IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1966

MANUEL PARDO Jr.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves an appeal from the denial of a Rule 3.850 motion on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the Brief shall be as follows: (R. ___)--Record on Direct appeal; (IAR.___) –- Record from Interlocutory Appeal; (PCR. _____)--Record from the post-conviction appeal; (Supp. PCR.___) - Record from Supplemental Record on Appeal. References to the exhibits introduced during the hearing and other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Pardo requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND OF THE FACTS

Mr. Pardo and co-defendant Rolando Garcia were charged with various offenses set forth in a nineteen (19) count indictment in Case Number 86-12910 (R. 1-15a). An amended indictment raising the charges to twenty-four (24) counts was thereafter filed (R. 16-34a), charging Mr. Pardo and Mr. Garcia with: first-degree murder of Mario Amador (Count I); first-degree murder of Roberto Alonso (Count II); robbery of cocaine from Mario Amador (Count III); unlawful possession of a firearm while engaged in the felony of first-degree murder and/or armed robbery (Count IV); first-degree murder of Luis Robledo (Count V); first-degree murder of Ulpiano Ledo (Count VI); armed robbery of a wallet and its contents from Luis Robledo (Count VII); unlawful possession of a firearm during a felony of murder and/or armed robbery (Count VIII); first-degree murder of Sara Musa (Count IX); first-degree murder of Fara Quintero (Count X); armed robbery of Sara Musa (Count XI); armed robbery of Fara Quintero (Count XII); unlawful display of a firearm while committing a felony (Count XIII); first-degree murder of Ramon Alvero (Count XIV); first-degree murder of Daisy Ricard (Count XV); unlawful possession of a firearm during a felony (Count XVI). Counts XVII through XVIV name only Garcia (R. 25).

An indictment was filed in Case No. 86-14719 on June 11, 1986, charging Mr. Pardo and Mr. Garcia with the first-degree murder

of Michael Millot (Count I); and unlawful possession of a firearm while engaged in a criminal offense.

Various pretrial motions were filed, including a motion to sever defendants which was filed on October 30, 1986 (R. 191-93). After several conflicting rulings on whether the Garcia and Pardo cases would be severed from each other, and a mistrial, the trials of Mr. Pardo and Mr. Garcia were eventually severed from each other.[1]

After a jury trial, Mr. Pardo was found guilty on April 15, 1988 (R. 4124-28). On April 19, 1988, the jury recommended death sentences for the first degree murder convictions (R. 4272-74). The jury voted 8-4 to impose the death penalty for the murder of Mario Amador, 9-3 for Roberto Alonso, 9-3 for Luis Robledo, 9-3 for Ulpiano Ledo, 8-4 for Sara Musa, 10-2 for Fara Quintero, 10-2 for Ramon Alvero, 10-2 for Daisy Ricard, and 8-4 for Michael Millot (R. 4251-53). On April 21, 1988, the trial court imposed sentences of death (R. 4138-44). On direct appeal, this Court affirmed Mr. Pardo's convictions and sentences. Pardo v. State, 563 So. 2d 77 (Fla. 1990). The United States Supreme Court denied certiorari on May 13, 1991. Pardo v. Florida, 111 S. Ct. 2043 (1991).

On July 21, 1998, Mr. Pardo filed an interlocutory appeal to this Court regarding the denial of access to public records by

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[1]Garcia was eventually tried on all counts, and convicted and sentenced to death. His convictions were overturned by the Florida Supreme Court due to the error in failing to sever the counts. Garcia v. State, 568 So. 2d 896 (Fla. 1990).

the lower court. That appeal was pending until January 18, 2000, when it was dismissed without prejudice to raise upon final appeal. On June 25, 2001, Mr. Pardo filed an Amended Motion to Vacate his convictions and sentences of death pursuant to Rule 3.850/3.851. On September 12, 2002, a supplement to the 3.850 motion was filed raising the applicability of Ring v. Arizona, 122 S. Ct. 2428 (2002) to Florida's death penalty process. Following a *Huff* hearing, the lower court ordered an evidentiary hearing on three issues; (1) Whether the State violated Brady v. Maryland 373 U.S. 83 (1963) when it failed to turn over to the defense a eight hour video taped statement of the State's witness Carlo Ribera; (2) Whether Mr. Pardo's trial counsel represented Mr. Pardo under a conflict of interest, and (3) Whether trial counsel was ineffective for not moving to sever all nine first degree murder counts into separate trials.

2003 Evidentiary Hearing

On June 25 and June 30, 2003, an evidentiary hearing was conducted. Counsel for Mr. Pardo presented two witnesses: (1) trial counsel Ronald Guralnick; and (2) movie producer Richard Seres. The State presented no witnesses.

Regarding the Brady claim, the State conceded at the evidentiary hearing that the video taped statements of Carlo Ribera, taken on May 6 & 7, 1986, were never provided to defense counsel. The State claimed that the tapes were not given to defense counsel because the prosecution did know about the existence of the video tapes. (PCR 237). At the evidentiary

hearing, trial counsel's pre-trial *Motion for Discovery* was admitted into evidence as Defense Exhibit C. In the *Motion for Discovery*, trial counsel specifically requested, *inter alia*, all recorded statements by all witnesses. Appellant also introduced into evidence Exhibit D, which was a portion of a pre-trial transcript from a court proceeding in Mr. Pardo's case. At that proceeding, the prosecutor specified that "we have turned over all impeachment evidence, all exculpatory evidence, and we do not have any that we haven't turned over." (Exhibit D). Trial counsel testified at the evidentiary hearing that he would have wanted all impeachment information regarding Ribera because he wanted to "impeach Ribera to death." (Supp. PCR. 156). When asked about specific contradictions between Ribera's trial testimony and the suppressed video taped statement, trial counsel testified at the evidentiary hearing that he would have considered using any materials provided to him (in this case, materials that were not provided to him) to benefit his client[2].

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[2]At the evidentiary hearing, the trial attorney, Ron Guralnick revealed that he did not view the video tapes nor the transcripts of the tapes which were provided to him by undersigned counsel. Undersigned counsel provided Mr. Guralnick the tapes and transcripts more than three weeks prior to the hearing. Furthermore, in hope of avoiding any such problem, undersigned counsel brought this matter to the court's attention over a month prior the hearing during a status conference. Following this court's explicit instruction, undersigned counsel spoke with Mr. Guralnick and conveyed the court's wishes that he view the tape prior to the evidentiary hearing. Mr. Guralnick responded that he would do so. Thus, undersigned counsel followed the court's directions and cannot be faulted for Mr. Guralnick's failure to watch the video taped statements. Certainly, Mr. Pardo should suffer no prejudice from this matter. Additionally, in an abundance of

(Supp. PCR 159-60).

Trial counsel testified at the evidentiary hearing that Mr. Pardo hired him privately (Supp. PCR 183) and was only paid an "insignificant" amount of money. (Supp. PCR 187). Trial counsel also acknowledged that prior to trial, he authored a *Motion to Withdraw*[3] which stated, *inter alia*, "One fact is certain, Counsel cannot possibly defend this Defendant on what amounts to a pro bono basis because to do so would virtually destroy his law practice." (Defense Exhibit M).

With respect to the issue of the severance of the charges facing his client, trial counsel testified during cross examination that he did join in Mr. Pardo's co-defendant's motion to sever the counts but decided to withdraw from that motion because:

> All the separate counts of murder that had been filed against him, if I had tried them each individually, I mean, his chances of winning every single one of them with the evidence they had, you would have a better shot a winning the lottery. So it was my opinion that with an insanity defense, if they're all joined in one case, that if the jury believed the he was insane, then he was a total winner.(Supp. PCR 233).

On August 26, 2003, the lower court rendered an order denying

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caution, undersigned counsel moved for a continuance so that Mr. Gurlanick could view the tapes, as well as request that Mr. Guralnick view the tapes in open court since the tapes were already admitted in evidence at that point in the evidentiary hearing, both requests were denied (Supp. PCR.142).

[3] Trial counsel's *Motion to Withdraw* was not included in the record on appeal from the Direct Appeal. It therefore appears that the Motion was never filed.

all claims raised in Mr. Pardo's Rule 3.850 motion. This appeal now follows.

SUMMARY OF ARGUMENTS

1. The lower court erred in summarily denying several meritorious claims where an evidentiary hearing was necessary to resolve the claims.

Compelling evidence that Mr. Pardo was incompetent at the time of trial, as well as evidence that the mental health experts who did examine Mr. Pardo performed scientifically deficient evaluations was alleged in Mr. Pardo's Rule 3.850 motion and required a full evidentiary hearing. While the issue of failure to hold a competency hearing was raised on direct appeal, it was not discovered that Mr. Pardo suffered from a severe thyroid disorder until after he was sent to death row. As alleged in Mr. Pardo's Rule 3.850 motion, compelling medical evidence exists that severe, untreated thyroid disorders can cause numerous psychiatric conditions. The very same evaluations that the lower court and this Court previously relied upon to find Mr. Pardo competent included several tell-tale signs of Mr. Pardo's severe physical illness that caused severe psychiatric impairments. However, the doctors who performed the evaluations mis-diagnosed obvious symptoms, and their conclusions are medically unreliable. The effect of Mr. Pardo's thyroid

disorder on his competency, as well as the unreliability of the pre-trial evaluations are not refuted by the record and thus require evidentiary development. Furthermore, other claims which were raised and not refuted by the record were also improperly denied without an evidentiary hearing. In fact, compelling evidence that Mr. Pardo was not even at the scene of two of the homicides is clearly not refuted by the record. Additionally, trial counsel's failure to properly secure a competent mental health expert was likewise not refuted by the record and thus required an evidentiary hearing.

2. **The lower court erred in denying relief following an evidentiary hearing on Mr. Pardo's Brady claim**

Undoubtedly the key witness for the State in its prosecution against Mr. Pardo was Carlo Ribera. Ribera was a criminal who told police he became involved in the world of drug dealing. Ribera became "friends" with Mr. Pardo and co-defendant Rolando Garcia and ultimately became a confidential informant for the police and provided information to the police about Mr. Pardo and Rolando Garcia. Several years after Ribera testified against Mr. Pardo at trial, it was discovered that an eight hour video taped statement by Ribera was never turned over to the defense. The statement contradicts Ribera's trial testimony in several material ways. Additionally, the suppression of the statement denied Mr. Pardo a fair trial because had the statement been disclosed, additional avenues of investigation

and defense strategies could have been pursued . The lower court granted an evidentiary hearing on the issue of whether the State violated Brady v. Maryland, 83 S.Ct. 1194 (1963) by failing to disclose the video taped statement. The lower court erred by denying this Brady claim following the evidentiary hearing.

3. The lower court erred in denying relief following an evidentiary hearing on Mr. Pardo's claim of ineffective assistance of counsel for failure to sever counts

Despite the fact that the State did not oppose a severance of several of the unrelated homicide charges Mr. Pardo was facing, trial counsel withdrew from an earlier motion to sever counts and proceeding to trial on all nine murder charges and numerous other felonies. At the evidentiary hearing, trial counsel testified that the reason he wanted to proceed on all charges was that if at one trial single trial the jury believed his client was insane, then his client would be a "total winner." (Supp. PCR 233). However, trial counsel believed Mr. Pardo would have a better shot a winning the lottery than winning every separate trial. This "strategy" was unreasonable, not based upon the quality of evidence against each charge Mr. Pardo faced, and heavily influenced by trial counsel's financial inability to represent Mr. Pardo in numerous trials.

4. The lower court erred by denying Mr. Pardo access to public records

The lower court denied Mr. Pardo access to numerous public records due to Mr. Pardo's inability to demonstrate how the requested public records would be relevant to Mr. Pardo's post-conviction motion. The lower court sought guidance from this Court on how relevance should be established in relation to public records requests. An interlocutory appeal was filed with this Court and eventually denied without prejudice to raise upon final appeal. By requiring Mr. Pardo to establish relevance in order to receive public records, Florida Rule of Procedure 3.852 violates Mr. Pardo's constitutional right of access to public records guaranteed by the Florida Constitution. Furthermore, Rule 3.852 violates Mr. Pardo's Fourteenth Amendment right to equal protection by creating a separate class, death row inmates, who must show relevance in order to receive public records.

ARGUMENTS

ARGUMENT 1

The lower court erred in summarily denying several meritorious claims where an evidentiary hearing was necessary to resolve the claims

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).

STANDARD OF REVIEW: To uphold the summary denial of claims raised in a Rule 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Where no evidentiary hearing was held by the lower court, the appellant's factual allegations must be accepted to the extent that they are not refuted by the record. Peede v. State, 748 So. 2d 243 (Fla. 1999). Under Rule 3.850 and this Court's well settled precedent, a post conviction appellant 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). Mr. Pardo has alleged facts, 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.

A. The evaluations which found Mr. Pardo competent were inadequate and scientifically unreliable. Mr. Pardo was incompetent at the time of his capital trial.

The claims related to Mr. Pardo's competency were addressed by the lower court in four interrelated claims; (1) trial counsel failed to request a competency evaluation (PC-R 376); (2) failure to investigate underlying cause for Mr. Pardo's insanity (PC-R 378); (3) Mr. Pardo was incompetent to stand trial (PC-R 379); and (4) the mental health experts who evaluated Mr. Pardo failed to conduct professionally competent and appropriate evaluations (PC-R 380). For each claim, the lower court erred in not conducting an evidentiary hearing. The lower court essentially denied the competency claims holding that the issue was previously addressed by this Court on direct appeal and rejected citing

> Mr. Guralnick stipulated that his client was competent, and reiterated that he only wanted a determination of insanity. The court appointed experts examined Defendant, found him to be sane, and also determined that he was competent to stand trial. Thus, not only was there no reason for the court to have ordered a competency hearing, but also there was no prejudice to Defendant, as the hearing would not have benefitted him. Pardo v. State, 563 So. 2d at 79 (PC-R 376, 379).

While undersigned counsel acknowledges that the claim of failure to conduct a competency hearing was raised and rejected on direct appeal, the instant consolidated competency claims are not procedurally barred. What the lower court's order demonstrates is that it completely misunderstood or simply ignored the actual issues raised. While it is true that the

mental health experts appointed to determine insanity also found Mr. Pardo competent, the actual issues raised were that these evaluations were professionally inadequate, scientifically unreliable, and that they failed to diagnose clear symptoms of illness. The facts alleged in Mr. Pardo's 3.850 motion were legally sufficient to require an evidentiary hearing on whether Mr. Pardo was competent at the time of trial as well as whether the mental health evaluations were scientifically adequate to satisfy the requirements of due process.

The notion that a defendant must be competent to stand trial is a bedrock principle of our legal system not just to assure the defendant of a fair trial but to assure that the entire judicial procedure has credibility. Simply put, if a defendant is incompetent and cannot assist his attorney in defending himself, then the trial can never be considered a fair one. In such a situation, the defendant suffers and the Constitution suffers. Mr. Pardo's case represents exactly this situation.

Soon after Mr. Pardo was convicted and sent to death row to await his execution, blood tests confirmed what should have been obvious to everyone involved in Mr. Pardo's capital trial. Mr. Pardo suffers from a severe thyroid disorder which manifested itself in physical changes that were apparent to both the attorneys and mental health experts who worked on Mr. Pardo's case. Aside from the physical changes that could be seen with the naked eye, Mr. Pardo's thyroid disorder was the cause of a severe mood disorder and clinical depression which rendered Mr.

Pardo incompetent. Although Mr. Pardo's above-average intelligence and knowledge of the criminal justice system made him more than capable of understanding the standard questions which experts use to determine competency to stand trial, Mr. Pardo's illness made it impossible for him to rationally understand the charges he faced and he could not assist in any meaningful manner in his defense. This of course was vividly played out in front of the judge and jury as Mr. Pardo took the stand over his attorney's objection and completely contradicted the defense theory presented to the court. (R. 3561). In fact, Mr. Pardo testified to the jury that he is not insane and they should ignore the defense. (R. 4205).

A review of Mr. Pardo’s testimony reveals that he was irrational and could not assist in his defense. Despite the fact that Mr. Pardo was a police officer, he told the jury that he has not committed murder because murder is the unlawful taking of human life, and the people he killed were parasites and leeches and not human beings (R. 3565,66). Even if in his own mind he acted rationally, it cannot be said that Mr. Pardo could meaningfully assist in his own defense. The record reveals, quite to the contrary, that Mr. Pardo undermined his own defense at every step. What the record reveals is that Mr. Pardo did not truly have a rational understanding of the charges he faced. Clearly he did not believe his victims were literally cockroaches that needed to be exterminated. Mr. Pardo certainly understood that the people he killed were human beings. It is

plainly irrational to plead not guilty by reason of insanity, and then proceed to tell the jury that he disagrees with his own defense and that he is not insane. (R. 3600). Mr. Pardo left the jury little choice but to convict him when he took credit for killing the humans he called “dregs of society.” (R. 3574). It was not until the penalty phase, prior to Mr. Pardo taking the witness stand, when trial counsel finally stated the obvious; that “Mr. Pardo’s is incompetent to understand how his statements will help or hurt him.” (R. 4203). Even then, trial counsel failed to request a full competency hearing. What trial counsel did not know, and what every doctor who was involved in Mr. Pardo’s case failed to discover, was that Mr. Pardo was suffering from a disease which caused severe physical and mental impairments.

The medical evidence linking thyroid disorders and psychosis has a long and well documented history which pre-dated Mr. Pardo's trial. Mr. Pardo was prepared to present at an evidentiary hearing evidence of his thyroid disorder, evidence that he was in fact suffering both physical and mental manifestations of his thyroid disorder well before the killings for which he was convicted took place, and evidence that his trial attorney and all the mental health experts who worked on Mr. Pardo's case, should have known of Mr. Pardo's disease.

The requirement that a defendant actually be competent at the time of his trial has long been firmly established. A claim of incompetence to stand trial can be proven by the subsequent

presentation of collateral evidence as to actual competency. Nathaniel v. Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974; Mason v. Florida, 489 So.2d 734 (Fla. 1986). Incompetency can also be raised as a denial of due process because of the ineffective assistance of counsel and/or the mental health experts. Due process can also be denied by the court's failure to conduct a reliable and adequate competency proceeding. Pate v. Robinson, 383 U.S. 375 (1966). The evaluations in Mr. Pardo's case were neither reliable nor adequate.

A review of Mr. Pardo's trial reveals that there was never any serious attention paid to whether Mr. Pardo was truly competent to proceed to trial and assist with his defense. On May 22, 1986, Mr. Pardo was arraigned, pled not guilty and requested a trial by jury (R. 1161). On March 22, 1988, two weeks before his trial commenced, and nearly two years after his arrest, trial counsel for Mr. Pardo filed a motion to rely on the insanity defense. (R. 1433). Upon questioning by the judge, trial counsel stipulated that his client was competent and that the motion only addresses the issue of insanity (R. 1439). The trial judge appointed three mental health experts to "counter those experts involving the insanity defense" and specifically stated "I am not going to appoint experts for his competency in view of counsel's announcement; that he is competent to stand trial" (R. 1440). The court then appointed Dr. Leonard Haber, Dr. Jacobson, and Dr. Miller to counter the insanity defense. Id. Although none of the experts were appointed to determine

competency, each of the three experts, as well as the defense expert, Dr. Marquit, all concluded and testified that Mr. Pardo was competent to stand trial[4]. What is most glaring from the doctors' reports and their subsequent testimony before the jury is not that they found Mr. Pardo to be competent, but instead, despite the unquestionably bizarre and grandiose explanations Mr. Pardo provided, the reports and testimony provide tell-tale signs of a hormonal and thyroid disorder that were in fact alluded to but strangely dismissed with no further investigation.

Dr. Sanford Jacobson is a psychiatrist and thus a medical doctor. In his report to the trial judge, Dr. Jacobson found that:

> [He] (Pardo) did not appear to be anxious during the interview but he may be experiencing more stress than meets the eye. He noted that he has been losing some hair and talked about the loss of his mustache, some hair loss, and the loss of part of one of his eyebrows and well (SIC) as the loss of the hair from his arms and part of his legs. This might reflect the acute stressful situation he is in.

At trial, when Dr. Jacobson was questioned by the State regarding Mr. Pardo's appearance, he stated: "Well, I would say at least superficially, there was nothing unusual about his physical appearance. He was neat. He was clean. He was tidy. Later on the interview, it became apparent that there was some hair loss over one of his eyebrows. He pointed out some problems in terms of losing hair in his arms, et cetera."

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[4] At no time was there a "competency hearing."

(R. 3780).

Dr. Syvil Marquit, a psychologist, testified on behalf of Mr. Pardo stating that he is insane yet competent to stand trial. In his report, Dr. Marquit too noticed tell-tale signs of a thyroid disorder but had his own un-investigated explanation:

> In jail for the last two years there has been no opportunity for him to pursue his mission. He has let himself go and become flabby all the while thinking, what he will do when he gets out. Underneath he may be covering up his inner turbulence as he has started to lose hair or his eyelashes, eyebrows, and on his arms which may be symptomatic, possibly, of a condition called trichotillomania, in which the victim pulls his hair out. He denies doing this but on one occasion I saw him fingering the hair.

Aside from the doctors' utter failure to follow up on obvious physical symptoms, the experts simply made conclusions that were based upon nothing more than speculation. Had the doctors followed up on Mr. Pardo's symptoms, and conducted even a superficial medical examination, it would have been discovered that Mr. Pardo had gained over one hundred pounds while awaiting trial in Dade County, he had a history of abnormal sleeping patterns, an unusual lack of tolerance for cold, and a history of hair loss that could have and should have been discovered in his military medical records. Furthermore, the fact that Mr. Pardo, an ex-marine and someone who prided himself on his superb physical fitness ballooned up in weight while in jail to the point where he certainly looked

obese, and was missing patches of his hair, eyelashes and eyebrows, should have led the mental health experts to request a complete physical examination. Instead, the experts came up with unsubstantiated conclusions about how Mr. Pardo's stress level was affecting his appearance.

At an evidentiary hearing, Mr. Pardo is prepared to present expert medical testimony that Mr. Pardo suffered from an altered mental state secondary to a general medical condition of thyroid impairment which rendered him incompetent to stand trial. Because of his serious physical condition, Mr. Pardo was incapable of rationally assisting his attorney during trial, and of participating in and making any strategic decisions in his best interest. The result of trial counsel's stipulation of competency, trial counsel's failure to move the court for a competency determination despite the fact that trial counsel stated on the record that Mr. Pardo was not competent, and the mental health expert's inadequate and unprofessional evaluations is that a legally incompetent man was capitally tried and sentenced to death. When new evidence casts doubt on the previous assessment relied upon on direct appeal that Mr. Pardo was competent to stand trial, as it does in this case, an evidentiary hearing is clearly warranted.

Moreover, there was absolutely no testimony provided, nor were any factual determinations made, to the effect that the competency determination made in this case even approximated

the fulfillment of the constitutionally-mandated standard:

> The trial court at a hearing to determine competency to stand trial must apply the Dusky test which requires a determination of (1) whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) whether he has a rational as well as a factual understanding of the proceedings against him.

Lane, 388 So. 2d at 1025 (quoting Dusky v. United States, 362 U.S. 402 (1960)) (emphasis added). It is beyond dispute that "it is not sufficient for a trial judge to find that the defendant is oriented to time and place and has some recollection of events." Id. Nor is the defendant's demeanor dispositive of the issue. Pate, 383 U.S. at 386. "[T]he existence of even a severe psychiatric defect is not always apparent to laymen. **One need not be catatonic, raving or frothing, to be [legally incompetent].**" Bouchillon v. Collins, 907 F.2d 589, 593-94 (5th Cir. 1990). Such is the case with Mr. Pardo. While Mr. Pardo was not catatonic or incessantly drooling, and while he is indeed intelligent and knowledgeable regarding the various actors in the legal system, his unquestionably bizarre behavior and exceptionally peculiar beliefs certainly raised the question of Mr. Pardo's competency. However, when these beliefs and bizarre behaviors are understood in the context of someone with a severe thyroid disorder, it is apparent that Mr. Pardo did not have the sufficient present ability to consult with his trial attorney and prepare his defense with a reasonable degree of

understanding. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).

The posture and competency claims raised by Appellant are similar to Mason v. Florida, 489 So.2d 734 (Fla. 1986). Oscar Mason, a death sentenced inmate, raised in a Rule 3.850 motion a claim that he was incompetent at the time of his capital trial.

Prior to his trial, Mason's counsel raised doubts to the court about Mason's competency. Apparently, Mason was previously found competent during a separate trial for a charge of attempted murder. Two of the doctors found Mason to be competent to stand trial. *Id* at 736. Upon appeal, this Court remanded the case back to the circuit court for an evidentiary hearing on the competency claim. This Court found that because of the proffered evidence of an extensive history of mental health problems which trial counsel never uncovered, and the fact that this history was not considered by the examining psychiatrists, "we must remand for a hearing on whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history," *Id.*

Mr. Pardo's case is on point with Mason. Not only were the examining psychiatrists unaware of Mr. Pardo's history of severe physical and mental health problems, but their actual reports and trial testimony reveal tell-tale symptoms of Mr. Pardo's illness yet were never diagnosed. The actual

evaluations conducted by the mental health experts were medically and legally inadequate.

The Lower Court's Order

The lower court's order denying the claims related to Mr. Pardo's competency is wholly inadequate in explaining why these claims were summarily denied. The only "record" cited by the lower court is this Court's direct appeal opinion which noted that the mental health experts found Mr. Pardo competent. However, this utterly ignores the factual allegations that Mr. Pardo's thyroid disorder caused severe psychiatric defects causing his incompetency and insanity. The lower court's order ignores the factual allegations that the mental health evaluations were unreliable and inadequate. Interestingly, the doctor's reports, in and of themselves, are evidence that the evaluations were legally and medically inadequate. Despite noting numerous physical symptoms of a thyroid disorder, the mental health experts failed to pursue further investigation. Instead, they simply speculate incorrectly why Mr. Pardo was suffering from such bizarre physical symptoms.

In denying the claim that trial counsel was ineffective in investigating the underlying cause of Mr. Pardo's insanity, the lower court's order states that "if a medical doctor did not diagnose a physical disorder, it cannot reasonably be said that counsel was ineffective in failing to further investigate

the cause of Defendant's insanity" (PC-R 378). This demonstrates the lower court's misunderstanding of the issue and subsequent error in denying this claim without an evidentiary hearing. Instead of offering anything to refute the factual allegations, the lower court's order simply ignores the questions regarding ***why*** the mental health experts (including a medical doctor) failed to properly diagnosis obvious symptoms of Mr. Pardo's thyroid disorder. The question of whether the evaluations were adequate is likewise ignored. The question of whether a severe thyroid disorder can cause a defendant to be incompetent and insane is likewise ignored. What the lower court order does provide is what is already known, that the mental health experts at trial found Mr. Pardo to be competent. This simply does not dispose of or even address the actual claims raised. Only through an evidentiary hearing, where competent medical testimony can be heard, can this claim be addressed[5]. Because the files and records do not conclusively refute this claim, and the appellant's factual allegations must therefore be accepted as

[5] The need for an evidentiary hearing on this issue is crucial because Mr. Pardo's competence pervades all aspects of his trial. Questions such as: *Why did Mr. Pardo insist on testifying over his attorney's objections? Why did Mr. Pardo take credit for all nine murders when evidence existed that his co-defendant has a major, if not dominant role in the homicides? Why did Mr. Pardo take credit for the murders of Sara Musa and Fara Quintera when evidence exists that Mr. Pardo was not even at the scene of the crime?* cannot be properly answered unless understood within the context of a defendant suffering from severe physical and mental impairments.

true, the lower court erred by not conducting an evidentiary hearing.

B. Failure to Investigate and Challenge Mr. Pardo's Guilt

In Appellant's Rule 3.850 motion, it was alleged that Mr. Pardo was innocent of the homicides of Sara Musa and Fara Quintero, two of the victims for which he was sentenced to death. Despite the fact that Mr. Pardo took credit for killing these two women, trial counsel had a duty to investigate the accuracy of these charges[6]. This is especially true because trial counsel believed Mr. Pardo to be insane and therefore trial counsel had reason to be weary of his client's claims.

What has been discovered in post-conviction investigation is compelling evidence that Mr. Pardo did not kill these two women. In fact, alibi and other witness testimony supports the claim of innocence. The claim is not refuted by the record and clearly warrants an evidentiary hearing. At such a hearing, post-conviction counsel is prepared to present witnesses who can testify to compelling evidence demonstrating

[6] This claim is interrelated with the ineffective assistance of counsel claim raised in Argument 3. Clearly, trial counsel's conflicted desire to proceed to trial on all murder counts affected his ability to independently evaluate the actual evidence of guilt. Additionally, Mr. Pardo's incompetence likewise affects this claim. Specifically, Mr. Pardo knew he did not kill these two women yet took credit for their killing. An evidentiary hearing on the competency claims is necessary to understand why Mr. Pardo took credit for these murders.

Mr. Pardo's innocence of these two homicides.

Where no evidentiary hearing was held by the lower court, the appellant's factual allegations must be accepted to the extent that they are not refuted by the record. Peede v. State, 748 So. 2d 243 (Fla. 1999). Under Rule 3.850 and this Court's well settled precedent, a post conviction appellant 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). Mr. Pardo has alleged facts, which, if proven, would entitle him to relief. By denying this claim without hearing the factual evidence, the lower court erred.

ARGUMENT 2

The lower court erred in denying a new trial after an evidentiary hearing on Mr. Pardo's Brady claim.

In order to obtain relief and prove a Brady violation, Mr. Pardo must prove (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. Way v. State, 760 So. 2d 903 (Fla. 2000) (quoting Strickler v. Greene, 527 U.S. 263 (1999).

In evaluating prejudice, "a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles v. Whitley, 514 U.S. at 434-35. Rather, the suppressed information must be evaluated in light of the effect on the State's case as a whole and the "importance and specificity" of the witness' testimony. United States v. Scheer, 168 F.3d 445, 452-53 (11th Cir. 1999). Thus, the focus of whether the suppressed evidence is prejudicial is found in whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler v. Greene, 527 U.S. 263 (1999). Mr. Pardo submits that all elements of a Brady violation have been met, and the lower court erred by denying Mr. Pardo a new trial.

Standard of Review: In reviewing a trial court's evaluation of the evidence, this Court will not "substitute its view of the facts for that of the trial judge when competent evidence exists to support's the trial judge's conclusion." State v. Huggins, 788 So.2d 238 (Fla. 2001); quoting from Jones v. State, 709 So.2d 512 (Fla. 1998). However, the third prong of Brady, whether the appellant was prejudiced by the non-disclosure of the favorable evidence, is a legal questions which is subject to independent appellate review. State v. Rogers, 782 So.2d at 377 (Fla. 2001); Way v. State, 760 So.2d

at 913 (Fla. 2000).

A. Undisclosed eight hour video taped statement of State's star witness Carlo Ribera

The undisclosed evidence which is the subject of the Brady violation was an eight hour video taped statement made to the Hialeah Police Department by the State's star witness at trial, Carlo Ribera. The video tapes depict eight hours of an interview between a representative of the Hialeah Police Department named Fermin Rodriguez and Ribera. The interview was conducted over a two day period commencing on May 6, 1986 and ending May 7, 1986. The tapes culminate in several polygraph examinations of Ribera. Shortly before the video taped statements were made, Ribera went to the Hialeah Police Department and provided information on criminal activity by Mr. Pardo and Rolando Garcia. Although originally a confidential informant, Ribera became the centerpiece of the State's case against Mr. Pardo and Rolando Garcia. Ultimately, Ribera testified against Mr. Pardo at trial. As the lower court's order correctly points out, the State conceded that the video taped statement was not disclosed to the defense at trial. (PCR 371).

The video taped statement was unavailable to the defense for development of defense strategy, for use in investigation, and for purposes of impeachment. In fact, the statement Ribera provided to the police contradicts his trial testimony is

several material ways. It also shows his testimony changed over time demonstrating coaching by the State. The undisclosed videos depict the true picture of Carlo Ribera and the one that the jury never saw. Aside from the numerous internal inconsistencies of Ribera's story within the tape, aside from the repeated admonishments by the interviewer accusing Ribera of lying and in fact pointing out the lies to Ribera, aside from the bold acknowledgment of Ribera that he was not being truthful in his account of what he knew regarding his association with Mr. Pardo and Rolando Garcia, aside from these obvious tools of impeachment, the video tapes serve as a live-action display of Carlo Ribera's pompous bravado rife with inconsistencies.

Whether it regarded impeachment, developing investigation, preparing for depositions, communicating trial strategies with his client, and challenging search warrants, trial counsel testified at the evidentiary hearing that he would have considered using any materials provided to him (in this case, materials that were not provided to him) to benefit his client[7]. (Supp. PCR 159-60). Thus, this Court's obligation

[7]At the evidentiary hearing, the trial attorney, Ron Guralnick revealed that he did not view the video tapes nor the transcripts of the tapes which were provided to him by undersigned counsel. Undersigned counsel provided Mr. Guralnick the tapes and transcripts more than three weeks prior to the hearing. Furthermore, in hope of avoiding any such problem, undersigned counsel brought this matter to the court's attention over a month prior the hearing during a status conference. Following this court's explicit instruction, undersigned counsel spoke with Mr. Guralnick and conveyed the court's wishes that he view the tape prior to the

to independently review whether Mr. Pardo was prejudiced by the State's suppression goes well beyond the impeachment of Carlo Ribera with the numerous lies told by Ribera in the video tapes when compared with his trial testimony. In fact, as the progeny of case law following Brady makes clear, this Court must focus on the reliability of the outcome as a whole.

B. The Lower Court's Order

The lower court's order is inadequate in explaining why the Brady claim is denied. After citing the case law in which Brady claims are to be evaluated, the lower court's order essentially denies the claim because "trial counsel had sufficient evidence that Ribera was a liar, and since the Defendant insisted on testifying that he committed the murders, it cannot be said that the tapes could have placed the whole case in such a different light as to undermine confidence in the verdict." (PCR 373).

The rationale behind the Order ignores the numerous ways in which the suppressed evidence was material. By focusing on

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evidentiary hearing. Mr. Guralnick responded that he would do so. Thus, undersigned counsel followed the court's directions and cannot be faulted for Mr. Guralnick's failure to watch the video taped statements. Certainly, Mr. Pardo should suffer no prejudice from this matter. Additionally, in an abundance of caution, undersigned counsel moved for a continuance so that Mr. Gurlanick could view the tapes, as well as request that Mr. Guralnick view the tapes in open court since the tapes were already admitted in evidence at that point in the evidentiary hearing, both requests were denied(Supp. PCR 142).

the notion that trial counsel already had "sufficient evidence that Ribera was a liar," the lower court fails to examine the materiality of the suppressed video tapes. The very notion that trial counsel had "sufficient" evidence in which to impeach Ribera would seem to indicate that there was enough evidence presented at trial that demonstrated Ribera was not a credible witness. To the contrary, the evidence the State presented through Ribera was crucial to the State's theory at trial that Mr. Pardo was a drug dealer who was ripping off other dealers. Furthermore, trial counsel was entitled to receive ***all*** impeachment material from the State, not just ***sufficient*** impeachment evidence. In Cardona v. State, 826 So.2d 968 (Fla. 2002), when confronted with an argument from the State that withheld evidence would have only been cumulative impeachment evidence, this Court rejected that notion holding that the analysis should turn on the significance of the impeachment. ("We conclude that the reports of the undisclosed interviews contain material inconsistencies on several key points not addressed at trial that could have seriously undermined Gonzalez' credibility"). ***Id*** at 974. Furthermore, the "fact that a witness is impeached on other matters does not necessarily render the additional impeachment cumulative." ***Id*** citing United States v, Rivera Pedin, 861 F.2d 1522, 1530 (11th Cir. 1988). Similarly, Mr. Pardo was prejudiced by the State's withholding of the Ribera video tapes in several significant areas that the lower court

simply ignored.

Mr. Pardo submits that materiality can be found in the following areas. Each area, both independently and cumulatively, provides sufficient prejudice to warrant relief.

1. Grounds to challenge the search warrant

Had the video taped statement of Carlo Ribera not been suppressed by the State, Mr. Pardo's trial counsel would have had the tools to successfully move to suppress prejudicial evidence obtained as a result of the interview and subsequent search warrant obtained following the interview. The video tapes taken as a whole make it clear that the goal of the entire interview and subsequent polygraph examinations was to get Ribera to pass the tests so that a search warrant could be obtained. In fact, immediately following the last polygraph examination, the search warrant for Mr. Pardo's home was prepared and executed. As a result of the search on Mr. Pardo's apartment, numerous items were recovered and ultimately presented to the jury, including: Mr. Pardo's diary (R. 2305), which was introduced into evidence (R. 2307);[8] a Polaroid camera; portions of carpeting and projectile fragments which "corroborated" what Ribera had told law enforcement were seized (R. 2334-35); a credit card belonging

[8]Entries from the diary were thereupon elicited by the State through Detective MacArthur (R. 2310-21; 2367).

to Luis Robledo (R. 2337-39); newspaper clippings discussing the discovery of the bodies of Mario Amador and Roberto Alfonso (R. 2341-43); newspaper clippings discussing the murder of Michael Millot (R. 2343-44); police badges and identification cards belonging to Mr. Pardo (R. 2345-47); a police radio and walkie-talkie (R. 2348). Numerous photographs of Mr. Pardo's home were also described, including a photograph of military fatigues (R. 2353), documents from New York City police reports (id.), a safe (R. 2356); and portions of a door with "what appears to be projectile damage" (R. 2358).

What the video tapes reveal is the exact opposite of a search for the truth by law enforcement. Had the truth been the goal, the interview would have been terminated when it became utterly apparent that Carlo Ribera was a liar, and was telling one whopping tale after the next. The tapes provide a vivid and colorful display of the examiner, Fermin Rodriguez, repeatedly catching Ribera in his lies and fairly tales. Throughout the interview, Ribera could not remember important information and filled in the blanks with information that had been provided to him by the Metro-Dade police officers who spoke with him previously. For example, when describing the Robledo homicide, Ribera states that Mr. Pardo "goes into the room, okay. I thought it was upstairs. Metro Dade police officer says no it's a one floor, it's not two floors, so I imagine they went into the bedroom." As Ribera spun his

story, Rodriguez, at one point, told him "you're getting your ass in a bind because you're lying to me. I'm telling you, your catching yourself in lies." Rodriguez then challenges Ribera on his changing stories as to the relative roles that Mr. Pardo and Mr. Garcia played, finally telling Ribera "you're not being 100 percent." Rodriguez further states that I don't need the polygraph instrument to tell you that you're not being 100 percent truthful with me" and that "this thing here is not going to fly the way that you're being. You better level with me. You need help now. We are willing to give you a hand but we don't like to be stroked either." Ribera acknowledged that he "needed a hand" because otherwise he would not be talking to the police. Ribera states that he was "possibly confused" and Rodriguez tells him "I will be more than happy to help you out" and help him get "unconfused." Rodriguez goes on to admonish Ribera, telling him that "you cannot be confused when you go take a polygraph because remember what I told you, you go down the tubes." Again and again Rodriguez had to warn Ribera about lying; for example, he tells Ribera "Why do I have to drag this out of you? If I have to drag stuff out of you it gets worse. You know what I am saying? I mean, you know, I wasn't born yesterday." Rodriguez goes on: "Stop the bullshit. Stop the punches. Tell me the truth. Do you understand where I'm coming from" I speak English just like you do." He tells Ribera to "take it like a man" and that "I'm willing to listen

cause I want to help you pass the polygraph. But the only way that I can do that you got to level with me. And you know what you've been doing, you've been playing the violin for the past two and a half hours, and you know it cause I know it." He then tells Ribera that he's on "his side" and is not trying to "hurt him" and that if he did not care about Ribera, "I would have tested you about two and a half hours ago, I would have said you flunk, Carlo, get the hell out of my way." (See Defense Exhibit E).

The interview was never terminated because the truth was not the goal. Any reliance on information gathered from Carlo Ribera is clearly in reckless disregard for the truth when seen in light of these suppressed video tapes. Undoubtedly, the contents of these tapes would have been cannon fodder for a suppression motion as to the evidence garnered as a result of a search obtained with insufficient probable cause. Franks v. Delaware, 438 U.S. 154 (1978); Thorpe v. State, 777 So. 2d 385 (Fla. 2001). The affidavits were based mostly on information supplied by Ribera with no stated good faith basis for believing the information. As the tapes make perfectly clear, Ribera was extensively coached, told how to take the test, provided with the test questions, and failed numerous times. The same questions were repeated over and over again until such time as the tests produced a "positive" result, thus giving the police and the State the impetus to finalize the search warrants they so desperately needed.

The affidavit in support of probable cause for the search lacked probable cause and the results of the search should have been suppressed. Griffith v. State, 532 So. 2d 80 (Fla. 1988); State v. Bogard, 388 So. 2d 1296 (Fla. 1980). Moreover, the affidavits fail to detail the numerous inconsistent statements that Ribera gave, including his suggestions that the detective help him "remember" as well as the detective's offers to "help" Ribera "remember" information with the goal of passing the polygraph. State v. Van Peiterson, 550 So. 2d 1162 (Fla. 1989). In light of the fact that Ribera's information was the primary basis for probable cause, any attempt to excise the unreliable information provided by Ribera would leave a facially insufficient probable cause affidavit. Illinois v. Gates, 462 U.S. 213 (1983). Of course, this is why the police spent hour after hour with Ribera, giving him details, "helping" him remember, and conducting test until he "passed." Taken as a whole, the video tapes of Ribera are so checkered by internally inconsistent lies, fairy tales, deceptive self portrayals, and persistent beratings by the examiner accusing Ribera of lying that no judge would have issued an arrest warrant knowing that this man was the main source of information.

Aside from the video tapes being invaluable in terms of challenging the search warrants, the initial search warrant dated May 7, 1986 contains the following assertion: “Most of the details about the homicides that the source knew were

never released to the media and were not published or broadcast in any press or media accounts of the crimes." (See Defense Exhibit K - Affidavit for Search Warrant). Not only is this assertion in reckless disregard for the truth but it is flatly contradicted by Ribera's own statement in the suppressed video tapes where Ribera claims to have actually learned about Fara Quintero and Sara Musa's death from watching the news on television. Whether sufficient probable cause still exists if this portion of the affidavit is excised is not the question, what this court must consider is the effect the suppressed tapes had on the outcome of Mr. Pardo's trial. Clearly none of the information provided by Ribera should have been considered as truthful or trustworthy due to his incessant lies and story telling. Additionally, the fact that the suppressed video tapes contain statements that outright contradict assertions in the affidavit would have provided trial counsel with another avenue to challenge the search warrant and move to suppress the evidence obtained by the police.

2. Impeachment of Ribera at trial

The inconsistencies found between Ribera's trial testimony and his statements in the suppressed video tapes range from the trivial to the highly material. Beginning with the trivial, at trial, Carlo Ribera, testified that he only reached the tenth grade and attended Miami Springs Senior High School. (R. 2156). However, in the taped interview he

states first that he graduated from Hialeah High School, then states that he says he only reached the 11th grade and took his GED. (Defense Exhibit E). Another inconsistency appears in where Ribera says he first met Mr. Pardo. At trial he states that he met Mr. Pardo at a christening. (R. 2161). However, on the tapes Carlo Ribera describes in detail how Manny Pardo and Rolando Garcia had come into the Rainbow Video store to offer their services as “hit men” or “collection agents”. On the video tape, Ribera states that the owner of Rainbow Video and many of its customers were involved in the drug trade but that Ribera did not work there but merely helped out. This sort of deception begins to further support the State’s theory that Mr. Pardo was just trying to rip off drug dealers, even though at trial Ribera makes himself out to be an insignificant employee. “ I was a clerk. I rented movies out and received movies in, ” Ribera states (R. 2157). Mr. Ribera also waivers about whether Mr. Pardo or Mr. Garcia showed him the pictures of the victims. At times he states that Mr. Pardo showed him the pictures of the victims during many visits to Mr. Pardo’s house. Yet, at other times he states that he never really spoke with Mr. Pardo and that he (Ribera) was not allowed into Mr. Pardo’s home.(Defense Exhibit E).

There are further inconsistencies which strike at the heart of this case. Mr. Ribera lies about where he first saw the stolen credit cards taken from the murder victims. At one

point he states that he first learned of the credit cards through Ms. Musa and Ms. Quintero. He saw them with the cards at their apartment. At another point, he states he first saw the cards at Mr. Pardo's home, with Rolando Garcia and Mr. Pardo showing them to him.

Importantly, Ribera tells inconsistent accounts of who was the actual shooter. On the tapes after stating that Mr. Garcia was the brains of the duo and Mr. Pardo the killer, Ribera flip-flops and states in another portion of the tapes that Mr. Pardo was the brains and Mr. Garcia the killer. Another important inconsistency lies in where Ribera learned of the Musa and Quintero murders. At one point, he claims he learned of them through the television[9]. Yet, at another he claims he was shown pictures of the dead women by Rolando Garcia and Mr. Pardo.

Aside from Ribera's inconsistencies, there is his appearance. Ribera is seen sniffling and snorting, blowing his nose, wheezing through a great portion of the eight hours of tape. Then, during some of the testing he mainly falls asleep. Additionally, Ribera is constantly berated by the interviewer for lying, and even warns him on numerous occasions that he will fail the polygraph test. Trial counsel

[9] Interestingly, Ribera claimed on the video tapes not to really know the victims Sara Musa or Fara Quintero enough to tell them apart, but he was then able to identify how the rooms in their apartment were decorated and he knew that they were killed because he recognized the scene at their apartment on the TV new broadcast that reported their deaths.

could have used Ribera's bizarre behavior on the video tapes to challenge whether Ribera was actually impaired from drug use or coming down from drug use during the time of his statement to the police.

The video tapes also serve as strong impeachment by demonstrating how Ribera's knowledge evolved and became more specific over time. For example, at trial, when asked about the type of car that "El Negro", one of the victims, drove , Ribera definitively states that is was "[A] black Oldsmobile, two-door, black with a half tan top." (R. 2198). On the videotapes, referring to El Negro's car, Ribera stated that he could not recall if the car was a black Cadillac, Buick or Oldsmobile. (Exhibit E). Ribera was obviously extensively coached and fed information for his trial testimony. When a particular witness is crucial to the State's case, evidence of coaching is especially material to that witness's credibility. Cardona v. State, 826 So. 2d 968, 981 (Fla. 2002). See Rogers, 782 So. 2d at 384. In Mr. Pardo's case, whether Ribera was coached on what type of car a victim drove should not be the focus. The focus is that Ribera was coached on at least some testimony. This opens the door for the trial attorney to examine how else the witness has been coached by the State. When looking at the video tapes and comparing them with Ribera's trial testimony, it is clear that Ribera has changed from a boastful, fearless, big shot with many connections in the drug world who was asked by Mr. Pardo and

Rolando Garcia if they had any contract "hit" work for them, to the portrayal that the jury saw as a fearful, struggling, insignificant man who was taken under by the allure of Mr. Pardo and Rolando Garcia's life as drug dealers and hit men.

3. Investigation, defense strategies, and communications with Mr. Pardo

As described above, the undisclosed video tapes statement of Carlo Ribera contained a wealth of information clearly favorable to the defense. Perhaps the most insidious aspect of the State's suppression of Ribera's statement is how the defense was deeply impaired in exploring various options and investigations for the trial defense. The State's suppression of the Ribera video tapes not only directly undermined confidence in the outcome of Mr. Pardo's trial rendering it unreliable, but also undermined *what could have been*. As the case law makes clear, "[c]ourts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So.2d at 385 (Fla. 2001). Had the tapes been disclosed to Mr. Pardo, his trial attorney would have had many new avenues to pursue in which he could have defended his client.

As the testimony and other evidence revealed at the evidentiary hearing, the reliance on the insanity defense was

very late in Mr. Pardo's case. It was not until nearly two years after trial counsel began his representation of Mr. Pardo that he decided on the insanity defense.(Supp. PCR 143). As the court records indicate, it was not until Mr. Guralnick noticed bizarre changes in Mr. Pardo's appearance that he requested a psychologist to evaluate Mr. Pardo.[10] Had the video tapes not been suppressed by the State, a reasonable doubt strategy could have been successfully pursued.[11] Unfortunately, trial counsel was denied the ability to make an informed trial strategy by the State's suppression of material evidence.

Undoubtedly, Mr. Pardo hurt his case by taking the witness stand. Although he made it clear to the jury what his motivation was in claiming to kill all nine victims, he also

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[10] It appears Mr. Guralnick, despite his years of experience, was confusing insanity at the time of the crime with competency to proceed to trial. It is not clear why it took two years and physical changes in Mr. Pardo's appearance for Mr. Guralnick to conclude that Mr. Pardo was insane at the time of the crimes. Mr. Pardo pled in his 3.850 motion that he was indeed incompetent at the time of his trial due to a severe mood disorder which was caused by a serious physical illness; hypothyroidism. The doctors appointed by the court to opine on Mr. Pardo's insanity commented on the tell-tale signs Mr. Pardo displayed of a thyroid disorder but the evaluations were all unprofessional and incompetent because they speculated as to why Mr. Pardo had these physical changes but all doctors missed the obvious physical illness from which Mr. Pardo suffered. The lower court denied Mr. Pardo's competency claim without an evidentiary hearing.

[11] Despite Mr. Guralnick's testimony that this was not a reasonable doubt case, (Supp. PCR 144) the history of co-defendant Rolando Garcia's case belies this assertion. Despite the evidence being no more compelling against Mr. Pardo, Mr. Garcia is today a free man.

made it clear what his motivation was in taking the witness stand (R. 5363). Essentially, Mr. Pardo was dismayed at the lies he perceived Carlo Ribera was telling the jury and he wanted to set the record straight. Despite the fact that trial counsel did attempt to impeach Carlo Ribera, he was denied the strongest evidence available in which to show the jury that Ribera was not to be believed on anything that comes from his mouth. Had trial counsel had the suppressed video tapes, he could have used the strength of that impeachment tool to discuss with his client why taking the witness stand was unnecessary because the jury would not find Ribera credible. Once again, Mr. Pardo was denied this option by the State's suppression of evidence. Furthermore, as evidence presented at the hearing demonstrated, trial counsel hired an investigator to reveal as much information on Carlo Ribera as he could find. (Supp. PCR 146) Considering that the pre-trial strategy of the defense prior to relying on the insanity defense included investigating the credibility of the State's star witness, and this strategy continued at trial with counsel's cross examination of Ribera stressing that Ribera was an "unadulterated liar" (R.2251), it cannot be said that the State's suppression of the most compelling impeachment tool did not effect the entire defense in a manner that utterly undermines confidence in the outcome. Put another way, the State's suppression affected pre-trial strategy, deposition inquiries, investigations of State witnesses

including law enforcement, communications between attorney and client, and ultimately trial strategy and actual tactics used during the trial.

Despite the fact that Mr. Pardo took the stand and wanted credit for killing the nine individuals he was charged with killing, this does not lessen the prejudice which ensued by the State suppressing the Ribera video tapes. A Brady claim cannot be disposed of simply because of other sufficient evidence of guilt. As noted above, when evaluating prejudice, "a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles v. Whitley, 514 U.S. at 434-35. Rather, the suppressed information must be evaluated in light of the effect on the State's case as a whole and the "importance and specificity" of the witness' testimony. United States v. Scheer, 168 F.3d 445, 452-53 (11th Cir. 1999). See Hoffman v. State, 800 So.2d 174 (Fla. 2001), (this Court ordered a new trial based on a Brady violation despite the fact that there was evidence of guilt including a confession by the defendant).

The prejudice emanating from the State’s failure to disclose the Ribera tapes pervades all aspects of the two years from Mr. Pardo’s arrest through the trial. Had trial counsel been provided with these bombshell video taped statements of the State’s most important trial witness, everything from deposition questions to defense strategies

would have been different. Under the unique circumstances of Mr. Pardo's case, it cannot be said that justice has been served and a reliable outcome was achieved when the most damning piece of evidence against the State's star witness was not disclosed to the defense.

Mr. Pardo submits that all three prongs of Brady are met and a new trial is warranted. In Cardona, this Court made clear that when the State violates the principles of Brady, reversal in such cases is not to punish society by granting relief, instead, the overriding factor must remain the integrity and fairness of the judicial process. The principle necessitating reversal when the State fails to disclose to the defense material favorable evidence was espoused in Brady itself:

> The principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. ... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice ....

Cardona v. State, 826 So. 2d 968 (Fla. 2002).

ARGUMENT 3

The Lower Court Erred in Denying Mr. Pardo's Claim of Ineffective Assistance of Counsel Following an Evidentiary Hearing

In order to obtain relief under a claim of ineffective assistance of counsel, Appellant must show that trial counsel's performance was deficient; and that the deficient performance prejudiced the defense. Appellant must prove that trial counsel's errors were so serious that Appellant was deprived of a fair trial, a trial whose results are reliable. Strickland v. Washington, 466 U.S. 668 (1984); Wilkes v. State, 813 So.2d 12 (Fla. 2002).

Standard of Review: Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. Stephens v. State, 748 So.2d 1028 (Fla. 1999).

A. FAILURE TO SEEK SEVERANCE OF COUNTS.

Mr. Pardo and co-defendant Rolando Garcia were charged with various offenses set forth in a nineteen (19) count indictment in Case Number 86-12910 (R. 1-15a). An amended indictment raising the charges to twenty-four (24) counts was filed thereafter filed (R. 16-34a), charging Mr. Pardo and Mr. Garcia with: first-degree murder of Mario Amador (Count I); first-degree murder of Roberto Alonso (Count II); robbery of

cocaine from Mario Amador (Count III); unlawful possession of a firearm while engaged in the felony of first-degree murder and/or armed robbery (Count IV); first-degree murder of Luis Robledo (Count V); first-degree murder of Ulpiano Ledo (Count VI); armed robbery of a wallet and its contents from Luis Robledo (Count VII); unlawful possession of a firearm during a felony of murder and/or armed robbery (Count VIII); first-degree murder of Sara Musa (Count IX); first-degree murder of Fara Quintero (Count X); armed robbery of Sara Musa (Count XI); armed robbery of Fara Quintero (Count XII); unlawful display of a firearm while committing a felony (Count XIII); first-degree murder of Ramon Alvero (Count XIV); first-degree murder of Daisy Ricard (Count XV); unlawful possession of a firearm during a felony (Count XVI). Counts XVII through XVIV names only Garcia (R. 25). An indictment was filed in Case No. 86-14719 on June 11, 1986, charging Mr. Pardo and Mr. Garcia with the first-degree murder of Michael Millot (Count I); and unlawful possession of a firearm while engaged in a criminal offense.

At a pretrial hearing on Feb 2, 1988, trial counsel announced that "[w]e have motions to sever counts and defendants" (R. 1405). At a hearing on March 24, 1988, the State indicated that it did not object to severing the Musa/Quintero counts (R. 1525), acknowledging that those two cases are "a closer question" and "it's too close a call a question to allow it in a joint trial" (R. 1528). The trial

court then granted severance of the Musa/Quintero cases as to Mr. Garcia (who, at that point, was already severed from Mr. Pardo's case) (R.1530-31). Mr. Pardo's counsel adopted Garcia's severance of counts motion, which the court granted by severing counts 9 through 13 (R. 1577). The fact that the numerous homicide charges which Mr. Pardo and co-defendant Rolando Garcia faced were unrelated has already been addressed by this Court in Rolando Garcia's direct appeal. There, this Court made clear that "there was no temporal or geographical connection to link these crimes in an episodic sense." Garcia v. State, 568 So.2d 896,899 (Fla. 1990).

In the middle of jury selection at Mr. Pardo's trial, defense counsel inexplicably changed positions, withdrawing his previous motion regarding the severance of counts (R. 1840), agreeing that the Musa/Quintero cases, as well as the Millot case, were to be tried together (R. 1840-41). It was this decision to go to trial on all counts which rendered trial counsel ineffective. This decision was unreasonable and prejudicial to Mr. Pardo's right to a fair trial.

1. The Evidentiary Hearing

The lower court granted an evidentiary hearing regarding trial counsel's decision to not seek severance of the various counts. The trial attorney, Ron Guralnick, testified that he had a reason for wanting to go to trial on all murder counts, even though the State did not object to the severance. The

lower court's order paraphrases trial counsel's reasoning: "The odds of proving reasonable doubt in each case was remote. The jury would be more likely to believe an insanity defense , given the number of victims. If the defense worked, the Defendant would be a total winner." (PCR 374). The lower court went on to reject the claim that counsel was ineffective because trial counsel had a reasonable strategy for wanting to go to trial on all counts.

2. Not all Strategic Reasons are Reasonable or Credible

The rationale provided by trial counsel and accepted by the lower court appears reasonable only when taken out of context from what occurred prior to trial. Trial counsel's duty was to zealously advocate for his client as to each charge, not seek the most efficient strategy. As the evidence at the evidentiary hearing indicated, representing Mr. Pardo effectively was financially destructive for trial counsel. What the lower court ignored in its order and what trial counsel could not explain was the *Motion to Withdraw* that was found in trial counsel's file. The motion was never filed for unexplained reasons and makes clear that trial counsel knew he could not represent Mr. Pardo on all counts. Introduced as Defendant's Exhibit N, trial counsel acknowledges authoring the following motion:

> COMES NOW Counsel for the Defendant, MANUEL PARDO, who hereby move to withdraw as Defendant's Counsel herein for the

reasons set forth below:

1. When first retained by Defendant, neither Counsel nor Defendant knew how many counts of murder and related offenses his client would be charged with.

   At that time, Counsel had no idea how many State's witnesses there would ne nor how complicated the case would be.

2. Counsel was retained by his client for a nominal fee at best, considering the number of charges and witnesses in this case as well as the complexities of this case.
3. Defendant was indicted under two (2) separate indictments with 7 Counts of Murder in the First Degree as well as a host or related charges.
4. The State has named over one hundred and thirty witnesses a major portion of which are outside of the State of Florida.
5. The deposition of the lead investigator alone in these cases has been continuing for about thirty hours and is not yet completed.
6. The trial will take a minimum of one month.
7. Counsel has made an earnest effort to continue to represent his client but cannot do so without further fees generated in the case or he will virtually have to close down his practice.
8. In an effort to continue representing his client, Counsel has made a motion to be specially appointed by the Court as Special Public Defender in order that he be enabled to be paid the statutory fees for the cases filed against his client, but the County Attorney's Office has opposed this motion.
9. One fact is certain, Counsel cannot possibly defend this Defendant on what amounts to a pro bono basis because to do so would virtually destroy his law practice.
11. (SIC) This is a case of unusual circumstances and the County is unreasonable in its opposition to Counsel Motion to Appoint him as Special Public Defender.

At the evidentiary hearing, Mr. Guralnick stated that severing the counts was incompatible with the insanity defense because in trying all the counts together he hoped he could

persuade the jury to believe that Mr. Pardo had been insane for all the episodes. He felt that if the murders were tried separately, it would be difficult to persuade all of the different juries of Mr. Pardo's insanity. This rationale is simply not credible. The reality is that if one trial would cause Mr. Guralnick to practically close down his practice, imagine the burden several trials would be to Mr. Guralnick's law practice. It is worth re-stating trial counsel's own language from his motion to withdraw: "**One fact is certain, Counsel cannot possibly defend this Defendant on what amounts to a pro bono basis because to do so would virtually destroy his law practice**." Surely, several trials were simply not an option for Mr. Pardo because Mr. Guralnick had already realized it was not economically feasible.

The lower court chose to ignore Mr. Guralnick's *Motion to Withdraw* that was never filed prior to trial. Obviously something changed that allowed Mr. Guralnick to represent Mr. Pardo without "destroying his law practice." The lower court simply accepts trial counsel's simplistic reasoning without examining its reasonableness. Furthermore, the lower court misstates trial counsel's reasoning in a critical way, the lower court's order paraphrases trial counsel reasoning that "the jury would be more likely to believe the insanity defense, given the number of victims." (PCR 374). This rationale is not supported by the record. What trial counsel said was

All the separate counts of murder that had been filed

> against him, if I had tried them each individually, I mean, his chances of winning every single one of them with the evidence they had, you would have a better shot a winning the lottery. So it was my opinion that with an insanity defense, if they're all joined in one case, that if the jury believed the he was insane, then he was a total winner.(Supp. PCR 233).

Trial counsel did not testify that the jury was more likely to believe the insanity defense if there were a greater number of victims. Even if the lower court accepted this premise as part of trial counsel's strategy, it does not rationally follow; killing nine people does not make a defendant more likely to be insane than killing one person. The legal test for insanity does not take into consideration the number of victims. Only through adequate expert evaluations and competent testimony before a jury can insanity be established. The reality behind trial counsel's decision to go to trial on all counts is bound to trial counsel's financial inability to represent Mr. Pardo in numerous trials. Trial counsel was barely being paid for representing Mr. Pardo at his single capital trial, it would have taken several months to prepare for and participate in several capital trials. Without funds from the county, and with Mr. Pardo's inability to pay his lawyer even close to the going rate for his services, trial counsel was in no position to represent Mr. Pardo in numerous trials.

A new trial is warranted because trial counsel's decision to proceed to trial on numerous unrelated crimes was unreasonable and prejudicial. Mr. Pardo's case became a financial quagmire for trial counsel causing trial counsel to make tactical

decisions that were unreasonable and detrimental to Mr. Pardo. Additionally, the large number of underlying charges along with the nine murder charges was difficult for the jury to fairly evaluate. In fact, this Court reversed Mr. Pardo's co-defendant's convictions because "[b]ased on the evidence in the record, we conclude that combining the effect of the allegations and the evidence of the number and nature of the crimes did not 'promote a fair determination of the defendant's guilt or innocence of each offense.'... We also note the difficulty that trying these combined charges must present to a jury." Garcia v. State, 568 So.2d 896, 901 (Fla. 1990). The same prejudice which undermined Rolando Garcia's trial consequently prejudiced Mr. Pardo. The fact that Mr. Pardo's trial counsel withdrew his motion to sever the counts does not alleviate the confusion to the jury nor does it "promote a fair determination of the defendant's guilt or innocence of each offense." A new trial is warranted.

Argument 4

The lower court erred by denying Mr. Pardo access to public records. Fla. Statute § 119.19 and Fla. R. Crim. P. 3.852 (1998) is unconstitutional on its face and as applied to capital post-conviction litigants.

A. Public Records Requests and 1998 Interlocutory Appeal

The history of Mr. Pardo's public records litigation has been complex. Numerous records from the State Attorney's Office which prosecuted Mr. Pardo, as well as from law enforcement agencies involved in the investigation of Mr. Pardo, were not disclosed in the early 1990's due to the pending re-trials of co-defendant Rolando Garcia. Thus, the public records litigation was essentially on hold for approximately seven years. Moreover, the procedures for requesting and obtaining public records in capital cases was completely overhauled during the time period in which Mr. Pardo was seeking his records, which also contributed substantial delay and confusion to the process.

After numerous court hearings regarding public records requests from Mr. Pardo, and subsequent objections from various agencies, the lower court, on June 18, 1998, granted the objections and motions for protective orders from:

a. Metro-Dade Police Department

b. City of Miami Police Department

c. Florida Department of Corrections

d. State Attorney's Office for the 15th Judicial Circuit

e. Florida Department of Law Enforcement

f. Clerk of Court, 11th Judicial Circuit

g. Florida Department of Highway Safety & Motor Vehicles

The lower court found that "the requested materials have not been shown to be relevant, and the Court will therefore not address the issues of overbreadth or burdensomeness." (IAR. 1192-1219).

On July 21, 1998, Mr. Pardo filed an interlocutory appeal to this Court regarding the denial of access to public records by the lower court in the case[12]. That appeal was pending until January 18, 2000, when it was dismissed without prejudice to raise upon final appeal.

Mr. Pardo is entitled to all of the records which were denied to him during the public records litigation before the lower court. In addition there may be records the existence of which counsel is presently unaware. Mr. Pardo is aware of at least one record which has not been disclosed to counsel for Mr. Pardo as of today's date. A witness for the State who testified in Mr. Pardo's trial, Ernest Basan, apparently wore an undercover wire in an attempt to identify suspects in the homicide of

[12] The origins of the interlocutory appeal arise from a public records hearing that took place on March 6, 1998. After hearing arguments from all parties involved regarding how to evaluate whether Mr. Pardo's records request were relevant, Judge Genden, the circuit court judge, denied the records request and stated; "How do I decide what's going to lead to discoverable evidence when I don't know what the issues are. So I'm asking the Supreme Court – I'm asking you to take this up on appeal because everyone in the State needs some direction." (IAR 1192-1219)

Michael Millot. Mr. Basan, not a law enforcement officer, was apparently working on behalf of the Miramar Police Department.

Collateral counsel has a duty to seek and obtain each and every public record that exists in order to determine whether any basis for post-conviction relief exists therein. Porter v. State, 653 So. 2d 375 (Fla. 1995). This Court has made it clear that a prisoner whose conviction and sentence of death has become final on direct review is entitled to criminal investigative public records. See 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). Furthermore, the this Court has consistently remanded cases back to circuit courts and extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Ventura v. State, 673 So. 2d 479 (Fla. 1996). Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano v. Dugger, 561 So. 2d 54 (Fla. 1990).

B. The requirement that Mr. Pardo demonstrate relevance to obtain public records under Rule 3.852 violates the Florida Constitution.

Article I, Section 24 of the Florida Constitution states in relevant part:

> Section 24. Access to public records and meetings

> (a) Every person **has the right** to inspect or copy **any** public record made or received in connection with the official business of **any** public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.
>
> * * *
>
> (c) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . . **Laws enacted** pursuant to this section **shall contain only exemptions** from the requirements of subsections (a) or (b) **and provisions governing the enforcement of this section**, and shall relate to one subject.

(emphasis added).

Article I, Section 24 and the case law enforcing it are clear that the only public records which may be kept from the view of any person at any time during an agency's normal operating hours are those that are expressly exempt from public records disclosure by the Florida Constitution or a general law that "shall state with specificity the public necessity

justifying the exemption" and which is "no broader than necessary to accomplish the stated purpose of the law." Id. Therefore, it is clear that Fla. Stat. s. 119.19 and rule 3.852 are in violation of Mr. Pardo's rights under Article I, Section 24, of the Florida Constitution, Amendments V and XIV to the U.S. Constitution, and relevant case law in that they all seek to impermissibly restrict his access to public records by requiring Mr. Pardo to demonstrate *inter alia*: i) that he has made his own search for the records from sources other than the agencies subject to his public records demands (e.g., the records repository maintained by the Secretary of State); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976) (holding that the Public Records Act contains no requirement that, simply because the information contained in certain public records might be available from other sources, the person seeking access to those records must first show that he has unsuccessfully sought the information from these sources); see also Davis v. Sarasota County Public Hosp. Bd., 480 So. 2d 203 (Fla. 2d DCA 1985) (rev. denied 488 So. 2d 829) (holding that a citizen seeking to examine records of a public agency is entitled to examine the actual records and not merely extracts); ii) that his requests are relevant to his post-conviction proceedings; News-Press Pub. Co., Inc. v. Gadd, 388 So. 2d 276 (Fla. 2d DCA 1980) (holding that the Public Records Act does not direct itself to the motivation of the person seeking public records); Lorei v. Smith, 464 So. 2d 1330 (Fla. 2d DCA 1985) (holding that the

purpose of a request for public records is immaterial).

By forcing Mr. Pardo to demonstrate how a particular public record is relevant before post-conviction counsel has had an opportunity to fully investigate all possible meritorious issues places the investigation process on its head. While some public records are clearly relevant without explanation, i.e. police reports regarding the crime for which the defendant was convicted, other public records may or may not be critical depending on further investigation. By way of example, a public records request by Mr. Pardo for police files on a State's witness at trial may or may not exist. Furthermore, even if such records do exist, they may or may not reveal relevant information. However, if no records request is made, a full investigation cannot be conducted. Using the above example, if a State's witness has a history of making unsubstantiated claims to the police, that information would be useful in investigating the State's case. Yet, without seeing the actual records, it would be impossible for counsel to articulate to the court how the records are relevant without knowing the contents of the records. By denying Mr. Pardo access to public records based upon an inability to show relevance, the lower court denied Mr. Pardo the right to fully investigate all avenues for challenging his conviction and death sentence.

The restrictions placed upon capital post-conviction defendants violates Article I, Section 24 of the Florida Constitution by unfairly limiting access to records which all

other citizens may lawfully obtain. Furthermore, by restricting access to public records, Rule 3.852 violates the Fourteenth Amendment to the Federal Constitution by denying equal protection under the law. Mr. Pardo seeks reversal of the lower court's order denying access to public records, and leave to obtain all public records requested before the lower court. Furthermore, Mr. Pardo seeks leave to amend his Rule 3.850 motion after an opportunity to review the previously denied public records.

CONCLUSION

Based on the foregoing arguments and the record in this case, Mr. Pardo submits that his convictions and sentences, including his sentence of death, must be vacated and a new trial ordered. In the alternative, Mr. Pardo requests this Court remand this case to the circuit court for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra Jaggard, Office of Attorney General, on November __,2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in Courier New 12 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

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RESPECTFULLY SUBMITTED,

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