IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-____

MANUEL ANTONIO RODRIGUEZ,

Petitioner,

v.

JAMES MCDONOUGH, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Rodriguez's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. Rodriguez was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as "R. page number" and to the transcript of the trial proceedings as "T. page number." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, Florida Constitution. This petition presents issues

which directly concern the constitutionality of Mr. Rodriguez's convictions and sentences of death.

Jurisdiction in this action lies in this Court, see e.g. Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Rodriguez's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Rodriguez requests oral argument on this petition.

STATEMENT OF CASE AND FACTS

Petitioner was indicted on September 15, 1993, along with the co-defendant, Luis Rodriguez, on three counts of first-degree murder and armed burglary with an intent to commit an assault. Petitioner was tried and convicted on all counts in October of 1996 in the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County. The trial court sentenced the Petitioner to death for each of the murder convictions and life imprisonment with a three-year minimum mandatory for the armed burglary.

This Court upheld the convictions and sentences on direct appeal. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000) cert. denied, 121 S. Ct. 145 (2000). The Petitioner relies on the facts as presented in his initial brief. This Petition is being filed simultaneously with Mr. Rodriguez's initial brief following the denial of his motion for post-conviction relief.

CLAIM I

MR. RODRIGUEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT ON DIRECT APPEAL

Mr. Rodriguez had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984); see also Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985).

Because the constitutional violations which occurred during Mr. Rodriguez's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Rodriguez's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Rodriguez's behalf is

identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors – including those already recognized on direct appeal - did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967).

Appellate counsel failed to challenge the erroneous rulings of the trial court during the penalty phase in excluding and restricting relevant mitigation; failed to appeal the denial of the motion to suppress Petitioner's statements to the police; failed to challenge the improper prosecutorial argument; and failed to appeal the trial court's erroneous rulings made during the guilt phase. The facts and arguments presented in Claims II, III, IV, and V, infra, are specifically incorporated herein. In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ERRORS THAT OCCURRED DURING MR. RODRIGUEZ'S PENALTY PHASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION

A. The sentencing phase did not comport with clearly established law under Eighth Amendment jurisprudence.

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). Mr. Rodriguez's penalty phase was diverted from its main purpose and instead resulted in Mr. Rodriguez being denied the opportunity to fully and fairly present his mitigation to the jury and became a forum for the state to use Mr. Rodriguez's extensive troubled life history against him. Appellate counsel was ineffective for failing to raise these errors on direct appeal.

The Eighth Amendment forbids exclusion of mitigation at capital sentencing. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); see also Hitchcock v. State, 755 So. 2d 638 (Fla. 2000) (remanded for

re-sentencing "provided that [the State] does so through a new sentence hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available."). The Eighth and Fourteenth Amendments require that "the sentencer not be precluded from considering **as any mitigating factor** any aspect of record..." Lockett, 438 U.S. at 604 (emphasis in original).

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances of facts may be used to aggravate a crime for the purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). Limitations of the sentencer's ability to consider aggravating circumstances other than those specified by statute is required by the Eighth Amendment. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

Moreover, the trial court is prohibited from failing to consider mitigating circumstances that have been presented by defense counsel on the basis that they are irrelevant to the proceedings. As this Court has emphasized, "[W]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, **the trial court must find that the mitigating circumstances has been proved**." Spencer v. State, 645 So. 2d 377, 385 (Fla. 1994), citing Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (emphasis added).

B. Failure to appeal trial court's improper limitation on Mr. Rodriguez's introduction of mitigation evidence.

1. RESTRICTIONS ON TESTIMONY

The trial court's ruling that evidence of depression and mental illness afflicting Mr. Rodriguez's family members was not relevant mitigation was in error. Defense counsel Eugene Zenobi sought to introduce testimony from Ana Fernandez (Manuel Rodriguez's sister) about the details surrounding their mother's suicide attempt; their mother attempted to slit her wrists while her grandchildren were in her home with her. T. 3866. Mr. Zenobi strenuously argued that this testimony was relevant both to show the extent of the maternal depression and to establish that multiple generations of the Rodriguez family suffer from mental illness. T. 3868. The trial court sustained the State's objection and prohibited the defense from introducing such testimony.[1]

In sustaining the State's objection, the trial court stated:

> There is--**if there is going to be no medical testimony that she suffered from any schizophrenia, or anything in any way related to what the defendant or the testimony concerning what the defendant's major mental illness is, then *I don't see the relevancy.***
>
> If you are telling me that the only thing we are going to hear is that a grand child takes Prozac, **without it being linked to some major**

[1] The State objected to defense testimony regarding Manuel's mother's Alzheimer's disease as having "nothing to do with the defendant's character" after having presented irrelevant and highly prejudicial victim impact testimony during the guilt phase. T. 3857.

> **mental illness, then I am going to find that is not relevant** unless it can be linked up to some mental illness that it is hereditary in some way. These are all different types of problems people are suffering from without any linkage. ***I see no relevance***.

T. 3870.

Mayra Molinet (Manuel Rodriguez's younger sister) was also able to testify about the details regarding their mother's suicide attempts and history of depression. Ms. Molinet faced her own battles with drug addiction and three commitments to a psychiatric hospital, establishing the pervasiveness of mental illness in this family. T. 3897. The trial court precluded the defense from eliciting testimony regarding how the mother's mental illness affected their entire family, including Manuel Rodriguez. Id. The trial court also precluded the defense from putting forth testimony regarding the details of Ms. Molinet's life between the years of 1976-1986 when she was addicted to both heroin and cocaine. T. 3901.

During Ms. Molinet's testimony, she volunteered that she was "struggling to get over depression." She added that her daughter was also depressed: "She is only nine and I am trying to help her because - - ." T. 3904. The State objected to this testimony. Ms. Molinet then informed the court – outside the presence of the jury - that her nine-year-old daughter very recently underwent extensive testing and that her physician diagnosed her as being clinically depressed and would be prescribing

Prozac pending a determination of the appropriate dosage. T. 3905-06.

The court sustained the State's objection based on the belief that the Petitioner failed to show a "link between the depression of the mother, the depression of the daughter and the depression of the niece to the defendant's diagnosed mental illness." T. 3915. Mr. Zenobi argued that the testimony was relevant and admissible:

> ... [I]f the state seeks to undermine the theory of psychology and psychiatry with a volitional attack, then I am simply coming back by generation by generation by generation and the inheritability of this thing, which directly relates to Mr. Rodriguez.

T. 3910; see also T. 3909, 3910-3915.

2. PREJUDICE

The jury was prevented from properly considering the evidence of Mr. Rodriguez's substantial mitigation which included a long-term diagnosis of schizophrenia, addiction to drugs, multiple commitments to psychiatric facilities and a childhood with a mother who suffered from severe depression. In fact, the State was able to, in essence, void Mr. Rodriguez's mitigation presentation by improperly arguing his mitigation as aggravation.[2]

Trial counsel's attempt to present to the jury the history of intergenerational

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[2] See argument below fully detailing appellate counsel's failure to challenge the State's improper argument of mitigation as nonstatutory aggravation.

mental illness in the Rodriguez family directly rebutted the State's arguments that Mr. Rodriguez was faking his mental illness. The feature of Mr. Rodriguez's penalty phase became a question of whether he was a malingerer; evidence that, in fact, his closest family members, suffer from similar mental illness directly rebutted the State's argument. The trial court's determination that Mr. Rodriguez had to have an expert to scientifically link the hereditary issue in order to be relevant was in contravention to the mandates of the United States Supreme Court. T. 3870, 3915. When the trial court precluded the defense from presenting evidence concerning Mr. Rodriguez's niece's mental illness the result was that relevant mitigating evidence was excluded.

In Tennard v. Dretke, 124 S. Ct. 2562 (2004), the U.S. Supreme Court detailed the threshold for relevance of mitigating evidence in a penalty phase:

> We established that the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard—'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" -- applied. [Citation].
>
> We quoted approvingly from a dissenting opinion in the state court: '**Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'** [Citation]**. Thus, a State cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence of less**

than death.'

> Once this ***low threshold for relevance*** is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence.'[Citations].

Tennard v. Dretke, 124 S. Ct. at 2570. (citations omitted) (emphasis added).

Mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant's proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. at 604. Thus, the circumstances of the defendant's background and family history are directly relevant and must be considered for mitigation. See e.g. Spaziano v. Florida, 468 U.S. 447, 460 (1984); Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. at 110-12.

As this Court recently reiterated in Offord v. State, 32 Fla. L. Weekly S 276 (May 24, 2007), even when an aggravating circumstance as strong as "heinous, atrocious, or cruel" (HAC) has been proved, substantial mitigating circumstances may make the death penalty inappropriate. Id. (quoting Nibert v. State 574 So. 2d 1059, 1063 (Fla. 1990))[3]; see also Hovey v. Ayers, 458 F. 3d 892, 930 (9th Cir.

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[3] Furthermore, just as in Offord, malingering was one of the predominant issues presented by the State to the jury in Mr. Rodriguez's case. In fact, in Offord, the defendant testified himself, that he was "not crazy" and "could fool any doctor…" Offord v. State. It is clear that defense counsel needed to present evidence in order to rebut the state's attack on the validity of Mr. Rodriguez's mental illness. In fact, this Court on direct appeal relied upon the State's argument that Mr. Rodriguez

2006); Hendricks v. Calderon, 70 F. 3d 1032, 1044 (9th Cir. 1995). The HAC aggravator was never an issue in this case.

Appellate counsel was ineffective for failing to challenge the trial court's improper exclusion of mitigation evidence. Inexplicably, appellate counsel raised a claim with regards to the trial court's error in limiting mitigation evidence limited to the trial court's limitation on the testimony given by Dr. Pass but failed to challenge the restriction on testimony regarding intergenerational mental illness under the Eighth Amendment. Dir. App. Br. at 80-83. The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing on the particularized characteristics of the defendant. Hardwick v. Crosby, 320 F. 3d 1127, 1162-63 (11th Cir. 2003). Appellate counsel, in focusing on the more minute errors on appeal, failed to see the big picture and never presented the full Eighth Amendment violations to this Court. The trial court committed reversible error when it ruled to exclude the evidence of intergenerational mental illness in Mr. Rodriguez's family; the prejudice due to appellate counsel's failure to raise this issue is clear.

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was malingering when it concluded that the admission of Lago's hearsay statements during the penalty phase were harmless error.

C. Failure to appeal the trial court's failure to properly consider the mitigation presented in sentencing Mr. Rodriguez to death.

The trial court failed to properly consider and weigh mitigating evidence when it explicitly rejected Mr. Rodriguez's mother's mental illness as a non-statutory factor. R. 1782-85 (sentencing order); T. 3745. This determination was based on the erroneous assumption that depression is not a major mental disorder.[4] During the penalty phase, Mr. Rodriguez presented evidence which established his mother's longstanding battle with mental illness and specifically depression, including separate suicide attempts. T. 3862-3866, 3897, 3899.

The trial court charged the jury with two statutory mitigators and well as several other nonstatutory mitigators including "[T]hat the Defendant's mother has a history of mental problems which has impacted upon the Defendant." R. 1782-1783. But the trial court refused to consider the evidence of Mr. Rodriguez's mother's mental illness, based on a faulty assumption that **"I don't think depression has ever been identified as a major mental illness**." T. 3475. The trial court had a duty to independently evaluate the evidence and weigh the aggravators against the mitigators. "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating

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[4] See Diagnostic and Statistical Manual of Mental Disorders, 7, 218-224, 228-230 (3d ed. 1987). Major depression is categorized as an Axis I Mood Disorder.

circumstances, shall enter a sentence of life imprisonment or death." Florida Statute, Section 921.141(3)(1987). The trial court failed to properly assess the mitigating circumstances.

"Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence." Parker v. Dugger, 498 U.S. 308, 315 (1990). Had the court properly considered Mr. Rodriguez's mother's mental illness, it would have been obligated to find mitigating circumstances. "[A] judge who fails to consider…nonstatutory mitigating circumstances commits reversible error." Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). The Eighth Amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Mr. Rodriguez's deprivation of the individualized treatment to which he is constitutionally guaranteed required that appellate counsel raise this issue in the direct appeal.

D. Failure to challenge prosecutorial misconduct of improperly arguing mitigation as nonstatutory aggravation.

The prosecutor's theme for the State's case during the penalty phase was that Mr. Rodriguez's documented mental health history demonstrated that he suffered from no mental illness and was purely a malingerer and was therefore,

attempting to deceive the jury with his presentation of mitigation. Throughout the penalty phase, the State made it a feature of the case that Mr. Rodriguez was a malingerer and effectively used the symptoms of his illness and contact with mental health doctors against him.

The prosecutor turned the mitigation provision on its head, arguing it as aggravation. The State improperly argued that all of Mr. Rodriguez's commitments to state hospitals over 15 years, psychiatric treatment in prison facilities, diagnoses of major mental disorders, and prescriptions for psychotropic medications were in essence aggravation—an attempt by the defendant to "trick" the jury. The prosecution premised this argument that Mr. Rodriguez is faking on ludicrous arguments designed to inflame the jury. During the State's closing argument for example, the prosecutor stated that when the defendant is committing crimes he is not a "drooling, incoherent" person. T. 4216. The prosecutor further argued that mentally ill people are easy to pick out by their bizarre behavior and they are "[P]eople that we knew were mentally ill just in the first thirty seconds of being around them" and "…if they are not acting strangely, there is no psychiatric issue involved." T. 4224, 4242. The prosecutor undermined the seriousness of Mr. Rodriguez's mental illness:

> You know what happens with people who see, think, and hear things that aren't there? … They are talking to an imaginary person who is

> there. They are yelling at the top of their lungs. That is what sick people, **people who really have mental illness do**.
>
> Ever see people who live under bridges? Hardly describe them as being neatly dressed. **The truly mentally ill,** the people who have to be found so they don't catch cold on nights when it gets down to the forties.

T. 4257. The prosecutor went so far as to state that Mr. Rodriguez does not suffer from mental illness because he was not "baying at the moon." T. 4223.

Also, the prosecutor commented that mentally ill people don't control their illness and that Mr. Rodriguez only exhibits "bizarre" behavior when he is arrested and that individuals can not have a "mental problem, a drug problem, a schizophrenia problem, and a paranoid problem" and therefore, Mr. Rodriguez was just "practicing" different illnesses for the doctors. T. 4423-25. At one point the prosecutor referred to the testimony being elicited during Mr. Rodriguez's mitigation presentation as "gobbledygook." T. 3641-42.

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, supra. As a result, these impermissible aggravating factors resulted in a sentence that was based on an "unguided emotional response," a clear violation of Mr. Rodriguez's

constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989). This Court's reliance on the evidence that Mr. Rodriguez "was a malingerer" in conducting the harmless error analysis with regard to the trial court's error in admitting hearsay testimony of State snitch Alejandro Lago highlights the prejudice that resulted from appellate counsel's failure to raised this issue on direct appeal. Rodriguez at 34-35.

E. Failure to challenge the prosecutorial misconduct when the State made prior convictions a primary feature of the penalty phase.

Evidence of prior felony convictions may not be emphasized to the point where they become the feature of the penalty phase. See Finney v. State, 660 So. 2d 674, 683-84 (Fla. 1995); see also Stano v. State, 473 So. 2d 1282, 1289 (Fla. 1985); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993) (details of prior felony convictions should not be made a feature of the penalty phase proceedings). However, due to the prosecutor's improper comments during the penalty phase this is precisely what occurred.

In closing argument, the prosecutor used seven large pieces of cardboard to highlight Petitioner's criminal history, over defense objection:

> These seven pieces of paper, seven pieces of cardboard are the life work of this defendant. This is what he is all about. ***A picture that is almost—almost overwhelming***. I mean, it has to be difficult for you as juror to say to yourselves we are talking about somebody who has committed, not only committed but been **convicted of over seventy**

> **different armed crimes**. Who has committed these three awful murders and we are evaluating these things as though there is something in life that **can balance out against forty-one years of this type of 'handy work.'**

T. 4198 (emphasis added).[5]

Additionally, the prosecutor persisted in making highly inflammatory arguments emphasizing the number of years of Mr. Rodriguez's prior sentences:

> You can count up all the years; ten, fifteen, twenty, thirty, fifty, whatever they might be...I think if you counted up there is **over fourteen hundred years sentences** in this little packet. That is the person you are dealing with. He likes these crimes.

Mr. Rodriguez was prejudiced by the improper conduct: shortly after beginning deliberations, the jury requested to see the poster board of the prior convictions and the certified copies of the prior convictions. T. 4317-4319. It was deficient performance for appellate counsel not to raise a challenge on this issue; the Petitioner's criminal history is probably the most significant aggravator that weighed against him. This is true in light of the fact that the evidence supporting

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[5] The prosecutor repeatedly emphasized Mr. Rodriguez's early convictions when Mr. Rodriguez was a young teenager. The prosecutor declared that Mr. Rodriguez has had "second chances," did not want to be rehabilitated, and instead committed more violent crimes becoming more sophisticated and learning new techniques. T. 4206-4207. The State used prior convictions based on acts Mr. Rodriguez committed when he was a juvenile to establish the prior violent felony aggravating circumstance in violation of the Eighth Amendment and the principles underlying Roper v. Simmons, 125 S. Ct. 1183 (2005). At the penalty phase, the State relied upon convictions that Mr. Rodriguez received when he was only fifteen for grand theft auto. T. 4206.

the aggravator of "cold, calculated, and premeditated" was, in the light most favorable to the State, weak, at best. As this Court reiterated in *Mr. Rodriguez's own direct appeal*, the state must "ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings." Rodriguez v. State, 753 So. 2d at 39; see also Finney; Duncan; Stano; supra. Appellate counsel was prejudicially deficient for failing to challenge the inflammatory argument about the collateral felonies that became the penalty phase's focus, going far beyond rebuttal of mitigation to the point where it was a feature of the case.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE DENIAL OF THE MOTION TO SUPPRESS PETITIONER'S STATEMENTS

A. The trial court erred in denying Mr. Rodriguez's motion to suppress.

This Court upheld Petitioner's convictions based on various inculpatory statements that he gave to law enforcement upon his arrest. These statements were obtained in violation of State constitutional, Federal constitutional, and Florida statutory protections and rights. Trial counsel filed a motion to suppress these statements and, after an evidentiary hearing, the trial court denied the motion. R. 47-49; R. 349-364. The trial court failed to properly apply clearly established federal law under Miranda v. Arizona, 394 U.S. 436 (1966) and Colorado v.

Connelly, 479 U.S. 157 (1986), in denying Mr. Rodriguez's motion to suppress.

1. FACTS RELEVANT TO THE CLAIM

On August 4, 1993, Detectives Crawford and Smith traveled to the Tomoka Correctional Institution (a medical prison facility) where Mr. Rodriguez was incarcerated an interrogated him.[6] T. 194, 318. At this time, the co-defendant Luis Rodriguez had already provided a sworn statement to the police the previous day, August 3, 1993, in Orlando Florida. T. 218. In fact, the detectives had already extensively questioned several of the witnesses.[7] T. 218-219. First, Mr. Rodriguez explained to 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 benefit of Miranda warnings, Mr. Rodriguez told the detectives a "bizarre" story that included a conspiracy relating to his doctors. T. 323, 324, 447.

Subsequently, on August 13, 1993, Mr. Rodriguez was placed under arrest for the homicides pursuant to a warrant and he was interrogated once again. However, by the time the warrant was issued, Mr. Rodriguez had been transferred

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[6] The trial court suppressed the statements taken by the detectives at Tomoka Correctional Institution for failing to advise Mr. Rodriguez of his Miranda rights. R. 355-356. Although not inculpatory, the statements were incriminating.

[7] The detectives had already interrogated and secured statements from Luis Rodriguez, Isidoro Rodriguez, and Maria Malakoff. T. 218-219.

to a prison facility in Starke, Florida. Upon arrest, Detectives Crawford, Smith, and Leclaire drove Mr. Rodriguez in a Ford Explorer for over six and a half hours to the Miami-Dade Police department where the detectives continued their interrogation. T. 199, 210-216, 287, 333, 325-326. During the drive to the police station, Mr. Rodriguez was restrained by handcuffs, a leg brace, and a belly ring. T. 203. Additionally, during the interrogation that ensued during the transport, the detectives lied to Mr. Rodriguez by telling him that Isidoro Rodriguez was out-of-state. T. 206.

At the hearing on the motion to suppress, the detectives testified that Mr. Rodriguez gave numerous conflicting statements in which he denied any involvement in the crime and at no point would Mr. Rodriguez sign a sworn statement during the interrogation. T. 205-07, 217, 331, 432. There is no tape or other independent verification of the circumstances of the interrogation. The interrogation at the homicide office took place immediately upon Mr. Rodriguez's arrival from the prison facility after a several hour car ride, in an eight (8) feet by ten (10) feet interview room without a phone and lasted over three (3) hours. T. 209, 434. It was not until after being shown the co-defendant's sworn statement that Mr. Rodriguez said that it was Luis Rodriguez's idea to rob the Josephs. T. 331, 332.

Throughout the multiple conflicting stories that Mr. Rodriguez gave during his interrogation, the detectives fed him the details they had learned about the crime by Luis Rodriguez's statement and insisted upon Mr. Rodriguez's guilt. In essence, "…we [the detectives] thought he was lying and it didn't fit, and we believed things that we learned from Luis [Rodriguez]…" Id. In fact, the detectives used both Luis Rodriguez's and Maria Malakoff's statements during Mr. Rodriguez's interrogation and read multiple excerpts from these statements to him. T. 427-445. However, the detectives refused to allow Mr. Rodriguez to read the statements himself or in their entirety. T. 431, 442. Mr. Rodriguez's statements continued to change each time the detectives fed him details from the other witnesses' statements. Id. As the detectives admitted at the hearing, these tactics were part of a concerted effort to coerce a statement from Mr. Rodriguez that was consistent with the detectives' accepted version of events. T. 430-432, 435, 437-438.

Additionally, there was testimony that Mr. Rodriguez was under the influence of Trilafon, a psychotropic medication, and Benadryl. T. 213-426. The detectives were well aware of Mr. Rodriguez's psychiatric history and that there had been *prior judicial determinations* that Mr. Rodriguez was incompetent to stand trial. T. 266, 278, 282, 328, 393.

2. THE TRIAL COURT FAILED TO FOLLOW FEDERAL LAW IN DENYING THE MOTION TO SUPPRESS

The trial court improperly concluded that there was no evidence to suggest that Mr. Rodriguez's mental condition impaired his ability to make a voluntary choice and that the record did not indicate that police resorted to physical and psychological pressure. R. 361-362. The trial court's determination was premised on the erroneous view that Mr. Rodriguez's waiver of his Miranda rights and subsequent statements to the police at the homicide office at the Miami-Dade County police station were freely and voluntarily made.

The validity of the waiver of Mr. Rodriguez's Miranda rights must be considered under the "totality of the circumstances"[8] and in light of the coercive circumstances of this interrogation. Mr. Rodriguez's interrogation took place under the conditions where the already-incarcerated Defendant had a history of mental illness and was under the influence of psychotropic medication at the time of his interrogations at the prison, during the transport by the interrogating detectives

[8] See North Carolina v. Butler, 441 U.S. 369 (1979); Henry v. Dees, 658 F. 2d 406 (5th Cir. 1981).

from the prison facility, and at the homicide office the the Miami-Dade Police Department. In Miranda v. Arizona, the United States Supreme court reviewed the police use of *inherent coercive psychological tactics and techniques in obtaining confessions:*

> [T]he setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. . . . When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. . . .The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Miranda, 394 U.S. at 455. This Court outlined the factors used to determined whether a statement is voluntary:

> Case law reveals that the "totality of the circumstance" may include police conduct and interrogation techniques used by the police; the duration and nature of the questioning; **the physical setting in which the interview occurs**; **the content of the confession product**,[9]

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[9] In considering the "content" this Court should consider whether the details of the crime match what the police or State believe may have occurred and the extent to which a defendant is merely parroting back what he has been fed by the interrogators. In this case, Mr. Rodriguez was alleged to have told police that "Luis's brother, Isidor[o], arrived in a van and it was Luis and Isidor[o] who went inside." T. 332. This suggests that the police had reason to believe that Isidoro committed this crime, despite the State's argument to the jury that "Somebody obviously was in that apartment with Luis Rodriguez. And we still haven't heard .. . who that second person could have been." T. 3304.

> which, although not determinative, may shed light on whether it was 'voluntary' or not; **the mental condition and psychological makeup of the accused, and his history and background**; the age, legal sophistication, intelligence, and education of the suspect; and all factors which may assist the court in its determination.

State v. Sawyer, 561 So. 2d 278 (Fla. 1990) (emphasis added). Even when the psychological tactics described are not specifically employed, "**the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals**. Id. at 455 (emphasis added).

The trial court misapplied clearly established federal law in denying Mr. Rodriguez's motion to suppress. Relying on Colorado v. Connelly, the trial court incorrectly concluded that Mr. Rodriguez's statement was given voluntarily and free from police coercion. R. 359-362. In Connelly, the defendant approached the officer himself, without "state action" or being put into custody, and the Supreme Court determined that due to this detail, the fact that the defendant was mentally ill did not render his statements involuntary absent coercive police activity. Colorado v. Connelly, 479 U.S. at 160, 165 - 167. Mr. Rodriguez's case was clearly distinguishable because he was arrested and therefore, plainly in custody and the subject of police questioning when he gave his statements.

Additionally, the trial court incorrectly focused its factual inquiry on the lack

of explicitly "coercive" techniques by the detectives when it determined that Mr. Rodriguez freely and voluntarily waived his right to counsel. R. 359-362. Specifically, the trial court failed to address whether Mr. Rodriguez was competent at the time he signed the Miranda waiver and furthermore, the trial court dismissed both the coercive techniques employed by the detectives during the interrogation and the key issue that the detectives persisted in securing a Miranda waiver when they were explicitly aware that Mr. Rodriguez was actively under the influence of psychotropic drugs and receiving treatment at a Florida Department of Corrections mental health facility. Id. Furthermore, as Miranda dictates, regardless of police tactics, custodial interrogations are *inherently coercive.*

The factual inquiry into whether a confession is voluntarily given centers upon (1) the conduct of the law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure. See Mincey v. Arizona, 437 U.S. 385, 399-401 (1978). With regard to the first prong, according to the officers' own testimony, Mr. Rodriguez's confession was extracted by a combination of lies, threats and emotional manipulation. Lies or insistence upon a defendant's guilt are among the factors that render a confession involuntary. See Frazier v. Cupp, 394 U.S. 731 (1969) (misrepresentations of evidence by police is relevant to determining voluntariness); see also Fillinger v. State, 349 So. 2d 714, 716 (Fla. 2d

DCA 1977) (police insisted on defendant's guilt) cert. denied 374 So. 2d 101 (Fla. 1979; Martinez v. State, 545 So. 2d 466, 467 (Fla. 4th DCA 1989) (police repeatedly told defendant that he was lying and that the evidence against him was solid). Florida courts have repeatedly "condemned the articulation by the police of incorrect, misleading statements to suspects." State v. Cayward, 552 So. 2d 971, 973 (Fla. 2d DCA 1989).

Furthermore, with respect to the "suspect's capacity to resist that pressure," it was unrefuted at the hearing that Mr. Rodriguez was undergoing psychiatric treatment and under the influence of psychotropic medication at the time of the interrogation. T. 266, 268-273. Moreover, the detectives had explicit knowledge of this fact and persisted on securing a Miranda waiver in spite of this knowledge. T. 266, 278, 282, 328, 393. The mental capacities of a defendant are factors that go directly to the voluntariness of a confession. See Haynes v. Washington, 373 U.S. 503, 513-14 (1963); Jurek v. Estelle, 623 F. 2d 929, 937 (5th Cir. 1980), cert. denied, 450 U.S. 1001 (1981) (courts must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will); Jones v. State, 845 So. 2d 55 (Fla. 2003).

Finally, the trial court did not take into account the fact that the *second* set of

statements were obtained *after* the officers had already obtained incriminating and inadmissible statements from Mr. Rodriguez without the benefit of Miranda warnings. The trial court's determination that those statements were "voluntary" despite that fact that the statements were the product of a custodial interrogation without Miranda warnings was unreasonable. Given that the first set of statements was not voluntary, the State could not establish that the second statements were not given as a direct result of the fact that Mr. Rodriguez had already given statements. Brown v. Illinois, 422 U.S. 590 (1975); Oregon v. Elstad, 470 U.S. 298 (1985); see also Missouri v. Seibert, 124 S. Ct. 2601 (2004).

The combination of the *inherently* coercive techniques employed by the detectives during the interrogation together, with the mental incapacity that Mr. Rodriguez was suffering at the time of his statement of which the detectives were explicitly aware and, the fact that Mr. Rodriguez had already given an involuntary statement, rendered Mr. Rodriguez's statement involuntary under the "totality of the circumstances" and the dictates of clearly established case law.

B. Appellate counsel's failure to challenge the denial of the motion to suppress was deficient performance that resulted in prejudice.

Appellate counsel was ineffective, under the Sixth Amendment, for failing to challenge the trial court's error in denying Petitioner's motion to suppress.

Appellate counsel has the duty to raise all meritorious issues regarding errors occurring in both trial and pre-trial[10] and thus, was obligated to appeal the denial of the motion to suppress, which resulted in the admission of incriminating statements during his trial.

Furthermore, appellate counsel was prejudicially deficient. On direct appeal, this Court held that the prosecutor's arguments that "we still haven't heard in nay of the discussions, what the theory is of who that second person could have been," and "there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant," were improper comments on the failure to testify and impermissibly shifted the burden of proof. Rodriguez, 753 So. 2d at 39; see also T. 3305, 3315-16. However this Court considered the improper comments in the context of Mr. Rodriguez's "admissions that he was present in the apartment, as well as other numerous inculpatory remarks" when it concluded that the prosecutorial misconduct was harmless beyond a reasonable doubt. Id. Confidence

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[10] Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (2003). "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent on appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003).

in the outcome has been undermined due to the failure of appellate counsel to challenge the denial of the motion to suppress on appeal; had he done so, there is a reasonable probability of a different outcome on appeal.

CLAIM IV

APPELLATE COUNSEL FAILED TO CHALLENGE THE PROSECUTORIAL MISCONDUCT THAT WAS PERVASIVE THROUGHOUT THE ENTIRE TRIAL AND VIOLATED MR. RODRIGUEZ'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. The prosecutor made improper comments throughout the trial.

The prosecutor's actions throughout Mr. Rodriguez's trial exceeded the bounds of zealous advocacy and resulted in error requiring reversal. The pervasive nature of the prosecutorial misconduct tainted the jury from the very outset and had an improper impact on the penalty phase deliberations. These comments included reference to the novel "The Heart of Darkness" during the state's guilt phase close and, in so doing, characterized Manuel Rodriguez as "evil . . .capable of every wickedness." T. 3392-93. Additionally, the prosecutor made improper comparisons of Manuel Rodriguez to the serial killer and torturer portrayed in the movie "Silence of the Lambs." T. 3330-3332.

"Under our law, the prosecutor has a duty to be fair, honorable and just . . . [T]he prosecuting attorney 'may prosecute with earnestness and vigor - indeed, he

should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.'" Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984), citing Berger v. United States, 55 S. Ct 629 (1935). As recognized on appeal, the State persisted in undercutting its own legal burden by arguing to the jury that Mr. Rodriguez failed to present his own alternative theory to rebut the State. Rodriguez, 753 So. 2d at 39. Both *challenged and unchallenged* prosecutorial misconduct during the trial rendered Mr. Rodriguez's convictions fundamentally unfair under clearly established federal law and deprived Mr. Rodriguez of the reliability in the sentencing determination that the Eighth Amendment requires. See Darden v. Wainwright, 477 U.S. 168 (1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Appellate counsel should have challenged the improper victim impact testimony that came into evidence during the guilt phase. Under Booth v. Maryland, 482 U.S. 496 (1987),[11] such evidence is also constitutionally impermissible. The only purpose of the victims' family members testimony was to garner sympathy: nothing about their lives was relevant in the guilt phase of the trial and the introduction of this highly prejudicial evidence deprived Mr.

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[11] Booth was reversed in part in Payne v. Tennessee, 111 S. Ct. 2597 (1991) with regard to victim impact evidence during the sentencing phase. The victim impact evidence came in during Mr. Rodriguez's guilt phase.

Rodriguez of his right to as "dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981).

The error of allowing Virginia Nimer and Tama Zaydon to testify violated Mr. Rodriguez's right to a fair trial under the U.S. Constitution especially in light of the fact that defense counsel offered to stipulate to the identity of the deceased. See Old Chief v. United States, 519 U.S. 172 (1997); Brown v. State, 719 So. 2d 882, 887 (Fla. 1998).

The prosecutor told the jury that the Josephs had health problems, had each had pacemakers, had raised three children, had numerous grandchildren, and were a very close-knit family. T. 1714. The prosecutor pointed out to the jury that victim Genevieve Abraham had been married to her husband for forty-seven (47) years and that their daughter had been diagnosed with cancer and the prognosis was not good. T. 1719, 1720. The prosecutor made more improper comments by telling the jury that Genevieve and her sister, who was one of the persons who went to the apartment and discovered the victims had been killed, were Abest friends@ and that the sister moved in with the Abrahams' after their parents died. T.1726; see also, T.1754, 1759, 1763, 1799 (irrelevant and prejudicial testimony elicited from Virginia Nimer who discovered the bodies); T.1812 (testimony

elicited from Tama Zaydon).

Appellate counsel was ineffective for failing to challenge comments made by the prosecutor that impermissibly shifted the burden of proof. 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 was too sick. T. 3356. By so arguing to the jury, the State completely erased any curative effects of Detective Venturi=s testimony that he thought the interview was stopped because Mr. Rodriguez was sick. This was an improper reference to the jury 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.

Throughout the entire trial, the prosecutor made comments to inflame the jury including during his closing argument where he improperly told the jury that it was their duty to find the "Truth" and send a message to Mr. Rodriguez and implicitly to the rest of the community. "The people who are involved in that crime **have to be punished**. And the only way that could happen is for a juror to return a **truthful verdict**. Nobody should be allowed to escape conviction for a crime like that if they actually committed it. **That would be wrong**." T. 3405-06; see also T. 3300, 3407-3408. The prosecutor also improperly argued that the jury's

responsibility was to seek "justice for the victims." T. 3303. Such appeals have consistently been held to be improper. See Urbin v. State, 714 So. 2d 411 (Fla. 1988).

The State improperly attacked defense counsel. Lewis v. State, 780 So. 2d 125 (Fla. 3d DCA 2001). The "prosecutor may not ridicule a defendant or his theory of defense." Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990), citing Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987). The prosecutor repeatedly and improperly argued that the defense was attempting to "trick" the jury: "This is a serious matter. It is not about **yanking your chain.**" T. 3301 "**It is not my job to trick you, to mislead you**, to shout, to yell, to confuse you, to call people liars. Name calling is not part of the evidence in this case." T. 3314; see also T. 3342, 3313, 3349.

B. Appellate counsel's failure to challenge the prosecutor's conduct on appeal was ineffective.

Improper prosecutorial comments and misconduct are properly raised on direct appeal. See Cherry v. State, 781 So. 2d 1040 (Fla. 2003). The failure to properly object at trial does not preclude raising this claim on direct appeal. See Urbin v. State, 714 So. 2d 411 (Fla. 1988). Appellate counsel was prejudicially deficient for failing to effectively address the prosecutorial misconduct that

occurred in Mr. Rodriguez's trial.[12]

Appellate counsel did challenge some comments on Mr. Rodriguez's right to remain silent and burden-shifting that this Court determined was error, Rodriguez at 39; there was no possible strategic reason for failing to present the total, cumulative picture on appeal. See Kyles v. Whitley, 514 U.S. 419 (1995); see also Peterson v. State, 376 So. 2d 1230, 1234 (4th DCA 1979) ("contents of the [prosecutorial] final argument, taken as a whole, were such as utterly to destroy the defendant's most important right under our system"). Appellate counsel was ineffective for failing to raise this claim on direct appeal because the combination of these errors "reaches down into the validity of the trial itself" to the extent that the death sentence would not have been obtained without the assistance of errors. See Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996).

CLAIM V

APPELLATE COUNSEL WAS INEFFECTIVE UNDER THE SIXTH AMENDMENT FOR FAILING TO CHALLENGE THE TRIAL COURT'S ERRONEOUS RULINGS THAT WERE IN VIOLATION OF FLORIDA AND FEDERAL LAW

A. Failure to challenge the limitations on cross-examination that deprived Mr. Rodriguez of a fair trial.

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[12] See also Claim II, Sections D and E, supra, regarding prosecutorial misconduct during the penalty phase.

1. LIMITATIONS ON CROSS-EXAMINATION

Repeatedly throughout Mr. Rodriguez's trial, the court sustained State objections to questions defense attempted to ask on cross-examination of State witnesses. The Sixth Amendment right of cross examination of State witnesses has been recognized by the United States Supreme Court as "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). "[C]ross-examination… is beyond any doubt the greatest legal engine ever invented for the discovery of truth." Ford v. Wainwright, 106 S. Ct. 2595, 2605 (1986), quoting 5 Wigmore, Evidence Section 1367 (Chadbourn rev. 1974). Although objections to the restrictions on cross were clearly on the record, appellate counsel did not raise this issue on direct appeal. Appellate counsel's performance deficient and the failure to raise the limitations prejudiced Mr. Rodriguez on his appeal.

a. Limitations on the cross-examination of Anastasia Rodriguez.

Luis Rodriguez's mother, Anastasia Rodriguez, was allowed to have special visits with her son at the police station while he awaited trial on this triple-homicide. Defense counsel was precluded from highlighting to the jury exactly what the nature was of the visits and treatment Luis Rodriguez was receiving from the police officers and state attorneys in this case. T. 2125-2126. This prejudiced

Mr. Rodriguez especially because the State downplayed the significance of the special visits in testimony and closing arguments:

> 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.

b. Limitations on the cross-examination of Officer Nyberg.

Despite Officer Nyberg's physical presence during the removal of the bullets at the autopsy, the Court sustained the State's objection and prohibited defense counsel from questioning Officer Nyberg on the removal of the bullets and the discrepancies in the paperwork relating to the bullets. T. 2387. Defense counsel was also precluded from asking the officer about his knowledge of what Detective did with the electronic eavesdropping equipment that he took to Orlando. T. 2391. A police officer's role in investigating a crime is always relevant on cross.

Additionally, defense counsel was precluded from asking Officer Nyberg about *whether or not he saw Luis Rodriguez present at the homicide department's Christmas party or a birthday party*, stating "if this is going where I think it is,

sustain." T. 2390. The special accommodations afforded to Luis Rodriguez were a key issue in the case:

> [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?

T. 3367 (State's closing argument).

c. Limitations on the cross-examination of Detective Smith.

The court barred defense counsel from cross-examining Detective Smith on his knowledge of the relationship between Luis Rodriguez and the state attorneys and law enforcement. The court sustained the State's objection and precluded defense counsel from eliciting testimony about what his knowledge was of Luis Rodriguez's visits with his family and his wife. T. 3183-84.

d. Limitations on the cross-examination of Isidoro Rodriguez.

Isidoro was a suspect for this crime and the co-defendant, Luis Rodriguez's, brother, however the trial court kept defense counsel from fully cross-examining him on his knowledge of the crime and the suspects. The trial court sustained the State's objection precluding the defense from asking Isidoro Rodriguez whether he knew if his brother Luis had killed anyone. T. 2506.

The trial court excluded questioning that related to Rafael Lopez, who the witness had intimate knowledge of, as a violent person and potential suspect in this case. T. 2507-2512. Rafael Lopez was the police informant witness who turned Luis Rodriguez into law enforcement using crime stoppers, participated in being bugged for conversations with Luis Rodriguez, and acted as an informant to the police.

e. Limitations on cross-examination of Detective Loveland.

The trial court sustained the State's objection precluding the defense from eliciting testimony about the detective's investigation in the Joseph's criminal record for exporting one hundred and two firearms. T. 1845. Significantly, there were never any guns recovered for the homicides in this case. The detective's knowledge of the victim's federal record of exporting firearms to Lebanon was highly relevant to the issue of the murder weapons used to commit the homicides as well as the possibility that someone else committed the crime.

f. Limitations on the cross-examination of Officer Casey.

The trial court sustained the State's objection precluding the defense from eliciting testimony relating to Officer Casey's knowledge of the blood present on the handkerchief that he recovered from Samuel Joseph at the scene of the crime, information relating to the additional bullet that was recovered from the crime

scene, and the latent fingerprint lifts that were specifically taken by the officer. T. 1948, 1976-1977, 1950.

As a result, defense counsel was precluded from eliciting testimony from the witness pointing out the fact that blood found on the handkerchief was not Mr. Rodriguez's but in fact, blood of the victim, Bea Joseph. T. 1948. Nor was the defense permitted to elicit testimony relating to the additional bullet that was recovered and the significance of the additional crime scene investigation that took place in other apartments of the building and firearms testing conducted at the crime scene. T. 1976-1977. Defense counsel was also prohibited from emphasizing through Officer Nyberg that none of the fingerprints matched Mr. Rodriguez. T. 1950.

g. Limitations on the cross-examination of Detective Venturi.

The court precluded the defense from presenting a complete defense by restricting cross-examination of the detectives regarding their investigations in the Joseph's police record and their known arms dealing. T. 2197. Detective Venturi told the jury that he learned that the Joseph's had been victims before in an exceedingly similar crime where they were assaulted in the home. T. 2194. In fact, the Miami-Dade police department was examining a number of leads in relation to this homicide when Detective Venturi left the office. Id. Information relating to

the Joseph's record in arms dealing is relevant to the investigation and puts in context the likelihood that there were other suspects who may have committed the crimes.

h. Limitations on the cross-examination of Maria Malakoff.

Maria Malakoff was a key player at the trial: she was Manuel Rodriguez's common-law wife and stepsister to both Luis and Isidoro Rodriguez. First, the court prohibited the defense from asking any questions about her prior statement regarding Mr. Rodriguez's alibi the night of the homicide. T. 2717-2725. This was prejudicial in that the State later argued the impeachment evidence as substantive evidence. Further, this Court upheld two aggravating factors on direct appeal based, in part, on Ms. Malakoff's prior inconsistent statements. Rodriguez, 753 So. 2d at 46-47. The Court also precluded the defense from questioning Ms. Malakoff on any details about her stepbrother Isidoro Rodriguez who was a potential suspect in this crime. T. 2728.

2. THE FAILURE TO APPEAL THE SIXTH AMENDMENT VIOLATION OF THE RIGHT TO CONFRONTATION RESULTED IN PREJUDICE

A state evidence rule may not be applied mechanistically to defeat a criminal defendant's right of confrontation. Chambers v. Mississippi, 410 U.S. 394 (1973).

Moreover, a state may not arbitrarily limit a defendant's ability to either secure favorable evidence or limit the evidence a defendant can present. Holmes v. South Carolina, 126 S. Ct. 1727 (2006). Many of the objections were sustained on the grounds that the cross-examination went "beyond the scope of direct." T. 1948, 1976-1997, 1950, 2125-2126, 2197, 2194, 2387, 2391, 2506, 2507-2512, 3183-84. However, this rule cannot be so mechanically applied. Nor can the defense be precluded from asking questions exploring the adequacy of police investigation.

The striking contrast between the rulings regarding questions the defense wished to ask on cross-examination of State witnesses and the rulings on questions the State was permitted to ask its witnesses indicates the unfairness of Mr. Rodriguez's trial. The state was repeatedly permitted to ask questions from the detectives and witnesses regarding Isidoro Rodriguez and his potential involvement in this case and Luis Rodriguez's State deal and privileges to secure his testimony against Mr. Rodriguez. However, the defense was improperly precluded from asking questions, which would have modified, supplemented, contradicted, rebutted, or made clearer the facts presented by the State. Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978).

The Petitioner was further prejudiced because the trial court precluded defense counsel from arguing during closing arguments that defense counsel was

restricted from bringing out information through witnesses on cross examination. T. 3268-3270. "There are few subjects, perhaps, on which [the Supreme] court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-405 (1965). Appellate counsel was prejudicially deficient in failing to challenge the denial of the right to confront witness on direct appeal. Given the numerous areas that the defense from precluded from exploring, the convictions should have been reversed.

B. It was error to allow the State to call witness Maria Malakoff to the stand for the express purpose of impeaching her prior statement and then to allow the State to argue that impeachment testimony as substantive evidence.

Appellate counsel challenged the trial court's reliance on Malakoff's impeachment and police statement as substantive evidence when he challenged the trial court's finding of the "avoid arrest" aggravator. Dir. App. Br. at 98. This Court held that the trial court did not abuse its discretion in relying on the prior inconsistent statement as substantive evidence for the purposes of sentencing. Rodriguez, 753 So. 2d at 47. This Court stated unequivocally that pursuant to Florida Statute Section 90.608 (1997), the impeachment "could not be not be used

as substantive evidence against Rodriguez" in the guilt phase. Id. Yet, that is precisely what occurred. Appellate counsel inexplicably failed to challenge the trial court's erroneous ruling permitting the impeachment; consequently, this Court did not address the admissibility of the testimony or the fact that the state *argued the impeachment evidence as substantive evidence in the state's closing argument to the jury during guilt phase.*

A party may not knowingly call a witness for the primary purpose of impeaching with an otherwise inadmissible prior statement. Morton v. State, 689 So. 2d 259, 264 (Fla. 1997).[13] In making this determination, the following factors should be considered: (1) whether the witness's testimony surprised the calling party, (2) whether the witness's testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of de minimis substantive value. See James v. State, 765 So. 2d 763, 766 (Fla. 1st DCA 2000).

The *sole purpose* of calling Malakoff was for the purpose of impeaching her with her prior inconsistent statement. T. 2674-2685. The State'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.

Malakoff attempted to invoke her Fifth Amendment right not to testify but

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[13] Receded from on other grounds in Mr. Rodriguez's direct appeal opinion, Rodriguez v. State, 753 So. 2d 29 (Fla. 2000).

was ordered to do so by the trial court, over defense objection. T. 2674-2687. Clearly, the State was not surprised by Malakoff's testimony on the stand: the prosecutor immediately began going through her previous statement at the outset of her testimony before asking her one substantive question where she contradicted her prior statement. T. 2692.

Additionally, the state *recalled* Officer Nyberg over defense counsel's objection in order to read into the record Malakoff's prior inconsistent statement for the sole purpose of admitting the hearsay evidence under the guise of impeachment to present the statement as substantive evidence to the jury. T. 3303, 3047-3058; see Florida Statute Section 90.801(2)(a)(2007). The State improperly relied upon the statement as substantive evidence during closing argument. T. 3050-3052, 3378.

During closing argument the State argued the prior inconsistent statement as substantive evidence:

> 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. Later the prosecutor, in the attempt to sway the jury to disregard the jury

instruction that the jury is only to consider the prior statement for purposes of impeachment, argued:

> 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.

Appellate counsel was prejudicially deficient. The state improperly argued the impeachment as substantive evidence during the guilt phase closing argument. The prejudice that resulted was not only the convictions but the sentences of death as well.

CLAIM VI

ON DIRECT APPEAL, THIS COURT FAILED TO CONDUCT A PROPER HARMLESS ERROR ANALYSIS

A. Harmless error standard.

Adopting the test set forth in Chapman v. California, 386 U.S. 18 (1967), this Court held:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no

reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The test "is to be rigorously applied." Id. at 1137.

> **The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.** Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id. at 1139 (emphasis added). The Writ of Habeas Corpus is the proper vehicle for raising a challenge to this Court's direct appeal harmless error analysis under Chapman. See Shere v. State, 742 So. 2d 215, 218 n. 7 (Fla. 1999).

B. Errors recognized on direct appeal.

"[T]he Fifth Amendment. . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609 (1965). On direct appeal, this court determined that the prosecutor's comments during the closing argument were improper but held that the error was harmless because "…**[T]he evidence presented to the jury in this case included Manuel Rodriguez's admission that he was present in the apartment, as well as other numerous inculpatory remarks.** Rodriguez at 39 (emphasis added). Also, this court determined that references to collateral crimes were erroneously admitted but nonetheless,

concluded that the errors were harmless.[14] Id. at 43.

In Goodwin v. State, 751 So. 2d 537 (Fla. 1999). this Court stated:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Id. at 540 (citations omitted). The State was required to "prove beyond a reasonable doubt that the [the errors] did not contribute to the conviction." Diguilio, 491 So. 2d at 1135; see also Arizona v. Fuminate, 111 S. Ct. 1246 (1991).

On direct appeal, Mr. Rodriguez challenged the admission of hearsay statements attributed to jailhouse snitch Alejandro Lago which suggested that Mr. Rodriguez was faking his mental illness and used his medications to get high. T. 4066-67, 4073. This Court determined that the admission of the testimony was erroneous especially because the hearsay was presented by a "potentially more credible police officer." Rodriguez at 44. However, this Court erroneously determined that this admission was harmless error "… given the number of strong aggravators in this case and the conflicting testimony as to Manuel Rodriguez's

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[14] Detective Venturi improperly referenced the fact that Mr. Rodriguez had a police "ID number" and Detective Crawford erroneously and improperly stated that Mr. Rodriguez used ten aliases. T. 2199.

mental health, including some testimony that he was a malingerer." Id. at 45. The reliance on the testimony that Mr. Rodriguez was a "malingerer," in light of the lower court finding that he was mentally ill was inappropriate. R. 1783-84. The appellate court may not substitute its own judgment for that of the trial court. See Diguilio, 491 So. 2d at 1139.

In addition, this Court held the trial court's erroneous consideration of the fact that the murder was committed during an armed burglary and was also committed for pecuniary gain as two separate aggravators was harmless error. Id. at 46. "Regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weigh process in favor of death." Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); see also Stringer v. Black, supra.

The failure to conduct a proper harmless error analysis resulted in the arbitrary and capricious imposition of the death sentences. Parker v. Dugger, 498 U.S. 308 (1991).

CONCLUSION

For the foregoing reasons and in the interest of justice, Mr. Rodriguez respectfully urges this Court to grant habeas corpus relief.

CERTIFICATES OF SERVICE AND COMPLIANCE

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

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

_____
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