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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Pardo's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The following symbols will be used to designate references to the record in this appeal: "R" -- record on appeal to this Court; "PC-R" -- record on instant 3.850 appeal to this Court; "Supp. PC-R." -- supplemental record on instant 3.850 appeal to this Court. All other citations will be self-explanatory.

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ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING SEVERAL MERITORIOUS CLAIMS WHERE AN EVIDENTIARY HEARING WAS NECESSARY TO RESOLVE THE CLAIMS

A. Competency Claim

The State's Response to Appellant's substantive claim that he was tried while incompetent is utterly unresponsive to the actual claim raised. The State argues that "since the trial court adequately explained why it denied the claims, the fact that it did not attach portions of the record proved no grounds for reversal." Response at 42. However, as Appellant argued in his Initial Brief, the lower court failed to adequately explain why Appellant was not entitled to an evidentiary hearing.

Regarding Appellant's substantive claim that he was tried while incompetent, the State wrongly asserts that "to state such a claim sufficiently, a defendant must allege "'clear and convincing evidence [raising] a substantial doubt' as to his or her competency to stand trial." Citing *James v. Singletary*, 957 F.2d 1572 (11th Cir. 1992). Response at 43. This is not the test for when a defendant under Rule 3.850 is entitled to an evidentiary hearing, the relief sought

here. Appellant was entitled to an evidentiary hearing to prove his asserted claim. The State continues by arguing that "the claim was properly denied because Defendant did not allege clear and convincing evidence that he was in fact incompetent at the time of trial." Response at 45. The actual issue before this court is whether the lower court erred in not providing Appellant with an evidentiary hearing in order to prove his allegations. The State is attempting to put the cart before the horse by arguing the merits of Appellant's competency claims without Appellant having the opportunity to present evidence supporting his claim.

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 an evidentiary hearing unless the motion, 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). Appellant has alleged facts, which, if proven, would entitle him to relief. Because the files and records in this case do not conclusively show that he is entitled to no relief, the lower court

committed error by denying Appellant the opportunity to prove his allegations at an evidentiary hearing.

What the lower court ignored and what the State likewise failed to address is that even assuming *arguendo* that Appellant did receive what was akin to a competency hearing[1], the actual claim raised in Appellant's 3.850 motion was that the evaluations themselves were neither reliable, nor adequate, nor medically or scientifically valid. The State echoes the lower court's finding that four experts found Mr. Pardo to be competent and blithely argues that just because "defendant has a new doctor who will opine at this late date that he has an "'altered mental state"' is insufficient to create a real and legitimate doubt regarding Defendant's competency." Response at 46. The truth of the matter is all three court appointed experts, as well as the defense psychologist negligently misdiagnosed a serious physical illness that has well known and well accepted psychiatric manifestations. The State's Response is simply unresponsive to this issue.

While the State attempts to argue that this claim was insufficiently pled, the record belies this argument. In fact, the specificity and detail of the allegations

[1] It is factually a matter of record that Mr. Pardo did not receive an actual competency hearing. Although the court appointed experts, appointed for the purpose of evaluating insanity, also found Mr. Pardo to be competent, there was never any adversarial examinations, nor any reliable challenging of the experts finding of competency.

raised in the lower court go much further than the minimum requirement of Rule 3.850. Simply put, Appellant's allegations were not insufficient. Appellant detailed what the actual diagnosis was that the trial experts negligently missed (PC-R 91-95); Appellant identified the post-conviction expert and his findings (PC-R 102); Appellant also made specific allegations as to the remarkable physical changes on Mr. Pardo's body that were noted by the trial court experts but were negligently misdiagnosed.

Notwithstanding the State's bald assertion, this is not a situation where a post-conviction defendant simply finds a new expert who disagrees with the trial court experts. What is before this Court is a situation where a post-conviction defendant is entitled to an evidentiary hearing in order to show that the trial court experts failed to perform reliable and adequate evaluations, where the trial attorney failed to properly investigate his client's physical and mental health, and where even though the defendant did have the assistance of a mental health expert at trial, that expert's inadequate and professionally unreliable assistance was tantamount to no expert assistance at all.

Regarding Appellant's claims that the defense mental health expert failed to perform an adequate mental health evaluation, the State incorrectly asserts that

Ake[2] is not implicated because "[d]efendant is not claiming that the trial court refused to appoint experts to assist him with defense. In fact the trial court did appoint such experts. Instead, he is complaining about court appointed experts." Response at 48. While the State is correct in that the trial court did not refuse the defense expert assistance, the State is incorrect in asserting that Appellant is only complaining about the court appointed experts on competency. First, there were never any experts appointed to determine competency. Secondly, all four experts, (the three court appointed experts and the one defense expert) failed to diagnose a clearly indicated physical illness that is implicated with a long history of mental health manifestations. Because the expert assistance was grossly inadequate, Appellant would maintain that it was tantamount to no assistance at all. See *State v. Sireci, 502 So.2d 1221 (Fla. 1987). (We must warn that a subsequent finding of organic brain damage does not necessarily warrant a new sentence hearing. However, a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage).* Additionally, if receiving psychiatric assistance is to have any constitutional meaning to a defendant, the quality and reliability of the expert assistance is crucial. Simply put, the expert

[2] *Ake v. Oklahoma*, 470 U.S. 69 (1985).

assistance must be competent to meaningfully protect a defendant's constitutional rights. In fact, the language of *Ake* makes clear that a defendant is entitled to a "competent" expert who performs an "appropriate" examination. *Ake* at 83. In Appellant's case, the defense expert and the three court appointed experts failed to perform competent, reliable, and adequate evaluations. Appellant sat face to face with the four experts and despite the fact that he had patches of his hair missing, despite the fact that patches of his eye brows were gone, despite the fact that Appellant gained a large amount of weight at the Dade County Jail, despite the fact that he was articulating extremely bizarre ideas, none of these "experts" recommended any medical testing or did any meaningful follow-up evaluations. The performance of all four experts was negligent, deficient, and amounted to no assistance at all. To the contrary, Appellant was prejudiced by the experts negligence which resulted in an incompetent defendant proceeding to a calamitous trial.

The State argues that Appellant has failed to assert anything that trial counsel should have done to prepare the experts for their evaluation, therefore trial counsel was not ineffective for failing to see that the experts conducted proper evaluations. Response at 48. However, it was trial counsel's responsibility to ensure that Mr. Pardo's mental health expert performed a competent and reliable evaluation. It was trial counsel who noticed that his client's behavior warranted

expert assistance. (R.1436-37). It was trial counsel who should have noticed that his client's bizarre physical changes required a medical evaluation beyond what his incompetent psychologist could provide. Trial counsel's failure to properly investigate his client's physical and mental health condition, as well as his failure by omission to notice bizarre and striking physical changes on Appellant's face and body prejudiced Appellant's Sixth Amendment right to effective assistance of counsel. Trial counsel's ineffectiveness is further evidenced by his failure to request a competency hearing during the trial when it became apparent that Appellant did not have the sufficient present ability to consult with his trial attorney and prepare his defense with a reasonable degree of rational understanding. It was only prior to Appellant taking the witness stand during the penalty phase when trial counsel finally stated the obvious; that "Mr. Pardo is incompetent to understand how his statements will help or hurt him." (R. 4203). At this point, trial counsel was obligated to request a hearing to determine competency. Yet counsel failed to move for a competency hearing, and he failed to make the same argument on the record prior to or during Appellant's guilt phase testimony when it also became crystal clear that Appellant did not rationally understand the charges he faced, nor could he assist in his own defense.

Trial counsel's failure to investigate and discover his client's severe physical and mental illness was deficient in terms of both competency, as argued

above, as well as an insanity defense. The insanity defense, which the jury rejected at trial, was utterly flawed when considered in the context of trial counsel's failure to discover the true nature of Appellant's physical and mental illness. The lower court's order simply passes the buck in terms of who is responsible for this failure to investigate. The lower court's order states "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 rationale inexplicably holds no one responsible for a critical error in a capital case. The lower court does not hold the doctors responsible for failure to diagnose clear symptoms of a medical disorder, and yet relieves trial counsel of any responsibility for deficient performance "because 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." *Id*.

The State's Response Brief is utterly non-responsive in addressing Appellant's claim that the court appointed doctor's evaluations, as well as the defensive psychologist's evaluations were inadequate and unreliable. Instead of responding to the actual issues raised by Appellant, the State supports the lower court's reasoning by arguing that trial counsel "did have Defendant evaluated for competence....[t]he mere fact that Defendant has now found a new doctor who is

willing to testify that Defendant was incompetent does not show counsel was ineffective." Response at 48. The State does not address the inadequacies of the actual evaluations detailed by the Appellant in his Initial Brief. Instead, the State argues that Appellant's claim was properly denied by submitting the magic words that Appellant's claim was "insufficiently pled." Response at 46. As detailed above, the factual allegations made in Appellant's Rule 3.850 were specific, comprehensive, and not refuted by the record. In fact, the record is replete with evidence that Appellant did not possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and could not maintain 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). What the record does show is that Appellant's irrational understanding of proceedings he faced, and his inability to consult with his lawyer with a reasonable degree of rational understanding led to a circus-like trial. What the record demonstrates is that Appellant undermined his own defense and made irrational statements that essentially forced the jury to convict him and sentence him to death.

The relief Appellant seeks is an evidentiary hearing where he can demonstrate that the pre-trial mental health evaluations were unreliable and inadequate. At such an evidentiary hearing, Appellant can demonstrate that he was

denied competent and adequate psychiatric expert assistance, that he was denied effective assistance of counsel in arguing both competency and insanity, and that he was tried and convicted while incompetent. This Court has recently re-affirmed the standard for when the lower court should hold evidentiary hearings. "As a general proposition, a defendant is entitled to an evidentiary hearing on any well-pled allegations in a motion for postconviction unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Parker v. State*, 245 Fla. LEXIS 547 (Fla. March 24, 2005). See *Maharaj v. State,* 684 So. 2d 726 (Fla. 1996*)*; *Anderson v. State,* 627 So. 2d 1170 (Fla. 1993*)*; Fla. R. Crim. P. 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are insufficient to meet this burden. See *Kennedy v. State,* 547 So. 2d 912 (Fla. 1989*)*. However, in cases where there has been no evidentiary hearing, the court must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. *Parker v. State,* 245 Fla. LEXIS 547 (Fla. March 24, 2005); See *Peede v. State,* 748 So. 2d 253 (Fla. 1999*)*; *Valle v. State,* 705 So. 2d 1331 (Fla. 1997). This Court should now reverse the lower court and remand Appellant's case for an evidentiary hearing.

B. Ineffective Assistance of Counsel at the Guilt Phase

In his Initial Brief, Appellant argued that the lower court erred by not ordering an evidentiary hearing on Appellant's allegation that trial counsel was ineffective in investigating Appellant's guilt as to the murders of Ms. Musa and Ms. Quintero. The State loosely labels Appellant's claim as "conclusory," and "insufficient." Response at 49. However, the State's reasoning is without merit and is belied by what Appellant actually alleged. Appellant alleged that he had an alibi for these two killings and was prepared to present evidence that Appellant was not at the scene of the crime. Although Appellant's allegations are concise, they are not insufficient. While some allegations require more detailed factual allegations, this claim can only be further delved into through witness testimony at an evidentiary hearing.

The State argues that trial counsel was not ineffective because "the defendant informed his attorney that he in fact committed the crime." Response at 50. However, this claim is necessarily inter-related to Appellant's competency claim as well as Appellant's ineffective assistance of counsel claim presented in Claim III. At an evidentiary hearing, Appellant can demonstrate that his incompetence at the time of trial was a factor in his testimony where he took credit for all nine murders despite the fact that Appellant knew he did not kill Ms. Musa and Ms. Quintero. Furthermore, trial counsel had a duty to investigate the facts of the crime beyond what his client had told him were the facts. This is especially

true considering the fact that trial counsel presented an insanity defense and was therefore aware his client's mental state was at issue. Because there was no evidentiary hearing, this Court must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. *Parker v. State,* 245 Fla. LEXIS 547 (Fla. March 24, 2005); See *Peede v. State,* 748 So. 2d 253 (Fla. 1999); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997). Appellant is seeking relief from this Court in the form of remanding this case back to circuit court where Appellant can present evidence to support his allegation that he did not kill Ms. Musa and Ms. Quintero.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING A NEW TRIAL AFTER AN EVIDENTIARY HEARING ON APPELLANT'S BRADY CLAIM.

The State's Response does little if anything to defend the lower court's order denying relief regarding Appellant's *Brady* claim. As Appellant presented in his Initial Brief, the lower court denied relief 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 outcome." (PC-R at 373). The State does not specifically support nor find fault with the lower court's order other than argue that the claim was properly denied.

The State downplays the significance of its failure to disclose to the defense the video-taped statement of its star witness Carlo Ribera. The State argues that Appellant did not prove how the suppressed statement would have been admissible at trial. The State further argues that Appellant did not meet his burden because he did not lay a predicate for how the suppressed evidence could have been used for impeachment. The State ostensibly maintains the Appellant needed to call Ribera as a witness at the evidentiary hearing and actually use the suppressed statement to impeach his trial testimony. The State's argument is without merit for several reasons. Firstly, "withheld information, even if not itself admissible, can be

material under Brady if its disclosure would lead to admissible substantive or impeachment evidence." *Rogers v. State*, 782 So. 2d 373, 383 n.11 (2001). Secondly, the State fails to recognize how the trial defense could have been different had the defense known just how unreliable the State's main witness was in terms of his inconsistent recollection of his relationship with Mr. Pardo and Rolando Garcia. Likewise, the lower court's finding that "trial counsel had sufficient evidence that Ribera was a liar" (PC-R at 373), fails to regard how the trial defense could have been different had the true face of Mr. Ribera been fully revealed; "[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). *United States v. Bagley*, 473 U.S. 667, 683, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985*)* (reviewing court may consider directly any adverse effect that prosecutor's failure to respond to request for information from defendant might have had on preparation or presentation of defendant's case*)*.

The State argues that Appellant needed to call Ribera as a witness at the evidentiary hearing and actually use the suppressed statement to impeach his trial testimony. However, this Court has granted *Brady* relief in several situations where no such re-enactment of the trial took place with the inclusion of the

suppressed material. In capital defendant David Young's case, the State suppressed notes from an investigative police officer and without the benefit of an evidentiary hearing, this Court weighed the significance of the suppressed information and granted relief based on *Brady.*

> The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and **[*7]** which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

Young, 739 So. 2d at 559 (Fla. 1999).

In 2002, this Court granted Ana Cardona a new trial based upon the State's suppression of an interview with the State's star witness. Although there was an evidentiary hearing regarding the *Brady* issue which the lower court ultimately denied, this Court reversed and granted relief despite the fact that the witness was not cross examined at the evidentiary hearing with the suppresses statement. *Cardona v. State*, 826 So.2d 968 (Fla. 2002).

Although not on point as far as being used as *Brady* material, the clearest example of how critical the suppressed Carlo Ribera statement was to the defense can be seen in this Court's 2002 opinion in Appellant's co-defendant's case. *Garcia v. State*, 816 So.2d 554 (Fla. 2002). In Garcia's re-trial for the Amador/Alfonso homicides, the trial judge did not allow the defense to use the

very same Ribera statement [which is the subject of the instant *Brady* claim] to impeach Ribera at Garcia's trial. On direct appeal, this Court reversed and held that the trial court erred by not allowing the admission of the statement that impermissibly limited Garcia's right to cross examination. In its opinion, this Court refers to "area[s] of claimed impeachment" and "impeachment value" *Id*. The language this Court used in Garcia's case is useful in Appellant's case because notwithstanding specific questions Appellant's trial counsel could have impeached Ribera with at trial, the prejudice to Appellant in terms of his ability to cross-examine Ribera extended to how trial counsel could have prepared for his deposition of Ribera as well as the trial cross-examination vis-a-vis information counsel would have learned regarding Ribera's relationship with Rolando Garcia as well as his specific knowledge of the crimes.

The State further argues that "a lack of predicate is particularly important in this case. In his deposition, Ribera admitted that there were inaccuracies in his initial statements to the police." Response at 55. The State's Response is misleading because trial counsel would have assumed that his "initial statements to the police" was the audio taped statement that was turned over to the defense, not the suppressed video tapes. While the State attempts to argue that many of the alleged inconsistencies do not actually exist, the State fails to acknowledge that the video tapes contain numerous internal inconsistencies that necessarily conflict with

Ribera's other statements because it is not possible to decipher which version of Ribera's statement, if any, are actually true.

The State points to the fact that trial counsel, Ron Guralnick did not view the suppressed video tapes prior to testifying at the evidentiary hearing and "was able to state little more than that he may have used the tape depending on the contents of the tape." Response at 53. Appellant does not take issue with the State's correct rendition of the post-conviction record as to Mr. Guralnick's failure to view the tapes. However, it is of no moment whether he viewed them in terms of this Court's independent appellate review of *Brady*'s prejudice prong. *Rogers*, 782 at 377 (Fla. 2001); *Way v. State*, 760 So.2d at 913 (Fla. 2000). Trial counsel's position was 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[3]. (Supp. PC-R 158-160).

[3]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

Regarding how the suppressed video tapes could have led to the suppression of key evidence used against Appellant, the State argues that Appellant never proved that the affidavit in support of the search warrant was false or misleading. However, taken as a whole, the video tapes of Mr. Ribera are so checkered by internally inconsistent lies, fairy tales, deceptive self portrayals, and persistent beratings by the examiner accusing Mr. Ribera of lying, that there can not be any good faith basis for believing anything that Mr. Ribera said. The suppressed video taped statements of Carlo Ribera reveal that one thing is perfectly clear, Mr. Ribera is a liar. Yet it was only after hours of contradictions, hours of the police providing Mr. Ribera details, hours of "helping" Mr. Ribera remember, and conducting test after test until he "passed," only then did the police have the information they wanted to draft the search warrant. Yet the State persists that "the affidavit established that Ribera's credibility was determined by verifying information that Ribera had provided and by Ribera's knowledge of details of the crime that were not known to the public." Response at 64. The reality of Ribera's suppressed statement is that there is no good faith basis for believing anything Ribera said. What can clearly be inferred is that Ribera himself was likely

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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. PC-R 142).

involved in the homicides because he knew details about the crimes of which the public was unaware. In fact, the substance of the affidavit in support of the search warrant simply involved information Ribera gave the police that demonstrated his knowledge of the crimes, not anything connecting Appellant to the crimes other than Ribera's representations. Put another way, the only probable cause that could have been ascertained from Ribera's statement was that Ribera himself was criminally involved in the homicides. Because Ribera personally and colorfully demonstrated in his suppressed statement to the police just how incredible he was, his accusations that Appellant was involved in the homicides did not amount to much more than another lie. The fact that some items Ribera claimed to be in Appellant's possession ultimately turned out to be accurate after the search was conducted does not mean that the police had any good faith belief in anything Ribera had told them. To the contrary, the police knew from his preposterous and inconsistent story telling in the suppressed statement that he simply was not credible. Additionally, as the State even acknowledges, Ribera was extensively impeached because of his lies and the fact that some of what he told the police regarding the crimes were factually inaccurate. This does not demonstrate, as the lower court found that there was sufficient impeachment of Ribera, what it does demonstrate is that the suppressed statement, as well as all of Ribera's statements including his trial testimony were unreliable. Because the affiant for the search

warrant knew that Ribera was not credible, and the fact that Ribera was the primary source for what was pushed onto the magistrate as probable cause, there was no good faith basis to the affidavit and as such it was recklessly in disregard for the truth.

Regarding how the suppressed Ribera's statement affected Appellant's counsel's strategies at trial, the State mis-characterizes trial counsel's testimony. The State's Response includes "Mr Guralnick stated that his decision not to pursue a reasonable doubt defense was based upon a confession that Defendant had made to another inmate, the physical evidence and the corroboration of Ribera's statement by other evidence." Response at 72. What the State attempts to pass as trial counsel's testimony is in reality leading and loaded questions on cross examination that more often than not trial counsel simply acceded to after making it clear that he has no clear recollection of his decision making process at trial. (Supp.PC-R 210-224). In fact, the lower court judge at the evidentiary hearing interrupted the State's cross examination because it became clear that the State was merely presenting argument, not actual questions that trial counsel could answer through independent recollection. *Id* at 224.

To the extent that the State argues that trial counsel is merely speculating as to what he may or may not have done differently if he was provided the suppressed statement, that is the backward looking nature of analysis in a post-conviction

Brady claim. After all, it is the State who suppressed this bombshell statement from the defense of the State's star witness, and now argues that fifteen years after trial, the trial attorney can only insufficiently speculate as to what it would have done differently. However, "[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). *United States v. Bagley*, 473 U.S. 667, 683, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (reviewing court may consider directly any adverse effect that prosecutor's failure to respond to request for information from defendant might have had on preparation or presentation of defendant's case). Considering how the defense was "handicapped" is necessarily speculative. What is clear from the evidentiary hearing is that trial counsel testified that he would have used whatever information he was provided in his defense of Mr. Pardo. (Supp. PC-R 158-160).

Finally, as to whether the suppressed statement, if properly turned over prior to trial, could have altered the defense theory, or Appellant's decision to testify, this claim is intertwined with Claim I dealing with Appellant's incompetency. Certainly every trial strategy decision was impacted by Appellant's inability to rationally understand the charges he faced and reasonably assist in his own defense. Had the lower court properly granted an evidentiary hearing on

Appellant's competency claim, the evidence presented in Appellant's Brady claim would have been impacted as well. Reversal of the lower court's order is warranted.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING AN EVIDENTIARY HEARING

In his initial brief, Appellant argued that trial counsel was ineffective for failing to sever the nine murder counts, and numerous underlying felonies he faced at trial. Furthermore, Appellant argued that the reason trial counsel wanted to proceed to trial on all counts was due to financial considerations, not what was the most effective or reasonable defense strategy.

In its Response Brief, the State treats Appellant's ineffective assistance of counsel claim as a straight forward claim where the lower court makes factual findings that trial counsel made a strategic decision for the actions he took. However, Appellant's claim is not so straightforward because the factual findings made by the lower court are simply not supported by the record. Trial counsel did testify that he had a reason for proceeding to trial on all counts (Supp. PC-R 233), however, the reason trial counsel provided and the reason the lower court used to justify its order denying relief are simply different. In fact, the trial court's merely substituted its own rationale for why trial counsel wanted to proceed on all counts, yet the State attempts to argue that the lower court's concocted rationale was a finding of fact that should be given deference. What the record reveals is

that the lower court's findings are not factual, and are not supported by competent, substantial evidence.

The true motive for trial counsel's decision to proceed to trial on all counts was due to the staggering costs several capital trials would take upon trial counsel's law practice. As trial counsel conceded at the evidentiary hearing. Appellant hired him privately (Supp. PCR 183) and was only paid an "insignificant" amount of money. (Supp. PCR 187). At the evidentiary hearing, Appellant introduced Defense Exhibit N that was an unfiled Motion to Withdraw[4]. The most salient information from the motion to withdraw reveals the financial quagmire which trial counsel found himself in Appellant's case: In trial counsel's own words: "**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**." Exhibit N.

The State attempts to downplay the significance of Exhibit N by arguing "counsel at the evidentiary hearing never even asked counsel at the evidentiary hearing if the grounds asserted in the draft of the motion influenced his decision to seek severance." Response at 78. The State further argues that because trial counsel did initially seek severance and continued to seek severance for more than

[4]The full text of Exhibit N can be found in Appellant's Initial Brief.

a year after drafting the motion, (Response at 79), this would tend to show that the financial considerations were not the motivation behind proceeding to trial on all counts. The State misunderstands Appellant's argument. The very fact that trial counsel initially sought severance demonstrates that trial counsel was, at least initially, defending Appellant strategically. The need for severance was a slam-dunk decision[5] as it would clearly prejudice any defendant to have the jury know of numerous but ultimately unrelated crimes[6]. Yet in Appellant's case, as the actual trial approached, a *hail mary* approach was decided upon where trial counsel hoped " 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). This is not a strategy but instead an implicit acknowledgment of an inadequate defense based upon an inadequate investigation. What can be reasonably inferred from the evidence presented and an analysis of the record is that trial counsel was stuck in a position where the right thing to do on behalf of his client was to travel down a costly road of three or

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[5] 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).

[6] 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 initial 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).

perhaps four difficult capital trials. The fact that trial counsel initially sought severance and then as the trial approached withdrew that request only strengthens Appellant's argument that trial counsel was conflicted by his financial quagmire.

While the State argues that trial counsel's strategy to proceed on all counts was reasonable, it is clear that what the State attempts to pass as factual findings by the lower court are not supported by what counsel actually stated on the record. While the trial court held that "the jury was more likely to believe the insanity defense given the number of victims" (PC-R 374), this cannot be accepted as a factual finding because it was not in fact the reason trial counsel provided. The State argues "it was not unreasonable for the trial court to infer that counsel believed that the insanity defense was stronger with all murders in one case." Response at 80. However, the insanity defense is a legal concept that requires a legal analysis. The defendant's intent for each homicide needed to be proven to the jury. Essentially, what the trial court inferred trial counsel's strategy to be was to show the jury that *Mr. Pardo was so crazy that he killed nine people*. This simply does not make sense in a courtroom where real legal burdens needed to be met[7]. Given the fact that the lower court's factual findings as to trial counsel's

[7] Interestingly, during voir dire, one potential juror who did not ultimately serve on the jury responded to his thoughts about the insanity defense in Mr. Pardo's case in a very telling manner: Potential Juror Vitanza: "So, he went crazy six times or he killed them all at once or he went crazy one time or he went crazy six different

strategy are not supported by the record, this court should give no deference to them. The most reasonable inference from the totality of the evidence presented below, is that trial counsel could not, and would not defend each count facing the defendant due to the enormous financial strain doing so would take upon his private legal practice. Ultimately, the same prejudice that warranted reversal in Appellant's co-defendant's initial trial equally prejudiced Appellant; "[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). Trial counsel decision to proceed to trial on all counts was deficient and the resulting prejudice was Appellant's conviction. This Court should reverse the lower court's order and grant Appellant a new trial.

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times?" (R. 1772). Clearly, even to a laymen juror, it did not ring true that the number of victims strengthened the notion of insanity.

CONCLUSION

As to the remaining arguments argued in Mr. Pardo's brief, he relies on the arguments and authority cited therein. Based on the forgoing arguments and those in his initial brief, Mr. Pardo requests that this Court reverse the lower court and grant an evidentiary hearing, and/or grant his request for a new trial.

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, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami FL 33131 on April 26, 2005.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief is typed using Times New Roman 14 point font using Microsoft Word.

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