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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

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

ARGUMENT

I. MANUEL RODRIGUEZ SEEKS A REMAND FOR FULL AND FAIR EVIDENTIARY HEARING BEFORE A NEW CIRCUIT COURT JUDGE ON EACH OF HIS GUILT PHASE ISSUES.

The lower court was presented with an overview as to how the lack of adversarial testing rendered Mr. Rodriguez's convictions unreliable:

> Many of these deficiencies in the adversarial process relate directly to the singular, broader issue of the failure to inform the jury of substantial available evidence that would have, separately and together, severely impeached the credibility of State witnesses, most notably, co-defendant-turned-State's-witness, Luis Rodriguez, Isidoro Rodriguez, and Rafael Lopez.
>
> *** * ***
>
> Given both the quality and quantity of evidence that could have, but for various reasons, was not presented to the jury that would have rendered Luis Rodriguez an entirely incredible witness, it cannot be said with any degree of confidence that Mr. Rodriguez received a fair trial.

PCR. 46-47 (Claim 1, Rule 3.850 motion). As argued in the Initial Brief, the lower court summarily denied a hearing on the majority of factual allegations in the Rule 3.850 motion which resulted in the failure to consider the cumulative effects of the individual violations on the integrity and reliability of the trial.[1] In the Answer Brief, the State continued the pattern of inappropriately dissecting the individual claims and consequently failed to properly set forth the factors that are integral to consideration of prejudice. The only way to fairly evaluate these serious claims of ineffective assistance of counsel and government misconduct in this case is to consider the entire picture, cumulatively. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Kyles v. Whitely, 514 U.S. 419 (1995); United States v. Blasco, 702 F. 2d 1315, 1329 (11th Cir. 1983) (a "piecemeal review of each incident" is insufficient).

A. <u>The fact that the jury believed Luis and Isidoro Rodriguez despite the cross-examination at trial makes the suppressed evidence even more significant to the prejudice analysis.</u>

The State asserted that the issues regarding Luis Rodriguez were properly denied for "lack of materiality or prejudice under any standard" and

[1] The State asserted that the claim brought under Brady v. Maryland, 373 U.S. 83 (1963) regarding the potentially exculpatory or impeaching information from inmate Willie Sirvis was properly denied. Answer at 26-27. Mr. Rodriguez maintains that he should have been allowed to question the prosecutor about the failure to turn the letters over to trial counsel. Nevertheless, at this point, Mr. Rodriguez has finally located Mr. Sirvis and will seek permission to return to circuit court to pursue a hearing based on the new information.

then listed various reasons why (in the State's view) the additional evidence impugning Luis's credibility – information that the jury never heard - was not material. Answer at 33. As an example, the State argued that there was no prejudice because Luis was cross-examined at trial regarding his visits with his family, the plea agreement that "spared his life," and the police threats toward his family members. Id. But attorney Houlihan asked the jurors in closing argument at trial: "Is there some sort of agreement unseen by any of us?" T. 3288. We now know the answer to that question was yes.

The State's argument in the Answer Brief is similar to the argument rejected by this Court in another Miami-Dade County case, Cardona v. State, 826 So. 2d 968 (Fla. 2002). In Cardona, this Court analyzed the significance of undisclosed evidence of impeachment against Gonzalez, the co-defendant turned State's witness.

> The State argues that any impeachment by the defense through the withheld evidence would have been cumulative to the impeachment of Gonzalez at trial.
>
> Thus, because the State asserts that any impeachment would have been cumulative, the State argues it was not material and Cardona cannot satisfy the prejudice prong of Brady.
>
> Specifically, the State asserts that Gonzalez already was impeached with respect to her bias as a State's witness when defense counsel elicited testimony that Gonzalez "did not have to worry about the death penalty anymore" because of her plea.

> However, the fact that a witness is impeached on other matters does not necessarily render the additional impeachment cumulative. See United States v. Rivera Pedin, 861 F. 2d 1522, 1530 (11th Cir. 1988).

Cardona at 974.

In light of Cardona, the State's argument fails. In this case, where the jury relied on Luis's testimony in order to convict *in spite* of the cross-examination, the suppressed evidence takes on even more significance. See e.g. Mordenti v. State, 894 So. 2d 161 (Fla. 2004). It is undisputed that the State believed that a "vital link in the prosecution became the willing testimony of the defendant Luis Rodriguez. . ." Exh. C (letter from Assistant State Attorney Abraham Laeser). The defense attorneys attempted to attack Luis's credibility based on special favors that were afforded to him as well as inconsistencies in his versions of what happened.[2] The problem was that

[2] For example, the trial attorney questioned Luis regarding inconsistencies between his original version and the testimony provided by the substitute medical examiner, Dr. Valerie Rao. T. 2881. The defense attorney later argued that the original medical examiner did not testify because he would not go along with the State's "script." T. 3289-98, 3440. It is this kind of information that is put in a new light by the evidence that was adduced at the hearing. 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:

the defense attorneys did not have all the ammunition they needed – if they only had the additional information available to them at the time, there is a reasonable probability that the outcome would have been different, either with respect to the guilt phase or the penalty phase.[3]

In closing argument at trial, attorney Houlihan argued that Luis was not credible and that the State continually relied on Luis's family members to make the case against Manuel.

> Luis Rodriguez has never given the same story two times. Why? Because he is not being truthful. He is not being honest.

R. 3281 (Defense closing).

> Every single time Luis is caught there is no proof of it and whenever the State tries to prove it what do they do? They rely upon family members. It is going to be Isidoro, or Ralph Lopez. Always some family.

> 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. 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.

[3] As argued in the Initial Brief, the trial court relied on the "cold, calculated and premeditated" (CCP) aggravating circumstance to support its decision to impose the death penalty. T. 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. Rodriguez v. State, 753 So. 2d 29, 44 (Fla. 2000).

T. 3285 (Defense closing). Given the familial relationship of all the witnesses who testified against Manuel, the State's similar arguments regarding additional evidence of threats against Isidoro by Detective LeClaire also fail. See Answer at 36.

B. The State violated Mr. Rodriguez's due process rights.

Given that Claim 1 of the Rule 3.850 motion was pled in the alternative *and* that Mr. Rodriguez argued that he was deprived of due process because of government misconduct in his post-hearing memorandum, it was astonishing that the lower court failed to consider the prejudice prong under Brady v. Maryland, 373 U.S. 83 (1963) let alone Giglio v. United States, 405 U.S. 150 (1972). It would be fundamentally impossible for the lower court to analyze a claim based on a violation of due process if the court did not even recognize the legal theories under which Mr. Rodriguez is afforded his entitlement to relief. Based on the foregoing, it is apparent from footnote 15 of the Answer Brief that the State did not understand why Mr. Rodriguez pointed out in the Initial Brief that the lower court denied relief only under Strickland v. Washington, 466 U.S. 668 (1984). PCR. 368-388, 61.

In the post-hearing memorandum filed in the circuit court following the evidentiary hearing, Mr. Rodriguez set forth the factual allegations

regarding Luis Rodriguez and how the prosecutor downplayed the significance of the family visits:

> The testimony and evidence presented at the post-conviction hearing thus establish that contrary to Detective Crawford's testimony both at the trial and at the hearing, [citation omitted], the State in fact had a very important motive in keeping their star witness happy. The prosecutor's later admissions in the letter to Metro-Dade Police Department director Fred Taylor expose a violation of Giglio because the jury was clearly misled by the testimony of Detective Crawford and that misleading testimony was further exacerbated by the State's closing argument.
>
> Furthermore, it is obvious that the State took great pains to bolster the credibility of Luis Rodriguez because the State's desired conviction of Manuel Rodriguez was a very powerful motive to keep him happy. At the trial, the defense failed to make objections to irrelevant and prejudicial questions posed to Luis Rodriguez by the State that only served to improperly bolster his character and credibility in the eyes of the jury. [footnote omitted]. . .
>
> * * *
>
> . . . The jury also never had the benefit of learning about the special visits in the prosecutor's own office [footnote omitted] nor did they ever get to see the photos of the family celebrations that took place in police custody with a man awaiting trial on triple-murder.
>
> In closing argument, the prosecutor portrayed Luis Rodriguez as a follower , '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 an effort to dispel the notion that the police allowed Luis Rodriguez to have sexual relations with his wife, the prosecutor expressed his opinion that Luis Rodriguez was a 'wily defendant' who took advantage of two experienced homicide detectives. (Defense Ex. A11). **In evaluating and considering Manuel Rodriguez' claims that the government**

> **gained the benefit of Luis Rodriguez' testimony first through threats and intimidation, later through extreme favors such as allowing him to have sexual relations with his wife while in police custody, and that there were undisclosed promises contained in the plea agreement, this [C]ourt should consider all of the foregoing information concerning the State's effort to mislead the jury concerning Luis Rodriguez.**

PCR. 377 – 378.[4]

> Manuel Rodriguez has established a Brady violation. The State was in possession of evidence that could have been used to impeach the co-defendant in his testimony. That evidence

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[4] Based on the foregoing, the lower court was well aware that the jury never got to see the "Disney" type photographs of the family visits. Nevertheless, the lower court found that:

> These photos were used at trial, according to the testimony of Abraham Laeser. Mr. Laeser testified that he investigated the photo issue immediately and the Defendant's counsel was aware of the existence of the photos.

PCR. 597-600 (Order); see also Answer at 28. In the Initial Brief, Mr. Rodriguez pointed out that there is not competent substantial evidence to support any finding that the photographs were used at trial. Initial Brief at 15, 37. Mr. Zenobi first heard about the existence of the photos in the middle of trial: "I am not aware of photographs." T. 3201. In objecting to further questions regarding the pictures at the evidentiary hearing, ASA Zahralban wrongly 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. In the Answer Brief, the State failed to respond to this argument and still has not provided Mr. Rodriguez or this Court with any information regarding the location of the photographs in the record, or anywhere else for that matter. This should be a simple problem to resolve – the photographs either were, or were not, used at trial.

> included the fact that Luis Rodriguez was threatened with the arrest of his loved ones if he did not cooperate with the police. It also included the fact that the State promised letters recommending his early release and that he could continue to visit his family under special circumstances.
>
> Additionally, it was discovered after the trial that although the testimony reflected that the special visits were for the sake of the family, the truth was that the visits were for the purpose of ensuring that the co-defendant remained a cooperating witness. This information was undisclosed by the State and/or the police and 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 the Luis Rodriguez had a motive to lie.

PCR. 382. The State asserted that Mr. Rodriguez is "procedurally barred" from his claim for relief regarding the due process violations. Answer 21-22. The State has confused the actual claim itself and the facts in support of that claim. The prosecutor's flip-flopping and hidden motives are certainly facts that served to prove, i.e., establish that it is more likely than not, that 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. However, to the extent that this Court would determine that Mr. Rodriguez is "procedurally barred" from pursuing a claim that was presented to the lower court, then Mr. Rodriguez seeks to

amend his pleading to conform with the facts as presented at the hearing at this juncture.

The State's position that the due process claim is merely based on a difference of opinion between ASA Laeser and Detective Crawford is based on a misreading of the controlling case law.[5] This issue is controlled by the decisions in Kyles v. Whitley and Davis v. Alaska, 415 U.S. 308 (1974). Under Davis, demonstrations of why a witness might have reason to curry favor with the State constitutes impeachment evidence that the defense is entitled to present before the jury. The prosecutor's motivation in allowing special treatment to the co-defendant is information that should have been provided to the defense.

The State cannot find support for its position in reliance on this Court's opinion in Reichmann v. State, 966 So. 2d 298 (Fla. 2007). The denial of relief in that case turned on the prejudice analysis and not on any made-up rule about the motivation of the witnesses. Even if there were such a rule, the State has relied on Laeser's self-serving testimony that he did not "knowingly" present false testimony at Manuel Rodriguez's trial. That self-

[5] In Taylor v. State, 855 So. 2d 1, 18-19 (Fla. 2003), relied on by the State, this Court was called upon to decide a question regarding the introduction of a victim-declarant's hearsay statements in order to prove the state of mind or motive of a defendant. That does not have anything to do with the issue in this case.

serving statement is contrary to the record: we know that Laeser himself asked a leading question and elicited the denial from Crawford that the family visits were allowed so that Luis would "be a cooperative witness or help with the prosecution." T. 2310. At the time of the trial, ASA Laeser surely knew that – in his position as the lead prosecuting attorney on the case – he was not objecting to the special visits because he wanted to "make certain that Luis Rodriguez remained a cooperating witness." Exh. C, 26. Mr. Rodriguez had a right to know that information.

In fact, the Riechmann case, arising out of Miami-Dade County, demonstrates that it is not uncommon for snitches to be provided with special family visits and fast-food *and* that this is information that should be formally disclosed:

> Specifically, Riechmann asserted that the State failed to disclose at trial and during the first postconviction hearing that Smykowski had gone on a State-arranged visit to see his daughter and that law enforcement officers had bought fried chicken for the occasion. Riechmann also presented a letter that Smykowski had written to the prosecutor asking for help in suggesting someone who could take care of his daughter while he was imprisoned. He alleged that the State knowingly allowed misleading or false testimony to be presented without correction when Smykowski testified that he had no contact with law enforcement officers between March and July 1988.
>
> Prosecutor Sreenan testified at the evidentiary hearing below that Smykowski had sought out the State and volunteered his testimony against Riechmann. **She also asserted that she did not recall seeing any letter from Smykowski concerning his**

> **daughter before Riechmann's trial, and that while she later became aware of the letter, the State did nothing for Smykowski's daughter, and his request for assistance was something the State would not get "involved in." She also testified that if she had known about Smykowski's visit to his daughter and the officers' purchase of fried chicken, she probably would have disclosed this to the defense.**
>
> Also at the evidentiary hearing below, Detectives Robert Hanlon and Joe Matthews confirmed that they had taken Smykowski on a trip to see his daughter pursuant to his request. Detective Matthews testified that he and Hanlon had secured Smykowski's custody from jail in order to conduct further investigation on the Riechmann case and, on the way back to jail, they allowed him a brief visit with his daughter. Detective Hanlon testified that they bought fried chicken to eat and that Smykowski was grateful. John Skladnik, a friend of Smykowski's from Poland, testified that he saw Smykowski and two men walk towards the house for this visit. Deborah Schaefer, Smykowki's daughter, testified that she remembered her father coming to visit her once when she was a child. Edward Carhart, Riechmann's trial counsel, testified that he did not know of Smykowski's letter to Sreenan, and had no indication that Smykowski had visited his daughter. He said he would have used this visit as impeachment of Smykowski.

Reichmann at 32-35. In Mr. Rodriguez's case, the State cannot hide behind the fact that the trial attorneys knew about the visits because the State intentionally misled the jury. T. 3367.

The State's complaint that Mr. Rodriguez "advances no theory on how evidence regarding Laeser's motive in not objecting Luis's family visits would have been admissible, particularly as Laeser was not a witness" demonstrates a complete lack of regard for the obligations of the prosecutor

under Brady. Answer at 24. As far as Mr. Rodriguez is aware, the prosecuting attorney was not witnesses in the Brady case, or any other case for that matter, in which a new trial has been granted based upon a violation of due process. In light of the information that we now know – i.e., 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" - it is difficult to imagine that Det. Crawford would be allowed to testify as he did at a re-trial, or that the prosecutor would get away with making the same arguments.[6]

[6] At trial, Crawford denied that the special family visits were allowed "for any ulterior motive. . .so that [Luis] would be a cooperative witness or help with prosecution or anything like that?" T. 2310. Detective Crawford later stated at the evidentiary hearing he "saw nothing wrong with the request with that man who was willing to cooperate being granted that request." PCR. 1294. Certainly, in light of the new information, no trial attorney would allow the prosecutor to re-argue:

> 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.

C. The lower court erroneously relied upon the statements used to impeach Maria Malakoff in considering the prejudice prong.

The sole purpose of calling Maria Malakoff to the stand was for the purpose of impeaching her with her prior inconsistent statement. T. 2674-2685. The prosecutor's position was that Malakoff's prior statement could be relied upon as substantive evidence and it intended to use her statement for that purpose. T. 3246-3260. This Court held that the statements used to impeach Malakoff "could not be not be used as substantive evidence against Rodriguez" in the guilt phase. See Rodriguez at 47. Yet, inexplicably, the State specifically relied upon those statements in the Answer Brief in an effort to list the evidence used to convict Manual Rodriguez in the context of the prejudice analysis on his post-conviction claims. Answer at 34-35. The State's position seems to be that because the jury learned that the mother of Manuel's child was purported to have said that Manuel told her he killed Sam Joseph and that he made sure they were all dead, then the Defendant was not prejudiced by the fact that the jury did not hear the additional impeachment evidence against Luis Rodriguez. Answer at 34-35.

In the Petition for Writ of Habeas Corpus, Mr. Rodriguez presented his claim that appellate counsel was ineffective in failing to challenge the improper use of the impeachment evidence in the guilt phase. Habeas at 43-46. It is undisputed that the State argued in closing:

> If you remember the impeachment testimony of Cookie [Malakoff], **not the statement she gave on the witness stand but the statement I impeached her with that she gave under oath before—'**Went by a Steak and Ale. Amoco Station on the left side of the road. We pulled over there. Luis got out. Luis threw something in the water. We dropped him off there.'

T. 3352 (emphasis added). Later the prosecutor said:

> But [Mr. Rodriguez] tells her at one point, and she swears to it under oath, and I know the judge is going to give you an instruction that says you can only use that to impeach her present testimony, in other words, to show that she might have had a motive to lie on the witness stand.
>
> **But [Malakoff's] first statement to the police is 'He told me he went back and shot them all to make sure they were dead'.**

T. 3378 (emphasis added). In the response to the Writ, the State argued that the challenge lacked merit since "jurors are presumed to follow the court's instructions." State's Response at 45-46. If that were true, then it is difficult to understand how any of those statements could be used to defeat the current constitutional claims. The State's reliance on the prosecutor's decision to argue the impeachment evidence as substantive evidence only goes to establish that the cumulative nature of the errors served to undermine confidence in the outcome. Given that both the lower court in post-conviction and the State mistakenly relied upon the impeachment evidence as substantive evidence in this case, Mr. Rodriguez has shown that he has been prejudiced.

Furthermore, Mr. Rodriguez was denied a hearing on his allegation that the trial attorneys were ineffective in failing to present evidence regarding the alibi that Malakoff provided. PCR. 51, 594. Mr. Rodriguez would like the opportunity to present evidence that would establish that Maria gave additional statements that would support his claims. In the Answer Brief, the State relied on Maria's statements to the police yet the State objected to the introduction of the police statement given on August 9, 1993 at the evidentiary hearing. PCR. 991-94, Def. Exh. A-9, 2756-2779. Consequently, Mr. Rodriguez was not allowed to question the trial attorneys about the information contained in that statement, i.e., that Isidoro Rodriguez was, in fact, in Miami on December 4, 1984 the day of the crime. PCR. 2761. The reason she remembered that date was because it was their father's birthday.[7] In that statement, that the prosecutor referred to as the "first" statement, Maria Malakoff referred to her earlier statements to the police. PCR. 2769-2770. Mr. Rodriguez is entitled to a full and fair hearing in which the circuit court judge considers all the relevant evidence including the prior statements provided by Malakoff.

[7] No doubt that the State did not want Mr. Rodriguez questioning the trial attorneys about this statement in the police report. It is directly contrary to Isidoro's trial testimony that he was not in Miami at the time. T. 2439. The trial attorneys, who did not depose Isidoro, were surprised that Isidoro had a self-made calendar to support his story. T. 2458.

D. The State's assertions in the Answer Brief regarding Isidoro Rodriguez are not supported by the record.

In the Answer Brief, the State made the nonsensical accusation that:

> Defendant's statement that Judge Sigler had denied a hearing regarding allegations that Isidoro was an informant is false. The denied claim was that 'Isidoro was threatened by police to testify against Mr. Rodriguez.'

State's Answer at 62-63, footnote 28. When someone provides information to the police about a criminal case in exchange for police protection, that person can be described as an "informant" or even, a "snitch." The fact is that Mr. Rodriguez was denied the opportunity to prove the following factual allegations made in the circuit court:

> Trial counsel was ineffective for failing to present available evidence that police both threatened and made promises to Isidoro in order to persuade him to make statements against Manuel and testify and him. The jury never learned that Isidoro had a powerful personal interest in inculpating Manuel Rodriguez in these crimes. **Previously to police contacting Isidoro in the investigation in the instant case, Isidoro provided information as a witness against a defendant in an unrelated murder. Because Isidoro assisted police in going after this dangerous individual charged with murder, police, specifically, Detective LeClaire, had Isidoro under police protection.** In fact, Isidoro moved to Orlando in order protect himself from this person. Subsequently, Detective LeClaire became an investigator working on the instant case. When he questioned Isidoro, LeClaire exploited Isidoro's vulnerability on this issue and threatened leave Isidoro unprotected from, and in fact, expose him to, the defendant in the other murder case Isidoro he did not assist police in their investigation and ultimate prosecution of Manuel. Police told Isidoro that if he did cooperate, police would see to it that he

> not be exposed. To the extent the State did not provide this information to trial counsel and trial counsel could not have discovered it with due diligence, the State violated Manuel's constitutional right to material impeachment evidence under Brady and its progeny.

PCR. 54 (Rule 3.850 motion, p. 12-13).

In the Initial Brief, Mr. Rodriguez explained in detail why the allegation that Detective LeClaire threatened to remove the cloak of police protection from Isidoro after he snitched in a different homicide case was not "refuted by the record" as concluded by the trial court:

> 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.**

Initial Brief at 46.

The State's arguments in the Answer Brief in opposition to Mr. Rodriguez's right to a hearing regarding Isidoro's complex and involved relationship with the same law enforcement department that investigated

both Manuel and himself is based upon a factual scenario that is not supported by the record. Given the argument as outline above, it is difficult to understand how the State could assert – as a fact – that "As LeClair did not interview Isidoro he could not have threatened him." Answer at 35. There is virtually no support in the record for the State's bold assertion that "LeClair did not question Isidoro." Answer at 36. Mr. Rodriguez's allegations were not dependant upon LeClaire conducting the interview. Mr. Rodriguez does not know how the State is getting this information regarding LeClaire's role and would like to question witnesses on the stand regarding this issue. The State's misleading presentation of the facts and absurd conclusions only highlight the need for a hearing: documents in the possession of both the State and Mr. Rodriguez that would contradict the State's version are not in the record because there was no hearing.

The deposition of Isidoro Rodriguez was initially filed by the State in the lower court on September 17, 2004 in support of its response to the motion for post-conviction relief. PCR. 2029-30.[8] Isidoro Rodriguez

[8] The State's representations to this Court are especially disconcerting in light of the State's opposition to Mr. Rodriguez's Motion to Supplement the Record filed in this Court on June 13, 2007. On October 18, 2006, Mr. Rodriguez filed a "Motion to Supplement the Record on Appeal" and requested that Isidoro's deposition be included. The State expressly stated no objection to that particular document being included and this Court granted the motion. Unfortunately, undersigned counsel did not notice that

provided a deposition on April 11, 1996 and even though trial counsel was present, it was the prosecuting attorney who conducted the examination. PCR. 2031-2054. In that deposition, Isidoro admitted that he provided a statement on August 3, 1993 – a statement that is not part of the record in this case because Mr. Rodriguez was denied a hearing. PCR. 2043. Isidoro

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the entire deposition was not included and subsequently requested that this Court grant an additional Motion to Supplement with the *entire* deposition. The State objected to the request to supplement the record with the deposition that the *State* filed with the trial court and this Court denied the Motion to Supplement the Record. **In the portion of the deposition that was filed with the circuit court and therefore available to Judge Sigler, but never made part of the record, the following dialogue took place:**

> **STATE: Was the statement that you gave to the police back on August 3rd true and correct?**
> **ISIDORO: Well, some parts of it were true and there was the agreement that we came to between LeClaire and Singleton that they would not go down and pick up my mom. . . .**
>
> **** ***
>
> **STATE: Then what is not correct in your statement?**
> **ISIDORO: Well, at the end where it says are you giving this voluntarily and all that kind of stuff. LeClaire was in front of me when I was giving the statement and he would nod his head: Say yes to this, say no to that. And I was following them in order to keep the promise that they had made to me, I was giving [sic] statement along those lines.**

Deposition, p. 64-66.

Because of the State's misrepresentations concerning LeClaire's role, Mr. Rodriguez renews his request to supplement the record and have these statements considered with respect to the summary denial of a hearing.

told the prosecutor: "I told those police officers what they wanted to hear because of the arrangement that we worked out. They said that they would not pick up my mom down in Miami if I would cooperate with them." PCR. 2053. Later, at trial, Isidoro would only admit to the jurors that there was a "possibility" that he could be arrested if he did not talk to the police. T. 2494. He denied that the police ever threatened to arrest his mother. T. 2497. Contrary to the lower court's ruling, the record does not refute Mr. Rodriguez's allegations; he is entitled to a full hearing.

E. Mr. Rodriguez is entitled to a hearing before a fair and impartial judge in the circuit court.

The State's mistaken assertion that Mr. Rodriguez failed to present an argument regarding the second motion to disqualify the lower court judge is directly relevant to the issues regarding Isidoro. Answer at 75. Mr. Rodriguez set forth the legal standard for reviewing the denial of a motion to disqualify within the same argument and discussion of the denial of the first motion to disqualify. Initial Brief at 74. Mr. Rodriguez also detailed the course of events that led to the filing of the motion in the Statement of Facts. Initial Brief at 20. Mr. Rodriguez explained in Argument I that he was entitled to a hearing on the allegations that Isidoro had close family ties and a business relationship with a member of the department and that Isidoro was an informant and a suspected drug dealer. Initial Brief at 45-48. Seeing

no need to belabor the legal standard, Mr. Rodriguez argued that:

> 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.**

Initial Brief at 75 (emphasis added). Mr. Rodriguez also referenced the factual basis as set forth in the motion which is part of the record in this case – most of the facts had already been discussed previously in the Initial Brief. The factual basis for the second motion to disqualify was based on news reports that revealed that circuit courts around the state were hiding court records:

> On October 3, 2006, The Honorable R. Fred Lewis, Chief Justice of the Florida Supreme Court, issued a letter to each of the chief judges of every circuit court in Florida requesting a review of sealed files in response to "recent media concerns about 'hidden cases' or 'secret dockets.'". . . The apparently widespread practice of hiding certain civil cases came to light as a result of an investigation conducted by reporters at the *Miami Herald* last summer. In the letter, Chief Justice Lewis requested that each circuit provide a report concerning the status of the review of sealed cases or records by October 13, 2006.
>
> On October 13, 2006, The Honorable Joseph P. Farina, Chief Judge of the Eleventh Judicial Circuit (Miami-Dade County),

submitted his report concerning the "Hidden Cases" or "Secret Dockets." . . . In this report, Judge Farina represented that "[a]s a result of the Clerk's research of files for the period covering 1993 to the present (approximately 1,994,159 cases), it was determined that this Circuit did not have any 'hidden cases' or 'secret dockets." However, according to the report, a total of twelve (12) civil cases were discovered that were not properly accessible to the public.

But just over a month later, it was revealed 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 (emphasis added). According to the report, "[m]ore bogus records apparently exist. Jose Arrojo, a top assistant to Miami-Dade State Attorney Katherine Fernandez Rundle, said 'judges' altering public records in informant cases at prosecutor's request has been 'an established practice in this circuit' for two decades.'" Id.

The report revealed that in Miami-Dade, the records were not just sealed or hidden from public view: the dockets were actually altered in order to provide cover for snitches. For example, the *Miami Herald* reported that in one case, Judge Trawick directed the clerk's office to alter the public docket for informant Salim "Johnny" Batrony, represented by defense attorney Paul Petruzzi, after Batrony plead guilty to money laundering in 2002. According to the report, "Batrony's case docket has continued to shape-shift. After a reporter's recent inquiry, electronic entries from April 17, 2002 stating that his criminal charges were 'nolle pros,' or dropped, were deleted." Id.

The *Miami Herald* report implicated Judge Sigler in the practice of docket fixing as well. According to the article, Judge Sigler took a plea at "an unusual, secret hearing" in a case:

A docket also was altered in the attempted murder and kidnapping case of another of Petruzzi's clients, Michael Scott Segal.

Segal was arrested in 2001 for stuffing his girlfriend into the trunk of a car and trying to drive it into a lake. Later, he pleaded guilty and became a snitch in a police investigation of corruption at the county's Turner Guilford Knight jail.

Segal entered his guilty plea at an unusual, secret hearing at a Miami-Dade police station on May 13, 2003. But you wouldn't know it from the docket. **The plea, taken by Judge Victoria Sigler, wasn't docketed. Petruzzi said the docket was altered to indicate that a trial was pending.** "We kept getting computerized notices of trial after he'd already pled," he said. Id. (emphasis added).

State Attorney Rundle has defended the practice but agreed that "[a]ny future practice will not include affirmatively falsifying docket entries.". . .; Dan Christensen and Patrick Danner, Dade Won't Falsify Court Records, Rundle Says, *Miami Herald*, Dec. 14, 2006.

The paper found two cases, but more apparently exist.

Florida law makes it a crime for anyone – including judges, clerks or 'other public officers' – to alter or falsify court records or proceedings. Offenders can be sent to prison for a year. Miami First Amendment attorney Thomas Julin called Fernandez Rundle's remarks to the chief justice 'stunning.' 'It appears the state attorney is admitting that she and others in the judiciary have simply ignored a criminal statute that flatly prohibits the falsification of judicial records,' Julian said. Id. (emphasis added). Mr. Rodriguez has no way of knowing just how widespread this practice has been.

The revelation that Miami-Dade County has actually altered or "falsified" criminal records in order to protect informants, supports many of the allegations made in Mr. Rodriguez's motion for post-conviction relief that is currently pending on appeal. Assistant State Attorney Arroyo's public admission that the clerk's office and members of the judiciary have engaged in the practice of altering documents for the benefit of the Office of the State Attorney **for over two decades** directly impacts Mr. Rodriguez's case. This is relevant information that

impacts the credibility of the prosecutor and law enforcement officers who took the stand in an effort to preserve the convictions in this case. Additionally, this practice impacts directly the validity of the public records that Mr. Rodriguez acquired through the post conviction process that relate to the criminal convictions of the witnesses who testified at his trial. Specifically, Isidoro Rodriguez was a suspect in this case and Mr. Rodriguez alleged in the Rule 3.850 motion that there was evidence that Isidoro committed this crime and he was never prosecuted due to his special relationship with police agents. It was only after he presented the police with his own version of his date-book and gas receipts that he was "cleared" by the Metro-Dade Police Department. Having decided to exclude him as a perpetrator, the State decided to prop him up as a witness against Manuel Rodriguez. Judge Sigler summarily denied a hearing on most of the factual allegations regarding Isidoro.

At the trial, Isidoro testified that he had nothing to do with the crime except that he retrieved a bag containing of the victims' jewelry and property from his mother, who allegedly found it under her trailer. Thereafter, according to Isidoro, he allegedly threw the bag into a field. In the case-in-chief, the State presented self-serving documents provided by Isidoro as a purported alibi to establish that he was in Orlando at the time of the crimes.

Documentary evidence shows that Metro-Dade officer Daniel J. Villanueva bought and sold real estate in Seminole County with Isidoro Rodriguez and Isidoro's wife, Velia L. Rodriguez. Velia Rodriguez is the cousin of Officer Villanueva. These real estate transactions show that Daniel Villanueva and Isidoro Rodriguez owned property together during the same time period that Isidoro was investigated as a suspect by Metro-Dade. Villanueva has also owned property that is connected to Rafael Lopez. It was alleged that the State failed to disclose that a business partner and a relative of Isidoro was a law enforcement officer with the Metro-Dade Police Department.

This was powerful impeachment evidence**: had the jury known about this witness's documented connection with the**

very same agency that arrested and prosecuted Manuel Rodriguez, it would have put all of his testimony in a different light. The jury very well may have discounted Isidoro's self-serving testimony that he was in Orlando at the time the crimes were committed and not involved in the murders. Had the special relationship with the police department been disclosed, the jury might well have concluded that Isidoro was shielded precisely because of that relationship.

Mr. Rodriguez pled that Isidoro acted as a snitch and provided information as a witness against a defendant in an unrelated murder in Miami-Dade County. Mr. Rodriguez also alleged that Detective LeClaire threatened to withdraw police protection from Isidoro if he failed to cooperate. Detective LeClaire was involved in the initial interrogation of Isidoro in 1993 and he took a taped statement from him**. Mr. Rodriguez also pled that both Isidoro and his wife were being investigated by authorities in Seminole County for narcotics offenses – the investigation alone would have been incentive for Isidoro to curry favor with the State.**

The foregoing allegations reveal that Isidoro had a complex and involved relationship with the same law enforcement department that investigated him as well as Mr. Rodriguez. Isidoro not only had close family ties and a business relationship with a member of the department; he was also an informant and a suspected drug dealer. Judge Sigler denied a hearing on these factual allegations as being insufficiently pled or refuted by the record.

The new revelation that the practice of "judges' altering public records in informant cases at prosecutor's request has been 'an established practice in this circuit' for two decades" has serious implications for the role of Isidoro in this case. (App. 3); Dan Christensen and Patrick Danner, Dockets Doctored to Shield Snitches, *Miami Herald*, Nov. 18, 2006**. The *Miami Herald* reported that public records on a snitch whose charges involved "stuffing his girlfriend into the trunk of a car" and trying to kill her were hidden by *Judge Sigler* in order to facilitate an investigation into jail corruption.** Id.

It is incumbent upon the State to set the record straight in this case and disclose any and all records – whether "super-sealed" or "altered" - involving Isidoro as a witness, informant, snitch, defendant, convicted felon or suspect. Mr. Rodriguez has a good faith basis that he could prove the allegations that he pled specifically regarding all of the impeachment evidence regarding Isidoro. However, the revelation that Miami-Dade County has a practice of "hiding" or "altering" dockets gives rise to the concern that there may be additional evidence available concerning this witness. The State Attorney's Office has a pattern and practice of giving special favors to informants; Mr. Rodriguez has specifically alleged that Isidoro is an informant. Unless and until Mr. Rodriguez has an opportunity for full discovery of all records and documents in the possession of the State, the Clerk's Office, and the police, he cannot fully pursue his constitutional claims. See Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995).

Similarly, it is incumbent on the State to disclose any and all records that reveal that Rafael Lopez received a reduced sentence on his own criminal case in exchange for his testimony.

The fact that Mr. Rodriguez was provided with some public records from various agencies in the course of his post conviction litigation is completely irrelevant to the issues raised here. The point is that the revelation discovered by the Miami Herald reporters establishes that the records that are supposed to be public are simply not reliable. Mr. Rodriguez has no idea at this point whether actually received all of the public records in his case or not.

On April 29, 2005, Mr. Rodriguez filed his initial Motion to Disqualify Judge based on Judge Sigler's actions of holding ex parte proceedings with the court reporter to make corrections on errors contained within the transcripts of the evidentiary hearing as well as Judge Sigler's demeanor and bias towards Defendant's counsel during the post conviction proceedings. Judge Sigler denied defendant's initial motion on May 3, 2005. The initial motion to disqualify is specifically referenced an

incorporated herein as facts in addition to the facts specified below (See Att. 1).

The initial motion to disqualify Judge Sigler was based on the failure to notify the parties that the court was having a meeting with the court reporter in order to fix the transcripts prior to making credibility determinations based on the actual record. Judge Sigler's comments and demeanor during the course of the proceedings exhibited a bias on behalf of the State and an appearance of impropriety.

This new information that Judge Sigler – who presided over Mr. Rodriguez capital post-conviction proceedings – is now implicated as being involved in altering records affects the integrity and reliability of those proceedings due to the nature of the specific allegations concerning Isidoro Rodriguez. The fact that Judge Sigler was not the presiding judge over Mr. Rodriguez' criminal trial or known to be specifically involved with altering court documents with regard to Isidoro Rodriguez is irrelevant.

Mr. Rodriguez is not alleging that Judge Sigler altered records in his case; he does not have any specific information that would support that the allegation at this time. The problem in this case is that Judge Sigler is alleged to have been involved in hiding a plea in a specific case; presumably Judge Sigler believed this to be a legitimate practice. Therefore, Mr. Rodriguez has a reasonable fear that Judge Sigler would not be able to fairly judge the issues he raised regarding Isidoro Rodriguez and Raphael Lopez and the distinct possibility that there are secret dockets—still hidden from view—regarding those witnesses. (emphasis added).

Judge Sigler's current involvement in the "hidden cases" and "secret dockets" investigation of the Eleventh Judicial Circuit in conjunction with her already documented acts of having ex parte proceedings to correct transcripts during Mr. Rodriguez's post conviction proceedings creates an appearance of impropriety that violates state and federal constitutional rights to due process. Should the Florida Supreme Court remand this

> case to the circuit court for evidentiary development, justice requires it be before a fair and impartial tribunal to determine the extent to which these practices have affected the reliability and integrity of Mr. Rodriguez' convictions.

PCR. at 3276 – 3283; see also 3315-3317 (news article about Judge Sigler that was attached as Appendix 4 to the motion to disqualify).

Despite the State's suggestion regarding Mr. Rodriguez's "theory," there was *never* any suggestion that Judge Sigler actually sealed any documents regarding Mr. Rodriguez's case. The simple fact is that records very well may have been sealed regarding Isidoro's case. As this Court has recognized, the act of hiding documents from the public is wrong. If records were hidden from Manuel Rodriguez, then there has been a violation of due process. If Judge Sigler engaged in an illicit practice of hiding documents then Manuel Rodriguez has a reasonable fear that Judge Sigler would not recognize that a similar action taken his case would be wrong. The facts as set forth in the motion must be taken as true; the facts alleged 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). Even though the hearing had concluded, Mr. Rodriguez expects to litigate his case further in the circuit court. The motion should have been granted.

F. Before Mr. Rodriguez's pre-trial statements can be considered in the context of the prejudice analysis, he must be afforded an evidentiary hearing on the performance of trial counsel in litigating the motion to suppress.

The lower court relied on Mr. Rodriguez's statements to the police in considering the prejudice prong regarding Claim 1. In the Answer Brief, the State asserted that the "Defendant placed himself at the scene of the crime" in support of the argument that Mr. Rodriguez's claims were properly denied under "any standard" of prejudice. Answer at 34. But the State's reliance on Mr. Rodriguez's pre-trial statements actually demonstrates the necessity of a full and fair hearing on the entire claim which includes the allegation that the motion to suppress was not effectively litigated. This Court also relied on Mr. Rodriguez's statements in conducting the harmless error analysis in the direct appeal opinion. 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.

II. THE SUMMARY DENIAL OF A HEARING ON ALL PENALTY PHASE CLAIMS WAS IN ERROR.

The essential feature of the penalty phase of a capital trial is that sentencing be individualized "focusing on the particular characteristics of the individual." Thomas v. Kemp, 796 F. 2d 1322, 1325 (11th Cir. 1986). The indispensable prerequisite to a reasoned determination of whether a defendant shall live or die is accurate information about a defendant and the crime committed. Gregg v. Georgia, 428 U.S. 153, 190 (1976). This Court has repeatedly reversed circuit court rulings where there has been a summary denial of a hearing on the penalty phase. Cook v. State, 792 So. 2d 1197 (Fla. 2001); Ragsdale v. State, 720 So. 2d 203, 206 (Fla. 1998) (concluding that Ragsdale has stated sufficient allegations of mitigation that are not conclusively refuted by the record to warrant an evidentiary hearing to determine whether counsel was ineffective in failing to properly investigate and present evidence in mitigation).

As a matter of fact – in recognition of the finality of the death penalty - a hearing *must* be held "on claims listed by the defendant as requiring a factual determination" in cases filed under the newer rules. Fla. R. Crim. P. 3.851(f)(5)(A)(i). Yet, the State has taken the position that Mr. Rodriguez's penalty phase claims were properly denied. Answer at 82. This position again seems to be based on confusion regarding the distinction between

factual allegations versus actual claims for relief.

Mr. Rodriguez alleged below that trial counsel provided ineffective representation in the penalty phase and the lower court summarily denied a hearing. Mr. Rodriguez, in the course of explaining why the lower court erred in denying a hearing, argued facts that are directly from the trial record that demonstrate how counsel was ineffective. Initial Brief 84-93. The individual facts are not "claims" in and of themselves as suggested by the State. Furthermore, the State, in its Response to Mr. Rodriguez's Petition for Writ of Habeas Corpus, identified specific instances of deficient performance (in the State's view) by trial counsel. In the Habeas Petition, Mr. Rodriguez challenged the failure of appellate counsel to raise a challenge under Lockett v. Ohio, 438 U.S. 586 (1978) on direct appeal. The State responded:

> Initially is must be noted that much of this claim, as pled, was not preserved for appellate review. . . . Defense counsel ultimately acknowledged that he was not prepared to offer medical testimony showing a medical link to some hereditary mental illness, but he intended to use lay witnesses to show the existence of mental health problems among several generations. . . . Defense counsel did not object but stated, 'Okay.' . . . Defense counsel did not attempt to proffer the answer to the only question asked which Ms. Fernandez was not permitted to answer – the ages of the children in the home at the time of the [mother's] attempted suicide. Counsel's acquiescence to the ruling and failure to proffer the answer to the question propounded demonstrates that there was nothing on this issue preserved for appellate review from Ms. Fernandez's testimony.

Response to Habeas at 12-14.

While Mr. Rodriguez does not agree that this claim was not preserved, he does agree with the State's observation that trial counsel was not prepared to offer medical testimony showing a medical link to some hereditary mental illness. It is exactly this type of evidence that trial counsel failed to present and that would have assisted the Defendant in establishing, as he alleged that he could, that he suffered from schizophrenia and bipolar disorder at the time of the crimes. This is exactly the type of evidence that could have been used to refute the finding made by this court that there was "conflicting testimony as to Manuel Rodriguez's mental health, including some testimony that he was a malingerer." Rodriguez at 45. It was in light of the conflicting testimony regarding mental health that this Court held the error in admitted the hearsay statements of jailhouse snitch Lago harmless.

The State's Answer presents arguments that amount to a dispute of material facts. Mr. Rodriguez pointed out that the prosecutor exposed the deficiencies in preparation of Mr. Rodriguez's case during the cross-examination of Dr. Tarpin by questioning her about the fact that the "history" she relied upon was the result of Mr. Rodriguez's self-report. Mr. Rodriguez also argued that Judge Rothenberg noted deficiencies in the defense case because there were no questions posed to the mental health

experts regarding the hereditary nature of mental illness. Initial Brief at 92. These were examples in this case that demonstrate similarities to the Hovey v. Ayers, 458 F. 3d 892 (9th Cir. 2006) case in which relief was granted. The State submitted that Hovey is inapplicable because the "witnesses competently testified" in this case. Answer at 86, footnote 41. Yet, Mr. Rodriguez was never given the basic opportunity to prove that the mental health experts, however numerous, were not able to do their jobs because the trial attorney did not do his. Mr. Rodriguez seeks a remand on each of his penalty phase claims.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was delivered to Sandra S. Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida, 33131 and Katherine M. Diamandis, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida, 33607 by U.S. mail, this ____ day of December, 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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