient performance.

E. CONCLUSION

The trial court's summary denial of Mr. Rodriguez' guilt phase claims flies in the face of the clear requirements of the law. It makes no use of the files and records in the cause, which, in any event, do not show conclusively that Mr. Rodriguez is not entitled to relief. The lower court's ruling thus ignores the express requirements of Rule 3.850 and the substantial and unequivocal body of law generated by this Court that lower courts must comply with the Rule.

This Court has "no choice but to reverse the order under review and remand" Hoffman, 571 So. 2d 450, and order a full evidentiary hearing on Mr. Rodriguez' guilt phase issues.

ARGUMENT 4

THE PUBLIC RECORDS ISSUE

Mr. Rodriguez was not afforded the opportunity to obtain many of the records, which were relevant and necessary to the complete investigation of his Rule 3.850 claims. As a result, he was unable to file a complete Rule 3.850 motion, to his substantial prejudice. For example, the failure of the agencies to comply with Mr. Rodriguez' public records requests prevented him from fully pleading his claims of newly discovered evidence, innocence of first degree murder and the death penalty, ineffective assistance of counsel and Brady and Giglio violations.

A. THE DADE COUNTY STATE ATTORNEY'S OFFICE

Effective legal representation was denied Mr. Rodriguez because voluminous records from the Dade County State Attorney's Office were withheld from Mr. Rodriguez. In addition, other records were not made available because the lower court did not release them after conducting an in camera inspection of items redacted and/or withheld by

the State Attorney.

One of Mr. Rodriguez' codefendants was a character named Carlos Ponce, aka "Tata". While indisputably involved in the crimes for which Mr. Rodriguez was convicted, Ponce was never apprehended or tried. Mr. Rodriguez requested all records held by the State Attorney relating to Ponce, but the State failed to turn over case files # F95-12972 and F95-21757 because they had been lost in the State Attorney's office. At a hearing on the public records issue held on December 6, 1996, the Dade State Attorney's records custodian, Luis Nieves, testified that according to his printouts, Ponce had been prosecuted in 1995, and that the cases had been "no actioned" (sic), and that the files were not, or should not have been destroyed.(T. 239-255, Volume 4). These files, relevant to the investigation of Mr. Rodriguez' case, have never been turned over to Mr. Rodriguez' counsel, despite the assurance of Mr. Nieves that he would redouble his efforts to locate the files (T.261, Volume 4).

In addition, numerous records for which the State had

claimed exemption were apparently lost in the course of ex parte communication between the lower court and the State. As a result, these records were never sealed nor included with the lower court file.[21] See PCR. 607-608. At a hearing on December 6, 1996, both Assistant State Attorney Brill and Judge Carney testified that the records, consisting of handwritten notes, had been lost (T. 261-282, Volume 4). Ms. Brill further testified that she had neither itemized the pages which had been withheld, nor specified particular exemptions taken. While it was clearly impossible for counsel for Mr. Rodriguez to make complete argument as to the propriety of withholding the documents. Mr. Rodriguez' counsel made arguments that just because the notes were handwritten, they were not necessarily exempt from disclosure:

> [by Ms. Gardner] [I]n fact there's been testimony to the opposite. If indeed[the prosecutors]wanted those notes or believed that these notes were just for their own personal use, they

[21]Thus rendering effective appellate review by this Court impossible.

> would have, of course, once they left the office, would have destroyed those notes, would have thrown them out, would have tossed them in the garbage, would have put them in recycling. The fact that the notes remained in the file mean that they are meant to communicate and did communicate to subsequent attorneys their defense strategies and/or--not defense strategies--their ideas and their conclusions.
>
> Now, I think that sometimes people get deceived by the fact that these are handwritten. It's not determinative that something is in handwritten form as to whether it is to be a final or formalized document. Just because these notes were in a handwritten form does not mean that they were personal notes

(T. 283-284 Volume 4). It is clear that the lower court improperly withheld the documents to Mr. Rodriguez' substantial prejudice.

B. THE SUPPLEMENTAL 3.852 RECORDS

The lower court improperly refused to allow Mr. Rodriguez to pursue legitimate supplemental public records requests, and to amend his Rule 3.850 motion accordingly. Pursuant to Fla. R. Crim. P. 3.852(d)(2)(D)(1996), Mr. Rodriguez had timely filed and served supplemental public

records requests on May 22, 1997.(PCR. 1379-1480).[22] The rule stated in relevant part that:

> If a request or requests for production already have been served upon an agency, any supplemental requests for production shall be filed within 90 days after the initial production of the records or within 90 days of the effective date of this rule, whichever is later. Such supplemental request for production shall be limited to the production of records which only became known from the records produced in the initial production of records

(Fla R. Crim. P. 3.852(d)(2)(D) (1997).

Clearly, Mr. Rodriguez fell within the scope of 3.852(d)(2)(D). The supplemental records requested became known from the previously requested and supplied records. However, the process was interrupted before the supplemental requests had been resolved, when Mr.

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[22] Fla. R. Crim. P. 3.852 originally became effective on October 31, 1996. However, on November 21, 1996, with 69 days left for Mr. Rodriguez to file his supplemental requests, Mr. Rodriguez' counsel filed an Emergency Motion to toll Rule 3.852. The motion was granted on November 26, 1996. This Court then lifted the tolling on March 31, 1997, leaving Mr. Rodriguez until June 8, 1997 to file his requests.

Rodriguez was required by the lower court to file his amended Rule 3.852 motion on July 31, 1997.[23] In Claim I of his motion, Mr. Rodriguez listed the agencies who had not complied with his Rule 3.852 supplemental requests and noted that the court had not yet rule on those requests. See R. 1867.

On August 20, 1997, Mr. Rodriguez timely filed a Supplemental Motion to Compel Disclosure of Public Records relating to his supplemental requests.[24](PCR. 2055-2060). However, the lower court never heard the motion to compel, and at the State's behest, scheduled a Huff hearing to be held on March 13, 1998 regardless of the outstanding public records issues.

On March 13, 1998, at the Huff hearing, the lower court reiterated its refusal to hear the August 20, 1997

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[23] The lower court in an ore tenus order on April 18, 1997 gave Mr. Rodriguez 30 days to file his amendment. See T.35, April 18, 1997 hearing. By two orders dated May 20, 1997 (R. 1377) and July 8, 1997(R.1556), this time limit was extended to July 31, 1997.

[24] Under Fla. R. Crim. P. 3.852 (f)(1996), Mr. Rodriguez had 60 days to file his motion to compel.

Motion to Compel. It also refused to consider Mr. Rodriguez' fourth amendment to his Rule 3.850 motion, which Mr. Rodriguez filed at the commencement of the Huff hearing. See T.54. March 13, 1998 hearing. This fourth amendment was filed in an attempt to at least include some of the public records material order to preserve claims arising from the supplemental materials he had at that point received, notwithstanding the lack of compliance by many agencies and the failure by the court to conduct a hearing on the August 20, 1997 motion to compel. (R.2092-2268). However, this fourth amendment was still incomplete, since Mr. Rodriguez had not received compliance with his supplemental requests from the Florida Highway Patrol; the Office of the State Attorney for the Eleventh Judicial Circuit; Clerk of Court for the Eleventh Judicial Circuit; City of Miami Police; Metro Dade Police; Department of Corrections; FDLE and the Office of the Attorney General.[25] At the hearing, Mr. Rodriguez renewed

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[25] At a hearing on March 13, 1998, the lower court refused to consider the March 13, 1998 amendment as

his objection to the failure of the lower court to consider his supplemental Rule 3.852 requests (T. 44, Volume 6). The lower court completely disregarded the provisions of Fla. R. 3.852 regarding supplemental requests to Mr. Rodriguez' substantial prejudice. Mr. Rodriguez was denied the opportunity to fully litigate his Rule 3.852 requests, and denied the opportunity to amend his Rule 3.850 motion accordingly. Relief is warranted.

C. ADDITIONAL PUBLIC RECORDS REQUESTS

On December 29, 30 and 31, 1998, Mr. Rodriguez filed demands for additional public records pursuant to Emergency Florida Rule of Criminal Procedure (h)(2) (PCR.2558-2565, PCR Supp 243). As with the supplemental requests detailed supra, the lower court failed allow Mr. Rodriguez to present his requests and litigate them appropriately. Relief is warranted.

D. CONCLUSION

This Court has made it clear that a prisoner whose

"untimely"

conviction and sentence of death has become final on direct review is entitled to criminal investigative public records as provided in Chapter 119. See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). As detailed above, Mr. Rodriguez was denied the opportunity to investigate his Rule 3.850 motion, due to the lower court's erroneous refusal to allow him to litigate his outstanding public records issues. Relief is warranted.

ARGUMENT 5

FAILURE BY JUDGE CARNEY TO DISQUALIFY HIMSELF

A. JUDGE CARNEY'S BIAS AT TRIAL

Judge Thomas M. Carney presided over the jury trial of this capital case and ultimately imposed a sentence of

death.

Mr. Rodriguez was denied his rights to due process by virtue of Judge Carney's obvious bias and prejudice against him, which manifested itself throughout the trial. To the extent that trial counsel failed to object to this evident bias and prejudice, Mr. Rodriguez received ineffective assistance.

Judge Carney's bias and predetermination of the case was obvious from the beginning of the proceedings against Mr. Rodriguez. Judge Carney consistently sustained the State's objections to defense counsel's questions about "Tata", to Mr. Rodriguez's substantial prejudice. See e.g. R. 972. Thorough the judge's actions, counsel for Mr. Rodriguez was hamstrung, and prevented from presenting an effective defense. Moreover, the judge maintained a campaign of snide remarks, designed to belittle defense counsel. The Court referred to defense counsel as "ridiculous" (R. 1410), and "childish" (R.1417).

Judge Carney's bias against Mr. Rodriguez was blatantly reiterated even after Mr. Rodriguez's capital

trial. During a sentencing hearing of a codefendant in the home invasion, Judge Carney referred to Mr. Rodriguez as a "rare, despicable person".

The evidentiary value of the defense case evaporates when the judge prosecutes the State's case and rehabilitates the state's case adversely to Mr. Rodriguez's position. The court's action was improper. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Trial counsel was constrained by the court from presenting evidence and accepted the court's interference without objecting. Counsel was therefore ineffective. Blanco v. Singletary.

The Court's blatant acts of favoritism undermined the credibility of the defense case and prevented the jury from fairly weighing the evidence presented. To the extent that the trial court would allow, counsel's failure to object or move for mistrial when the bias and misconduct of the court was obviously prejudicing the jury, constitutes deficient performance.

Judge Carney's bias and prejudice against Mr.

Rodriguez is further demonstrated by his signing of a sentencing order prepared by the State after some ex parte communication that occurred off the record. See Argument 1, supra. The cynical delegation to the State of the judge's responsibility independently to prepare a sentencing order demonstrated the trial court's bias against Mr. Rodriguez as well as demonstrating impermissible conduct. In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court expressly held:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weight the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261. A hearing is warranted on this issue.

B. JUDGE CARNEY'S CONDUCT DURING POST CONVICTION

PROCEEDINGS

Postconviction counsel for Mr. Rodriguez has on several occasions, moved to disqualify Judge Carney from presiding over Mr. Rodriguez's Rule 3.850 proceedings.

During post conviction proceedings, Judge Carney has continued his practice of ex parte communications with the Assistant State Attorney assigned to the case, and defense witnesses. On June 10, 1996 counsel for Mr. Rodriguez filed a motion to disqualify Judge Carney due to his ex parte communications with the State regarding a prospective hearing. Assistant State Attorney Penny Brill had requested a hearing on the case, and counsel for Mr. Rodriguez had assumed that the requested hearing was a status conference because public records litigation was not complete. In a telephone conference with Judge Carney's judicial assistant, counsel for Mr. Rodriguez requested to appear by telephone on the assumption that the hearing was to be a brief status conference. Counsel for Mr. Rodriguez overheard the judicial assistant ask the judge what type of hearing it would be, and overheard the

judge tell her that it was an evidentiary hearing. The notice of hearing did not specify the nature of the hearing requested by the State Attorney. Clearly the judge had heard this representation from one source - Ms. Brill.

In addition, at a public records hearing On December 6th, 1996, the lower court informed counsel for Mr. Rodriguez that he had excused several defense witnesses from attending the public records hearing (T. December 6, 1996, 10)[26] Counsel for Mr. Rodriguez objected to the Court's ex parte conversations with her witnesses and to their summary release from attending the scheduled hearing. The Court's discussions with these subpoenaed persons and their subsequent excusal from appearing at the hearing denied Mr. Rodriguez his rights to present a defense and to confront witnesses. Based upon his

[26]Later in the hearing, the Court modified this statement; the Judge maintained that he had not spoken with the witnesses, but that his judicial assistant had talked with the subpoenaed individuals. However, this is a distinction without a difference. It matters not whether the Court directly conversed with the subpoenaed witnesses. The relevant consideration is what the witnesses were told, and under whose authority and direction they were released from appearing.

discussion with the witnesses, the trial Court questioned the necessity of subpoenaing these individuals to testify, asserting that the witnesses had already complied with defendant's request for public records. Notes in the possession of the Court concerning the tribunal's contact with defense witnesses, were introduced into the record. Defense counsel moved the lower court to stay the proceedings and to allow the Mr. Rodriguez to file a written motion with the court to recuse Judge Carney from the proceedings. The motion to stay the proceeding was denied, and Mr. Rodriguez forced to go ahead with the hearing without his witnesses, to his substantial prejudice.

Furthermore, during the same public records hearing, it became apparent that Judge Carney and Ms. Brill had engaged in ex parte communication concerning the transmittal of portions of the State Attorney's file to the court for in camera inspection. At the hearing it became apparent that the records, once reviewed by the court had not been returned to the clerk, filed and

sealed, as requested by counsel, but misplaced. To determine what happened to the records, counsel for Mr. Rodriguez examined both Ms. Brill and Judge Carney. Both Ms. Brill and Judge Carney testified that the records had been transferred by Ms. Brill to the judge after the conclusion of a telephonic status conference with Mr. Rodriguez' counsel. (T. December 6, 1996, 276-281). Ms. Brill had not itemized the exemptions she was claiming and counsel for Mr. Rodriguez was thus precluded from making argument on the exemptions. Again, Mr. Rodriguez was prevented by the court's impermissible *ex parte* communication from fully litigating his public records claims.

In Rose v. State, 601 So.2d 1181 (Fla. 1992), this Court held that "a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. In State v. Arbelaez, 28 Fla. L. Weekly S586, this Court clarified the Rose decision by stating that " Obviously we understand that this would not include strictly administrative

matters not dealing in any way with the merits of the case."(emphasis added). Judge Carney's ex parte communication did not deal with strictly administrative matters, since his actions in both instances precluded Mr. Rodriguez from effectively litigating his public records issues.

In addition to his practice of ex parte communication with the State and others, Judge Carney should have recused himself as being a material witness in the case. As noted above, Judge Carney appeared as a material witness in the public records hearing held on December 6, 1996. Counsel for Mr. Rodriguez renewed her oral motion to disqualify Judge Carney, which he denied with the comment "Since you've called me, I'll deny it" (T.December 6, 1996, 276).[27] Once the motion for disqualification was made, the judge, rather than limiting inquiry to a

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[27]Counsel for Mr. Rodriguez followed up her oral motion with a legally sufficient written motion, timely filed with the lower court on December 16, 1996 (R PCR.645-671). This was denied by the lower court by order dated January 28, 1997.

determination of the motion's legal sufficiency, actively participated and became a witness in a mini-hearing conducted to determine the judge's actions. Any pretense of judicial impartiality was lost.

In addition, on March 9, 1998 counsel for Mr. Rodriguez filed a further motion to disqualify Judge Carney on the grounds of his having conducted ex parte communication and having signed the sentencing order provided by the State rather than conducting an independent weighing of the aggravating circumstances and mitigating circumstances(PCR.2341-2353A). See Argument 1, supra. Mr. Rodriguez requested an evidentiary hearing on this issue, but it was summarily denied. This instance represented a two fold example of Judge Carney's bias and prejudice against Mr. Rodriguez. Not only did the lower court brush aside Mr. Rodriguez' well founded fear of Judge Carney's bias against him, arising from the unsigned sentencing order issue, but he also ultimately denied a hearing on the issue at which his own misconduct would have been exposed. Furthermore, had evidentiary

development of the claim been allowed by Judge Carney, he would have been required to disqualify himself as a material witness in the proceedings. The fact that he refused to disqualify himself and then refused evidentiary development of the issue demonstrates the extent of Judge Carney's prejudice against Mr. Rodriguez.

The appearance of bias generated by Judge Carney's participation as a witness in the proceedings is further exacerbated by comments he made during the post conviction proceedings. During the December 6th hearing there was some discussion regarding the relevancy of certain public records. Counsel attempted to explicate for the Court the significance of these documents to issues raised in postconviction pleadings. Although the dialogue between counsel and the Court had initially been framed in terms of a hypothetical, the exchange quickly devolved into a discussion of the merits of Mr. Rodriguez's case. The Court seemed at a loss in identifying the significance of the undersigned's arguments regarding the integral nature of public records to the pending postconviction

proceedings. Judge Carney stated that he had presided at Mr. Rodriguez's trial, and it was pretty clear who the shooter was. The undersigned renewed her request to disqualify the Court from these proceedings, arguing that the Court had expressed its opinion as to Mr. Rodriguez's guilt, and was unable to fairly and impartially determine the merits of the defendant's collateral claims. The Court denied defense counsel's *ore tenus* motion for recusal.

Judge Carney's bias and misconduct impels Mr. Rodriguez to reasonably question the court's impartiality. "In the case of a first-degree murder trial, where the trial judge will determine whether the defendant is to be sentenced to death, the reviewing court should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993)(quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)).

ARGUMENT 6

COUNSEL'S FAILURE TO OBJECT TO UNCONSTITUTIONAL JURY INSTRUCTIONS

A. AGGRAVATING CIRCUMSTANCES

At the time of Mr. Rodriguez' trial, sec. 921.141, Fla. Stat., provided in pertinent part:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> ****
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> ****
>
> (f) The capital felony was committed for pecuniary gain.
>
> ****
>
> (h) The capital felony was especially heinous, atrocious, or cruel.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S.Ct. 2926 (1992), require a resentencing before a jury in Mr. Rodriguez' case.

Mr. Rodriguez' penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed a death sentence. Under Florida law, the judge was required to give great weight to the jury's verdict. Espinosa.

Trial counsel failed to object. Trial counsel had no strategic reason for his failure to object. He was ineffective for not doing so. To the extent the issue could have been presented on direct appeal, appellate counsel was ineffective for not raising the issue on direct appeal.

B. BURDEN SHIFTING

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So.3d 1(Fla.

1973), cert denied 416 U.S. 943(1974). This standard was not applied to Mr. Rodriguez's capital sentencing phase and counsel failed to object to the court and prosecutor , improperly shifting to Mr, Rodriguez the burden of proving whether he should live or die, Mullaney v. Wilbur, 4211 U.S. 684 (1975). Relief is warranted.

C. CALDWELL ERROR

Mr. Rodriguez' jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory" in violation of law. Defense counsel did not object to this erroneous instruction. However, because great weight is given the jury's recommendation the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Here the jury's sense of responsibility would have been diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985).

Throughout the proceedings in Mr. Rodriguez' case, the lower court and the prosecutor frequently made statements

about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder. The lower court repeatedly informed the jurors that the lower court had the responsibility for deciding what punishment shall be imposed. Counsel objected to instruction or argument that diluted the jury's sense of responsibility

D. AUTOMATIC AGGRAVATING CIRCUMSTANCE

Mr. Rodriguez was convicted of first degree murder, with robbery as the underlying felony. The jury was instructed on the "felony murder" aggravating circumstance. The trial court subsequently found the existence of the "felony murder" aggravating factor. (R. 276).

The jury's deliberation was obviously tainted by the

unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S.Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Rodriguez entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance.

Trial counsel's failure to object, which is a cognizable claim in Rule 3.850 proceedings, see e.g. Davis v. State, 648 So.2d 1249 (Fla.4th DCA 1995) constituted ineffective assistance and an evidentiary hearing is warranted as no tactical motive existed for failing to object.

ARGUMENT 7

THE PROSECUTORIAL MISCONDUCT ARGUMENT

The prosecutor urged the jurors during his closing argument at penalty phase to sentence Mr. Rodriguez to death on the basis of inflammatory, improper comments and numerous impermissible factors. Mr. Kastrenakis effectually foreclosed the jury from recommending a life sentence (R. 1840, 1853, 1862).

The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974).

Arguments such as those made by the State Attorney in Mr. Rodriguez' penalty phase violate due process and the Eighth Amendment, and render a death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc); Potts

v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." Potts, 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." Wilson, 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. This Court had held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

For each of the reasons discussed above, the Court

should vacate Mr. Rodriguez' unconstitutional conviction and sentence of death. Rule 3.850 relief is warranted.

ARGUMENT 8

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Florida's death penalty statute denies Mr. Rodriguez his right to due process of law and constitutes cruel and unusual punishment on its face and as applied to this case. Execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States. Mr. Rodriguez hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents.

ARGUMENT 9

THE INCOMPLETE RECORD ARGUMENT

The lower court is required to certify that the record on appeal in capital cases is complete, Fla. Stat. Ann. sec 921.141(4); Fla. Const.art 5, Sec. 3(b)(1), and when

errors or emissions appear, reexamination for the complete record in the lower court is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Portions of the record were missing from Mr. Rodriguez' direct appeal record. For example, the entire opening argument is missing. As a result, neither this Court, nor any future reviewing court conduct full review to determine the extent to which Mr. Rodrigueez' constitutional rights were violated. Furthermore, there is still a question as to the accuracy and reliability of the transcript. To the extent that trial and appellate counsel were responsible, Mr. Rodriguez was denied the effective assistance of counsel.

ARGUMENT 10

THE JUROR INTERVIEW AND JUROR MISCONDUCT ARGUMENT

Florida Rule of Professional Responsibility Rule 4-3.5(D)(4) provides that a lawyer shall not initiate communications or cause another to initiate communications with any juror regarding the trial.

This prohibition impinges upon Mr. Rodriguez' right to

free association and free speech. This rule is a prior restraint. This prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to ascertain if juror misconduct occurred while an incarcerated defendant is precluded form so doing. Death sentenced inmates are so precluded.

This prohibition restricts Mr. Rodriguez' access to the courts and impeded his ability to develop constitutional claims including those attacking his convocations and sentences, including his death sentence. Relief is warranted.

ARGUMENT 11

IMPERMISSIBLE VICTIM IMPACT

Impermissible victim impact was considered in sentencing Mr. Rodriguez to death. In Payne v. Tennessee, 111 S. Ct. 2597 (1991), the United States Supreme Court overruled the holding in Booth v. Maryland, 482 U.S. 469 (1987) barring victim impact evidence. Mr. Rodriguez was tried and sentenced to death when the holding in Booth was

undisturbed.[28] Payne, however, did not overrule Booth's entire holding. Courts still may not consider "a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence." Payne, 111 S. Ct. at 2611 n.2; Hodges v. State, 595 So. 2d 929 (Fla. 1992).

Prior to Mr. Rodriguez' sentencing hearing, Judge Carney actively solicited the opinions of the victim's family members as to what the sentence to be imposed on Mr. Rodriguez should be:

> THE COURT: I know that the victim's family has attended all of the proceedings in this case and I would appreciate either indirectly through you, Mr. Kastrenakis or certainly from one of them as a representative, whatever they choose, what their feelings are about the sentence that should be imposed.
>
> MR. KASTRENAKIS: We've already discussed that and I think they all plan to be there on March 28th to speak to the Court.

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[28]Payne was decided on June 27, 1991. Rehearing was not denied until September 13, 1991, after Mr. Rodriguez was sentenced to death.

THE COURT: Very well.

(R.1891). Clearly, Judge Carney intended the family members' preference for death influence his sentence.

Subsequently at the sentencing hearing, family members testified, and the State noted that the victim's family wanted the death penalty to be imposed on Mr. Rodriguez:

> MR. TONER: Both the victim's survivors and jury have recommended unanimously in this case 12-0.
>
> Death is the only appropriate remedy in this case.

(R. 1753).

Sentencing in a capital case is to be individualized. The sentence must be tailored to the defendant's characteristics and the circumstances surrounding the crime. Zant v. Stephens, 462 U.S. 862 (1983). Consideration of the views of the victim's survivors is not a "principled way to distinguish this case, in which the penalty was imposed, from the many in which it was not." Godfrey v. Georgia, 446 U.S. 420 (1980).

To the extent trial and appellate counsel failed to properly litigate this issue, Mr. Rodriguez received

prejudicially ineffective assistance of counsel. Mr. Rodriguez requests a hearing on this issue, and thereafter, Rule 3.850 relief.

ARGUMENT 12

THE CUMULATIVE ERROR ARGUMENT

Mr. Rodriguez did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 841 F.2d 1126 (11th Cir. 1991). It failed because the sheer number and types of errors that occurred in his trial, when considered as a whole, virtually dictated the sentence that Mr. Rodriguez ultimately received.

The flaws in the system which sentenced Mr. Rodriguez to death are many. They have been pointed out not only throughout this brief,but also in Mr. Rodriguez' direct appeal and while there are means for addressing each individual error, addressing each error only on an individual basis will not afford constitutionally adequate safeguards against Mr. Rodriguez' improperly imposed death

sentence. This error cannot be harmless. The results of the trial and sentencing are not reliable. Relief is warranted.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Rodriguez respectfully urges this Court to reverse the lower court order, remand the case to another judge by random selection, grant a hearing on Mr. Rodriguez's public records claims, grant an evidentiary hearing on the outstanding penalty phase claims and guilt phase claims and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by federal express to all counsel of record on October 9. 2000.

____

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