IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-859

MANUEL ANTONIO RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Manuel Antonio Rodriguez, Appellant/Defendant, appealed the denial of his motion to vacate his convictions and sentences of death in 2005. Following oral argument in April of 2008, this Honorable Court remanded jurisdiction for a period of six months for further evidentiary proceedings. This is the Mr. Rodriguez's Supplemental Initial Brief following the relinquishment period.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"R." - record on direct appeal to this Court;

"T." - transcripts on direct appeal to this Court;

"PCR." - record on appeal after post-conviction denial;

"Supp. PCR." - supplemental record after post-conviction denial;

"Trial Exh." - exhibits from the 1996 trial;

"Exh." - exhibits from the evidentiary hearings;

As in the Initial Brief, first names may be used for the sake of clarity due to the common last names of the Defendant/Appellant and the witnesses who testified against him.

REQUEST FOR ORAL ARGUMENT

Mr. Rodriguez has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Rodriguez, through counsel, urges that the Court permit oral argument.

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

A. Introduction.

Manuel Antonio Rodriguez was convicted of three counts of capital first degree murder based primarily on the testimony of Luis Rodriguez (co-defendant), Isidoro Rodriguez, Jr. (Luis's brother), and Rafael Lopez (Isidoro's brother-in-law). There was no physical or forensic evidence linking Manuel Rodriguez to the 1984 Abraham murders. T. 2356-59; Supp.PCR. 5307, 5312.

Law enforcement followed up on hundreds of leads but made no arrests until almost ten years later when Rafael Lopez contacted the police and gave them information that led them to investigate Luis and Isidoro Rodriguez. T. 3021-22. Luis was arrested and charged with the capital murders but was allowed to avoid the possibility of the death penalty by pleading to a reduced charge in exchange for his testimony against Manuel. Prior to trial, Luis was repeatedly taken out of the jail where he was awaiting trial on capital murder and allowed special visits with his family members, some of whom were witnesses in this case. T. 2743-2981.

Isidoro Rodriguez was initially a suspect in this case. It was only after he presented the police with his handwritten notes in a date-book and gas receipts that he was "cleared" by police. At the trial, Isidoro testified that he had nothing to do with the crime except that he retrieved a bag containing the victims' jewelry and property from his mother, who said she found it under her trailer. Isidoro claimed

that she called him for his help and that he retrieved the bag, took it back to Central Florida, and discarded the contents with the exception of one coin. T. 2416-2525.

The jury returned a verdict of guilty on all counts and Manuel Rodriguez was sentenced to death. See Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), cert. denied, 531 U.S. 859 (2000). Mr. Rodriguez subsequently filed a motion for post-conviction relief. Supp.PCR.1775-1847; PCR. 42-167. Relief was denied following a limited evidentiary hearing that was held in December 2004. PCR. 955-1086, 1221-1313, 590-634 (May 3, 2005 order). A timely notice of appeal was filed. PCR. 636-37.

While the appeal was pending in this case, and after the briefing was complete, on January 18, 2008, the Defendant filed a successive motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. Supp.PCR. 3856-81. Following oral argument held in April 2008, this Court issued an order reversing the lower court, in part, and relinquishing jurisdiction to the circuit court for further evidentiary proceedings. Supp.PCR. 4192-95. The April 30, 2008 order directed that a hearing should be scheduled on the following factual issues: the State failed to disclose letters written by former jail inmate Willy Sirvas that could have been used to impeach Luis Rodriguez; the jury never heard information that could have been used to impeach Isidoro Rodriguez, whether due to the State's failure to disclose information or due to the ineffective assistance of counsel,

including the allegation that the State has had a practice of hiding or altering dockets; and the State failed to disclose information that could have been used to attack or impeach the claims presented in the penalty phase concerning State informant Alejandro Lago. Supp.PCR. 4192-95.

Upon relinquishment, Mr. Rodriguez renewed his motion to disqualify the lower court judge. Supp.PCR. 4199-4215.[1] This motion was denied at the first status conference. Supp.PCR. 4358, 4216. Mr. Rodriguez subsequently filed several demands for public records addressed to various agencies. Over the course of several months, there were a number of pre-hearing status conferences during which issues concerning witnesses and discovery were addressed. Again, a limited and truncated hearing was held on September 22, 23, and 24, 2008. Supp.PCR. 5192-5555, 6132-40. Relief was denied. Supp.PCR. 5082-90 (Oct. 6, 2008).

B. <u>Guilt Phase.</u>

1. ISIDORO RODRIGUEZ

Manuel Rodriguez alleged in his Rule 3.850 motion that there was evidence that it was Isidoro who helped Luis commit the robbery. PCR. 52-57. In 2004, the lower court conducted a limited evidentiary hearing regarding the allegations that:

[1] The Defendant recognizes that this Court affirmed the denial of the previous motions to disqualify. Supp.PCR. 4192. Mr. Rodriguez filed the subsequent motion in order to preserve his federal due process claim that he has been denied a full and fair hearing in the state court.

trial counsel was ineffective for failing to present information that Luis's girlfriend believed that Luis and Isidoro left Central Florida together to commit the crimes; trial counsel failed to call Edgar Baez who was an eyewitness and whose description of the perpetrator was consistent with Isidoro Rodriguez's appearance; and, trial counsel failed to present evidence that Luis's family possessed jewelry taken from the victims. See Initial Br., pp. 16-18, 44-56. However, the lower court denied a hearing on other factual claims concerning Isidoro that the jury never heard. PCR. 54, 64; 595, 602. Relief was denied. Supp.PCR. 595-634.

This Court remanded the case to the lower court for further evidentiary proceedings. Supp.PCR.4192-4195 (Apr. 30, 2008 order). Following the remand, Mr. Rodriguez requested additional public records in order to assist him in proving his claim. Supp. PCR. 4219-48. For the first time, Mr. Rodriguez was provided access to the State Attorney files in connection with the Andres Roman homicide case. Supp.PCR. 4743-4744; 4323-25. Prior to the hearing, Mr. Rodriguez filed a motion requesting the court to take judicial notice of the following: court file in State v. Andres Roman in which Isidoro was an eyewitness to a drug related murder alleged to have been committed by his drug dealing friend and business partner; court file in State v. Isidoro Rodriguez which demonstrated that Isidoro had been arrested and charged in a burglary case that was eventually dismissed;

and the fact that the Mariel boatlift did not begin until April 15, 1980.[2] Supp.PCR. 4733-35, 6150-73. The lower court did not take judicial notice of either the Andres Roman file or the Isidoro Rodriguez file. Supp.PCR. 6232-37.

a. The Seminole County narcotics investigation.

This Court directed that a hearing was required regarding the allegation that either the State failed to disclose, or trial counsel failed to utilize the information that "Seminole County law enforcement officials were investigating allegations that Isidoro Rodriguez and his wife were involved in major narcotics-related offenses." PCR. 64; Supp.PCR. 4193. Back in 1992, Lieutenant Pete Kelting was assigned to the local drug task force associated with the Seminole County Sheriff's Office.[3] Supp.PCR. 4775. Kelting recalled that he had the opportunity to assist law enforcement from Miami-Dade County on a capital murder case. After reviewing a report written at the time, Kelting could recall that he had received an anonymous complaint regarding the alleged drug dealing activities of Isidoro Rodriguez. He remembered the location on Bear Lake Road in Apopka. As a result of receiving the complaint, he opened a file to begin an investigation and pulled toll records for

[2] At trial, Isidoro stated that he married in December of 1979 and left South Florida a couple of months later to get away from South Florida because of the Mariel boatlift. Supp.PCR.4755. His sworn testimony in the Roman case indicates that he left South Florida to get out of the drug dealing business himself. Supp.PCR. 4760. The lower court refused consider this information.

[3] Lt. Kelting's deposition was accepted into evidence in lieu of live

the address in question. That would be the normal course of action in determining whether to investigate further. Supp.PCR.4778-80. He could not recall what ultimately happened with the investigation—there was no indication that Isidoro was ever arrested.

Prior to giving the deposition in this matter, the Lieutenant attempted to see if he could locate the records concerning the investigation but was not able to find anything. Supp.PCR. 4785. If he had been subpoenaed to testify by the defense back in 1996, there is no reason that he would not have been available. Supp.PCR. 4787.

Trial counsel, Richard Houlihan, could not recall that he was ever aware that Isidoro had been investigated by the Seminole County Sheriff's Office. Supp.PCR. 5353. He explained that he would have liked to have had this information, and that he would have questioned Isidoro about the narcotics investigation at the deposition if he had been aware of it. Even if Isidoro was never arrested or convicted of any narcotics offense, that is still the kind of information that Houlihan needed to know in order to construct a theory of defense:

> The whole theory of defense here would have been radically different in that the actions of a particular family, Isidoro, Luis, the mother, who I think the jewelry was found underneath her home. I mean, that there is a family involved here. Manny's the odd man out. Manny's the schizophrenic. Manny's the guy who had always been ridiculed by

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testimony. Supp.PCR.4645-48, 4677, 4772-4802.

> these people. He's always been the outsider. And he's the one the family is going to dump on.
>
> So anything to build that up in front of the jury, that it isn't just one person's word against the other. It's almost like a criminal conspiracy. . . . . [W]hen I said circle the wagons before, I meant they're trying to, as a family, protect their own.

Supp.PCR. 5356.

Assistant State Attorney Abraham Laeser testified that the information about the Seminole County investigation was noted in one of the possibly thousands of reports contained in approximately 40 boxes that had been turned over to the defense as part of discovery prior to the trial. Supp.PCR. 5520-21,5531-32.

b. <u>Cousin Lieutenant Villanueva.</u>

After having been granted a hearing on the allegation that "a business partner and relative of Isidoro (his wife's cousin), who was very close to Isidoro and had on-going business ventures with Isidoro at the time of the investigation and subsequent trial, was a detective with the [Miami]-Dade Police Department," the Defendant renewed his efforts to obtain public records concerning Velia Rodriguez and Lieutenant Daniel Villanueva. Supp.PCR. 4474-80 (demand and letter); PCR. 64; Supp.PCR. 4193. The Miami-Dade Police Department ("MDPD") brought copies of Villanueva's personnel file along with other requested records to court for a public records hearing on July 18, 2008. Supp.PCR. 4532-36, 4564-68.

Nevertheless, the lower court denied Mr. Rodriguez's request for the records, finding the request was "overbroad." Supp.PCR. 4481-83.

Lt. Daniel Villanueva has been employed by at MDPD since 1986 and he is currently assigned to the robbery unit. Supp.PCR. 5243-44. He worked at headquarters on and off for most of his career and has known fellow officers Smith, LeClaire, and Singleton for years. Supp.PCR. 5251-52. The witness could not recall the specific dates that he was assigned to the building at headquarters, and a renewed request for his personnel file was denied. Supp.PCR. 5253-54.

State witness Rafael Lopez is Velia's brother, and Velia is married to Isidoro. Rafael and Velia's mother and Daniel Villanueva's mother are sisters, making Villanueva and state witness Lopez first cousins. Villanueva grew up around Rafael and Velia; he would see them at Christmas, birthdays, and family barbeques. Villanueva has known Isidoro since 1979.[4] Supp.PCR. 5244-46. In fact, Villanueva traveled to Central Florida to attend the wedding of Isidoro's son as recently as August 2008. Supp.PCR. 5256.

Lt. Villanueva is also in the real estate business and has bought and sold two residences with his cousin, Velia, and Isidoro. Supp.PCR. 5247-50. In fact, one of the properties is located at 911 Lake Bear Road in Apopka which is where Isidoro

[4] The witness identified a photograph as a "appearing like a younger version" of Isidoro from the 1970s. The lower court denied the Defendant's request

was living when the Seminole County authorities became interested in him. Villanueva denied that he was aware that his business partner was being investigated for narcotics violation. Supp.PCR. 5254-55. Villanueva held property with Isidoro at least between 1989 and October 1995—during the same time frame that Manuel Rodriguez was investigated and tried in this case. Supp.PCR.5964-88; (Exh. O, P, Q, K, L, M, and N). The Lieutenant denied that he had any involvement in the investigation. Supp.PCR. 5265-67.

c. Threats against Isidoro.

Retired MDPD Sgt. Kenneth Al Singleton was brought into the investigation in this case because of his prior relationship with Isidoro Rodriguez. Sgt. Singleton was a member of "CENTAC," a special law enforcement unit that was designed to investigate drug related homicides in Miami. As part of the CENTAC unit, Singleton was involved in the investigation of a 1979 drug related murder in which Andres Roman was indicted for killing Oscar Alvarez.[5] Supp.PCR. 5152-53. Andres Roman, known to be a dangerous drug dealer, was implicated in four

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to admit the photograph. Supp.PCR. 5244-56, 5257-63 (Exh. A16).

[5] The lower court sustained the State's repeated objections regarding the details of the Roman case. Supp.PCR. 5164-67; see also Supp.PCR. 5651-5679, 5750-5838, A12, A13, A15. Mr. Rodriguez proffered that Roman and the victim (Alvarez) went to visit Isidoro Rodriguez, Sr. at his home and that Isidoro Rodriguez, Jr. was present. Isidoro Rodriguez, Jr. saw Roman shoot Alvarez. They dropped the victim off at the hospital where he later died. Supp.PCR. 5164-67. The lower court did not consider the details of the crime.

homicides. Supp.PCR. 5164. After Sgt. Singleton got information from a man named Guy Salome,[6] he finally was able to track Isidoro down in 1983, four years after the murder. Supp.PCR. 5169. Isidoro was surprised that Singleton found him—he was "visibly shaken" and never anticipated anyone linking him to the shooting of Oscar Alvarez. Supp.PCR. 5170-74. Isidoro said that he would have to think about it before giving a statement in connection with the investigation of Roman. Supp.PCR. 5174-75. Isidoro eventually testified against Roman at the State's behest. Roman was acquitted.

The investigators[7] on the Abraham homicides knew that Singleton had prior contact with Isidoro due to his involvement in the Roman case so they thought it would be beneficial if he accompanied them to Central Florida. Supp.PCR. 5180. Sgt. Singleton went with Detectives LeClaire and Nyberg to interview Isidoro in 1993. Supp.PCR. 5182–83. After Isidoro went to the substation in Seminole County, Singleton and Nyberg went to pick up Isidoro's wife, Velia Rodriguez because they thought that she would be helpful in convincing Isidoro to cooperate. Supp.PCR. 5186. Isidoro did not want to assist and he initially told the police that

[6] Mr. Rodriguez only recently was able to find and interview Guy Salome who is in federal prison. Supp.PCR. 5177. By separate motion, the Defendant seeks to return to circuit court to present Salome's testimony.

[7] Singleton knew Det. Crawford and Det. Smith because he worked with them at headquarters. He also knows Daniel Villanueva.

he had no knowledge about the jewelry. Supp.PCR. 5185-86.[8] Singleton denied that he threatened Isidoro; however, he could not remember if he threatened Velia with the implication that Isidoro was involved in murder.[9] He also could not recall if there was any type of arrangement that he would not arrest or "pick up" Isidoro's mother if Isidoro cooperated. Supp.PCR. 5193-94. Sgt. Singleton claimed that Isidoro was given no protection in exchange for his testimony against a dangerous drug dealer who was implicated in four homicides. Supp.PCR.5196.

Prior to Manuel Rodriguez's trial, Isidoro provided a sworn statement to the police in which he described picking up a bag of costume[10] jewelry and a coin from his mother. Supp.PCR. 5881-91 (Exh. G). Later, in a deposition taken on April 11, 1996, Isidoro denied that his mother told him that she was afraid that the jewelry she found could have something to do with the Abraham murders. He gave the following explanation for why he disposed of the jewelry from his mother's trailer:

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[8] The lower court sustained an objection to a question regarding whether Singleton told Velia that Rafael Lopez had implicated Isidoro in a murder. The Defendant proffered that the allegation was that the officers were part of the threats, or at least the perception that Isidoro was being threatened, in other words, the information is relevant to Isidoro's state of mind. Supp.PCR. 5187.

[9] The lower court would not consider statements in Singleton's pretrial deposition: "We advised her that her husband had been implicated in this case by her brother Rafael." Supp. PCR. 5964 (A19)(Supp.PCR. 5188-93).

[10] The court would not consider the BOLO report that gave a different description of the jewelry. Supp.PCR. 5895-99.

> [By Mr. Koch[11]] Q. And the reason you told the police that you [threw the jewelry out the window] was when you did it, you suspected that the jewelry had come from the murders in [the Defendant's] apartment?
>
> [by Isidoro] A. **I told those police officers what they wanted to hear because of the arrangement that we worked out.** They said that they would not pick up my mom down in Miami if I would cooperate with them.

Supp.PCR. 5700-03 (Exh. F – 1996 deposition)(emphasis added). When the prosecutor followed up with questions, Isidoro testified about the threats:

> [by the State] Q. When they picked you up, you were not under arrest; correct?
> A. That day there were threats.
> Q. Well, you were not arrested, you were not handcuffed; were you?
> A. No sir,
> Q. And you were asked if you would voluntarily come down to speak to them; correct?
> A. Or else I would be arrested.
> Q. Do you remember which detective it was that told you that?
> A. It was Detective Singleton.

Supp.PCR. 5712 (Exh. F). Isidoro later implicated Det. LeClaire:

> Q. Then what is not correct in your statement?
> A. Well, at the end where it says are you giving this voluntarily and all that kind of stuff. **LeClaire was in front me when I was giving the statement and he would nod his head: Say yes to this, say no to that. And I was following them in order to keep the promise that they made to me, I was giving [sic] statement along those lines.**

[11] Former Assistant Public Defender Art Koch represented the co-defendant, Luis Rodriguez. In 2004, Koch testified that the State promised to help Luis obtain early release. PCR. 1239-41.

Supp.PCR. 5744-46 (Exh. F)(emphasis added). Both Det. LeClaire and Sgt. Singleton denied threatening Isidoro Rodriguez in order to obtain his cooperation.

d. The Secret Dockets

While this appeal was initially pending, the Miami Herald reported that "[j]udges and prosecutors in Miami-Dade have had official court records altered and kept secret dockets to disguise what was actually happening in some court cases." Dan Christensen and Patrick Danner, Dockets Doctored to Shield Snitches, Miami Herald, Nov. 18, 2006. In the Rule 3.851 motion, Mr. Rodriguez alleged that the "secret docket" problem has implications for the role of Isidoro in this case. Supp.PCR. 3869-71.

Jose Arrojo, Chief Assistant State Attorney, had his secretary perform a search for records regarding Isidoro Rodriguez; no information was found. Arrojo testified that he would expect to find any place where Isidoro Rodriguez was a witness, defendant or informant listed in the database. Supp. PCR. 5287-92. Diane Pattavina, a supervisor in the Miami-Dade Clerk's Office, personally performed a search of the Clerk's database for Isidoro Rodriguez and only found a 1978 trespassing case where he was a defendant. Pattavina would expect to find cases regarding Isidoro Rodriguez if he were a defendant in a case but not if he was an informant or witness. Access is not limited to a few individuals because entries are made on the docket in multiple locations by numerous people. Sealed documents

were not listed on the database where she performed her search. Pattavina admitted that it is possible for files to go missing. Supp.PCR. 5271-83.

2. LUIS RODRIGUEZ

Willy Sirvas was incarcerated in the local jail with Luis Rodriguez prior to the Defendant's trial. Supp.PCR. 6189. In 1995 and 1996, Sirvas addressed two letters to prosecutors Andrew Hague and Abraham Laeser regarding the co-defendant, Luis Rodriguez. Supp.PCR. 6200-04, 5621-26 (Exh. A, B). In May 1996, Mr. Sirvas wrote that "Mr. Richard Houlihan could use my testimony in court in reference to Luis Rodriguez lies to save his ass. [I]s only one true [sic]." (Exh. A.) ASA Laeser received the letters prior to trial but chose not to turn them over. Supp.PCR. 5487-91. Willy Sirvas was convicted of burglary and sent to prison in Florida until he was released in 2001. He was then deported to his home country, Peru. Supp.PCR. 6190.

Willy Sirvas, who testified via satellite from Lima, Peru, admitted that he formerly had an alcohol problem that led to arrests and felony convictions. Supp.PCR. 6189. He has now been sober for five years. Supp.PCR. 6191-93. Sirvas told the lower court that more than ten years ago, Luis was in a safety cell, but they used to talk to one another when they went to the yard. Supp. PCR. 6194. Luis always had cigarettes even though the inmates in the safety cells were not

allowed to have such privileges. Supp.PCR. 6195. Luis was also taken out of his cell by a State Attorney investigator. Supp.PCR. 6196-98.

Luis told Sirvas that "the only chance that he had to avoid the death penalty is to turn a State witness and get his co-defendant before he testifies against me." Supp.PCR. 6199. Sirvas testified on cross-examination by the State:

> . . .[Luis] told me, you know, hey, I'm the one, that's what he said, I'm the one that did it but my only way to save my ass is to testify against my co-defendant.

Supp.PCR. 6220-21. Sirvas was in jail in 1996 and would have provided further information if he had been asked. Supp.PCR. 6206.

Manuel Rodriguez was represented at trial by "two fine trial attorneys with capital experience." Supp.PCR. 598. Attorney Richard Houlihan told the jury in opening argument at trial that "State of Florida's case rises or falls completely, totally on Luis." T. 1742. He explained that the letters contained precisely the type of information that he was looking for in order to get the much needed "hook" in order to attack Luis's credibility. Supp.PCR. 5306-11. Houlihan expressed anger at not having received the letters prior to trial. Supp.PCR. 5311-14. Co-counsel Eugene Zenobi recalled that Luis was the co-defendant: "a killer and informant." Supp.PCR. 5450. Zenobi explained that "any information that goes to the co-defendant, at least his veracity, is necessary in a case like this." Supp.PCR. 5452. Neither defense attorney recalled ever having received the letters: both explained

that they would have investigated further; at the very least they would have gone out to the jail and asked questions. Mr. Zenobi succinctly explained the importance of having the information contained in the Sirvas letters: "It's what the jury believes is credible." Supp.PCR. 5459.

C. Penalty Phase.

1. ALEJANDRO LAGO

The penalty phase commenced on December 9, 1996. At the trial, the defense presented the testimony of psychologists and psychiatrists who had evaluated Mr. Rodriguez over the preceding twenty years in mitigation. The State referred to the Defendant's documented history of mental illness as "gobbledygook" and proceeded to persuade the jury that he was malingering. T. 3641-42.

Prior to the penalty phase, trial counsel took Lago's deposition. See Supp. R. 4-133; Supp.PCR.6024- 6131. The testimony was so far-fetched that the prosecutor informed the defense that Lago would not be called as a witness at trial. See i.e. Supp.PCR. 6127 (reference to Santa Claus giving him envelopes for medication). At the trial, Detective Jarrett Crawford took the stand to testify about his contact with a jailhouse informant, Alejandro Lago. T. 4065. Attorney Zenobi immediately objected due to ASA Laeser's promise that Lago would not be used. "[T]his representation has been severely violated almost to ethical grounds at this point."

T. 4076. Once the State withdrew Lago as a witness, all investigation into his background stopped. Attorney Houlihan told the trial court that Lago's deposition testimony was "absurd"—the deposition was made part of the record for the purpose of appeal. T. 4065-71.

Over objection, Crawford was allowed to tell the jury that Lago was an inmate at the jail, housed near Manuel Rodriguez pending trial. T. 4076. Crawford said that Lago said that Manuel said he did not need his medication because he was only acting insane. Crawford said that Lago said that Manuel said he took his medication just to get high. Lago gave the police some of the medicine that he obtained from Manuel Rodriguez; the medicine was submitted to the laboratory and it came back as the same type of medicine that had been prescribed to Manuel Rodriguez. T. 4079-83. The defense chose not to cross-examine Crawford about the claims Lago made to him about the Defendant. T. 4083.[12]

During the course of collateral litigation, the Defendant was provided with letters written on behalf of Lago apparently in exchange for his cooperation in this case as well as a report regarding a polygraph examination. PCR. 95-100. This Court directed the circuit court to hold a hearing on the claim that the State's

[12] Mr. Rodriguez addressed the trial court himself at that point: he explained that when the inmates are in the yard, or asleep in their cell, the medication is simply left on a "flap" on the cell door. He said that he had reported that he medicine was stolen. T. 4083-84.

failure to disclose this information was a violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). Supp.PCR. 4192-95.

At the 2008 hearing, retired Detective Greg Smith testified that Lago called the homicide office on many occasions to speak with him regarding Mr. Rodriguez.[13] Lago was subsequently given a polygraph examination, and the results were considered suspect.[14]

Detective Smith identified a letter signed by himself and Crawford, dated May 22, 1995, which states, in pertinent part:

> Alejandro Lago has assisted this agency with several investigations. This assistance has been an immense help. The information on all cases has always been correct and accurate.
>
> **Mr. Lago has been polygraphed on all issues and has always been truthful. It will become necessary for Mr. Lago to testify in these matters in the next couple of years. We are confident that he will continue to help us in a truthful manner. Whatever consideration you can extend to Mr. Lago would be greatly appreciated. . . . .**

Supp.PCR. 5648 (Exh. C)(emphasis added). Smith and Crawford wrote a similar letter for Lago on February 8, 2006. Supp.PCR. 5842 (Exh. D); see also,

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[13] The State refused to assist in obtaining retired officer Crawford's testimony and, because he is a police officer, Mr. Rodriguez was unable to locate his address. Supp.PCR. 4558-64, 5582-83.

[14] A reported dated December 2, 1993 indicated that there were "no significant reactions" that would indicated that Lago was deceptive. However, due to the consistent nature of subdued reactions throughout the examination, the results should be considered "suspect." The report was addressed to Smith. Supp.PCR. 5958-61 (Exh. I).

Supp.PCR. 5644 (Exh. H)(Letter from another prosecutor regarding assistance on other unrelated cases). These letters were not provided to trial counsel prior to, or during the 1996 trial. Supp.PCR. 4587-91; 5232-34.

Manuel Rodriguez was sentenced to death on January 31, 1997 and filed a notice of appeal to this Court thereafter. R. 1738-1792; T. 4454-55. The direct appeal was not final until October 2, 2000 when the petition for certiorari was denied. Rodriguez v. Florida, 531 U.S. 859 (2000). On March 7, 1997 (while Mr. Rodriguez's direct appeal was pending in this Court) Smith wrote a letter to the U.S. Immigration and Naturalization Service for the benefit of Lago:

> Mr. Lago-Gonzalez recently assisted Detective Jarrett Crawford and myself with information about a 1984 triple homicide. This information contributed toward the person responsible being convicted on all counts.
>
> In December, 1984 Genevieve Abraham and her friends, Bea and Sam Joseph, were executed during a home invasion robbery. Mr. Lago-Gonzalez provided information identifying the subject involved. . . .
>
> Mr. Lago-Gonzalez has indicated that this information might have an effect on future considerations by your agency.

Supp.PCR. 5650 (Exh. E).

Eugene Zenobi took the primary responsibility for the sentencing phase of the trial. Supp.PCR. 5431. At the evidentiary hearing, Zenobi recalled that he did not continue to investigate because he trusted the representation of the prosecutor. Supp.PCR. 5433. Zenobi had never seen the letters nor was he ever aware that Lago

had been given a polygraph. Supp.PCR. 5433-35. Trial counsel was not aware that the investigating officers wrote letters on Lago's behalf. Supp.PCR. 5449. He explained how the government's conduct impacted the defense:

> Now, in this particular situation I was fairly concerned with the issue of malingering versus legitimate mental depression. And that had a lot to do with this particular issue. Because, of course, these statements made by the witness that we had not considered flew in the face of where we were going on the mental illness which was, I believe, a hereditary family depressive mental condition. . . . I believed that that representation by the State representative somewhat undercut out ability to pursue that.

Supp.PCR. 5445-46. If trial counsel had the letters in his possession prior to trial, he would have investigated further. Supp.PCR. 5449. Asked why he would have liked to have known about the letters, assistance in other cases, and the polygraph, the trial attorney explained simply, "It's all impeachment." Supp.PCR. 5449.

STANDARD OF REVIEW

Mr. Rodriguez has presented several issues which involve mixed questions of law and fact. Thus, a *de novo* standard applies. Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

SUPPLEMENTAL SUMMARY OF THE ARGUMENT

ARGUMENT I: Mr. Rodriguez's convictions and sentences of death are unreliable due to government misconduct that established a due process violation. The State misled the jury concerning the true nature and purpose of special

accommodations afforded to co-defendant-turned-state-witness Luis Rodriguez. Further, the jury never heard evidence that Isidoro Rodriguez had a complex relationship with the same agency that investigated him, his brother, and the Defendant. The lower court summarily denied a hearing on most of the factual allegations and failed to conduct the required cumulative analysis resulting in the denial of a full and fair hearing.

ARGUMENT V: Mr. Rodriguez was entitled to a hearing on his claims that his death sentence is not reliable due to the cumulative effects of the ineffective assistance of counsel, government misconduct, and erroneous rulings. The State's failure to turn over letters written on behalf of a jailhouse informant undermined confidence in the outcome of the trial. Mr. Rodriguez was deprived of an individualized sentencing determination.

ARGUMENT

SUPPLEMENT TO ARGUMENT I

MANUEL RODRIGUEZ IS ENTITLED TO A NEW TRIAL DUE TO THE DEPRIVATION OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE VIOLATION OF HIS DUE PROCESS RIGHTS UNDER GIGLIO AND BRADY

A. The jury never heard powerful evidence that would have impugned the credibility of the State's star witnesses.

1. ISIDORO RODRIGUEZ

a. The jury never heard that Isidoro had a complex and involved relationship with the same law enforcement department that investigated both Manuel as well as himself.

In denying relief, the lower court analyzed each of the allegations regarding Isidoro as a separate claim. But at the heart of each of these "claims" is that Isidoro had a complex and involved relationship with the same law enforcement department that investigated both Manuel and himself. The evidence presented at the 2008 hearing established that Isidoro not only had close family ties and a business relationship with a member of the police department, but he was also involved in the underworld of the drug business that flourished in Miami in the late 1970s and early 1980s. The jury never heard any of this evidence, either because the trial attorneys failed to present it, or because the State failed to disclose the information.

The lower court treated the secret dockets issue as a separate claim. Supp. PCR. 5088-89. The reality is that the practice of hiding or altering public records demonstrates that there very well may be more exculpatory or impeaching information regarding Isidoro (or any other witnesses) that has not been disclosed. After hearing testimony, it is still unclear how the records are kept or if a complete search is even possible. The search conducted by ASA Arrojo failed to uncover Isidoro's arrest in 1978 as well as his involvement in this case or the Roman case. The search of the Clerk's Office only uncovered the 1978 arrest. The lack of information on destroyed files and the possibility of missing files casts doubts on the reliability of determining if "secret dockets" existed regarding Isidoro Rodriguez.

The lower court denied relief regarding the Seminole County investigation of Isidoro based on an anonymous citizen complaint, finding that the information "would not have been admissible as impeachment." Supp.PCR. 5087.[15] However, this Court has found that:

> [W]ithheld information, even if not itself admissible can be material under Brady if its disclosure would lead to admissible substantive or impeachment evidence. . . . While the actual police reports may not be admitted as substantive evidence, they can still serve as the basis for [a] Brady claim to the extent he could have investigated and used the information contained in the reports.

[15] This rationale was provided for the prior denial of a hearing on this issue in 2004-05. PCR. 600.

Rogers v. State, 782 So. 2d 373, 383 n.11 (Fla. 2001). Additionally, the lower court found that it was possible that Isidoro did not know that he was being investigated. Supp.PCR. 5087. The court never considered that trial counsel explained that if he had been aware of the narcotics investigation, that would have been something he would have questioned Isidoro about in a pre-trial deposition.[16] Supp.PCR. 5393-98.

Of course, the 1992 anonymous complaint about possible drug violation takes on more significance when considered along with Isidoro's involvement in the Andres Roman case. The State attempted to portray Isidoro as merely an innocent witness to a murder while, at the same time, keeping out any evidence of the underlying facts.[17] The fact is that most people do not happen to be witnesses on more than one homicide case, and it should be noted that in both situations, Isidoro attempted to avoid assisting the police. The record reflects that it was four years before Singleton was able to catch up with Isidoro after he saw Roman shoot someone at point blank range. Isidoro said that he would have to think about it

[16] To the extent that trial counsel should have been aware of the information, failure to follow up on it constitutes deficient performance.

[17] The court found it significant that "Isidoro was not charged in the Roman case because he was not involved in the murder. Isidoro was a witness to the murder. He was not given money, special benefits, protections, or status as an informant." Supp. PCR. 5085. The court would not admit the deposition in which Isidoro admitted that he was given immunity for his testimony. Supp.PCR. 5761-

before giving a statement in connection with investigation of Roman. Supp.PCR. 5174-75.

It was in 1984 that Isidoro obtained jewelry that was suspected to be proceeds from the robbery of the Joseph's home. Isidoro certainly did not call the police and report that he thought his mother was being framed at the time. Also, Isidoro certainly was not interested in giving a statement or cooperating when Singleton tracked him down again in 1993. Supp.PCR. 5182-86. In the Rule 3.850 motion, Mr. Rodriguez alleged that the jury never heard that:

> Previously to police contacting Isidoro in the investigation in the instant case, Isidoro provided information as a witness against a defendant in an unrelated murder.

PCR. 54. After hearing some evidence on this issue, the court denied relief in reliance upon the "credible" testimony of Smith, Singleton and LeClaire that they did not threaten Isidoro in order to obtain his testimony. Supp.PCR. 5085.[18] In sum, the lower court found that Isidoro's claim that he was threatened not to be credible; yet, Isidoro's testimony was used to convict Manuel Rodriguez. See T. 2494, (Exh. F). Either Isidoro is credible, or he is not.

With respect to Isidoro's relationship with his wife's cousin, the court found "as there was no involvement by Villanueva, there was nothing that Luis or Isidoro

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[18] The court found Smith to be credible despite the fact that he did not testify

could have been impeached with."[19] Of all the facts that the lower court found significant, the court failed to take into consideration the undisputed fact that Villanueva was doing business with Isidoro during the same time frame that Manuel Rodriguez was being investigated and tried for first degree murder. This was powerful impeachment evidence. Had the jury known about this witness's documented connection with the very same agency that arrested and prosecuted Manuel Rodriguez, it would have put all of his testimony in a different light. The jury very well may have discounted Isidoro's self-serving testimony that he was in Orlando at the time the crimes were committed and not involved in the murders; the jury might well have concluded that Isidoro was shielded precisely because of that relationship.

b. Manuel Rodriguez was prejudiced because Isidoro's testimony was not adequately tested; he is entitled to a new trial.

Isidoro was called by the State at trial primarily to corroborate his mother's testimony over a hearsay objection. T. 2416-2525. Isidoro reiterated that Anastasia Rodriguez called him around the time of the 1984 crimes and told him that she found a bag containing jewelry and coins under her trailer and that she was afraid

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on this issue at all. See Supp.PCR. 5085, 5217-43.

[19] The lower court incorrectly found as a fact that Villanueva and Velia's "mothers are cousins." Supp.PCR. 5086. This is wrong: their mothers are sisters making Villanueva the first cousin of Velia Rodriguez and Rafael Lopez. Rafael is a convicted felon who testified over defense objection. T. 2989–3001; 3015–29.

she was being framed. T. 2433-36. Isidoro was the witness who was able to link Manuel to the jewelry. T. 2436-37, 2515.

It came out at trial that Isidoro was given the privilege of visiting with his brother, Luis, at the jail prior to trial. But, the State reassured the jury that the police were just being "decent" in allowing the co-defendant in a triple homicide visit with his family. T. 3367. The jury also heard that Isidoro was an initial suspect in these homicides. PCR. 1269. But, over defense objection, the State presented purported alibi evidence in the form of handwritten notes that Isidoro claimed he wrote on a calendar, bank records and receipts for work he claimed to perform, and a gas receipt showing that gas was purchased by someone using his credit card in the morning on day of the crimes. T. 2439, 2475-90. The Defendant was precluded from exploring Isidoro's involvement in this crime at trial. T. 2506, 2728. The State later bolstered Isidoro's credibility in closing argument by suggesting that he had solid alibi. T. 3371. The State also told the jury that Isidoro had no prior criminal history or record. T. 3372.

At the 2008 hearing, Richard Houlihan told the judge that the "two brothers were in cahoots" and that "any kind of link of putting either one of the two in, kind of harms way for criminal law purposes could have helped us, in my opinion, be it a drug offense, . . . just something to argue to the jury. . ." Supp.PCR. 5354. But the jury never heard that unrebutted testimony that Seminole County authorities

opened a file to look into an anonymous complaint suggesting that Isidoro was committing narcotics violations. Similarly, the jury did not know that MDPD Lt. Daniel Villanueva owned property with Isidoro at the same time that his law enforcement agency was investigating this case. Finally, the factfinders were deprived of the evidence that Isidoro had been a witness in a drug related homicide before he was involved in this case.

In order to ensure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the state and the defense. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Brady is violated and materiality is established even if the withheld evidence might not be admissible at trial. Rogers, 782 So. 2d at 383 n.11. This Court must consider how the State's failure to disclose certain information handicapped the defendant's ability to investigate or present other aspects of the case. Id. at 385. Of course, defense counsel has the duty to investigate reasonable defenses, and present evidence to support the theory of defense. Strickland v. Washington, 466 U.S. 668 (1984).

Whether due to the State's failure to disclose, or due to trial counsel's neglect, the result of Manuel Rodriguez's trial was not reliable. A criminal

defendant is entitled to impeach a State witness regarding their interest, motive and bias in testifying against him. Olden v. Kentucky, 488 U.S. 227, 232 (1988). Isidoro's testimony was never put to the test; Mr. Rodriguez is entitled to a new trial.

In closing argument to the jury, ASA Laeser argued that:

> Somebody obviously was in that apartment with Luis Rodriguez. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been.

T. 3304.

> [T]here was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant . . . There were no two sides.

T. 3314. This Court determined on direct appeal that these comments were a violation of the right to remain silent. Rodriguez, 753 So. 2d at 37-40. The prosecutor's comments are even more egregious considering that in 2004, Manuel Rodriguez attempted to establish that there was evidence that it was Isidoro who helped Luis commit the crimes. PCR. 52-57 (See Initial Brief pp. 16-18, 44-56). The admitted errors must be considered in analyzing prejudice in this case.

c. The lower court erred in refusing to consider the previously undisclosed information about Isidoro that was contained in the State's files on Andres Roman.

At the 2004 hearing, the lower court restricted the Defendant from questioning the trial attorneys regarding their strategy. PCR. 1071-76. This Court relinquished jurisdiction for further proceedings, yet, at the 2008 hearing, the lower court also restricted the Defendant from proving prejudice. Supp.PCR.5328. The Defendant should be afforded an opportunity to present all of the evidence and witnesses that will prove his claims without bifurcation of the issues to be decided. See Henry v. State, 937 So. 2d 563, 574 (Fla. 2006).

Following the remand, the defense was allowed to review the State Attorney files concerning defendant Andres Margarito Roman (case numbers 83-5091, 83-7399, 83-5031).[20] Based on the information contained in those files, Andres Roman and Oscar Alvarez went to the home of Isidoro Rodriguez, Sr. (aka Yo Yo). Yo Yo's nephew, Isidoro Rodriguez, Jr. (aka Papi) and another associate, Guy Salome, also happened to be at the home. According to the various statements in the file, Andres Roman shot Oscar Alvarez at point blank range while Isidoro Jr. stood there watching. Isidoro assisted in taking the victim to the hospital but he did not stick around to tell anyone what happened. It was not until years later that Sgt. Singleton tracked a reluctant Isidoro down and obtained a statement from him

regarding the homicide. See Supp. PCR. 4745-49, 5651-73 (Exh. A12-13). The State's file contained a deposition provided by Isidoro Rodriguez, Jr. concerning his role in the Roman/Alvarez case. The lower court refused to consider the information revealed in the Roman case; the evidence was proffered for the purpose of appeal. Supp. PCR. 5349, 4816, 5750-5838 (Exh. A15- Aug. 29, 1996 depostion). In that deposition, Isidoro explained that after he met Roman he quit working. Supp.PCR. 5759. Isidoro admitted that he owned various guns: "HK 93 submachine gun, .357 Dan Wesson, PPK, and currently two .38s, a Thomas .45." Supp.PCR. 5756. Isidoro also admitted that he was involved in selling cocaine; he would transport the drugs for Roman. Supp.PCR. 5761–68.

In the deposition, Isidoro adamantly denied being involved in stealing drugs or "rip-offs" but he admitted that Roman shared some of the ill-gotten proceeds with him. Supp.PCR. 5766- 70. Significantly, Isidoro admitted that he was promised immunity:

> Q. Has anybody told you that you would not be prosecuted for any crimes you may admit here?
> A. Yes, I have.
> Q. Who told you that?
> A. By Bob Scola and several others – you know.
> Q. **So they said that no matter what you admit to here in the deposition, you will not be prosecuted?**
> A. Uh huh.
> Q. When was the last time that was said to you?

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[20] The Clerk's files have been destroyed. Supp.PCR. 4302.

A. I'd day about two or three months ago.
Q. You were also told that by Lloyd Hough?
A. Uh huh.
Q. Who else told you that?
A. **Singleton**, Bob Scola.

Supp.PCR. 5761-61 (emphasis added). Assistant State Attorney Robert N. Scola was present at the deposition; presumably, if Isidoro had not been provided with immunity, it would have been corrected right then and there. Supp.PCR. 5752.

The State's Roman file also contains handwritten notes regarding Isidoro detailing a disturbing relationship between Isidoro and the police:

> 8/78 At arrest at warehouse . . . cops took package out of warehouse and put in regular cars . . . cops kept some guns and didn't turn them into property – Off Randall . . . W got convicted only of traffic charges . . . did 5 weekends in DCJ . . . Δ + Guy not dressed as cops that day.

Supp.PCR. 4752. Additionally, there is a notation indicating that Isidoro went to California using the alias of Francisco Relis in order to take the place of Andres Roman on drug charges. Supp. PCR. 4753. The State told the jury that Isidoro had "no criminal history or record," even though evidence to the contrary was sitting in the State's office in a file. T. 3372. Manuel Rodriguez did not receive a fair trial. Giglio v. United States, 405 U.S. 150 (1972). None of the foregoing information was considered by the lower court. This was error.

2. LUIS RODRIGUEZ

a. The State failed to disclose information from Willy Sirvas that could have been used to impeach Luis Rodriguez.

The lower court denied relief on this Brady claim finding that there is no prejudice:

> Arguably, the 1996 letter should have been turned over. However, Defendant was not prejudiced as a result of the failure to turn over the 1996 letter. Counsel for Defendant testified at the hearing that they did not think that Luis was telling the truth. Luis was extensively cross-examined. Even if Sirvas was called to testify at trial, his oral testimony contradicted what he wrote in the letter. He did not have any credibility in front of this Court and he would not have had any credibility in front of a jury.

Supp.PCR. 5084. This finding is in error. Neither defense attorney recalled ever having received the letters: both explained that they would have investigated further; at the very least they would have gone out to the jail and asked questions. Mr. Zenobi succinctly explained the importance of having the information contained in the Sirvas letters: "It's what the jury believes is credible." Supp.PCR. 5459. It is irrelevant that the lower court did not believe Sirvas.

b. Manuel Rodriguez was prejudiced because Luis's testimony was not adequately tested; he is entitled to a new trial.

Luis Rodriguez avoided the specter of his own execution by pleading guilty to the reduced charges of second-degree murder in exchange for helping the State make its case against Manuel Rodriguez. T. 2854-69; (Exh. B 2004) 15-23. Luis's

testimony served as the centerpiece of the State's case and it was essential that the jury believe him in the absence of physical evidence against Manuel. Mr. Sirvas's allegations are directly relevant to the claim that the State knowingly presented false evidence at trial when Luis Rodriguez, as well as Detectives Crawford and Smith, testified that state agents were unaware that Luis and his wife engaged in sexual relations at the police substation. PCR. 57; See Initial Br., 13-16, 22-44. The lower court refused to consider the other post-conviction claims in relation to Sirvas's testimony. The lower court also refused to consider how the State's failure to disclose the letters handicapped the defense.

The evidence that has been presented in post-conviction impacts the penalty phase as well. The direct appeal challenge to the CCP and "avoid arrest" aggravators was rejected based, primarily, on facts as testified to by Luis whose trial testimony has now been seriously undermined. Rodriguez, 753 So. 2d at 44.

c. The lower court erred in refusing to consider the recent letter written on Luis's behalf.

Willy Sirvas's testimony served to corroborate the claim that Luis received special treatment in exchange for his testimony against Manuel. At the 2004 hearing, the Defendant presented evidence on the claim that the State promised to assist Luis in obtaining early release. Supp.PCR. 59, 1240, 1245-97. In support of that claim, the Defendant asked the court to take judicial notice of the court file in

Luis's appeal to the Third District Court of Appeal concerning his post-conviction litigation. Supp.PCR. 2786-3140 (A13-2004).

Following the remand, the Defendant again reviewed the status of the litigation in the Third District Court of Appeal and renewed the motion for judicial notice of the underlying circuit court case as well as the appeal. Supp.PCR. 4733, 6173-78. The request was denied. Supp.PCR. 6229-32. On April 15, 2008, the Third District Court of Appeal issued an order indicating that the State of Florida has taken inconsistent positions in Luis's case as well:

> In prior litigation, this court was informed that the appellant is not eligible for parole. [Luis] Rodriguez v. State, (citation omitted). However, the file now before us now contains a letter from the assistant state attorney to the Parole Commission. The court's question is whether the appellant has been determined to be parole eligible, and if not, what was the purpose of the letter?

Supp. PCR. 5631 (A4-2008). The letter to the Florida Parole Commission was written by Abraham Laeser on Luis Rodriguez's behalf. In pertinent part, the letter states:

> I am writing to you to fully inform you of the precise nature of the co-operation which this inmate has provided to the State of Florida in this cause. **This is being transmitted to you as part of his plea contract with the State, but also because it may be helpful in any decisions concerning this inmate that you may have to make in the future.**

Supp.PCR. 5633-34(letter dated May 7, 2007)(emphasis added). The lower court's failure to admit and consider this evidence was an abuse of discretion. The letter

contains evidence of a position taken by the State that is contrary to the position taken before the lower court on issues which it had to decide. In closing argument at trial, Houlihan questioned whether there was some hidden plea deal that they did not know about:

> So [Luis] enters into a deal. He shakes on it. 'Come in here and tell the truth and he gets second degree and life.' And he talked to you about why he called up the parole commission. You remember? 'Oh, yes. I called up these clemency people.' Well, why is he doing that? He intends in ten years or so to get out. **Is there some sort of agreement unseen by any of us?** I don't know, but that is his intention. Is – is he right, or is he wrong? One – three murders and one sentence for second degree murder. Why such a deal?

T. 3285-88. (defense closing argument)(emphasis added).

The letter to the Parole Commission supports Mr. Rodriguez's previously plead claims to relief under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). The letter contains further evidence that the State of Florida has no problem taking alternative positions without regard to justice, in violation of due process. Cf. Bradshaw v. Stumpf, 545 U.S. 175 (2005). When first confronted with the letter, the State accused the defense of playing a "little game." Supp.PCR. 6174. The State later opined that "It is hard to believe that Mr. Laeser would write such a letter," while at the same time objecting to any consideration of the letter. Supp.PCR. 5492-93. Mr. Rodriguez was thus deprived of the opportunity to question witnesses regarding the information in the letter. The

letter should be considered as part of the cumulative analysis of prejudice in this case. See, e.g., Initial Brief, pp. 13-16, 22-44.

B. The lower court erred in denying access to public records that could have helped Mr. Rodriguez prove his claims.

Upon relinquishment, Mr. Rodriguez filed demands for public records on the Seminole County Sheriff's Office, Miami-Dade Corrections, MDPD, and the Office of the State Attorney.[21] Supp.PCR. 4219-48, 4253-79. The denial of public records was in error.

On July 18, 2008, counsel for MDPD brought a full banker's box of public records to court that had been pulled and copied in response to Mr. Rodriguez's demand. Nevertheless, MDPD, the State and the Office of the Attorney General all objected to allowing the defense to have access to the records in these boxes. Supp.PCR. 4519-26. The lower court denied the records requested with respect to Isidoro Rodriguez, Alejandro Lago, and Rafael Lopez based on the finding that "records were previously requested and MDPD provided the records to the repository." Supp.PCR. 4413. This was erroneous. Of course, Mr. Rodriguez was not seeking records that have already been provided in connection with the

[21] Rule 3.852(i) sets out the limitation on postproduction requests for additional records in capital collateral proceedings. Requests pursuant to subdivision (i) may be filed at any time so long as counsel makes a "timely and diligent search" of the repository records and identifies those not found. See Rule 3.852(i)(1)(A-B).

investigation in this case; rather, he was seeking records regarding *other* cases in which the foregoing persons might have been involved.

Further, the order erroneously states that Mr. Rodriguez was seeking copies of the Sirvas letters, i.e., the "letters sent to the State Attorney that Luis Rodriguez lied during his testimony." Supp.PCR. 4414. With respect to MDPD, Mr. Rodriguez was specifically seeking records regarding Mr. Sirvas's criminal history. The denial was particularly egregious given that the lower court allowed the State to attempt to impeach Sirvas with convictions that the defense was not allowed to have access to. Supp.PCR. 6209-10, 4543.

With respect to Lt. Villanueva, the lower court denied access to his personnel filed because the Defendant has previously requested it and the request was "overbroad." Supp.PCR. 4414. First, the fact that any record may have been previously requested and denied is irrelevant. Once Mr. Rodriguez was granted a hearing on this issue, he was entitled to seek additional public records in support his claim. Further, the request was not overbroad: MDPD copied Lt. Villanueva's personnel file and brought it to the hearing. Counsel for MDPD admitted, "I have his personnel file, and I believe that should reflect his assignments." Supp.PCR. 4565-66. Given that this Court remanded jurisdiction for a hearing regarding Villanueva's possible influence on the investigation in this case, the denial to

access to the public records was an abuse of discretion. Mr. Rodriguez is entitled to the file.

Mr. Rodriguez also sought records from Miami-Dade Corrections. regarding former inmates who were in custody between 1993 and 1997 as well as sign-in sheets for the time period between 1993 and 1997 for several of the investigating officers. The lower court denied the request finding that the Defendant is "required to investigate claims fully before filing the motion." Supp.PCR. 4416. This presents a catch-22: on the one hand, he cannot ask for public records unless they are relevant to a claim, on the other hand, he cannot ask for public records after he has already filed his claim. The reality is that the records sought are public records that may provide additional proof of the pending claims; the denial of access is error.

C. Cumulative Analysis

In 2004 and 2008, Manuel Rodriguez presented evidence that the jury never heard that could and should have been presented in order to impugn the credibility of the State's star witnesses, Luis and Isidoro Rodriguez. In considering the prejudice component, this Court must consider that there was no forensic evidence connecting Mr. Rodriguez to the crimes. The only other evidence beside the testimony of Luis Rodriguez and his blood relatives was the admission of the series

of bizarre statements made by the Defendant himself, who suffers from a history of mental illness.

Mr. Rodriguez has argued that he was denied the effective assistance of appellate counsel because the admission of the inculpatory statements was never challenged on direct appeal. See Habeas Pet., pp. 19-30. He further argued that trial counsel failed to adequately argue the motion to suppress his statement prior to trial. See Initial Br., pp. 56-62. But, even if this Court were to deny relief on the foregoing Fifth and Sixth Amendment claims, the pre-trial statements were inherently unreliable and cannot, consistent with the dictates of due process, be used to uphold either the convictions of guilt nor the sentences of death. See Kansas v. Marsh, 548 U.S. 163 (2006)(discussion of DNA exonerations, even where the evidence included a "confession.").[22] The statements that were attributed

[22] Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; one recent study reports that between 1989 and 2003, 74 American prisoners condemned to death were exonerated, Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & Criminology 523, 531 (2006) (hereinafter Gross), many of them cleared by DNA evidence, ibid. Another report states that "more than 110" death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and "[h]undreds of additional wrongful convictions in potentially capital cases have been documented over the past century." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psych. Pub. Pol. and L. 577, 593 (2004). Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury, Gross 544, 551-552, and the total shows that among all prosecutions

to Mr. Rodriguez were not even consistent with the crime scene. Certainly, his statements were not consistent with the State's theory that Manuel was the planner and that Isidoro was not involved. T. 331-438. Both trial attorneys expressed concerned regarding the inherent lack of reliability of their former client's stories. Supp.PCR. 5311-14, 5353-58, 5445-49.

This Court must consider the errors that were recognized on direct appeal cumulatively with all errors that occurred during the trial. On direct appeal, this Court held that ASA Laeser's arguments that "we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been," and "there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant" were improper comments on the failure to testify and impermissibly shift the burden of proof. Rodriguez, 753 So. 2d at 39; see T. 3305, 3315-16. Additionally, Detective Venturi improperly referenced the fact that Mr. Rodriguez had a police "ID number" and Detective Crawford erroneously and improperly stated that Mr. Rodriguez used ten aliases. T. 2199.

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homicide cases suffer an unusually high incidence of false conviction, id., at 532, 552 , probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent, id., at 532. Marsh, 548 U.S. at 208.

This Court determined that references to collateral crimes were erroneously admitted. Rodriguez, 753 So. 2d at 43.

In conducting the cumulative analysis, factual allegations on which Mr. Rodriguez has been denied a hearing must be accepted as true. As part of the review, this Court must consider, *inter alia*, the factual issues on which this Court held a hearing in 2004,[23] the ineffective assistance of counsel at trial and on appeal (see, e.g., Claim I of the Rule 3.850 motion); and the denial of the right to a fair and impartial jury, and the denial of the right to conflict free counsel. See Initial Br. and Reply Br. (SC05-859); the Habeas Pet. and Reply (SC07-1314); PCR. 43-167; Supp. PCR. 3856-3881; (Rule 3.850 and 3.851 motions).

Mr. Rodriguez has established prejudice; he is entitled to a new trial.

SUPPLMENT TO ARGUMENT V

MANUEL RODRIGUEZ WAS DENIED A RELIABLE SENTENCING PHASE IN VIOLATION OF HIS STATE AND

[23] Numerous documents were proffered and not considered in 2004. See, e.g.. Exh. A2 (Deposition of Edgar Baez); Exh. A3 (Sketch); Exh. A4 (Deposition of Rafael Lopez); Exh. A7 (Deposition of Carol Arsenault); Exh. A6 (Deposition of Cathy Sundin); Exh. A12 (arrest affidavit of Luis). Evans v. State, 995 So. 2d 933 (Fla. 2008) held that without introducing the deposition into the record, which would enable the Court to determine whether counsel was aware of this information, Evans cannot demonstrate that counsel was deficient for failing to investigate further. State v. Greene, 667 So. 2d 756 (Fla. 1995) does not preclude the use of depositions for determining what information trial counsel had within the context of post-conviction proceedings. Mr. Rodriguez maintains that he must be allowed to admit documents into evidence, and question witnesses about those documents.

FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS; HE IS ENTITLED TO A HEARING ON EACH OF HIS PENALTY PHASE CLAIMS

A. State Misconduct.

Trial counsel was never provided with letters that contained information that could have been used to attack the credibility of Alejandro Lago, i.e., that he was receiving consideration in exchange for his assistance and that he not only took a polygraph examination but that the results were suspect. "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "'dirty business' may raise serious questions of credibility." On Lee v. United States, 343 U.S. 747, 757 (1952). Had the jury been made aware of the benefits conferred upon Lago, the jury may well have rejected his claims even as they were presented as hearsay through law enforcement. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Gorham v. State, 597 So. 2d 782, 785 (Fla. 1992)(quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). Mr. Rodriguez was deprived of a reliable sentencing phase due to the State's misconduct; he is entitled to a new penalty phase.

The lower court denied relief:

> Defendant somehow concludes that it could have impeached Lago, who did not testify, via Det. Crawford. Even that was possible, the claim is lacking in merit. It was raised on direct appeal and found to be harmless error.

Supp.PCR. 5089. In 2005, the lower court denied a hearing on this claim on the same basis. PCR. 618. Mr. Rodriguez did raise a Confrontation Clause challenge to the admission of Lago's claims as testified to by Crawford on direct appeal:

> Specifically, Crawford testified to double hearsay: Lago told him that Manuel Rodriguez had said that he (Rodriguez) was not crazy; Rodriguez just used pills to get high; and Rodriguez knew that he had to act insane or the police would connect him to other crimes.

Id. at 43. This Court held that the admission of Crawford's statements was erroneous, but harmless in light of other evidence presented at the penalty phase. Nevertheless, this Court directed that a hearing was required on the due process claim brought under Brady. In evaluating the Sixth Amendment violation on direct appeal, this Court had no choice but to take Crawford's testimony at face value, thus, this Court found harmless error.[24] At this point, however, Mr. Rodriguez has alleged a due process violation—the integrity and reliability of the sentencing hearing itself has been undermined by the State's misconduct.[25]

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[24] This Court was not apprised of the fact that the police wrote a letter on behalf of Lago in 1997, while the direct appeal was pending.

[25] The prosecutor's testimony that he was not aware of the letters is of no consequence. Kyles v. Whitley, 514 U.S. 419, 421 (1995).

This Court recognized, Lago's credibility was already bolstered because his claims were being presented through a "potentially more credible police officer." Rodriguez, 753 So. 2d at 44. There is no rule that would have prohibited defense counsel from questioning Crawford about the letters he and Smith wrote for Lago. Lago stated Mr. Rodriguez stated he took the medication so he could get high while in jail; however Lago also said Mr. Rodriguez gave him the medication because he didn't like to take it. These are two conflicting statements. Detective Smith further testified that Lago said he transmitted the medication after Mr. Rodriguez gave it to him but Lago and Mr. Rodriguez were on separate floors of the cell wing. Detective Smith added that he was aware Mr. Lago was a convicted felon whose case was pending and had not been sentenced at the time he contacted the homicide office regarding Mr. Rodriguez. In fact, Lago was subsequently given a polygraph examination, and the results were considered suspect. Supp.PCR. 5217-5243.

Despite all of these conflicting statements and actions, the State relied on Mr. Lago's testimony through Detective Crawford in the penalty phase. While the results of the polygraph would not have been admissible at trial, this is information that would have been useful to trial counsel, especially given the State's reliance on the information from Lago. As the lower court noted, "Mr. Laeser testified that Lago was a jailhouse snitch, that he did not find him credible, and did not call him

as a witness." Supp.PCR.5089 (order denying relief). This fact makes the Brady violation even more egregious: the prosecutor admitted to seeking a death sentence based on information that he himself did not believe to be credible.[26] This is a violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

B. Prejudice.

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impaired confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. This Court must not only consider the errors that were recognized on direct appeal but must also consider the additional errors that served to deprive Mr. Rodriguez of a fair sentencing proceeding. The trial judge based the death sentences on six aggravating factors, one of which was struck on direct appeal finding it was error to merge the separate aggravating circumstances that the murder was committed "during an armed burglary" and for "pecuniary gain." Rodriguez, 753 So. 2d at 43. And, of course, this Court already found that the

[26] In closing argument in the guilt phase, the State portrayed Luis as a follower in order to bolster his credibility: "Frankly, he is a weakling . . . [h]e is weak. He let himself be led. He let himself be placed in that situation." T. 3333. Later, the prosecutor expressed his personal opinion that Luis was a "wily defendant" who was able to take advantage of two experienced homicide detectives. PCR. 1011. This is a pattern.

admission of Crawford's statements was in error—that must now be considered in the context of a due process violation.

The evidence presented at the sentencing phase included "conflicting testimony as to Manuel Rodriguez's mental health, including some testimony that he was a malingerer." Rodriguez, 753 So. 2d at 45. As a direct result of the focus on the malingering issue, Mr. Rodriguez's penalty phase was diverted from its main purpose and instead resulted in Mr. Rodriguez being denied the opportunity to fully and fairly present his mitigation to the jury and became a forum for the State to use Mr. Rodriguez's extensive troubled life history against him. The prosecutor's theme for the State's case during the penalty phase was that Mr. Rodriguez's documented mental health history should be rejected because he was malingering and trying to trick the jury. See T. 4216 (argument that the Defendant is not a "drooling, incoherent" person); T. 4223 (argument that the Defendant is not mentally ill because he was not "baying at the moon").[27] Additional errors include the improper use of prior felony convictions as a feature of the penalty phase, the trial court's exclusion of evidence of intergenerational mental illness, and the rejection of the Defendant's mother's mental illness as a non-statutory

[27] Inflammatory comments tainted the jury from the outset and had an improper impact on penalty phase deliberations. See T. 3392-93 (reference to the novel "The Heart of Darkness"); T. 3330-32 (reference to "Silence of the Lambs").

factor. See Habeas Pet., pp. 5-17, 30-34, Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

The evidence of Manuel's mental disorders at the time of the homicides would have established that he could not have possessed requisite mental state for the "cold, calculated and premeditated" (CCP) aggravating circumstance upon which this Court relied in affirming the death sentence. T. 1738-92, 1644-46. The challenge to the CCP and "avoid arrest" aggravators was rejected based, primarily, on facts as testified to by Luis whose trial testimony has now been seriously undermined. Rodriguez, 753 So. 2d at 44.

The indispensable prerequisite to a reasoned determination of whether a defendant shall live or die is accurate information about a defendant and the crime committed. Gregg v. Georgia, 428 U.S. 153, 190 (1976). Mr. Rodriguez is entitled to a new penalty phase.

CONCLUSION

Based on the facts and arguments contained herein, as well as in the previously submitted brief, Mr. Rodriguez is entitled to a new trial. Mr. Rodriguez respectfully requests that this Honorable Court reverse the lower court's decision and remand his case for a new trial, or, in the alternative, a new resentencing. If this Court determines that Mr. Rodriguez has not proven his entitlement to relief, then Mr. Rodriguez respectfully requests that his case be remanded for a full and fair evidentiary hearing before a new judge, on his previously plead claims as well as the new information and witnesses obtained from the State's file in the Andres Roman case.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplement Initial Brief was delivered to Sandra S. Jaggard, Assistant Attorney General, Department of Legal Affairs, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131 by U.S. mail, this 19th day February, 2009.

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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