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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Manuel Rodriguez's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.850. The circuit court of the Eleventh Judicial Circuit in Miami-Dade County denied Mr. Rodriguez's claims after a limited evidentiary hearing.

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;
"Exh."	-exhibits entered at the evidentiary hearing.

For the sake of clarity due to common last names, the Appellant/Defendant may be referred to as "Manuel" and the co-defendant, Luis Rodriguez, who shares the same last name, may be referred to as "Luis." State witness Isidoro Rodriguez may be referred to as "Isidoro."

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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STATEMENT OF THE CASE

On September 15, 1993, Manuel Antonio Rodriguez was indicted in the Eleventh Judicial Circuit of Miami-Dade County for three counts of first-degree murder and armed burglary with assault that occurred on December 4, 1984. R. 5-8. Mr. Rodriguez entered a "not guilty" plea and the Office of the Public Defender was appointed to represent him. The Public Defender had to withdraw due to a conflict that arose out of Assistant Public Defender Art Koch's representation of the co-defendant, Luis Rodriguez. Thereafter, attorneys Richard Houlihan and Eugene Zenobi were appointed to represent him at trial. R. 30-34.

The Defendant moved to suppress various statements that he had made to law enforcement. R. 47-49; T. 20-475. Following a hearing, the motion was granted in part, and denied in part, by the Honorable Judge Leslie Rothenberg on April 10, 1995. R. 349-364.

Mr. Rodriguez was tried before a jury beginning on October 7, 1996 and on October 24, 1996, he was convicted on all counts. R. 867-870; T. 3506-07. The penalty phase convened on December 9, 1996 after which the jury recommended that Mr. Rodriguez be sentenced to death for each count of first-degree murder. R. 1291-92; T. 4323. On January 31, 1997, the trial court sentenced Mr. Rodriguez to death for the three murder convictions, and to life imprisonment for the armed

burglary conviction. R. 1738-1792; T. 4454-55.

On direct appeal, this Court affirmed the convictions and sentences. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). The petition to the United States Supreme Court for certiorari was denied on October 2, 2000. Rodriguez v. Florida, 121 S. Ct. 145 (2000).

On September 14, 2001, the Defendant filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 (2000). Supp. PCR. 1775-1847. Judge Rothenberg presided over most of the public records litigation until her resignation from the circuit court bench and Judge Diane Ward was assigned to the case. Judge Ward recused herself and the Honorable Judge Victoria Sigler presided over the remainder of the post-conviction proceedings. Supp. PCR. 2014-2019. The Defendant filed his amended motion to vacate convictions and sentences on April 16, 2004. PCR. 42-167.

On August 24, 2004, the lower court granted an evidentiary hearing on only those sub-issues in one claim on which the State conceded that there was a need for a hearing. PCR. 901-914 (transcript of hearing held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993)). The remaining claims, including all penalty phase issues, were summarily denied. A limited evidentiary hearing was held on December 16, 2004 and December 23, 2004. PCR. 955-1086, 1221-1313.

The lower court granted leave to file written closing arguments once the transcripts were prepared. Upon receipt of the transcripts, the Defendant filed a "Motion to Reconstruct the Record" due to numerous mistakes in the transcripts along with the post-hearing memorandum. PCR. 368, 389. The Defendant subsequently filed a motion to disqualify the judge upon learning that Judge Sigler assisted in "correcting" the record without notice to the parties. Supp. PCR. 2229-2238.[1] Both the motion to disqualify and the amended motion for post-conviction relief were denied on May 3, 2005. PCR. 590-634; Supp. PCR. 2239-2240. The notice of appeal was filed on May 12, 2005. PCR. 636-637.

On December 14, 2006, Mr. Rodriguez joined in a petition filed in this Court challenging Florida's lethal injection protocols following the botched execution of inmate Angel Diaz. This Court dismissed the petition with respect to Mr. Rodriguez without prejudice. Lightbourne et al. v. McCollum, SC06-2392 (Fla.

[1]The "original" transcripts are at PCR. 955-1086 (12/16/04) and PCR. 1221-1331 (12/23/04). The transcripts labeled "corrected" (by Judge Sigler and the court reporter) can be found at PCR. 1087-1220 and PCR. 1314-1406.

The parties' suggested corrections are located at PCR. 392-425; however, the page numbers reflected on the suggested corrections and referred to at a hearing on May 3, 2005 do not match the page numbers on the "original" transcripts. PCR. 1466-1599. During the preparation of this brief, counsel noticed that there are errors that were not pointed out by either party in the lower court. The Defendant objects to the "corrected" version and therefore will refer to the "original" version first and then, if necessary, will refer to other pages in the record.

Feb. 9, 2007).

On March 12, 2007, this Court relinquished jurisdiction to the circuit court for the purpose of completing the supplemental record. Supp. PCR. 3196. Upon relinquishment, Mr. Rodriguez filed a Motion to Disqualify Judge Based on Newly Discovered Evidence. Supp. PCR. 3274-3320. Judge Sigler denied this motion on March 23, 2007 and a second (amended) notice of appeal was filed March 30, 2007. Supp. PCR. 3344-3398.

STATEMENT OF FACTS

A. The investigation and trial.

Manuel Rodriguez was charged with the 1984 armed burglary and murders which occurred in the same Miami apartment complex where he lived with the mother of his children, Maria Malakoff ("Cookie"). The victims were Samuel and Bea Joseph (Manuel's landlords) and the couple's friend, Genevieve Abraham. Mrs. Abraham and her surviving husband, Anthony Abraham, were prominent members in the community; consequently, this was a highly publicized case. See e.g. T. 986, 1035.

Manuel Rodriguez, who suffered from a history of mental illness and substance abuse, contacted the police twice in 1985, under assumed names, to give them tips on this case. T. 4443-46, 2177-82. The police were unable to confirm

any of his statements and he became a suspect himself.[2] T. 2187-89. However, there was no evidence to link him to the crimes. T. 2356-59.

The ensuing investigation revealed many suspects but the police did not arrest anyone until nearly ten years after the crime. T. 349, 2194-2197; Supp. PCR. 868-882.

Many years later Rafael Lopez, seeking to obtain reward money, contacted the police and gave them information that led to the investigation of his brother-in-law, Luis Rodriguez. T. 3021-22. Luis Rodriguez and Isidoro Rodriguez are Maria Malakoff's brothers and neither are blood relatives of Manuel. Anastasia Elisia Rodriguez is the mother of Maria, Luis, and Isidoro. Isidoro Rodriguez is married to Velia Rodriguez who is Rafael Lopez's sister. T. 2417-27. With the exception

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[2]The trial court granted a motion *in limine* to keep the jury from hearing that Manuel was incarcerated when he contacted the police. T. 2136-41. In recounting these early contacts with Manuel at the trial, Detective Venturi told the jury that he refused to answer any more of his questions after being read his rights under Miranda v. Arizona, 394 U.S. 436 (1966). T. 2160-99.

The challenge to this comment on the right to remain silent was denied on direct appeal because the detective also noted that Manuel had become sick. However, this Court agreed that the admission of Detective Venturi's reference to the fact that Manuel had a police "ID number" and Detective Crawford's erroneous statement that Manuel had used ten false names was improper. Ultimately, this Court determined that the references to collateral crimes were harmless error. Rodriguez at 41-43.

of Velia Rodriguez, each of these related people testified for the State against Manual at his trial.

The information obtained from Rafael Lopez led the police to Orlando, Florida in 1993, where they approached Luis Rodriguez at his place of employment. T. 2256-57, 2280, 2336. The police interrogated Luis and falsely told him that Manuel ("Tony") had already blamed him for the murders. As a result, Luis gave a confession in which he also implicated "Tony." T. 2284. Luis was arrested and charged with the capital murders.

The next day, August 4, 1993, Metro-Dade Detectives Jarrett Crawford and Greg Smith traveled to the Tomoka Correctional Institution where Manuel was incarcerated and obtained incriminating statements through interrogation. T. 194, 318. At this time, there was no physical evidence tying Manuel Rodriguez to the crimes: there was no money trail, no murder weapon, no blood, no footprints, and no DNA. Shortly thereafter, on August 13, 1993, Manuel was placed under arrest for the homicides pursuant to a warrant and he was interrogated once again. Manual gave a series of "bizarre" responses and eventually admitted that he was present at the scene and acted as a lookout. T. 323-24.

Following a hearing on the motion to suppress, the trial court ruled that the statements made while in custody at the Tomoka facility would not be admissible.

However, the trial court ruled that all statements made after Manuel's arrest were voluntary and admissible, specifically noting that there was no expert testimony regarding the effect of medications that Manuel was taking at the time of the interrogation. T. 513-14; R. 349-364. The introduction of the incriminating statements at trial was not challenged on direct appeal.

At the trial, the State set the stage with circumstantial evidence suggesting that Manuel committed the crimes. Anastasia Rodriguez took the stand and recounted for the jury how she discovered a bag of jewelry under her trailer near the time of the crimes. She also relayed that she subsequently saw Manuel and "Cookie" looking for something under the trailer. T. 2065-2096.

Isidoro Rodriguez, Luis's brother, was then called to the stand primarily to corroborate their 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 she was being framed. Isidoro said that he told her to move the bag and he would travel to South Florida from Orlando to retrieve it. T. 2433-36. He was also allowed to testify that his mother called him again and *told* him that she saw Manuel and Cookie looking for something under the trailer. Thereafter, according to Isidoro, he obtained the bag from his mother and disposed

of it except for one coin. T. 2436-37, 2515.

Isidoro admitted that police threatened to arrest him on this case in 1993. T. 2494. The State presented a purported alibi evidence for him in the form of a note that he 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. All of this evidence was admitted over objection. T. 2439, 2475-2490. The State later bolstered Isidoro's credibility in closing argument by suggesting that he had solid alibi. T. 3371.

The testimony from Isidoro Rodriguez, Anastasia Rodriguez, and other witnesses was not sufficient to establish Manuel's guilt. From the outset, the jury heard that the "State of Florida's case rises or falls completely, totally on Luis." T. 1742 (Defense opening argument). Before the jurors could convict Manuel they had to be convinced of Luis's credibility. At the trial, there was no objection when the prosecutor elicited testimony from Luis on direct that he served in the military, that he had no prior history of mental illness, and that he had never been convicted of taking something by force or violence. T. 2747-2762.

Luis Rodriguez told the jury that, after being recruited by Manuel to commit the crimes, he told his girlfriend, Cathy Sundin ("Carmen"), that he was going to Miami for some business but he did not tell her the nature of the business or what it

might involve except that he was going to make some money. T. 2768-69. He told the jury that he did not know the full plan until he arrived in Miami where he learned the plan was to rob the landlords. T. 2795-97. He said that upon his return to Orlando the next day, he told Sundin that he killed two people. T. 2841.

Luis told the jury that the robbery was Manuel's idea. He said that Manuel shot the Josephs and that he only shot Mrs. Abraham because he was scared of Manuel. T. 2827-32. The specific details about how everything happened changed between the time of the initial interrogation and the time that he took the stand at Manuel's trial following his entry into a plea agreement. "I told [the police] the truth except for a couple little areas there I left out the truth." T. 2881. One of the things Luis lied about was whether he actually punched Mrs. Abraham or hit her with his elbow. T. 2881, 2809-10. He initially told police that he was under the influence of cocaine at the time of the crimes – that was apparently not the truth. T. 2752-53. Luis also initially told police that he shot Mrs. Abraham through a pillow – that was apparently not the truth. Luis said in his original statement that he shot at two people – he told the jury that was not the truth. T. 2859.

Luis's initial version was not consistent with the opinions of the medical examiner based on the physical evidence. T. 2646-2669. Luis was cross-examined at trial regarding the fact that the "new" version fit better with what law

enforcement knew about the crime scene. T. 2881 – 2893; see also T. 3288-96.

Luis admitted that he had entered into a written plea agreement in exchange for his "truthful" testimony: he told the jury that his charges were reduced to second degree murder and he was sentenced to life in prison on each count of murder along with a life sentence on the armed burglary which included a three year minimum mandatory prison term. T. 2853-55, 2868-69. Consistent with the State's opening argument, he also told the jury that there were no further promises made to him and that he could only hope that he would someday be paroled through the clemency process. T. 2856, 2869-2872, 1734.

At trial, the jury learned that the police took Luis out of the jail for day trips to the police department and the State Attorney's Office on several occasions for special visits with his family including his mother, brother Isidoro, sister Maria Malakoff, and his daughter. T. 2765, 2353, 2876. After Luis was cross-examined about the nature of the visits, the prosecutor elicited the following from Detective Crawford:

> STATE: **Was this done for any ulterior motive, was this done so that he would be a cooperative witness or help with prosecution or anything like that?**
>
> CRAWFORD: **No, sir**.

T. 2310 (emphasis added). The jury also heard testimony that Luis was able to have sex with his wife (Carol Arsenault) *without* the detectives' knowledge during the course of these visits.[3] T. 2766-77, 2877.

In closing argument, attorney Houlihan told the jury that Luis has never given the same story twice. T. 3279. The defense argued that Luis gave his story to the police only after the police fed him information and lied by telling him that Manuel had turned on him. T. 3281. He argued that the State corroborated Luis's versions only with other family members – family members who were allowed to have special visits with him before trial. T. 3284-85. Houlihan questioned whether there was some hidden deal that they did not know about. T. 3285.

In response, the State said that the defense called Luis a liar but questioned what facts or information the defense had for the jurors to decide their verdict. T. 3302. Assistant State Attorney Abraham Laeser downplayed the importance of the special family visits.

> What do the police get out of being decent and letting [Luis] see his family? Do they get a new story, a new version, new facts, new suspects? **Or are they just being decent to somebody who had already admitted his acts and asked for permission to see his family? Is there a motive to force Luis to continue to tell the truth? . . .** We want you to continue telling us the truth, so we are going to let you see your daughter on her birthday.

[3]Trial counsel argued that the intimate relations were facilitated by the police in opening statement – but the jury never heard any proof of that. T. 1748.

T. 3367 (State's closing argument) (emphasis added). The jury convicted Manuel Rodriguez on all counts. T. 3505-11.

Just prior to the start of the penalty phase, Mr. Rodriguez complained to the trial court about attorney Houlihan. One of Mr. Rodriguez's concerns was the fact that Mr. Houlihan was having constant communication with his wife who was an attorney with the Office of the Public Defender during the representation of Luis Rodriguez. T. 3518-23.

At the penalty phase, the defense presented the testimony of psychologists and psychiatrists who had evaluated Mr. Rodriguez over the preceding twenty years. See Rodriguez, 753 So. 2d at 35. However, each of the expert witnesses who testified for the defense either had been appointed to evaluate Mr. Rodriguez for insanity or competence in connection with his arrest for other crimes or, had treated him when he was hospitalized. None of them re-evaluated him for the purpose of presenting statutory *and* non-statutory mitigation in the context of a capital case. T. 3627-3855. Several of Manuel's family members testified on his behalf; however, the trial court restricted the presentation of mitigation by excluding testimony regarding intergenerational mental illness.

In sentencing Mr. Rodriguez to death, Judge Rothenberg specifically rejected his mother's mental illness as a mitigating factor. Rodriguez at 35. The trial court based the death sentences on six aggravating factors, one of which was struck on direct appeal. Id. at 46. This Court upheld challenges to the finding of the "cold, calculated, and premeditated" and "avoid arrest" aggravators based primarily on information that came from Luis Rodriguez. Id. at 43-46.

B. The 2004 evidentiary hearing on the Rule 3.850 motion.

1. LUIS RODRIGUEZ

At the evidentiary hearing, the lower court heard evidence that after the trial, Detectives Crawford and Smith were investigated by internal affairs as a result of Luis's admission at trial that he had sex with his wife at the station while awaiting trial for capital murder. PCR. 1007-1011; Exh. C, 24-27. In a letter written on behalf of the officers, ASA Laeser admitted that the co-defendant was, in fact, granted special favors in an effort to ensure his testimony:

> In order to make certain that Luis Rodriguez **remained a cooperating witness, the State did not object to granting him some minor conveniences**, consistent with the security needs of the case. For example, he was permitted to meet on rare occasion, with his mother, sisters, wife, and young daughter in the homicide office or in my office, under the supervision of two or more officers.

Exh. C (letter from ASA Laeser to Metro-Dade Police Department director Fred

Taylor dated February 3, 1997) (emphasis added). Detective Crawford admitted at the evidentiary hearing that he **"saw nothing wrong with the request with that man who was willing to cooperate being granted that request**." PCR. 1294 (emphasis added). Both Crawford and Smith, when testifying at the evidentiary hearing, denied any permission, tacit or otherwise, for Luis to have sex with his wife while he was awaiting trial. PCR. 1291, 1308.

At the hearing Luis gave sworn testimony that Detective Smith actively encouraged him to have sex with his wife: he was told to place a piece of paper (a happy face sticker) over the peephole if he wanted some privacy. PCR. 1023, 1268-1275. This was in direct contravention to Luis's trial testimony. Luis also testified that some of his contact visits with his family took place outside the police station and at a local McDonald's. PCR. 1274. Luis stated that he was not always escorted and he was never handcuffed. PCR. 1275. According to ASA Laeser and Luis there are even "Disney" type of photographs in existence showing Luis, while awaiting trial on a triple-murder, outside, in a car, and in a courtyard with his family members. No law enforcement officers appear in some of the photographs. PCR. 994-1004, 1262-64. Luis's former attorney, former Assistant Public Defender Art Koch confirmed that the photographs were taken at his suggestion. PCR. 1232-39.

There is no record that the State ever turned the photographs over to trial counsel and neither Mr. Houlihan nor Mr. Zenobi could recall ever seeing the described photographs.[4] PCR. 1044, 1075. They each testified that they would have used the information that the police facilitated the sexual relations if they had known about it. PCR. 1052-53, 987-88.

Luis also testified at the evidentiary hearing that when the police approached him in 1993, they told him that his family members had been arrested ("picked up") and he was shown pictures of them. PCR. 1260-1261. These family members

[4]"I am not aware of photographs." T. 3201 (Statement of Mr. Zenobi made during the trial). In objecting to further questions regarding the pictures at the evidentiary hearing, ASA Zahralban asserted that the "pictures used at trial, they were tested turned over testified to at trial." PCR. 1001. ASA Laeser, who prosecuted the case, did not testify that the photographs had ever been "tested" or "turned over" because at the time he did not have the capacity to copy them. Later on, he did copy one of the photos of Detective Greg Smith and Luis walking outside in which they appear to be holding hands. PCR. 996-97. Although the photographs were mentioned at the trial, they are not part of the trial record exhibits. Collateral counsel has not been provided with copies of the photographs.

The lower court sustained State objections to questions regarding the whereabouts of the photographs, who they were turned over to and when, whether Luis was handcuffed, the extent to which he was taken to places such as McDonalds with or without police supervision while awaiting custody on the triple-murder charges, or other details concerning the visits with family. PCR. 1001, 1232-33, 1238, 1263-64, 1267, 1274. The Defendant argued that the lower court could not fairly evaluate the credibility of the witnesses or make a fair determination regarding whether the police assisted Luis in being able to have sex with his wife without also considering all the events that surrounded the visits. PCR. 1263-64.

included his mother, Anastasia Rodriguez; his brother, Isidoro; his sister, Maria Malakoff; and his girlfriend in 1984, Cathy Sundin. He said the police showed him documents that were purported to be the "indictments" and "confessions" of his family members and loved ones. Id. It was at this meeting that Luis confessed to the crimes and implicated Manuel.

The court also heard evidence that Luis sought to withdraw his guilty plea on the grounds that *he believed that he would be eligible for parole* based on the State's representations made at the time of the trial. PCR. 1276. Luis testified that based on conversations that were held "behind closed doors," that it was understood that the State would help Luis obtain an early release. PCR. 1275, 1285. Mr. Koch confirmed this. PCR. 1240. Luis was also promised one more special visit with his family before he was sent off to prison for the murder of three elderly people but that fell through because of the internal affairs investigation. PCR. 1274.

2. ISIDORO RODRIGUEZ

At the Huff hearing, the court agreed to allow a hearing on the allegations that trial counsel were ineffective for failure to: present evidence that Luis and Isidoro left Orlando, Florida together to commit the crimes; call an eyewitness to the crime whose description of the perpetrator was consistent with Isidoro's

appearance; and present evidence that Luis Rodriguez's family possessed jewelry taken from the victims. PCR. 52-56, 901-914.[5] But when it came time for the hearing, the Defendant was blocked at every turn from making his case.

Several of the factual allegations concerning the deficient performance by trial counsel resulted from information that the Defendant obtained from depositions that were taken in preparation of trial. The lower court sustained the State's objections to the admission of the depositions into evidence and would not allow questioning based upon the information contained within those depositions. PCR. 971-976; see also 985-994, 1052-53. The court cited this Court's decision in State v. Greene, 667 So. 2d 756 (Fla. 1995) as forbidding the use of deposition taken pursuant to Florida Rule of Criminal Procedure 3.220(h)(1) for any reason other than impeaching the trial testimony of a deponent as a witness. The lower court also refused to allow any proffer of the evidence based on the rationale that the judge in a hearing is the "trier of fact." PCR. 976 ("I don't want to have you ringing my bell in the middle of a hearing, so to speak.").

[5]The lower court summarily denied a hearing regarding the complex relationship that Isidoro had with members of the Metro-Dade police department that the jury never heard about. Mr. Rodriguez alleged that Isidoro was an informant and that he had a business relationship with an officer who worked for the police department. PCR. 54, 64, 595, 600-601.

The lower court further sustained objections concerning the strategic decisions by the attorneys as being beyond the scope of the issues upon which a hearing was granted. See e.g. 1071-76, 1039-1051. Due to the obstructions by the State and the denial of the right to present evidence, the Defendant was prevented from proving his Sixth Amendment claim that he was deprived of the effective assistance of counsel at his trial.

3. THE MOTIONS TO DISQUALIFY

Upon receipt of the transcripts, counsel discovered more than one hundred errors, omissions, misspellings, and inaccuracies. See PCR. 944-1086, 1221-1313. Consequently, Mr. Rodriguez filed a Motion to Reconstruct the Record along with his post-hearing memorandum in which he requested that the court grant the motion and set a hearing for the purpose of reconstructing the record; transport Mr. Rodriguez from death row for the hearing; and appoint an independent court reporter to review the stenographer's notes. PCR. 389-392.

On March 3, 2005, Judge Sigler set a short hearing, indicating that there was "not much time to burn." T. 1409. The record reflects that former collateral counsel expected that, if the motion was granted, there would be discussions as to the procedure and the reconstruction would be set on another day. T. 1413. The parties submitted suggested corrections. PCR. 393-424. At the next hearing, on

April 8, 2005, collateral counsel learned that there were "corrected" transcripts but did not receive a copy at that time. PCR. 1426-29. It was unknown how the transcripts were "corrected"; presumably, the court reporter decided on her own to run a spell check. The hearing was continued so the new transcripts could be reviewed; in the interim, counsel became aware that the court reporter actually sat down with Judge Sigler to make the suggested corrections. At the next hearing, on April 22, 2005, counsel's request to call the court reporter as a witness to obtain testimony as to the court reporter's recollections regarding the hearing and to find out how the transcripts had been prepared was denied. PCR. 1437-1452. When counsel requested a continuance in order to discuss the matter with Mr. Rodriguez, Judge Sigler accused counsel of "studied ignorance." PCR. 1443-45.

The decision to engage in exparte communication without notice to the parties, coupled with the open bias and hostility exhibited by the judge, formed the basis of the motion to disqualify filed on April 29, 2005. Supp. PCR. 2229-2238. Judge Sigler issued her order denying all relief after denying the motion to disqualify on May 3, 2005. Supp. PCR. 2239-2240. After the orders were issued, the parties and the court spent four hours reviewing the transcripts in an attempt to make sense of them. Each party was allowed to make suggested corrections to the transcripts based on fading memories – the record remains impossible to read.

PCR. 1466-1599.

During the time that the record on appeal was being prepared, Mr. Rodriguez sought relinquishment of this case back to the circuit court for the purpose of determining whether the State has hidden records concerning Isidoro Rodriguez based upon the news reports 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. Supp. PCR. 3177 – 3196; 3341-3344. This Court denied the motion on March 27, 2007.

In the meantime, this Court relinquished jurisdiction to the lower court for the purpose of supplementing the record. Based on allegations that were reported in the press about Judge Sigler's alleged involvement in sealing court documents, Mr. Rodriguez sought to disqualify her from presiding over his case in any further proceedings. Supp. PCR. 3274-3320. This second motion to disqualify was denied as well. Supp. PCR. 3374.

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).

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. 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 II: Mr. Rodriguez's due process rights were violated when the lower court denied his motions to disqualify. Mr. Rodriguez was also deprived of a proper record on appeal due to numerous errors in the transcripts.

ARGUMENT III: Mr. Rodriguez was entitled to a hearing on the claim that he was deprived of a fair and impartial jury because trial counsel were ineffective in failing to preserve error that occurred during jury selection for purposes of the direct appeal and failing to challenge biased jurors.

ARGUMENT IV: Mr. Rodriguez was entitled to a hearing on his claim that trial counsel operated under multiple conflicts of interest due to his marriage to an attorney whose office represented the co-defendant and his prior representation of a potential witness or suspect in this case.

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. Mr. Rodriguez was deprived of an individualized sentencing determination.

ARGUMENT VI: The lower court erred in summarily denying the remainder of the claims including that Mr. Rodriguez was denied access to public records.

ARGUMENT

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: Luis and Isidoro.

1. LUIS RODRIGUEZ

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. 2854-56, 2868-69; Exh. B, 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. The State gained the benefit of Luis Rodriguez's testimony first by threats and intimidation; and later, through undisclosed favors such as allowing him to have sexual relations with his wife while the police stood watch. Mr. Rodriguez's right to due process was violated when the jurors were misled concerning the true nature and purpose of special accommodations afforded to Luis while he was awaiting trial on triple-murder charges.

a. The State allowed false and misleading testimony to stand uncorrected and failed to disclose that Luis was granted special favors to "make certain that Luis Rodriguez remained a cooperating witness."

In the face of improper threats for perjury by the prosecutor, Luis Rodriguez testified at the hearing regarding the special treatment he received from the police while awaiting his trial for triple-murder. PCR. 1023; Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976). Luis was allowed to have several visits with family members including his mother, Anastasia Rodriguez; brother, Isidoro; sister, Maria Malakoff (Cookie); and his wife and daughter. PCR. 1261- 1275; T. 2353, 2876, 2101-2124, 2420-2517, 2690-28. His mother, brother, and sister all were witnesses who

testified at the behest of the State against Manuel Rodriguez. T. 2097, 2416, 2601. Even more troubling is the fact that many of these visitors were also potential witnesses against Luis Rodriguez himself.

Luis was cross-examined at trial regarding special visits with his family while incarcerated and awaiting trial for first-degree murder. The jury was led to believe that the "one" visit that took place in the prosecutor's office was merely happenstance. The jurors were misled by the prosecutor to believe that these visits were of no consequence to their evaluation his testimony:

> STATE: These visits between family member of Luis['s] family and Luis, you mentioned that one of them had taken place in the vicinity of the state attorney, is that right?
>
> CRAWFORD: Yes.
>
> STATE: **If you can describe what these meetings are they seem to have gotten nefarious description, tell us what these meetings are about?**
>
> CRAWFORD: At the state attorney's offices, it was for Luis to be spoken to by your prosecutors, and **his mother was coming in the same day and they were allowed to sit in the same room and talk and physically hug.**

T. 2365 (emphasis added).

ASA Laeser told the jury that the police were just being "decent" and that the State gained no benefit in facilitating the special visits:

> [Luis] was allowed to see his daughter on her birthday three years ago. **He was allowed to have his family see him on Christmas in the police station once three years ago. After his confession** . . .
>
> What do the police get out of being decent and letting him see his family? Do they get a new story, a new version, new facts, new suspects? **Or are they just being decent to somebody who had already admitted his acts and asked for permission to see his family? Is there a motive to force Luis to continue to tell the truth**? . . . We want you to continue telling us the truth, so we are going to let you see your daughter on her birthday.

T. 3367 (emphasis added).

After the trial, the *same* prosecutor revealed that Luis was allowed to have special visits as a consideration for his willingness to assist the State. In a letter in support of the investigating officers in this case, the prosecutor wrote:

> A **vital link** in the prosecution became the **willing testimony** of the defendant Luis Rodriguez against the much more culpable co-defendant, Manuel Antonio Rodriguez. . . . **In order to make certain that Luis Rodriguez remained a cooperating witness, the State did not object to granting him some minor conveniences, consistent with the security needs of the case.** For example, he was permitted to meet, on rare occasion, with his mother, sister, wife, and young daughter in the homicide office or in my office. . .

PCR. 1007-1011; Exh. C, 24-27 (emphasis added).[6]

The prosecutor suggested to the jury that the State had no further motive to keep Luis happy because he had already implicated Manuel during the initial

[6]ASA Laeser also revealed in the letter that Crawford and Smith "'baby-sat' balky witnesses" but the Defendant was prohibited from inquiring as to which witnesses were "balky." PCR. 1009.

police interview that took place in Orlando. T. 3367. This, of course, was untrue. Luis's previous incriminating statements could never be used against Manuel unless Luis agreed to testify. The jury never had the benefit of knowing that the case of Bruton v. United States, 391 U.S. 123 (1968) would have prohibited the admission of the Luis's statements unless Manuel had the opportunity to confront and cross-examine him. What was *not* known at the time was that Luis was given special benefits and "conveniences" *in exchange* for his testimony. Trial counsel would have wanted to know of any favors given to Luis. PCR. 1080, 598.

The testimony and evidence that was presented at the evidentiary hearing established - *contrary to Detective Crawford's trial testimony and the State's closing argument* – that undisclosed consideration was given in exchange for Luis's trial testimony. T. 2310. The State's inconsistent positions concerning the nature and purpose of the special family visits violates due process. Bradshaw v. Stumpf, 545 U.S. 175 (2005) . The prosecutor's later admissions in his letter to the Metro-Dade Police Department director Fred Taylor exposed violations of Giglio v. United States, 405 U.S. 150 (1972) because the jury was clearly misled about the hidden purpose of the visits.[7]

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[7]Mr. Rodriguez was erroneously denied a hearing on the claim that the prosecutor's arguments at trial presented impermissible considerations to the jury,

Where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). The use of misleading testimony by the government constitutes a Giglio violation, *even if the testimony is not clearly perjurious*. Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996). In this case, the prosecutor went to great lengths to bolster the testimony of Luis Rodriguez and mislead the jury as to the real value of keeping this "vital" witness happy. Trial counsel attempted to establish that Luis was not credible and that there must be some hidden consideration for his cooperation. There is a reasonable likelihood that the false and misleading testimony and argument to the jury regarding the true nature and purpose of the special accommodations affected the judgment of the jury and the State cannot prove beyond a reasonable doubt that the error was harmless.

ASA Laeser elicited the following testimony from Detective Crawford at trial:

> STATE: Let me talk about these visits by Luis to the police station, [sic]. Were there times when family members of Luis Rodriguez came to the police station on those same dates?

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misstated the law and facts, and were inflammatory and improper and that counsel was ineffective in failing to object. PCR. 131-136, 626 (Claim 12).

CRAWFORD: Yes, sir.

STATE: Was this at his request?

CRAWFORD: Yes, sir.

STATE: **Was this done for any ulterior motive, was this done so that he would be a cooperative witness or help with prosecution or anything like that?**

CRAWFORD: **No, sir**.

T. 2310 (emphasis added). This testimony was in direct contravention to the prosecutor's later revelation that "[i]n order to make certain that Luis Rodriguez remained a cooperating witness, the State did not object to granting him some minor conveniences, consistent with the security needs of the case" or that "a vital link in the prosecution became the willing testimony of defendant Luis Rodriguez." Exh. C, 26. It is also in direct contravention to Detective Crawford's admission at the evidentiary hearing that "**we saw nothing wrong with the request with that man who was willing to cooperate being granted that request**." PCR. 1294 (emphasis added). The integrity of the adversarial process at trial was destroyed by the State's failure to correct Crawford's testimony concerning the "ulterior motive" and the subsequent affirmative argument that there was no "motive to force Luis to continue to tell the truth." T. 2310, 3367. Mr. Rodriguez is entitled to a new trial on these facts alone.

The fact that the information was never disclosed to the defense is also a violation of Brady v. Maryland, 373 U.S. 83 (1963). In order to establish a Brady violation, the defendant must show that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; that the evidence was suppressed by the State, either willfully or inadvertently; that the suppression resulted in prejudice. Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001).

The contrary statements made by the prosecutor are part of the record and undisputed, yet the lower court ignored them in the Order denying relief. PCR. 597-599; 706-715. The lower court could not fairly evaluate the credibility of the witnesses at the evidentiary hearing without considering all of the corroborating circumstances as alleged in Claim I of the Rule 3.850 motion. See Roberts v. State, 678 So. 2d 1232 (1996) (quoting Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)). Because the lower court failed to even consider this Giglio/Brady violation coupled with the refusal to consider Claim I in its entirety renders all credibility findings regarding the claims presented at the hearing as an abuse of discretion.

b. The lower court failed to conduct the proper materiality analysis regarding the bogus indictments and the plea deal that was made "behind closed doors."

The State gained the benefit of Luis Rodriguez's testimony first through threats and intimidation; later, through extreme favors which included a plea deal

made "behind closed doors" and never disclosed to the defense, the jury, or the trial court.

Manuel Rodriguez alleged that the State knowingly presented false evidence and failed to disclose impeachment evidence to the defense when state law enforcement officers testified that police did nothing except talk to Luis about his family. At trial, ASA Laeser argued:

> The defense attorney just got up here and said, you know, the police, Luis; prosecutors, Luis – **there *must* have been some sort of promise.** He didn't just come in here voluntarily and give this information. **Has anybody said that from the witness stand? Did Luis say, "I was threatened. I was forced. I was coerced. Police mistreated me in order to get me to give this statement."**
>
> Did the detective say "We had to raise our voices to him. We had to slap our hand on the table. **We had to tell him we are going to do something to his mom and family" before he would admit what he did.**

T. 3363 (State's closing argument) (emphasis added).

At the hearing Luis testified that when the police approached him in Orlando, Florida in 1993, they told him that his family members and loved ones had been arrested ("picked up") and he was shown pictures of them. PCR. 1260; T. 2234-36. Luis testified that the police showed him documents that were *purported* to be the "indictments and confessions" of his family members and loved ones. PCR. 1261. These implicit threats were reported to his attorney. PCR. 1239-40.

None of the other family members were ever charged with any crime – any "indictments" shown could not have been official documents.

That the police threatened Luis Rodriguez with bogus indictments is entirely consistent with other facts known to be true based on the record. Detective Crawford admitted that Manuel Rodriguez had not blamed Luis Rodriguez for these crimes - this was a fiction created for the purpose of getting Luis Rodriguez to talk. T. 2256-57; see also T. 3081; PCR. 1261. It was also established at trial that each of the other people named by Luis as having been "picked up" had some involvement either in the crime itself, or in the aftermath. The jewelry taken from the victims' was found at Luis's mother's home. T. 2102. Isidoro was an initial suspect in the murders and he expressed concern for his mother's heart condition because the police threatened to go talk to her. T. 2492 – 97. Luis testified that he told Cathy Sundin about committing the murders. T. 2770. Finally, he testified that his sister, Maria Malakoff, went with him when he disposed of the gun after the murders. T. 2833-37.

Mr. Rodriguez also established that the State failed to disclose promises made to Luis Rodriguez in exchange for his trial testimony. The prosecutor executed a written plea agreement on behalf of the State Attorney in which Luis Rodriguez was allowed to enter a plea to reduced charges in exchange for

testifying "truthfully" at the trial. Exh. B, 15-23. At trial, Luis admitted that he initially lied to the police and to his own attorney about his role in the murders. T. 2861. The reason for the change was illuminated at the evidentiary hearing: Luis testified that at the time of the trial, he was worried about whether the deal would fall through because he had failed a polygraph but that Mr. Laeser told him that it was in Laeser's "control" as to whether Luis got his plea. PCR. 1277. On cross-examination, ASA Laeser asked Luis:

> Let's start with the polygraph examination that was part of the plea agreement, **the portion that you lied about was the fact that you originally told me and the investigator you never fired a shot but in fact, the truth was that you put a bullet in Mrs. Abraham's head that's the portion you failed.**

PCR. 1277 (emphasis added). Luis's plea was contingent upon whether he told the "truth" but the jury never heard that the version of that "truth" was in the State's hands.

Based on conversations that were held "behind closed doors," Luis Rodriguez expected the State to fulfill additional promises that were never disclosed to defense counsel. PCR. 1248, 1275-76, 1285. Luis later sought to withdraw his plea when he learned that the State would not assist him as

promised.[8] Both Luis Rodriguez and his attorney, Art Koch, testified that the State had agreed to send letters with the recommendation that he be released from prison early. PCR. 1275, 1285, 1240. Luis Rodriguez also expected to have at least one more special visit with his family before he went to prison. However, because the allegation that the police were allowing Luis to have sexual relations with his wife came to the attention of Manuel Rodriguez' defense counsel, Luis did not get to continue to visit with his family. PCR. 1274.

The lower court did not resolve either of these issues based on a credibility finding and did not address the fact that Luis gave false testimony. There is no finding that the police did not threaten Luis's family members with arrest and false indictments. Rather, the lower court simply assumed that if the allegation is correct, then Mr. Rodriguez did not meet the prejudice prong as "**the result would not have been different** if the threat of indictments was known." PCR. 600 (emphasis added). This issue was presented in the Rule 3.850 motion as a Brady claim but pled in the alternative under Strickland v. Washington, 466 U.S. 668 (1984). Even though Mr. Rodriguez argued that the State failed to disclose the

[8]The lower court took judicial notice of Luis's appeal to the Third District Court of Appeal from the denial of his motion for post-conviction relief but would not admit the file into evidence. PCR. 1018 –1022; PCR. 2786-3140 (Exh. A13 was proffered for the purposes of this appeal).

information in his post-hearing memorandum, the lower court denied relief only under Strickland. PCR. 368-388, 61, 600. Either way, the prejudice analysis is the same.

Similarly, the court determined that because Luis was "vigorously cross-examined by defense counsel regarding the plea agreement, **the result would not have been different** even if it were correct that the State promised assistance for an early release." PCR. 599, 59 (emphasis added).

When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law." Lightbourne v. State, 841 So. 2d 431, 437-38 (Fla. 2003). The lower court failed to apply the correct test for determining prejudice:

> The proper test for prejudice is not whether the suppressed evidence 'would have resulted ultimately in an acquittal.' (Citation omitted). **That would be too high a bar**. In fact, as we have explained, the test is not even whether the evidence 'more likely than not' would have resulted in an acquittal. (Citation omitted).
>
> All we have required is a 'reasonable probability that had the information been disclosed to the defendant, the result of this proceeding would have been different.' (Citation omitted). In other words, the **test in Brady focuses on the fairness and reliability of a trial that took place without access to the suppressed exculpatory**

> **evidence,** rather than requiring a showing that the actual result would have been different . . .

Floyd v. State, 902 So. 2d 775, 783 (Fla. 2005) (emphasis added).

The State was in possession of evidence that could have been used to impeach the co-defendant in his testimony. That evidence included the fact that Luis was threatened with the arrest of his loved ones if he did not cooperate with the police; that the State promised letters recommending his early release; and despite the fact that although the testimony reflected that the special visits were simply for the sake of the family, the truth was that the visits were a quid pro quo for Luis's testimony. All of this information only came to light *after* the trial.

Manuel Rodriguez was prejudiced by the failure of the government to disclose this information to the defense. The main theory of defense at the trial was that Luis Rodriguez had a motive to lie. This Court's decision in Mordenti v. State, 894 So. 2d 161 (Fla. 2004) which addressed the impeachment value of the undisclosed evidence concerning the star witness (Gail Mordenti) is instructive:

> We certainly recognize that the significance of impeaching Gail in the instant case was critical. Gail was a pivotal and weighty witness for the State. Gail was not only the most decisive witness at trial, but the only witness who was able to place Mordenti at the scene of the murder. Gail's testimony and credibility were of significant consequence when we consider that no physical evidence was produced linking Mordenti to the crime.

Id. at 170.

Each of these statements could be made with the regard to Luis Rodriguez's pivotal and "vital" role in the State's gaining a conviction against Manuel Rodriguez. Given the failure to disclose key impeachment evidence, confidence in the outcome of the trial has been undermined in this case. The death sentence is not reliable given this Court's reliance on Luis's testimony in upholding two of the aggravators. Rodriguez at 43-46. As trial counsel Eugene Zenobi stated, "anything that shows that the State [sic] encouraging corporation [sic] or giving favors is critical to the case [sic] that's a given for anyone." PCR. 1080. Based on the violations under Giglio and Brady, Mr. Rodriguez's convictions of guilt and sentences of death should be vacated and his case should be remanded to the circuit court for a new trial.

c. The State failed to disclose that the police actively encouraged and facilitated conjugal visits between Luis and his wife in exchange for his testimony against Manuel.

Luis Rodriguez's special contact visits that he enjoyed while awaiting trial on triple-murder charges took place at the police station and were not subject to the same control or environment as normal family visits at the jail. PCR. 1261. Some of these special visits took place outside the police station and at a local McDonald's. PCR. 1263-64. At the hearing, Detective Crawford denied that Luis

Rodriguez was allowed to visit with his family outside because they wanted the visits with his daughter to be in a controlled environment, "not that anyone would be foolish enough to take murder[ers] out to public places." PCR. 1302. Yet, there exist photographs of Luis Rodriguez, while awaiting trial on a triple-murder, in "Disney" type photos, outside, in a car, and in a courtyard with many of his family members. No law enforcement officers appear in some of the photographs. PCR. 995, 1000, 1232-33.

The evidence presented at the hearing proves that the State granted special favors in exchange for Luis's testimony. Exh. C, 25-27; PCR. 1297, 1403. It is undisputed that Luis Rodriguez was allowed to have contact visits with his wife at the police station. The photos of the visits in and of themselves constituted powerful evidence of impeachment.[9] PCR. 1236-38. Luis testified that he was given the opportunity to have private time with his wife and that Detective Smith encouraged him to place a piece of paper over the peephole if he wanted some privacy. PCR. 1023, 1268-1275. While he may not have been explicitly told that

[9]Mr. Zenobi first heard about the existence of the photos in the middle of trial. T. 3201. There is not competent substantial evidence to support any finding that the photographs were used at trial. If the trial attorneys had these photographs in their possession, then Mr. Rodriguez submits that it was ineffective assistance of counsel to fail to use them at trial to discredit the co-defendant's testimony.

he could engage in sexual intercourse, it was a "very nice sign" that he could. PCR. 1287. His testimony at the hearing is in direct contravention to his testimony at trial where he maintained that he took advantage of the police so that he could get some private time with his wife. The Metro-Dade Police Department took Luis's allegation serious enough to launch an internal affairs investigation against Detectives Crawford and Smith.[10] Defense Ex. A11. Given all the circumstances surrounding the treatment of this co-defendant, it was proven that Luis Rodriguez was encouraged and allowed to have sex with his wife while awaiting trial. The State took great pains to downplay the importance of these special visits to the jury.

The co-defendant turned snitch was kept happy by being allowed to have sex with his wife and enjoy visits from his family with minimal restrictions. This was undisclosed consideration. "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

[10]In closing argument, the ASA Laeser 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, in the letter to internal affairs, he expressed his personal opinion that Luis was a "wily defendant" who was able to take advantage of two experienced homicide detectives. PCR. 1011. The prosecutor admitted that he thought Luis was "wily" from the day that he was arrested. PCR. 1011.

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). The lower court's factual findings regarding the evidence that the police facilitated the conjugal visits were made in a vacuum: the court failed to consider all of the circumstances surrounding the visits. Therefore, the findings are not entitled to deference.

d. Defense counsel failed to properly impeach Luis on his assertion at trial that he tricked the police so that he could have sex with his wife at the station.

The trial record demonstrates that the trial attorneys did possess some information that the police facilitated the sexual activity. During the cross-examination of Luis on his assertion that he had "tricked" the police into getting the opportunity to be with his wife, Mr. Houlihan asked whether he had read his wife's deposition, with the implication that it contained a different version. T. 2878.

At the hearing, Mr. Houlihan could not remember many details regarding his trial preparation and he even equivocated as to whether he would have had knowledge of Carol Arsenaults's deposition at the time of trial because he was not present at the actual deposition. PCR. 1046, 1053. When questioned as to whether he had knowledge that the police were facilitating conjugal visits, Mr. Houlihan

responded that "Through my experience a lot of times reporters who live up here in that area don't send co-counsel copies [of the depositions]." PCR. 1063. This is contrary to the lower court's finding that both trial attorneys "testified that they reviewed all materials available to them numerous times before trial." PCR. 598.

Under Strickland v. Washington, 466 U.S. 668 (1984), Mr. Rodriguez had to establish that his attorneys rendered deficient performance and, that he was prejudiced. Yet, the Defendant was not allowed to question Mr. Houlihan concerning his knowledge about the wife's testimony let alone the decisions he made regarding that knowledge. PCR. 1046-47, 1052-54, 1060-63.

> In assessing the reasonableness of an attorney's investigation, however**, a court must consider not only the quantum of known evidence already known to counsel**, but also whether the known evidence would lead a reasonable attorney to investigate further.

Wiggins v. Smith, 539 U.S. 510, 527 (2003) (emphasis added).

The lower court would not allow questions about the deposition to be asked because discovery Rule 3.220 restricts the use of depositions to impeachment at trial. Green, 667 So. 756 at 759-760. In Green, this Court compared the discovery Rule 3.220(h) which allows for depositions for purposes of pre-trial discovery and Florida Rule of Criminal Procedure 3.190(j) which provides for depositions to perpetuate testimony to be introduced as substantive evidence at trial. Judge Sigler mocked defense counsel's argument that the "spirit" of Florida Rule of Criminal

Procedure 3.220 necessarily contemplates a trial setting. The Rule clearly prescribes the procedures that are to be used in conducting discovery after the filing of the charging document in a criminal case. Mr. Rodriguez was not seeking to enter the depositions into evidence as substantive evidence in a jury trial as was the case in Green. The lower court erred in rejecting the Defendant's argument that information contained in depositions is relevant and admissible for the purpose of establishing the reasonableness of an attorney's investigation in post-conviction. PCR. 1052-53. [11]

Detective Crawford admitted that he was aware that a witness had asserted in a deposition that the police knew that Luis Rodriguez and his wife had sex on one of the visits. ASA Laeser admitted that the defense attorneys would have had access to all of the depositions. PCR. 1292, 983. Mr. Zenobi agreed that "anything that shows that the State [sic] encouraging corporation [sic] or giving favors is critical to the case [sic] that's a given for anyone." PCR. 1080; see also Gorham v.

[11]Carol Arsenault's deposition was proffered for the purpose of appeal and not considered by the lower court. Supp. PCR. 987-99; 2439-2543 (Exh. A5). In her deposition, Luis's wife indicated that the police allowed them to have sex and that the detective told Luis to put a napkin over the peephole. Supp. PCR. 2509. Carol Arsenault also discussed the jail visits. P. 2512-16. There was also testimony that one of the investigating officers told her that Luis would be out in a few weeks. T. 2518. The lower court considered none of this and the Defendant was precluded from asking the trial attorneys about any of it.

State at 784-85. The refusal of the lower court to admit and consider the deposition that contained "the quantum of known evidence already known to counsel" was an abuse of discretion.

The lower court also failed to recognize that the relevant inquiry in this case is not whether it was *actually true* that Luis was encouraged by the police to have sex; rather, the issue is how the jurors would have viewed the evidence. Mr. Rodriguez was denied a full and fair hearing on his claim of ineffective assistance of counsel.

e. The lower court erred in summarily denying a hearing regarding other impeachment evidence that could have been used against Luis that the jury never heard.

The lower court erred in summarily denying a hearing on the sub-issue that the trial attorneys were ineffective in failing to impeach Luis with the known facts surrounding his 1982 conviction for Aggravated Battery on a Law Enforcement Officer in Orlando. PCR. 61, 600. After bolstering Luis's credibility, the State then solicited Luis's version of the aggravated battery - in which Luis painted himself as the victim of racially-motivated violence - despite the fact that he was

lawfully convicted in the State of Florida for a crime against a law enforcement officer.[12] R. 2748-50.

At the evidentiary hearing on this matter, the Defendant attempted to establish that the trial attorneys should have obtained a copy of the police report that supported the 1982 conviction and been prepared to impeach Luis before the jury. PCR. 1011-13. The lower court denied the request to admit a copy of the report and cut off all further questioning despite the argument that the court could not possibly make a reasoned determination regarding the trial attorneys' effectiveness without considering all the circumstances surrounding their failure to prepare. Supp. PCR. 2782-85 (A12). The failure to obtain and use the 1982 police report that listed the facts underlying the aggravated battery conviction could not possibly be attributed to "strategy."

The lower court also improperly denied a hearing on the State's failure to disclose the existence of a witness who possessed material impeachment evidence

[12]Luis's defense team sought information regarding the facts underlying the aggravated battery in anticipation of preparing mitigation in Luis's own capital case. The prosecutor presented alternate theories regarding the facts of the prior conviction. Pre-trial, ASA Laeser's response was: "There's no provision to relitigate whether or not he was convicted 12 years ago. That judgment and sentence has come to stand. *I would assume no jury is going to hear a defense for that conviction.* It's precluded as a matter of law." T. 12. As it turned out, it was Manuel's jury who got to hear Luis's defense at the solicitation of the State.

that Luis lied to police in order to protect himself. During the course of public records litigation in post-conviction, two letters were discovered in the State's files that were never disclosed to the defense. Prior to Manuel's trial, a jail inmate, Willie R. Sirvas, wrote to ASA Laeser and informed him that he was an inmate housed with Luis and that Luis told him everything about the murders. In a second letter to the State, Mr. Sirvas wrote, "Mr. Richard Houlihan could use my testimony in court in reference to Luis Rodriguez lies to save his ass." PCR. 68, 603. The State had the duty under Brady v. Maryland to disclose this evidence to trial counsel but did not do so.

2. ISIDORO RODRIGUEZ

State witness Isidoro Rodriguez *was* an initial suspect in these homicides. PCR. 1269. It was only after he presented the police with his own version of a date-book and gas receipts that he was "cleared."[13] Having decided to exclude him as a perpetrator, the State decided to use him as a witness against Manuel Rodriguez. Isidoro had a complex and involved relationship with the same law enforcement department that investigated both Manuel and himself. The Defendant alleged that Isidoro not only had close family ties and a business

[13] At trial, defense counsel's objection to the documentation of the "alibi" was overruled even though the documents had never been turned over during the course of discovery. T. 2442-2470.

relationship with a member of the department; he was also an informant and a suspected drug dealer. 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. Mr. Rodriguez is entitled to an evidentiary hearing unless the motion and record conclusively show that he is entitled to no relief. See Fla. R. Crim. P. 3.850(d); Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

a. The lower court erred in summarily denying a hearing on allegations that would have impugned the credibility of Isidoro.

It was alleged in the 3.850 motion that prior to police contacting Isidoro in the investigation in this case, Isidoro acted as a snitch and provided information as a witness against a defendant in an unrelated murder case. The Defendant alleged that because Isidoro assisted police in going after this dangerous individual charged with murder, the police, specifically, Detective LeClaire, had Isidoro under police protection. Contrary to his trial testimony, Isidoro moved to Orlando in order protect himself from this person. Subsequently, Detective LeClaire became involved in investigating this case. Mr. Rodriguez pled that when LeClaire questioned Isidoro, he exploited Isidoro=s vulnerability and threatened to leave Isidoro unprotected from the defendant in the other murder case if he did not

assist police in their investigation and prosecution of Manuel Rodriguez. The Defendant was prejudiced either because the State failed to disclose this information or because trial counsel failed to discover and use it to impeach Isidoro. PCR. 54 –55. Isidoro's status as an informant on another case should have been disclosed. Gorham v. State at 784.

The allegation that Detective LeClaire threatened to remove the cloak of police protection from Isidoro after he snitched in a different homicide case is not "refuted by the record" as concluded by the trial court. PCR. 54, 595. The lower court erroneously concluded that Sgt. Nyberg's trial testimony that he and Sgt. Singleton interviewed Isidoro somehow *excluded* the possibility of contact between Isidoro and Detective LeClaire at another time. Sgt. Nyberg's testimony does not even refute the possibility that Detective LeClaire was present at this particular interview. T. 2382; PCR. 595. To the contrary, during a discussion about a discovery violation regarding items from Isidoro, the trial transcript reflects that "a report by Detective John LeClaire, dated [September 14th of 1993], indicates on page 4 of that report that he had picked up these specific items from Mr. [Isidoro] Rodriguez and forwarded them . . ." T. 2470 –2472. This is also consistent with Detective Smith's trial testimony that Sgt. Singleton and Detective LeClaire had "gone to contact Isidoro." T. 2286.

It was also alleged below that the State failed to disclose to the defense that Seminole County law enforcement officials were investigating allegations that Isidoro Rodriguez and his wife, Velia Rodriguez, were involved in drug dealing. PCR. 64. Trial counsel could have used this information to impeach Isidoro Rodriguez when he testified against Manuel. The fact that law enforcement officials were investigating Isidoro and his wife for major narcotics-related crimes provided a strong incentive for Isidoro to curry favor with law enforcement agents by assisting them and providing testimony favorable to the State=s case against Manuel.

The lower court summarily denied a hearing on this issue based on the rationale that the allegations were "conclusory" and the evidence would have been inadmissible under Breedlove v. State, 580 So. 2d 605 (Fla. 1991). PCR. 600. This was error because the 3.850 motion was not required to provide every detail. Gaskin, supra. The general rule is that evidence of bias is always admissible. Fla. Stat. 90.608(2) (2007); Harmon v. State, 394 So. 2d 121 (Fla. 1st DCA 1980). 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 is not applicable. That case 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.

Additionally, the Defendant pled, and could have proven through documentation, 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 Metro-Dade Police Department." PCR. 64. This was powerful impeachment evidence: had the jury known about this witness's documented connection with an officer who worked for the very same agency that arrested and prosecuted the defendant, it would have put his whole testimony in a different light. The jury may have discounted Isidoro's self-serving testimony that he was in Orlando at the time the crimes were committed and instead concluded that he was shielded from prosecution precisely because of that relationship.

The lower court considered, and denied, the allegation that Isidoro was related to members of the very same police agency that investigated both him, Luis, and Manuel, without regard to the other circumstances that served to bring Isidoro's veracity into question.

b. At the evidentiary hearing, the lower court sustained the State's objections as to the trial attorneys' strategic decisionmaking; Mr. Rodriguez was blocked at every turn from proving his claim.

At the Huff hearing the Defendant was granted a hearing on the allegations that the trial attorneys were ineffective for failing to present available evidence that Isidoro committed the crimes and other evidence of impeachment. PCR. 52-56, 901-914. Mr. Rodriguez attempted to establish at the hearing that trial counsel rendered deficient performance by failing to: present evidence that Luis and Isidoro left Orlando together to commit the crimes; call an eye witness, Edgar Baez, whose description of the perpetrator was consistent with Isidoro's appearance; and present evidence that Luis Rodriguez's family possessed jewelry taken from the victims.

The information could have been used to meet the State's burden-shifting arguments that were found to be improper on direct appeal:

> 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; Rodriguez, at 37-40.[14]

Unfortunately, at the evidentiary hearing, Mr. Rodriguez was blocked from making his case at every turn. He sought to prove that defense counsel should have known that Luis admitted that he and another person were going to leave Orlando and travel to Miami to commit a crime and that Isidoro is the person who picked him up at his home to go travel South. In order to do that, he attempted to place the deposition of Cathy Sundin into evidence in an effort to establish that the trial attorneys had information that they could have used at trial against Isidoro or that should have led them to investigate further.[15] Based on the decision in State v.

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[14]The Defendant was precluded from cross-examining Isidoro regarding his involvement in this crime at trial. T. 2506. He was also denied the right to question Maria Malakoff about Isidoro's involvement. T. 2728.

[15]The deposition, proffered for the purposes of appeal and not considered by the court, was conducted by Mr. Zenobi and Mr. Koch in Winter Park, Florida on August 11, 1994. Supp. PCR. 2544-2671 (Exh. A6). Ms. Sundin, who was Luis's girlfriend at the time, described Isidoro (Pepe) as "sneaky" and a "wheeler-dealer." She recalled that "Pepe" picked Luis up in his van and took him to Miami when Luis left to commit the burglary in Miami. Supp. PCR. 2640, 2626. It was undisputed at trial that, at the time of the crimes, Isidoro lived in Orlando. A photograph of Isidoro's van was entered into evidence at the trial even though he failed to admit that he owned a van in his pretrial deposition. R. 692-94 (State exhibit 4-F, number 72).

In her deposition, Ms. Sundin also referred to the fact that "there was one certain object that was supposed to be special and that they had it buried at his mom's house." Supp. PCR. 2651.

Green, supra, the lower court would not allow the Defendant to even question the witnesses about the information the deposition contained. See Arg. I(B)(1)(c).

Mr. Rodriguez attempted to establish that counsel's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688.

> Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallangeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation.

Id. at 690-691.

Inexplicably, the State and the lower court determined that the review of discovery, division of labor, and decision-making processes of trial counsel were "beyond the scope" of the six issues on which a hearing was granted and therefore, somehow, not relevant to the issues to be determined.

> DEFENSE: Where do you believe keeping the sandwich at close lies on the scale of important as far as criminal trial, important to defenses?
>
> STATE: Objection. Aside from scopt,[sic] somebody else handled the other phase.
>
> COURT: Sustained.

PCR. 1071-72.

> DEFENSE: Who was responsible for receiving and keeping track of discovery files or . . .

STATE: Objection. No claims involves discovery.

COURT: Sustained.

PCR. 1074; see also 1039, 1045, 1051, 1073, 1076.

Contrary to the State's assertion that "somebody else handled the [guilt] phase," the trial record reflects that Mr. Zenobi conducted voir dire, argued the vast majority of legal objections during the guilt phase, and crossed the Detectives Crawford and Smith.[16] It also appeared that Mr. Zenobi kept track of the files based on the trial record. T. 2243. Mr. Rodriguez received conflicting responses as to who was in charge of decision-making: Mr. Houlihan could not remember if he had read certain depositions even though he said that he was in charge of strategy. PCR. 1038. On the other hand, Mr. Zenobi answered "no" when asked whether Mr. Houlihan was responsible for making strategy decisions; the court allowed the answer concerning who was in charge of strategy to stand but agreed with the State that it was "outside the scope" and ordered counsel to "get back to the six narrow issues we are having today's hearing." PCR. 1073.

Who kept track of the discovery, reports, and depositions on this case was directly relevant to the pre-trial preparation. If counsel was not aware of certain

[16]T. 1914, 2031, 2121, 2201, 2264, 2322, 2753, 2939, 3156, 3209, 3361; see PCR. 1032, 1038, 1080.

information in those documents then any decision not to pursue that evidence could not be reasonable. Mr. Rodriguez sought to establish that if trial counsel had properly prepared then the defense should have put on evidence to impeach Isidoro. Over and over again at the trial, the court limited cross-examination, primarily based on erroneous rulings that the questions that were "beyond the scope of direct."[17] Defense counsel did not put on any witnesses. "All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument." Diaz v. State, 747 So. 2d 1021 (Fla. 3rd DCA 1999).

The lower court simply could not evaluate the decision-making process without knowing whether counsel intentionally failed to put on evidence because they wanted to "keep the sandwich," i.e., maintain the right to first and rebuttal argument in closing. Mr. Houlihan complained during the trial that he did not want to take a witness as his own for fear of "losing the sandwich" – Mr. Rodriguez was entitled to question the attorneys about the specific evidence that they chose not to present to determine whether the strategy was reasonable. The Defendant was

[17]See e.g. T.1976-77 (Officer Casey); 2157, 2197 (Det. Venturi); 2372-79 (Det. Rivers), 2389-91 (Det. Nyberg); 2507-12 (Rafael Lopez); 1845 (Off. Loveland).

prevented from using depositions and reports as impeachment against the trial attorneys who should have been aware of them. PCR. 984-89, 991-94, 1011.[18]

Edgar Baez was an eyewitness to the crime. On December 4, 1984, at approximately 6:30 pm, he saw a man push a woman into the apartment. He was able to identify the woman as one of the victims, Genevieve Abraham. Exh. A, 6, 11. He could describe the man as having "Black hair, short, moustache black." PCR. 9. He could see through the window at first, but the man pulled the shades down with both hands. Id., 8.[19] At the evidentiary hearing, Mr. Baez did not recall the events from 1984 and his sworn statement given to the police in 1984 was entered into evidence as a past recollection recorded. PCR. 962-970.

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[18]The following documents were proffered and not considered: Supp. PCR. 2246 - 2274 (Exh. A2, Deposition of Edgar Baez); Supp. PCR. 2275-76 (Exh. A3, Sketch); Supp. PCR. 2277-2438 (Exh. A4, Deposition of Rafael Lopez); Supp. PCR. 2439-2543 (Exh. A7, Deposition of Carol Arsenault – indicating that the police knew about the sex); Supp. PCR. 2544 - 2671 (Exh. A6, Deposition of Cathy Sundin – indicating the Isidoro picked up Luis); Supp. PCR. 2672- 2755 (Exh. A7, Deposition of Riggs Gay); Supp. PCR. 2756 - 2779 (Exh. A9, sworn statement of Maria Malakoff); Supp. PCR. 2780-81 (Exh. A10, MDPD sheet on Isidoro); Supp. PCR 2782-85 (Exh. A12, arrest affidavit of Luis); Supp. PCR. 2786- 3140 (Exh. A13, Third District Court of Appeal file on Luis's appeal); Supp. PCR. 3141 - 3176 (Exh. B1, Luis's sworn statement).

[19]The shade was sent to the Florida Department of Law Enforcement for processing for latent prints. Mr. Rodriguez still does not have the results of that testing. Investigators recovered five latents of value which were never identified.

Mr. Rodriguez sought to enter Mr. Baez's deposition that he gave where he referred to a composite sketch (based on his description of the man he saw) in order to establish that the person in the drawing was not Luis or Manuel Rodriguez. This request was denied based on Florida Rule of Criminal Procedure 3.220. PCR. 970 –79. Without the sketch in evidence, it was impossible for Mr. Rodriguez to prove his claim. Incredibly, the lower court would not allow the Defendant to offer a proffer in order to establish how the documents were relevant and admissible: "I'll be glad to let you proffer, you have to do that outside of my presence since I'm the trier." PCR. 976. The record reflects that trial counsel attempted to question Detective Venturi about the contents of Mr. Baez's statement but the court sustained the State's objections. The trial judge ruled that the defense could call the actual witness. T. 2157-59. The refusal of the lower court to admit and consider the deposition that contained "the quantum of known evidence already known to counsel" was an abuse of discretion. See Wiggins at 527.

Judge Sigler already determined, and the State conceded, that a hearing was necessary. See e.g. Mendoza v. State, 32 Fla. L. Weekly S 278 (May 24, 2007). The lower court could not properly consider the ineffective assistance of counsel claims while laboring under the impression that the bases for strategic decisions of

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T. 2085-2094 (Testimony of Bernard Brewer); see Arg. VI (denial of public

counsel were not relevant to the claim. The refusal to allow Manuel Rodriguez to prove the claim of ineffective assistance of counsel was a violation of due process.

B. The lower court erred in denying a hearing on the claim that Manuel Rodriguez was denied his rights under the Fifth Amendment to the United States Constitution due to the ineffective assistance of counsel and/or government misconduct.

1. TRIAL COUNSEL WERE INEFFECTIVE IN LITIGATING THE SUPPRESSION OF STATEMENTS

The day after Luis was arrested, on August 4, 1993, Detectives Crawford and Smith traveled to the Tomoka Correctional Institution (a medical prison facility) where Manuel Rodriguez was incarcerated and interrogated him. T. 194, 318. Manuel told the officers that he suffered from mental problems and that he was under the influence of psychotropic medications. T. 198, 321. After being confronted about the murders, without the benefit of Miranda warnings, Manuel told the detectives a "bizarre" story. T. 323, 324.

Manuel Rodriguez was then transferred to a prison facility in Starke, Florida. Subsequently, on August 13, 1993, he was placed under arrest for the homicides pursuant to a warrant. He was then transported from Starke in a van by the investigating officers to Metro-Dade Police Headquarters where he was read his Miranda rights. T. 199, 210-216, 287, 333, 325. There was testimony that he was under the influence of Trilafon, a psychotropic medication, and Benadryl. T. 213-

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records).

426. The detectives were aware of Manuel Rodriguez's psychiatric history as well as the fact that he had previously been found to be mentally incompetent. T. 266, 278, 282, 328, 393.

At the hearing on the motion to suppress, the detectives testified that Manuel gave numerous conflicting statements in which he denied any involvement in the crime. T. 205-07, 217, 327, 331 432. After being confronted with the co-defendant's sworn statement, Manuel said that it was Luis's idea to rob the Josephs. T. 331, 332. Manuel also told the detectives that he only agreed to act as a lookout; he told them that Luis and Isidoro entered the landlord's apartment and he then heard shots. T. 218-222, 331-32.

As the prosecutor pointed out, trial counsel presented "no medical records" and "no testimony of any physician or experts as to [Manuel's] mental state or anything else." T. 467. The trial court ruled that all statements made after the Defendant's arrest were voluntary and admissible, specifically noting in the Order denying the motion that that "the **only** evidence presented concerning the Defendant's mental status was that **at some point in the Defendant's life** he had been found by a judge to be incompetent to stand trial and the Defendant was hospitalized." R. 358 (emphasis added). The trial court noted a complete lack of evidence that would establish that Manuel Rodriguez could not have intelligently

and knowingly waived his rights:

> Since there was **no evidence** presented as to how long the Defendant was at Tomoka or why he was at Tomoka, this Court cannot speculate as to the Defendant's stay at Tomoka. Since there was **no evidence** presented as to the reasons why the Defendant was taking Trilafon (a psychotropic medication) and Benadryl (an anti-histamine given to counteract the effects of the Trilafon), **nor the significance of the amounts being given to the Defendant,** this Court must rely upon the observations of the officers and the statements made by the Defendant.

R. 358-358 (Order on the motion to suppress) (emphasis added).

The lower court erred in failing to grant a hearing on the allegation that trial counsel failed to *effectively* challenge the admissibility of Mr. Rodriguez's statements to the police and that trial counsel was ineffective in failing to litigate the voluntariness of the statements before the jury. PCR. 72, 605. Mr. Rodriguez sought a hearing to establish that the trial attorneys could have established that his statements were not voluntary if the issue had been properly litigated.

An attorney representing a capital defendant must give serious consideration to whether any incriminating statements can be suppressed. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003), Commentary to Guideline 11.5.1; Guideline 4.1("Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings, including . . . the ability to comprehend Miranda warnings **. . .**"). Defense counsel has a duty to seek expert mental health assistance

on behalf of his client where necessary. Ake v. Oklahoma, 470 U.S. 68 (1985); Blake v. Kemp, 758 F. 2d 523 (11th Cir. 1985); see also PCR. 100-104 (Claim 7).

The validity of the waiver of the Miranda rights must be considered in light of the inherently coercive circumstances of this interrogation. The interview took place in a prison where the already-incarcerated Defendant had a history of mental illness and he was under the influence of psychotropic medication. Miranda v. Arizona, 394 U.S. 436 (1966). The trial court was required to appoint a mental health expert to assist the defense *upon a reasonable request* by the attorney. Ake, supra. The record reflects that Mr. Rodriguez suffers from a long history of mental illness – had trial counsel retained and presented an expert, the motion should have been granted. Trial counsel should have hired an expert to help explain to the trial court relevant factors about Mr. Rodriguez's mental status at the time he made his statement. See e.g. Carter v. State, 697 So. 2d 529, 534 (Fla. 1997). An expert might have assisted counsel in pointing out to the trial court, for example, that Mr. Rodriguez was actually under the influence of Busbar and *not* Benadryl. T. 4021-25. An expert most certainly could have explained the difference.

The fact that the trial attorneys in this case filed a motion to suppress does not "refute" this claim; is not dispositive on this issue; and not grounds for denial as stated in the Order denying relief. PCR. 605; see Smith v. Zant, 887 F. 2d 1407

(11th Cir. 1989) (The district court should have looked at whether the trial attorney had rendered deficient performance based on the Strickland analysis in failing to present evidence of the defendant's cognitive defects and mental retardation to the fact finder. Id. at 1417, J. Tjoflat, concurring); see also Owens v. United States, 387 F. 3d 607 (7th Cir. 2004) (Counsel was ineffective in drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house.). The Rule 3.850 motion was clear; even though the attorneys challenged the admission of the statements, they did not do so in a way that would protect their client's rights. And again, at the time this motion was filed, there was no requirement to provide names of witnesses who might testify at trial: there was sufficient notice as to the nature of the claim under Gaskin, supra.

In any event, Mr. Rodriguez also alleged that trial counsels' performance was deficient because the voluntariness issue was never presented to the jury. This aspect of the claim was completely ignored in the lower court and is not refuted by the record. Upon request by counsel, the jury will be instructed that the confession or statement should be considered "with caution and be weighed with great care to make certain it was freely and voluntarily made." Stephens v. State, 645 So. 2d 161 (Fla. 4th DCA 1994). In this case, the trial attorney did not even ask the jury to disregard the incriminating statements of his client, despite the fact that Mr.

Rodriguez expressed on the record his concern that this issue should be litigated before the jury.[20] T. 3369. There is no reasonable strategic basis for this neglect: a hearing is required.

Mr. Rodriguez was prejudiced by the failure to effectively litigate the suppression motion. On direct appeal, this Court held that the prosecutor'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 at 39; see T. 3305, 3315-16. However, this Court also considered the improper comments in the context of Manuel's "admission that he was present in the apartment, as well as other numerous inculpatory remarks" and concluded that the error was harmless beyond a reasonable doubt. Id.; State v. Marshall, 476 So. 2d 150 (Fla. 1985). If trial

[20]Despite the fact that the theory of defense was "he didn't do it" and that Mr. Rodriguez was "not the perpatrator [sic]" trial counsel *asked no questions on voir dire regarding confessions.* PCR. 1031, 1070. The lower court would not allow the Defendant to inquire as to why. PCR. 1033, 1071. Mr. Rodriguez is entitled to a hearing on this issue.

counsel had properly litigated the suppression motion, the jury would not have heard the statements; confidence in the outcome has been undermined.

2. TRIAL COUNSELS' PERFORMANCE WAS DEFICIENT IN FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS ON THE RIGHT TO REMAIN SILENT

Mr. Rodriguez alleged below that trial counsel was ineffective for not objecting or moving for a mistrial when, *during closing arguments*, the prosecutor commented on his right to remain silent. T. 3356; PCR. 77, 608. This Court summarized Detective Venturi's comments regarding the contacts that he had with Mr. Rodriguez in 1985 when he contacted police to give them tips:

> Venturi testified that he told Rodriguez he thought Rodriguez was involved in the crime; read him his Miranda rights; and, when he asked Rodriguez to tell him what really happened, Rodriguez 'bowed his head down and he just began to cry. There was some silence there and again I just felt that at this point I had to continue with my interrogation, but he refused to answer [any] more of my questions.'

Rodriguez, 753 So. 2d at 36.

This Court rejected Mr. Rodriguez's argument on direct appeal that he was entitled to a new trial, noting that the subsequent explanation that "He was getting sick, so we ended the interview," minimized any taint caused by Venturi's comment. Id. at 36-37; T. 2193.

However, in closing arguments, the prosecutor argued to the jury that when Mr. Rodriguez was asked whether he was willing to talk about his "participation in

the murders," Mr. Rodriguez only Aclaimed that he is too sick.@ T. 3356. By so arguing to the jury, the State completely erased any curative effects of Venturi=s explanation that he thought the interview was stopped because Mr. Rodriguez was sick. The inference was that Mr. Rodriguez refused to answer any more questions not because he was sick, but because he was guilty and wanted to exercise his right to remain silent. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

The lower court misapprehended the facts and nature of this claim in denying relief. The trial attorney registered an objection after Venturi's offhand comments, and specifically turned down the offer of a curative instruction so as not to magnify the situation. However, counsel unreasonably failed to complain when the prosecutor decided to attack Mr. Rodriguez's credibility by accusing him of only "claiming" to be sick. This had the effect of denigrating Mr. Rodriguez's Fifth Amendment right to remain silent and in no way "mirrored" the unintentional comments of Venturi.

Had trial counsel properly objected and moved for a mistrial in response to the prosecutor=s argument, Mr. Rodriguez would have been entitled to a new trial especially in view of the similar recognized error on direct appeal. Contrary to the lower court's order, this precise issue was not addressed on direct appeal; the point is that it would have been, had trial counsel been effective. The case that the lower

court relied on to erect a procedural bar, Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), was in a different posture and not applicable.

C. Due to the summary denial of a hearing on the majority of factual allegations, the lower court failed to consider the cumulative effects of the individual violations on the integrity and reliability of the trial.

Under Rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Gaskin v. State, 737 So. 2d at 516. Upon review of a trial court's summary denial of post-conviction relief without an evidentiary hearing, this Court must accept a defendant's factual allegations as true to the extent they are not refuted by the record. See Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000); Floyd v. State, 808 So. 2d 175 (Fla. 2002).

The lower court failed to exercise independent judgment on Manuel Rodriguez's constitutional claims of error and instead, chose to completely adopt the State's slice and dice approach to dissecting and rejecting the claims. The lower court erred in summarily denying Claims 2 through 22. The failure to consider the vast majority of the allegations raised in Claim 1 resulted in the denial of a full and fair evidentiary hearing. In order to avoid the required cumulative analysis, the State simplified, divided, and inappropriately recast Mr. Rodriguez's first claim into separate and distinct lettered topics "A-W." PCR. 195-235. The fact

that this was Manuel Rodriguez's motion and that he bore the burden of going forward was completely lost. Nowhere in Claim 1 is there any mention of "lettered" topics. The lower court adopted the State's approach by taking the various and numerous factual allegations out of context and stripping them down in isolation, and granting a hearing only on "six narrow issues." PCR. 1073.

It was error to deny a hearing on other factual allegations that trial counsels' performance was deficient: the combination of the errors resulted in prejudice. Trial counsel admitted error – "[I]n light of my mistake" – when he opened the door to evidence of prior bad acts in the guilt phase by asking about whether Luis "liked" Manuel. T. 2948 –2980; see also Rodriguez at 41-42 (finding that defense counsel opened the door to evidence of prior bad acts). The State was allowed to elicit testimony from Luis "that he had seen Manuel engage in two acts of random violence and that Manuel had blackmailed Malakoff." Rodriguez at 41; T. 2977 – 80; PCR. 66, 602; see Glancy v. State, 941 So. 2d 1201 (Fla. 2nd DCA 2006) (counsel held to be ineffective for eliciting damaging character evidence about the defendant by asking witnesses why they did not like the defendant).

Mr. Rodriguez was entitled to a hearing to establish that trial counsel were ineffective due to: the failure to object to Rafael Lopez's testimony to prior consistent statements; failing to present evidence of innocence (i.e., documented

evidence of an alibi); failing to present evidence about Cookie's son, Landi, that would have refuted the State's motive for the crime; and failing to object to the State's improper arguments that amounted to the admission of prejudicial victim impact evidence. T. 3016-3022; PCR. 69, 603, 73, 606, 51, 594.

There should also have been a hearing on the additional Brady claim that Rafael Lopez, a three-time convicted felon whose testimony only served to bolster Luis, received the benefit of a reduced prison sentence in exchange for his trial testimony. The State also failed to disclose an inter-office memorandum from the Surfside police department which indicated that police were informed that a person named Joseph Thomas admitted to committing the crimes. PCR. 68, 603.

Nowhere in the lower court's order denying relief is there a suggestion that a proper "cumulative" analysis - one that considered those errors recognized on direct appeal - was performed. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Kyles v. Whitely, 514 U.S. 419 (1995). A series of errors may accumulate a very real, prejudicial effect. A "piecemeal review of each incident" is insufficient. United States v. Blasco, 702 F. 2d 1315, 1329 (11th Cir. 1983).

The trial court failed to identify and apply the appropriate standard for determining prejudice under Kyles. On the limited and truncated hearing that was held, the lower court made determinations of fact that are not supported by

competent, substantial evidence and erroneously excluded defense evidence and refused to allow the trial attorneys to be examined regarding "strategy." Manuel Rodriguez was denied a full and fair hearing before a neutral tribunal on his claim that his convictions are materially unreliable because no adversarial testing occurred in violation of his rights as guaranteed by the U.S. Constitution by the Fifth, Sixth, Eighth and Fourteenth Amendments. PCR. 46 – 79.

ARGUMENT II

THE LACK OF A FULL AND FAIR POST-CONVICTION HEARING BEFORE A NEUTRAL TRIBUNAL SERVED TO DENY MANUEL RODRIGUEZ HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

A. The denial of the motions to disqualify was a violation of due process under the Fourteenth Amendment.

Mr. Rodriguez is entitled to a full and fair post-conviction proceeding, including a fair determination of the issues by a neutral, detached judge. Holland v. State, 503 So. 2d 1354 (Fla. 1987); see also Carey v. Piphus, 435 U.S. 247, 262 (1978). The original transcript of the evidentiary hearing contained more than one hundred errors, omissions, and inaccuracies. PCR. 944-1086 (12/16/04 hearing); 1221-1313 (12/23/04 hearing); 393-424 (suggested corrections provided by both parties). Consequently, Mr. Rodriguez filed a Motion to Reconstruct the Record along with his post-hearing memorandum. PCR. 389 – 392.

After Judge Sigler learned about the problems with transcription, she sat down with the court reporter and together, they attempted to "correct" the transcript, without notice to the parties. PCR. 1442, 2232. After learning about the meeting, Mr. Rodriguez filed a Motion to Disqualify the Judge on April 29, 2005. Supp. PCR. 2229-2237.

In the motion, Mr. Rodriguez alleged that at the adjournment of the March 3, 2005 hearing, the parties agreed to submit written suggested corrections to the transcripts. At the April 8, 2005 hearing, there was a discussion regarding the existence of "corrected" transcripts but collateral counsel did not obtain a copy. PCR. 1419-1436. The motion to disqualify alleged the following:

> At the close of the [April 8, 2005] hearing, it was still unknown to Mr. Rodriguez and his defense team exactly how the "corrected" transcripts came to be created. At the time of the hearing, the undersigned attorney still had not had an opportunity to review the "corrected" copy of the transcript, but there was no reason to dispute the State's position that the new transcripts were perhaps "prettier," but no better than the original transcripts prepared by the court reporter.
>
> At the hearing on April 8, 2005, this Honorable Court made it clear that the Defendant would bear the burden of establishing that the transcript was inaccurate:
>
> > I don't have an independent recollection this was said. With all due respect to Miss Diaz and you having an independent recollection that this exact line was uttered at that point in the proceedings; I am not making a finding, the transcript is incorrect, and I am not making a

> finding the transcript is incorrect, and I am not ordering this line to be inserted because the Court is not comfortable as to what those words were, . . .
>
> 4/8/05, p. 15.
>
> This ruling indicated that this Honorable Court was inappropriately elevating her own personal and independent recollection of the proceedings in order to make findings of fact as to whether the transcript was even inaccurate. In order to meet the burden of proving that the transcript is inaccurate, the undersigned attorney served the court reporter, Ms. Stacey Boffman, and former Asst. CCRC, Lucrecia Diaz, with subpoenas to testify as to their recollections of the hearings that were held in December, 2004.
>
> In preparation for the upcoming hearing, the undersigned attorney contacted Ms. Boffman by telephone in order to discuss her testimony on April 21, 2005. During the course of that conversation, Ms. Boffman indicated her belief that the transcript was accurate. In response to an inquiry concerning the preparation of the "corrected" transcript, Ms. Boffman told the undersigned counsel that she spent "two to three hours" with the Honorable Victoria Sigler working on the transcripts. Prior to this conversation, the Defendant had no way of knowing that the Court actively participated in the preparation of a new transcript.

Supp. PCR. 2229-2235 (excerpt from the motion to disqualify).

The lower court erred in denying the motion as untimely. PCR. 1468; Supp. PCR. 2239-2240. A motion to disqualify must be filed within ten days after the grounds on which the motion is based are discovered. The facts as alleged in the motion must be taken as true. Fla. R. Jud. Admin. 2.160; see also Lewis v. State, 530 So. 2d 449, 450 (Fla. 1st DCA 1988). The sworn motion in this case alleged

that counsel for the Defendant "had no way of knowing that the Court actively participated in the preparation of a new transcript" prior to the conversation that took place with the court reporter just days before the motion was filed. PCR. 2232. In fact, the record of the April 8th hearing reflects that counsel was under the misimpression that some type of written order had been issued. PCR. 1423, 1446.

Even if the Defendant did have *actual* notice that Judge Sigler had personally spoken with the court reporter, that - in and of itself - would not have formed a legally sufficient basis for disqualification. Porter v. Singletary, 49 F. 3d 1483, 1489 (11th Cir. 1995) ("both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics."). The problem here is not the fact that the lower court had contact with the court reporter. The issue is that Judge Sigler engaged in a behind-closed-doors meeting with a court reporter to reconstruct the record. The proper procedure was to have an evidentiary hearing, in open court, with all the parties involved to determine whether an accurate record could be reconstructed. Johnson v. State, 442 So. 2d 193 (Fla. 1983). The motion was timely filed.

Judge Sigler exhibited bias against Manuel Rodriguez throughout the proceedings below, but once the problem with the incorrect transcripts arose, the bias turned to open hostility. In the original transcript, the court reporter

transcribed the words "violent" and "violate" when the word should have been "wily." PCR. 400. The record contains many examples of errors in the transcription that the lower court did not appear to recognize:

> **3.190, peculation-of testimony.**

PCR. 973 (comment by the court) (emphasis added).

> **3.22, not be subsitanite evidence in spreading**.

PCR. 1052 (lower court ruling on State's objection) (emphasis added).

> **The Supreme Court said repeatedly, the claims that are merits proceedure insufficient. I forgot one in particulary the combination of the three we denied this urder don't count.**

PCR. 1013 (State argument) (emphasis added).

> **First of all, I like to correct with all do respect, these Argigleo_____ terms in Strickland violation are all under Claim One.**

PCR. 1233 (argument of collateral counsel) (emphasis added).

After the Defendant filed the Motion to Reconstruct the Record, there was a short hearing scheduled, presumably for the purpose of determining what procedures would be used if the motion was granted, and to set a future date. At the hearing, counsel's respectful request to ensure an accurate record for her death-sentenced client was met with disdain and sarcasm:

> THE COURT: So you filed **some kind of a motion about recreating**

a transcript.

MS. DIAZ: Yes, Your Honor. We filed a motion to reconstruct the record. After we received the transcripts we started to read through them and we realized that there's entire portions of it that don't make sense, arguments that we made, arguments that Mr. Laeser made that were just not correct.

THE COURT: **Page?**

MS. DIAZ: Excuse me?

THE COURT: If you say that there is a **page or a word** missing take me to it.

MS. DIAZ: I attached the entire transcript with every –

THE COURT: No, we're going to go through it, page by page. You tell me what you **think** isn't there.

MS. DIAZ: Would Your Honor like to do that today?

THE COURT: **As compared to never**.

MS. DIAZ: All right. Starting on the transcript that begins on December the 16th. Let's start with the spelling of my name.

THE COURT: **And that's important to the appellate record because?**

MS. DIAZ: It just is indicative of the type of mistakes that are prevalent throughout this transcript, Your Honor.

THE COURT: **So the Court denies the motion to pay for any correction of the spelling of your name unless you'd like to pay the court reporter to do that. Next.**

PCR. 1410-11 (emphasis added).

The sarcasm continued during the next proceeding, after both the State and Defendant submitted written suggested corrections detailing errors on nearly every

page of the more than two hundred pages of transcripts. When the first mistake on the transcript just happened to be counsel's first name, the court ruled, "I don't care" and accused counsel of being "petty." PCR. 1423, 1433. Of course, the Defendant would never have sought to take up court time if the only problem were the misspelling of one name.

The Defendant bears the burden of establishing error on the record as well as the risk if the record is not preserved. The transcription is so poor that it is simply impossible to read it with any coherence or comprehension of what the witnesses or parties are saying. The failure to make appropriate and contemporaneous objections and to present legal arguments to the trial court may result in a procedural bar. The lower court's initial ruling of "I don't care" with respect to counsel's first name is indicative of how Manuel Rodriguez's post-conviction motion was treated.

These personal attacks on the Defendant's counsel demonstrated partiality and formed part of the basis of the motion to disqualify. As alleged in the motion, the lower court accused counsel of "studied ignorance" without provocation. PCR. 1443-45. The bias was so extensive that the lower court even refused to order an expedited transcript of the prior hearing after inappropriately entertaining argument that a motion to disqualify would not be timely. PCR. 1449. Due process

guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 435 U.S. at 262. In a capital case like Mr. Rodriguez's, the courts "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993).

The test for determining the legal sufficiency of a motion for disqualification is an objective one which asks whether the facts alleged in the motion would place a reasonably prudent person in fear of not receiving a fair and impartial hearing. State v. Livingston, 441 So. 2d 1083, 1086 (Fla. 1983). The standard of review on a motion to disqualify is *de novo*. Mr. Rodriguez was and is not required to prove prejudice: the motion to disqualify should have been granted.

During the time that the record on appeal was being prepared, Mr. Rodriguez sought relinquishment of this case back to the circuit court to get the facts regarding the State's long-standing practice of hiding or altering criminal records of informants and to determine whether the State has hidden records concerning the State's witnesses, especially Isidoro Rodriguez. Supp. PCR.. 3341-3344. While that motion was pending, this Court relinquished jurisdiction to the circuit court for supplementation of the record and Mr. Rodriguez filed his second

motion to disqualify within ten days of this Court's order. Supp. PCR. 3274-3320.

The factual basis for the disqualification is set out in the motion. Supp. PCR. 3277-3283. News reports indicated that Judge Sigler took an undocketed plea at "an unusual, secret hearing" in a case involving a defendant in an attempted murder case who was helping the State in investigating corruption at a county jail. Supp. PCR. 3277-78. Judge Sigler had already denied a hearing regarding the allegations that Isidoro Rodriguez was an informant. Given the alleged participation in the practice of altering dockets by Judge Sigler, Mr. Rodriguez had a reasonable fear that Judge Sigler could not be fair and impartial regarding any allegation that the State may have hidden criminal records on Isidoro. The second motion to disqualify was denied. Supp. PCR. 3374, 3378-3379.

The standard of review on a motion to disqualify on appeal is *de novo*. The denial of the legally sufficient second motion to disqualify was a violation of due process.

B. Mr. Rodriguez was denied his due process right to an accurate transcript of the evidentiary proceedings.

The accuracy of the appellate record is paramount in capital cases. See Delap v. State, 350 So. 2d 462, 43 (Fla. 1977); Parker v. Dugger, 498 U.S. 308 (1991). Florida Judicial Rule of Administration 2.070(h), which imposes

heightened requirements on court reporters in all capital proceedings in circuit court, was ignored in this case. PCR. 1433. As a result of the careless transcription, it is unknown whether legal arguments or proffers of evidence made by counsel were preserved on the record. Anders v. California 386 U.S. 738 (1967) (appellate counsel must conduct a complete review of the record on appeal).

Despite the attempt by Judge Sigler to reconstruct the record based on her memory, many errors and omissions still remained. PCR. 955-1086; 1314 – 1418; 1440.[21] The problem was not just with the evidentiary hearing – the transcription of the Huff hearing is incomprehensible as well. PCR. 901-914, 356-360. Even more disconcerting is the number of transcripts from hearings that are missing entirely.[22]

[21]The Court Reporter certified both the "original" and the "corrected" version of the transcript from the hearing on December 23, 2005 on the *same* day: "*January 29, 2005*." PCR. 1406. The date of the certification is prior to the date of the hearing and there are two different versions of the transcript: they could not have been completed on the same day. Likewise, both versions of the December 16, 2005 hearing were certified on "January 26, 2004." PCR. 1086, 1220. Thus, the record contains two different versions that do not even approximate an actual recording of the hearing that were certified as "a true record of the testimony of the witness."

[22]It appears that there were proceedings held on 10/31/03, 11/13/03, 11/25/03, 12/11/01, 12/19/03, 1/29/04, and 2/6/04 for which there are not transcripts. PCR. 7-41.

The problem was compounded by the lower court's failed attempt to "correct" the transcripts – the integrity of the proceedings have been compromised. When a procedural error reaches the level of a due process violation, it becomes a matter of substance. Huff v. State, 622 So. 2d at 984. Given the number of errors that are pervasive throughout, Mr. Rodriguez is entitled to a new evidentiary hearing.

ARGUMENT III

MR. RODRIGUEZ WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY AND THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE; THE LOWER COURT ERRED IN REFUSING TO GRANT A HEARING

A. Trial counsel failed to preserve the record regarding the refusal to allow the Defendant to make a peremptory challenge.

The Defendant's jury was selected in a manner that was inconsistent with the requirements of Article I, Section 16, of the Florida Constitution and the Sixth and Fourteenth Amendment to the U.S. Constitution. PCR. 86-87 (Claim 3). Unconstitutional restrictions on Mr. Rodriguez's ability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. PCR. 628, 148-149 (Claim 14).

On direct appeal, this Court summarized Mr. Rodriguez's challenge to the denial of his right to exercise peremptory challenges:

> During jury selection, Rodriguez tried to exercise a peremptory challenge against a venire person. The State objected, noting that the venire person was Hispanic. Rodriguez justified the challenge by stating that the venire person had been charged and arrested for carrying a concealed firearm and that the charges were eventually dropped. Rodriguez sought to challenge the venire person, stating that he feared the venire person would feel a debt of gratitude to the State.
>
> The trial court determined that the explanation was racially motivated and **pretextual because other venire persons on the panel who had prior arrests and were similarly situated were not challenged.**

Rodriguez at 39-40 (emphasis added).

Peremptory challenges are presumed to be exercised in a non-discriminatory manner. This is especially true in cases where a similarly situated juror is of the same race as the challenged juror. Davis v. State, 691 So. 2d 1180 (Fla. 3d DCA 1997). But, a trial court's decision to the contrary will be affirmed on appeal, unless clearly erroneous. Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996).

Mr. Rodriguez argued on direct appeal that a "similarly situated juror," Alfred Arzuaga, was Hispanic and therefore, there was no reasonable basis by which to conclude that the peremptory challenge to another Hispanic juror was racially motivated. Initial Brief, on direct appeal, p. 59; T. 730-32. However, this Court denied relief on the issue because, based on the record, it could not be determined that the lower court's ruling was clearly erroneous. "This is especially true given that **we cannot determine the absence of pretext where the similarly**

situated venireperson used by Rodriguez was never identified as Hispanic." Rodriguez at 40 (emphasis added).

Thus, the primary basis for the denial of relief on direct appeal was trial counsel's failure to preserve the record. "Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." 2003 ABA Guidelines, (quoting Stephen B. Bright, Preserving Error at Capital Trials, THE CHAMPION, Apr. 1997, at 42-43.). The Defendant has the right to effective assistance of counsel on voir dire. See Thompson v. State, 796 So. 2d 511 (Fla. 2001); see also Miller v. Webb, 385 F. 3d 666 (6th Cir. 2004).

Counsel's inexplicable failure to place on the record and identify that the similarly situated juror was indeed Hispanic prejudiced Mr. Rodriguez because he was ultimately denied relief on appeal. PCR. 87. Peremptory challenges are presumed to be exercised in a non-discriminatory manner; if counsel had put the juror's ethnic background on the record then there is a reasonable probability that the convictions would have been reversed. Under federal law, the relevant focus in assessing prejudice is on the outcome of the appeal. Davis v. Sec'y for Dep't. of Corrections, 341 F. 3d 1310 (11th Cir. 2003). However, this Court recently decided that the defendant must prove prejudice at the trial level on a claim of ineffective assistance of counsel in voir dire. Carratelli v. State, 2007 Fla. LEXIS 1995 (July

5, 2007). In either case, Mr. Rodriguez was entitled to a hearing. PCR. 611.

The lower court also justified the denial of this claim, in part, because Mr. Rodriguez did not name the similarly situated juror despite the fact that Rule 3.850 only requires "notice pleading." PCR. 611. The trial transcripts and briefs on the direct appeal identify the "similarly situated" juror as Mr. Arzuaga and the State identified the juror with the Hispanic surname in pleadings in the lower court. PCR. 253-254. Mr. Rodriguez is entitled to a hearing.

B. Trial counsel was ineffective in failing to protect Mr. Rodriguez's right to a fair and impartial jury.

The right to a jury trial includes the guarantee of a fair trial by a panel of impartial, indifferent jurors. Irvin v. Dodd, 366 U.S. 717 (1961). This was a highly publicized case, as the victim Genevieve Abraham and her husband, Anthony Abraham, were prominent members of the Miami-Dade community. See e.g. T. 986, 1035, 1141-47, 1165, 1181. The lower court denied a hearing on his claim that trial counsel was ineffective due to the failure to make a motion to change venue after the voir dire of the jurors indicated that many panel members had extensive knowledge of news reports about the case. See e.g. T. 640-679, 1140-1188, 1228-1232; PCR. 612-14, 88-91 (Claim 4). There is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue.

The lower court also erred in denying a hearing on the allegation that Mr. Rodriguez was deprived of his Sixth Amendment right to the effective assistance of counsel due to the failure to challenge jurors -- either through a cause challenge or the exercise of a peremptory strike -- who exhibited evidence of bias. PCR. 86, 87 (Claim 3); 611. "[A]n evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief." Gaskin, 737 So. 2d at 516.

Juror Kennedy=s father worked at Anthony Abraham Chevrolet for twenty-five years. T. 1441, 1469. Juror Kennedy also worked at the car dealership with his father and had personally met Mr. Abraham in Juror Kennedy=s father=s office. T. 1469-70. Juror Kennedy had a discussion about how brutal the crime was with his father. T. 1469. Even though he initially claimed that he could be fair, upon defense counsel=s inquiry, Juror Kennedy avoided answering the question by responding:

> I was young at the time. I didn't have any association with him. My father was the main person dealing with Mr. Abraham. As far as – what can I say, I have a lot of feelings. I don't know what to say.

T. 1472. Counsel failed to follow up on any of his statements. T. 1472.

A juror should be excused if there is any reasonable doubt that the juror has a state of mind that would allow him or her to render an impartial verdict. Kearse

v. State, 770 So. 2d 1119 (Fla. 2000). The mere fact that the juror in this case indicated that he could be fair is not determinative in light of his later equivocation in response to questions by the defense. See Hill v. State, 477 So. 2d 553 (Fla. 1985). "When a juror makes a statement that [he] thinks [he] can be fair, but immediately qualifies it with a statement of partiality, actual bias is presumed when proper juror rehabilitation and juror assurance of impartiality are absent." Miller v. Webb at 675.

The record is replete with examples as to the jurors' failure to render a fair and impartial verdict. The trial court noted during the penalty phase testimony that "three jurors look like they are nodding off." T. 3786. Later on, there was a report that one of the jurors was heard asking, "What do we need this defense case for anyhow?" T. 3793. Mr. Rodriguez's complaint that the jurors laughed during some of the testimony was confirmed by the trial judge. T. 3805-09. With respect to Juror Kennedy, Mr. Rodriguez informed the court that "[Kennedy] met Mr. Abraham and he recognized him when he walked into the courtroom too and he is still on the jury when he made the jury. I noticed that." T. 3809-10.

Counsel=s failure to adequately question and to seek removal from the panel biased jurors constituted ineffective assistance of counsel on voir dire. "[T]here is no sound trial strategy that could support what is essentially a waiver of the

defendant's basic Sixth Amendment right to trial by an impartial jury." Miller at 676.

ARGUMENT IV

MANUEL RODRIGUEZ IS ENTITLED TO A HEARING IN ORDER TO ESTABLISH THAT HIS TRIAL COUNSEL OPERATED UNDER MULTIPLE CONFLICTS OF INTEREST IN VIOLATION OF FLORIDA AND FEDERAL LAW

Mr. Rodriguez is entitled to a hearing on his due process claim that he was denied his right to a fair trial because attorney Houlihan operated under a multifaceted conflict of interest that adversely affected his performance. PCR. 79-86 (Claim 2); see Mickens v. Taylor, 535 U.S. 162 (2002); Wood v. Georgia, 450 U.S. 261 (1981).

Luis Rodriguez was represented in his case by attorneys Art Koch and Steve Krammer who worked for the Office of the Public Defender in Miami-Dade County. PCR. 1222-25. Mr. Rodriguez alleged that "at all times during Mr. Houlihan's representation of Mr. Rodriguez, he was married to Edith Georgi, who, at all times during Mr. Houlihan's representation of Mr. Rodriguez, was a trial attorney for the Public Defender, Luis Rodriguez's attorney." PCR. 79-80. Mr. Houlihan's spousal relationship resulted in divided loyalties between his client and the interests of Luis Rodriguez. See Comment to R. Regulating Fla. Bar 4-1.10

("…a firm of lawyers is essentially 1 lawyer for purposes of the rules governing loyalty to the client"); Rule 4-1.6; and Rule 4-1.7(d).

In fact, the record demonstrates that counsel for Mr. Rodriguez obtained the active assistance of Ms. Georgi in trying Mr. Rodriguez=s case: she took notes for Mr. Houlihan during the opening argument. T. 1917-18, 3262. Incredibly, the trial court was placed on notice of this particular conflict but failed to protect the Defendant's constitutional rights by failing to make any type of meaningful inquiry into this obvious conflict of interest. The Supreme Court has determined that a trial court *must* initiate an inquiry if the court Aknows or reasonably should know that a particular conflict exists.@ Cuyler v. Sullivan, 446 U.S. 335, 347 (1980).

Later during the trial, there was a second incident when the prosecutor handed defense counsel Zenobi a copy of a recently filed motion filed by the State and Mr. Zenobi handed the motion to Assistant Public Defender Georgi so that she could pull the cases that were cited in the motion for him. T. 3263 –64. The *prosecutor*, in obvious recognition of the ethical issues, informed the court that Athe attorney that represents Luis Rodriguez [is] in court advising defense counsel for this defendant.@ T. 3263. Mr. Rodriguez was entitled to evidentiary development regarding the extent of Ms. Georgi's participation and whether confidences were revealed. PCR. 79-81.

Additionally, as alleged in the motion, public records and police reports of the case revealed that, when Mr. Houlihan was an assistant public defender in 1985, he represented a client who told police that he knew the persons who committed the homicides in this case. Mr. Houlihan attempted to broker a deal for his client whereby the client would tell police what he knew about the homicides, including the names of persons *who sold the jewelry taken from the victims*, in exchange for a favorable disposition in the client=s sentencing in a pending, unrelated criminal matter. PCR. 81-82.

The State presented no evidence that any of the property was ever sold. In fact, to the contrary, Luis testified that he took none of the property and Isidoro, who took possession of the bag of property allegedly found at his mother=s trailer, testified that he threw it away in a field. Evidence that someone sold the jewelry strongly suggests that either Luis or Isidoro, or both, lied to the jury. Mr. Houlihan, as counsel for Manuel Rodriguez, failed to present any evidence or cross-examine any witness to suggest that the jewelry was sold. However, Mr. Houlihan apparently had knowledge given to him by his former client indicating who sold the jewelry: knowledge would have been obtained through his confidential attorney-client communication with his former client. Mr. Houlihan could not ethically use his knowledge gained from his representation of his former

client to assist Manuel Rodriguez. This conflict of interest adversely affected trial counsel=s performance and a hearing was required. See Mickens.

As alleged, Mr. Rodriguez filed a bar complaint against Mr. Houlihan before the end of his trial. Mr. Rodriguez complained to the lower court that he had witnesses who were never called and that he did not like the constant exchange between Ms. Georgi and the other attorneys.[23] T. 3518-3523. However, the trial court allowed Mr. Houlihan to continue representing him throughout the remainder of the trial. The fact that Mr. Houlihan did not participate in the penalty phase in no way cured the problem. PCR. 81.

Mr. Rodriguez was not required to prove that he was "prejudiced" under the standard set out in Strickland v. Washington. He need only show that the conflicts adversely affected his attorney's performance in order to establish the due process violation. The adverse affect arising out of the conflict is manifest on the record as set forth in the specific examples of deficient performance alleged in the motion for post-conviction relief. PCR. 56 -164; see Arguments I, III, IV, and V. It was error to deny a hearing on this claim.

[23]Mr. Rodriguez also alleged below that trial counsel further injected conflicts into his representation when he hired former detective J.M. Detective Geller to investigate the guilt phase. Geller had previously worked under the supervision of Detective Venturi at the Metro-Dade Police Department investigating this case for the police. PCR. 82.

ARGUMENT V

MANUEL RODRIGUEZ WAS DENIED A RELIABLE SENTENCING PHASE IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS; HE IS ENTITLED TO A HEARING ON EACH OF HIS PENALTY PHASE CLAIMS

A. Introduction.

Before sentencing Mr. Rodriguez to death, Judge Rothenberg specifically rejected his mother's mental illness as a mitigating factor. Rodriguez, 735 So. 2d at 35. Judge Rothenberg based the death sentences on six aggravating factors, one of which was struck on direct appeal. This Court determined that the trial court erred by merging the separate aggravating circumstances that the murder was committed "during an armed burglary" and for "pecuniary gain" but held the error was harmless. Id. at 43.

Mr. Rodriguez also raised a Confrontation Clause challenge to the admission of hearsay statements attributed to a jailhouse snitch, Alejandro Lago:

> 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 Lago's testimony was harmless error in light of the "number of strong aggravators in this case and the **conflicting**

testimony as to Manuel Rodriguez's mental health, including some testimony that he was a malingerer." Id. at 45 (emphasis added).

Mr. Rodriguez is entitled to a hearing on each of his penalty phase claims. 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 v. Washington, 466 U.S. at 695; see also Wiggins v. Smith, 539 U.S. at 534. But for the deprivation of the effective assistance of both trial and appellate counsel, prosecutorial misconduct and the erroneous rulings of the trial court, there is a reasonable probability that the outcome of the sentencing phase would have been different. The admitted penalty phase errors found on direct appeal must be considered cumulatively with the allegations – taken as true – in post-conviction. Gunsby; supra. Relief from the sentences of death is warranted.

B. Mr. Rodriguez was deprived of his right to the effective assistance of counsel during his penalty phase.

Manuel Rodriguez was erroneously denied a hearing on the claims that he was deprived of both his right to the effective assistance of counsel in the penalty phase and his right to competent mental health expert assistance:

> Had he the benefit of effective assistance of counsel and competent mental health experts, he would have been able to establish substantial statutory mitigation. Specifically, he would have established that the crimes were committed while he was under the influence of extreme mental and emotional disturbance (section 921.141(6)(b), Fla. Stat. (1983)), and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (section 921.141(6)(f), Fla. Stat. (1983)).
>
> Manuel Rodriguez can establish at an evidentiary hearing through the presentation of expert mental health witnesses that, at the time of the crimes, December 4, 1984, he suffered from schizophrenia and a bi-polar disorder. Rodriguez=s condition was not the result of drug use but instead was caused by an organic condition over which Manuel had no control.

PCR. 95, 102 (Claims 6 & 7). The trial court rejected the existence of statutory mitigation, specifically noting the complete absence of evidence of the state of Manuel=s mental health at the time of the crime. R. 1738-1792.

The lower court denied a hearing on these claims, in part, because trial counsel presented the testimony of expert witnesses and family members. PCR. 618-19. This Court has recognized that the mere fact that the defense presented a case in mitigation does not preclude a finding that the trial attorney was ineffective. See e.g. Orme v. State, 896 So. 2d 725 (Fla. 2005) (granting a new penalty phase because defense counsel failed to provide mental health experts with information that demonstrated that the defendant had been diagnosed with bipolar disorder); see also Hovey v. Ayers, 458 F. 3d 892 (9th Cir. 2006). Certainly, the

fact that the defense put on witnesses is not sufficient to defeat the entitlement to a hearing under Florida Rule of Criminal Procedure 3.850.

The record reflects that while counsel put on a number of expert witnesses and family members, he did not conduct the requisite investigation into his client's social history and he was therefore, unable to humanize Mr. Rodriguez for the jurors. For example, during the penalty phase, there is a passing reference to the fact that Mr. Rodriguez lost his daughter the year that the crimes were committed. T. 3727, 2690 (Maria Malakoff also informed the jury that one of their twins died during her testimony in the guilt phase). This would be a traumatizing event for any parent and sufficient to cause extreme emotional disturbance – yet the jury never heard how this affected the mentally ill Defendant who stood before them. Trial counsel also attempted to put forth the available evidence of intergenerational mental illness in the family but he did not do his homework and consequently, could not tell the judge what condition Mr. Rodriguez's niece suffered from when he made his proffer. Manuel's sister, Mayra Molinet, had a 9-year-old daughter who suffered from clinical depression. T. 3905-3917. But, when the issue came up during the testimony of Ana Fernandez (Manuel's older sister), trial counsel thought the child was 13-years-old and could not tell the court if she had been diagnosed with schizophrenia or depression. T. 3872. When examining trial

counsel's investigation, a reviewing court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins at 527.

Virtually none of the mental health experts evaluated Mr. Rodriguez with respect to *the 1984 crimes* and none of them testified based on interviews with family members or other sources with a view toward establishing statutory or non-statutory mitigation *at the time of the crimes.* Each of the witnesses who testified for the defense either had been appointed to evaluate Mr. Rodriguez for insanity or competence in connection with his arrest for other crimes or, had treated him when he was hospitalized. None of them re-evaluated him for the purpose of presenting statutory *and* non-statutory mitigation in the context of a capital case.[24] There is no evidence that any of the professional witnesses knew, for example, that Manuel Rodriguez's mother had tried to commit suicide on several occasions; that his sister had been in an out of mental hospitals; or that his father died when he was a young boy.

As a result of trial counsel's failure to provide basic background information, the mental health experts were not able to assist the judge and jury in making "a sensible and educated determination about the mental condition of the

[24]T. 3627-3663; 3663-3718; 3733-3756; 3757-3817; 3817-3855.

defendant at the time of the offense." Ake v. Oklahoma, 470 U.S. at 81. In a capital case, the mental health expert should be available as part of the defense team. Id.; see also 2003 ABA Guidelines, Guideline 4-1. The mental health expert must be provided with the necessary background information:

> Because [the psychiatrist's] testimony was the heart of [the defendant's] mitigation case, and because the prosecution's counter-strategy was to attack the soundness of [the psychiatrist's] medical conclusions and the bases for them, there is a reasonable probability that [the psychiatrist's] ignorance of basic background facts . . . affected the jury's sentencing decision.

Hovey v. Ayers, 458 F. 3d at 929.

ASA Laeser exposed the deficiencies in preparation of Mr. Rodriguez's case during the cross-examination of Dr. Tarpin: he questioned her about the fact that the "history" she relied upon was the result of Mr. Rodriguez's self-report. T. 3745. Trial counsel utterly failed to rebut the State's mantra throughout the penalty phase: that Mr. Rodriguez was malingering. This Court's reliance on the "conflicting mental health testimony" and evidence that Manuel Rodriguez "was a malingerer" in conducting the harmless error analysis serves to highlight the prejudice that resulted from trial counsel's failures.

Judge Rothenberg also noted deficiencies in the defense case because there were no questions posed to the mental health experts regarding the hereditary nature of mental illness. T. 3911. The trial court sentenced Mr. Rodriguez to death

while under the mistaken impression that "I don't think depression has ever been identified as a major mental illness" and specifically rejected his mother's mental illness as a non-statutory factor. T. 3911; R. 1738-1792. It was trial counsel's job to educate the co-sentencers and to ensure that Mr. Rodriguez received the benefit of expert mental health assistance in making his case for life.

Defense counsel also has a duty to attack the aggravators. Rompilla v. Beard, 545 U.S. 374, 383-383 (2005). The jury was instructed that they could consider the aggravating circumstance that the crimes were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. T. 4310-4311. Based upon his mental state *at the time of the offense*, Manuel Rodriguez could not have engaged in the planning of the crime as alleged by the State nor could he have been the dominant leader over Luis. 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.

The court specifically relied on this aggravating circumstance to support of its decision to impose the death penalty. R. 1738-1792, 1644-46. This Court rejected the challenge to the CCP and "avoid arrest" aggravators based, primarily, on facts as testified to by Luis whose trial testimony has now been seriously

undermined. Id., Rodriguez at 44; see Argument I, supra.

Mr. Rodriguez's jury was not adequately or accurately instructed. Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 528 (Fla. 1989). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance that must be proven beyond a reasonable doubt. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Mr. Rodriguez's jury was not properly instructed regarding the elements of the aggravators. See Stringer v. Black, 503 U.S. 222 (1992).

C. Government misconduct served to undermine confidence in the reliability of the death sentences.

The lower court erred in denying a hearing on Mr. Rodriguez's penalty phase Brady claim that the State withheld material evidence that could have been used to impeach the hearsay statements of Alejandro Lago. PCR. 99, 618. Mr. Rodriguez also preserves his claim under Crawford v. Washington, 541 U.S. 36 (2004). PCR. 622, 107 (Claim 6).

Throughout the guilt and penalty phases, the State relied upon impermissible, improper argument in an attempt to convince the jury to find Mr. Rodriguez guilty of first-degree murder and to sentence him to death. PCR. 626, 131-136 (Claim 12). The prosecutor's argument was improper because it

"improperly appealed to the jury's [and Judge's] passions and prejudices." Cunningham v. Zant, 928 F. 2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, supra. Trial counsel was ineffective for failing to object.

D. It was error to summarily deny the remaining penalty phase claims.

Florida's capital sentencing statute violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. See Proffitt v. Florida, 428 U.S. 242 (1976). Mr. Rodriguez alleged below that Florida's death penalty statute is unconstitutional on its face and as applied because it fails to prevent the arbitrary imposition of the death penalty. PCR. 632, 157 (Claim 18).

The lower court also erred in denying Mr. Rodriguez's Eighth Amendment claim under the U.S. Constitution that he is innocent of the death penalty. Sawyer v. Whitley, 505 U.S. 333 (1992); PCR. 105-06 (Claim 8); 620-22. Innocence of the death penalty can be shown by establishing ineligibility for a death sentence. See, Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992).

Finally, the lower court erred in denying the claim that Florida's capital

sentencing scheme violated the Sixth and Fourteenth Amendments based upon the U.S. Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). PCR. 118-130 (Claim 11); 625. The Supreme Court based its Ring holding on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) which was decided before his conviction became final in direct appeal.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING THE REMAINDER OF MR. RODRIGUEZ'S CLAIMS.

A. Mr. Rodriguez was denied access to public records.

The lower court erred in denying the claim that the Defendant was denied access to public records. See State v. Kokal, 562 So. 2d 324 (Fla. 1990); PCR. 633, 161-62 (Claim 20). The records sought are reasonably likely to provide evidence of, or reasonably likely to lead to the discovery of admissible evidence establishing a right to relief. See e.g. T. 2085-2094. Mr. Rodriguez is entitled to all evidence that could be used to impeach the State's witnesses including Isidoro and Luis Rodriguez which would include copies of the photographs of the special visits that have never been provided. Mr. Rodriguez is unable to fully brief this issue due to the numerous transcripts that are missing in this case.

B. Mr. Rodriguez had a right to be present at all critical stages of the trial.

The lower court erred in denying the claim that Mr. Rodriguez was absent from critical stages of his trial in violation of his Sixth and Fourteenth Amendment rights. PCR. 116-17 (Claim 10); 624; T. 2264, 3220, 3245-61, 3261, 3513. A capital defendant is absolutely guaranteed by the United States Constitution the right to be present at all critical stages of judicial proceedings. See, e.g., Faretta v. California, 422 U.S. 806, 819, n.15 (1975); Drope v. Missouri, 420 U.S. 162 (1975); Fla. R. Crim. P. 3.180.

C. Mr. Rodriguez was not competent to stand trial.

Mr. Rodriguez is entitled to a new trial because, due to medications he was taking at the time and his mental condition during the trial, he was not competent to assist in his own defense during the trial. PCR. 629, 150 (Claim 15). Either his attorneys or the trial court should have requested a competency evaluation based on his behavior in the courtroom. Pate v. Robinson, 383 U.S. 375 (1966). In Medina v. Singletary, 59 F. 3d 1095 (11th Cir. 1995), the trial court actually held a competency hearing that was based on reports from independent psychiatrists *and* he was afforded an evidentiary hearing in post-conviction. This claim is not procedurally barred.

D. Racial discrimination in the imposition of the death penalty.

The death penalty in the United States, and particularly in the State of Florida, has been discriminately imposed against those accused of killing Caucasians. McClesky v. Kemp, 481 U.S. 279, 282 (1987); see Michael L. Radelet & Glen L. Pierce, Choosing Who Will Die: Race and the Death Penalty in Florida, 43 Fla. L. Rev. 1, 21 (1991); PCR. 631, 153-56 (Claim 17).

E. Mr. Rodriguez is insane to be executed.

The lower court denied Mr. Rodriguez's claim under Ford v. Wainwright, 477 U.S. 399 (1986) based on a finding that it is not ripe. PCR. 633, 163 (Claim 21). The U.S. Supreme Court has since held that a defendant does not have to preserve this type of claim in order to raise it in federal court at a later time. Panetti v. Quarterman, 2007 U.S. LEXIS 8667 (June 28, 2007).

F. Mr. Rodriguez is entitled to a new trial due to cumulative error.

Mr. Rodriguez did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991). The process itself failed him because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). A series of errors may accumulate a very real, prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual

and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); see also Kyles v. Whitley, supra. PCR. 164-65 (Claim 22); 634.

G. Lethal Injection.

Mr. Rodriguez preserves his right to bring a challenge to Florida's lethal injection protocol under the Eighth Amendment in a future proceeding. PCR. 159-160, 632.

CONCLUSION

Based on the foregoing, Mr. Rodriguez seeks a new trial due to the State's use of misleading testimony and argument regarding the special consideration that was afforded to Luis Rodriguez and the failure to disclose evidence that could have impeached the witness. If this Court determines that Mr. Rodriguez has not established the necessary prejudice regarding the Brady/Giglio violations, then Mr. Rodriguez respectfully requests that his case be remanded for a full and fair evidentiary hearing on each of his claims for relief before a new judge.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was delivered to opposing counsel, listed below, by U.S. mail, this ____ day of July, 2007.

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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