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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

Manuel Antonio Rodriguez submits this Supplemental Reply Brief of Appellant in response to the Supplemental Brief of Appellee (Supp. Answer). Mr. Rodriguez will not reply to every factual assertion, issue or argument raised by the State and does not abandon nor concede any issues and/or claims not specifically addressed in this Supplemental Reply. Mr. Rodriguez expressly relies on the arguments made in his prior briefs for any claims and/or issues that are only partially addressed or not addressed at all in this Supplemental Reply.

This case involves serious allegations of prosecutorial misconduct and deficient performance by trial counsel as well erroneous rulings by the trial court, all in violation of clearly established federal law. Simply put, Mr. Rodriguez, was deprived of due process and a fair trial in violation of the rights guaranteed to him under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. During the course of collateral litigation, the lower court was presented with an introduction as to why the result of the trial was unreliable:

> Many of these deficiencies in the adversarial process relate directly to the singular, broader issue of the *failure to inform the jury of substantial available evidence that would have, separately and together, severely impeached the credibility of State witnesses, most notably, co-defendant-turned-State's-witness, Luis Rodriguez, Isidoro Rodriguez, and Rafael Lopez.*
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> * * *
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> Given both the quality and quantity of evidence that could have, but

> for various reasons, was not presented to the jury that would have rendered Luis Rodriguez an entirely incredible witness, *it cannot be said with any degree of confidence that Mr. Rodriguez received a fair trial.*

PCR. 46-47 (Claim 1, Rule 3.850 motion)(emphasis added). The "myriad violations" that occurred in this case "collectively reveal a prosecution run amuck." United States v. Lyons, 352 F. Supp. 2d 1231, 1243 (M.D. Fla. 2004). In the brief, the State relied on the old tactic of dissecting the claims presented in order to argue that Mr. Rodriguez is not entitled to relief. This Court should reject the piecemeal approach to evaluating the various errors that occurred during both the guilt and penalty phase of the trial. The *individual* errors and violations that occurred during the investigation, arrest, prosecution, and beyond may not be a cause for great concern in and of themselves, but, when considered collectively, the inescapable conclusion is that Mr. Rodriguez was denied a fair trial and due process of law.

The State focused on minor and irrelevant pre-hearing issues that had no bearing on the issues on appeal. Many of the factual assertions in the State's brief are just plain wrong, or at the very least, misleading. For example, upon remand, the State refused to cooperate with Mr. Rodriguez's efforts to present the testimony of the previously undisclosed witness, Willy Sirvas. Rather, the State demanded that Mr. Rodriguez's counsel jump through impossible bureaucratic hoops at great taxpayer expense. Then, in the brief, the State accused the Defendant of not being diligent. This type of conduct is an example of the State's behavior since 1993 when Mr. Rodriguez was arrested.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The State asserted that "[a]t a series of status hearings, Defendant repeatedly averred that he was looking into how to have Sirvas returned to this country but that he did not believe he would be able to do so within the relinquishment period." The State then claimed that, "[e]ventually, Defendant moved to be permitted to take a deposition to perpetuate Sirvas' testimony in Peru because he has yet to apply to have Sirvas allowed in the U.S." Supp. Answer at 2.

The fact is that this Court issued an order relinquishing jurisdiction to the circuit court for an evidentiary hearing on several claims and further directed that the "State should cooperate with Rodriguez's counsel to secure the testimony of Mr. Sirvas under oath either in person or through other legally permissible alternatives." Supp. PCR. 4192-95. This was necessary because Willy Sirvas was deported by the U.S. government to Peru. See also, Supp.PCR. 4360. On May 16, 2008, Mr. Rodriguez advised the lower court that 8 C.F.R. § 212.5 provides for the parole of deported persons back into the United States in order to give testimony in court proceedings. Mr. Rodriguez suggested at that first hearing that an alternative would be for the parties to go to Peru.[1] Supp.PCR. 4363. Regarding the suggestion

[1] This possibility was first raised during oral argument in this case.

that the parties might go to Peru, the State Attorney raised budget concerns and asked whether there was a "secret fund that the court could dip into..." and the Attorney General interrupted, *"That's the defense's problem."* Supp. CR. 4371-72 (emphasis added).

On June 17, 2008, Mr. Rodriguez informed the court that it would take at least two-three months in order to obtain the required visa after application, and it did not appear likely that Sirvas would ultimately ever be paroled into the country. Supp.PCR. 4312-13. Therefore, Mr. Rodriguez made an *ore tenus* motion to have the parties travel to Peru to take a deposition. Supp.PCR 4314. The State objected, taking the position that "prosecutor's don't go to Peru." Supp.PCR. 4315. The State then suggested the possibility of satellite testimony "*assuming that they can show he's unavailable, which I think they have to actually go through and try to get this visa and have it fail first.*" Supp.PCR. upp. 4317. The lower court directed Mr. Rodriguez to attempt to secure the live testimony of Sirvas based on the State's objection and to simultaneously pursue the possibility of obtaining testimony via videoconferencing.

On July 18, 2008, Mr. Rodriguez advised the court regarding the progress on obtaining a visa; the court was told that the federal government required an *extensive* list of documents that had to be included with the application.[2] Supp.

[2] The lower court was informed at that time that the application required

PCR. 4591-93. Counsel for Mr. Rodriguez, a state agency, further addressed the issue of the considerable costs involved in just applying for the visa. Supp.PCR. 4594 -96. Despite the expense involved, the State's position was that Mr. Rodriguez should continue pursuing a visa. Supp.PCR. 4599.

Mr. Rodriguez then filed a formal written motion seeking to take Sirvas' deposition in Peru. Supp.PCR. 4418-39. As an alternative, Mr. Rodriguez sought to have the State Attorney's Office make the parole request and provided the proper form. Such parole request can be made only by a law enforcement agency (i.e. the Office of the State Attorney); this action would be in lieu of the defense filing for non-immigrant parole.[3] The Defendant argued that "[g]iven the State's blanket objection to travel abroad, the State should be directed to comply with the Florida Supreme Court order and cooperate by completing and submitting the necessary application in order to secure Mr. Sirvas' testimony." The Defendant asked for videoconferencing only as a "last resort" arguing that "the limitations of this technology should be considered."

The court ordered that Sirvas could appear via satellite the day before the other witnesses would testify, precluding counsel from traveling to Peru in order to

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information on any criminal record from Peru as well as the criminal record from the United States.Nevertheless, the lower court inexplicably denied Mr. Rodriguez's request for access to Sirvas' criminal history.

[3] There is no application fee for a law enforcement agency when it seeks parole of a witness in order to testify in the United States.

be present with the witness. The Defendant's repeated requests to bifurcate the hearing were denied. And, as predicted, there was confusion with the identification of documents, and the "time lag" caused some difficulty in hearing questions and answers posed to the witness.

SUPPLEMENTAL ARGUMENT IN REPLY

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

Because of the lack of adversarial testing, the State's case was "much stronger and the defense was much weaker, than the full facts would have suggested."[4] Kyles v. Whitley, 514 U.S. 419, 503 (1995). During the course of collateral proceedings, Mr. Rodriguez made numerous factual allegations regarding the evidence that was used against him that when considered collectively,[5] serve to undermine confidence in the outcome. The State ignored

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> [4] 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 these people. He's always been the outsider. And he's the one the family is going to dump on.

Supp. PCR. 5356.

[5] The State misinterpreted the analysis required under Kyles. Supp. Answer at 25. "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." Kyles at 436 "The dissent accuses us of overlooking this point and of

that all of the allegations regarding Isidoro point in one direction: the jury never heard evidence that could have led to a reasonable inference that it was Isidoro (and not Manuel Rodriguez) who participated in this crime with Luis Rodriguez. These allegations included evidence that (1) trial counsel was ineffective in failing to present available evidence that Luis and Isidoro left Orlando, Florida together to commit the crimes; (2) trial counsel was ineffective in failing to call Edgar Baez whose description of the perpetrator was consistent with Isidoro's appearance; (3) the jury never heard that Isidoro was investigated for narcotics violations, whether due to the State's failure to disclose or due to the ineffective assistance of counsel; (4) the jury never heard that MDPD Lt. Daniel Villanueva was engaged in real estate deals with his cousin Velia's husband (Isidoro) and that Villanueva worked with the investigating officers in this case, whether due to the State's failure to disclosed or due to the ineffective assistance of counsel; and (5) either the State failed to disclose or trial counsel was ineffective in failing to present available evidence that police both threatened and made promises to Isidoro in order to persuade him to make statements against Manuel. PCR. 52-56, 901-914. The State mischaracterized the nature as well as the importance of the allegations. Supp. Answer at 24-25.

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assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a Brady violation. We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately..." Id. n. 10.

The State has also misread this Court's statement that "the question of whether the evidence is exculpatory or impeaching is a question of fact, as is the question of whether the State suppressed the evidence." Allen v. State, 854 So. 2d 1255, 1259 (2003). In Allen, this Court reviewed a summary denial of an evidentiary hearing noting that there must be a hearing regarding whether withheld or suppressed evidence is exculpatory or impeaching. A trial court's determination that a particular piece of evidence is, or is not impeaching, is subject to *de novo* review. This Court owes deference only to questions of historical fact. Floyd v. State, 902 So. 2d 775, 779 (Fla. 2005) citing Way v. State, 760 So. 2d 903 (Fla. 2000). In Floyd, this Court conducted an independent analysis to determine whether the first prong had been met, in other words, whether the evidence the State had failed to disclose was exculpatory. Id. at 781-82.

The State argued that the claims were properly denied based on the lower court's factual findings. Supp. Answer at 28. That is not the case. First, with respect to the allegations in paragraph 21 of the rule 3.850 motion, the lower court relied in part, on the testimony of Det. Smith in making the factual finding that Isidoro was not threatened and was not given benefits. That is impossible because Det. Smith did not testify regarding this issue. Further, the lower court found as a fact that "Isidoro was not threatened. He was not given special benefits." This finding is directly contrary to Isidoro's trial testimony. T. 2493-2521.

The lower court also found as a fact that Det. Singleton and Det. LeClaire were "very credible" but ignored the inconsistencies in their own prior statements regarding the motive for bringing Velia Rodriguez to the Seminole County police station. Finally, the lower court implicitly rejected Isidoro's pre-trial testimony that he was threatened by Singleton. Supp. PCR. 5712 (Exh. F). At trial, the State presented Isidoro as a credible witness whose alibi should be believed. Now, the lower court has found that Isidoro's statements that he was threatened were not to be believed. Either Isidoro is credible, or he is not.[6]

The State argued below that Isidoro's participation in the Roman case was not relevant to any of the claims upon which this Court granted a hearing and was successful in keeping out the evidence of Isidoro's involvement in the Roman case. Yet the State has now asserted as a fact that "[s]ince there was no police protection provided to Isidoro for being a witness in the Roman case and no threats or promises related to the nonexistent protection, counsel could not be ineffective for failing to impeach Isidoro about it." Supp. Answer at 29. This assertion by the State is contrary to the information contained within the State's own files but not considered by the lower court. Isidoro said he was told he would not be prosecuted for any crimes that he may admit to during the deposition. Supp. CR. 5752-61.

The State also argued that the lower court was correct in denying relief

[6] Similarly, the lower court found Luis not to be a credible witness but the conviction rests largely on his shoulders.

regarding the Seminole County Sheriff's Office investigation under Breedlove v. State, 580 So. 2d 605 (Fla. 1991). However, the State took the same position in arguing for summary denial of a hearing. The general rule is that evidence of bias is always admissible. In a criminal case, this right to expose a witness's motivation rises to the level of a Sixth Amendment right. Olden v. Kentucky, 488 U.S. 227 (1988). Breedlove deals strictly with the possible impeachment of several investigating police officers who were *subsequently* indicted themselves on federal drug charges; at the time the officers arrested Breedlove, the officers would have had no reason to curry favor with the State. That is not the case here.

The same rules regarding bias and motive would apply to exposing the relationship between Lt. Villanueva and state witnesses Isidoro and Luis Rodriguez as well as cousin Ralph Lopez. See Supp. Answer at 32. The court did not consider 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.[7] The State pointed out that the relationship between Villanueva and the Rodriguez family (not Manuel) was noted in Det. Crawford's report (Supp. PCR 4809-10) as support for the position that the information was not suppressed. However, Mr. Rodriguez also alleged that to the extent that trial counsel failed to follow-up on this information, trial counsel was ineffective. Further, the fact that Crawford knew about the relationship – that he knew that his fellow officer and colleague was related to a suspect – lends credibility to the reasonable inference that the police went easy on Isidoro.

The State also argued that the lower court properly refused to consider the evidence revealed in the Roman case based on a "procedural bar." First, there was no hearing below regarding due diligence. Second, it was the State's duty to inform the Defendant that one of its star witnesses was involved in the underworld drug business that flourished in Miami in the late 1970s and early 1980s. See Banks v. Dretke, 540 U.S. 668, 675-676 (2004).

Instead of setting the record straight, the prosecutor bolstered Isidoro's alleged alibi and falsely told the jury that he had no criminal "history." T. 3372. The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United

[7] If the jury had heard all the evidence concerning Isidoro, they also could have concluded the Luis was covering for his brother.

States, 405 U.S. 150 (1972). "Where the prosecutor knowingly uses perjured testimony, the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Guzman v. State, 868 So. 2d 498 (Fla. 2003) quoting United States v. Agurs, 427 U.S. 97, 103 (1976).[8] If all of the available information had been presented to the jury, the State could not have argued that there was no evidence that anyone else committed the crime with Luis nor could the State have argued that Isidoro Rodriguez had "[n]o prior criminal history or record." T. 3372

Finally, the State attempted to defeat Mr. Rodriguez's entitlement to relief based on a cumulative analysis of all the errors. Supp. Answer at 44-45. The State argued that the violations of Mr. Rodriguez's constitutional rights should not be considered because, *inter alia*, Luis Rodriguez was "extensively cross-examined at trial," and that the special family visits and the opportunity for conjugal visits with his wife was presented at trial.[9] Supp. Answer at 45. The State's argument must

[8] This violation must be considered together with the false and misleading information the jury was fed concerning the true nature Luis Rodriguez's special family visits which included sex with his wife as well as visits with Isidoro. The integrity of the adversarial process at trial was destroyed by the State's failure to correct Crawford's testimony denying that there was an "ulterior motive" for the visits and the subsequent affirmative argument that there was no "motive to force Luis to continue to tell the truth." T. 2310, 3367; see In. Br. p. 23-29.

[9] The State also noted that Luis admitted that he was a convicted felon but failed to mention that the trial prosecutor bolstered his testimony and the trial counsel was ineffective in failing to impeach Luis regarding the underlying facts of the aggravated battery conviction. Mr. Rodriguez never got a hearing on this issue.

fail. The fact that a witness is impeached on other matters does not necessarily render the additional impeachment cumulative. Cardona v. State, 826 So. 2d 968 (Fla. 2002) citing United States v. Rivera Pedin, 861 F. 2d 1522, 1530 (11th Cir. 1988). Where the jury relied on the testimony of Luis and Isidoro to convict, the information that the jury never heard takes on even more significance. See e.g. Mordenti v. State, 894 So. 2d 161 (Fla. 2004).

The State argued that Mr. Rodriguez's individual claims are "barred and meritless." Supp. Answer at 45. The mere incantation of the phrase "barred and meritless" does not defeat the entitlement to relief. In many instances, the lower court denied relief not because the claims were barred or without merit, but because, in the lower court's view, Mr. Rodriguez failed to show prejudice or materiality.

> Materiality, for Brady and Giglio purposes, *does not turn on whether there is sufficient evidence to convict.* Kyles, 514 U.S. at 434. Evidence may be material even if it appears more likely than not that a trial will result in conviction. Id. at 434-35. *Materiality turns on whether, in the absence of certain evidence, a presumptively innocent defendant will receive a fair trial.* See id. The test is whether the undisclosed evidence "undermines confidence in the outcome of the trial." Id. (citation omitted).

United States v. Lyons, 352 F. Supp. 2d at 1244.

The fact is that by a "mixture of negligence, recklessness, and willfulness, the State utterly failed in its prosecutorial duties." See United States v. Lyons, 352 F. Supp. at 1244. There is evidence on the record that during the investigation, the police went to Luis and Isidoro and their family members, threatening them with the arrest and prosecution of their loved ones if they did not cooperate. The police were able to get Isidoro to confess his involvement in the crime when they lied to him and said that Manuel Rodriguez had already implicated him. Manuel Rodriguez alleged (but has not been granted a hearing) that the police obtained his incriminating statements in violation of his Fifth and Sixth Amendment rights. <u>See</u> In. Br. 56-62. On direct appeal, this Court recognized the improper comments of both law enforcement and the prosecutor during the course of the trial, but found harmless error. The prosecutor's statements to the jury 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 shifted the burden of proof. <u>Rodriguez v. State</u>, 753 So. 2d 29, 39 (Fla. 2000). This Court also found that Det. Venturi's reference to Mr. Rodriguez's police "ID number" and Det. Crawford's erroneous statement that Mr. Rodriguez has used ten aliases were improper references to collateral crimes.

After characterizing Manuel Rodriguez as "evil...capable of every wickedness" (T. 3392-93) in the closing argument of the guilt phase, the State continued in the same vein during the penalty phase. The record reflects that the prosecutor represented he would not call Alejandro Lago as a witness; he avoided keeping his word by presenting Lago's testimony through Det. Crawford. The State made a mockery of the mitigation evidence that was presented by the defense and secured a death sentence, based in part, on the finding of the cold, calculation, and premeditated (CCP) aggravator. The challenges to the aggravators were rejected by this Court based, primarily, on facts as testified to by Luis whose trial testimony has now been seriously undermined. Rodriguez, 753 So. 2d at 44.

In light of all of the evidence that has been revealed during collateral litigation - regarding trial counsel's failures as well as the State's misconduct (i.e., failure to turn over the letters from Sirvas, failure to turn over letters written on behalf of Lago, failure to disclose impeaching evidence that could have been used against Isidoro and Luis) - the incriminating statements attributed to Manuel Rodriguez cannot be used to uphold the convictions and death sentences. This nation's adjudicatory system is not a tool finely tuned to obtain convictions, but a system designed to foster respectable justice. United States v. Lyons, 352 F. Supp. 2d at 1251. Manuel Rodriguez is entitled justice in the form of a new trial.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief was delivered to Sandra S. Jaggard, Assistant Attorney General, Rivergate Plaza, 444 Brickell Avenue Suite 650, Miami, FL 33131 by U.S. mail, this 20th day March, 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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