IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1314

MANUEL ANTONIO RODRIGUEZ,

Petitioner,

v.

JAMES MCDONOUGH, Secretary
Florida Department of Corrections,

Respondent.

REPLY TO STATE'S REPONSE TO PETITION FOR HABEAS CORPUS

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INTRODUCTION

Mr. Rodriguez submits this Reply to the State's Response to Petition for Habeas Corpus. Mr. Rodriguez will not reply to every argument raised by the State. However, Mr. Rodriguez neither abandons nor concedes any issues/and claims no specifically addressed in this Reply. Mr. Rodriguez expressly relies on the arguments made in the Petition for Habeas Corpus for any claims and/or issues that are only partially address or not address at all in this Reply.

Additionally, Mr. Rodriguez addresses here the State's numerous assertions that Mr. Rodriguez's claims were not properly preserved for appellate review. This court should reject the State's piecemeal approach to the various errors that occurred during Mr. Rodriguez's guilt and penalty phases, both fraught with errors. This case involves serious allegations of prosecutorial misconduct and violations of clearly established federal law by the trial court. While Mr. Rodriguez does not concede that trial counsel did not make the necessary contemporaneous objections, regardless of whether there were "on the record" objections, appellate counsel had the duty to raise claims that constituted fundamental error.

Fundamental error is defined as that which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996), cert. denied, 522 U.S. 834 (1997). As Mr. Rodriguez's trial was

fraught with errors that included improper comments by the prosecutor, unconstitutional rulings by the trial court, appellate counsel's failure to present the meritorious issues discussed in his petition demonstrates that the representation of Mr. Rodriguez involved serious and substantial deficiencies. Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and cumulatively, Barclay v. Wainwright, 444 So. 2d 957, 959 (Fla. 1984), the claims omitted by appellate counsel establish that confidence in the correctness and fairness of the result of Mr. Rodriguez's appellate proceeding has been undermined. In light of the serious reversible error that appellate counsel never raised, a new direct appeal should be ordered, and these errors must be considered cumulatively. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

A. ARGUMENT IN REPLY TO CLAIM I: 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

The State's entire argument with respect to penalty phase errors, specifically the trial court's exclusion of relevant mitigation evidence, missed the point of Mr. Rodriguez's claim. The State refused to acknowledge that the Eighth Amendment requires admitting and giving effect to all evidence relevant to establishing mitigation. 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 question that is raised is whether appellant counsel failed in his duty to challenge the trial judge's rulings to exclude relevant evidence in violation of clearly established federal law. Not only did the State fail to properly analyze the trial court's rulings that Mr. Rodriguez argues are incompatible with both Lockett and Tennard, the State did not even acknowledge Mr. Rodriguez's reliance upon these cases two seminal case. Instead, the state either merely reasserted the same faulty reasoning cited by the trial court as to why the mitigation evidence was properly excluded or conveniently alleged that that the issues were not properly reserved for appellate review.

However, the State admitted that Mr. Rodriguez was denied the opportunity to present relevant mitigation evidence to the jury. Response at 16. As argued in Mr. Rodriguez's Petition, defense counsel, Mr. Eugene Zenobi was prohibited from presenting mitigation evidence through Mr. Rodriguez's sisters, Ana Fernandez and Mayra Molinet. This testimony would have demonstrated to the jury both the severity of Mr. Rodriguez's mother's mental illness and establish that multiple generations of Mr. Rodriguez's family suffered from significant mental illness. See Petition at 7-12. Specifically, as proffered by Mr. Zenobi, evidence of intergenerational and hereditary mental illness would have rebutted the State's

argument that Mr. Rodriguez did not suffer from any mental illness whatsoever. Id. Indeed, Mr. Zenobi strenuously argued against the trial court's rulings that he was required to provide a medical link between Mr. Rodriguez's mental illness and the fact that Mr. Rodriguez's mother, two sisters, in addition to his young niece who had been diagnosed with clinical depression by the age of nine and prescribed Prozac as part of her treatment, battled significant mental illness throughout their lives just as Mr. Rodriguez had. Id.

The State confirmed that the trial court excluded the evidence on the basis that Mr. Zenobi failed to provide an explicit medical link relating to hereditary mental illness. Response at 13, 15. Nevertheless, in an attempt to undermine the importance of these exclusions, the State argued that the excluded evidence was merely a "tidbit" of information the jury was kept from learning and alleges that Mr. Zenobi failed to properly object to trial court's ruling imposing on Mr. Zenobi what appears to be "super objection. Petition at 13, 16.

With respect to the alleged failure by Mr. Zenobi to preserve the issue for appellate review, the record is clear, the State simply ignores the lengthy arguments where Mr. Zenobi fought to have this evidence included. During Ms. Fernandez's testimony, 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.:

> So what I am trying to do is establish that it exists in the first generation and that is only the only way I can, through suicide attempts, and then eventually to the …children, and then eventually to the grandchildren…

T. 3868. Mr. Zenobi went on to argue to the trial court during Ms. Molinet's testimony as why it was both 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. Mr. Zenobi went on to explicitly proffer to the trial court the substance of Ms. Molinet's testimony. Id. The State attempts to assert that Mr. Zenobi is required to make what appears to be a "super objection" in order to preserve erroneous rulings by the trial court for appellate review.[1]

With respect to error committed by the trial court, the State merely restates the trial court's improper reasoning for excluding the relevant mitigation evidence.

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[1] Pursuant to Florida Statute § 924.951(1)(b) (2000), "preserved" means an issue or legal argument timely raised and ruled on by the trial court, that is "sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefore." Further, the entire purpose of requiring a contemporaneous objection is to allow the trial court to correct errors. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Clearly, Mr. Zenobi's lengthy and strenuous arguments over the trial court's improper rulings meet this standard. Whether or not Mr. Zenobi, specifically uttered the word "objection" is not required when the trial court made it clear to Mr. Zenobi that it would not allow the testimony. "A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless." See Brown v. State, 206 So. 2d 377, 384 (Fla. 1968), citing Birge v. State, 92 So. 2d 819 (Fla. 1957); see also Layman v. State, 728 So. 2d 814 (5th DCA 1999) (objection unnecessary where court understood defendant's position and debate would have been futile).

Contrary to the State's contention, the tenants of the Eighth and Fourteenth Amendments do not require that a defendant show a "medical link to some hereditary mental illness" in order for mitigation evidence to meet the criteria for what is relevant and admissible. As Mr. Zenobi argued:

> Just because there is not medical testimony, it doesn't mean there are no severe circumstances which fix generation upon generation, and in this case we plan to show that.

T. 3869. Indeed, the Eighth and Fourteenth Amendment 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).

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). It is clear that the testimony regarding the mother's suicide attempt and Mr. Rodriguez's niece's diagnosis of depression meet this **low** constitutional threshold. The information that Mr. Zenobi attempted to elicit through Mr. Rodriguez's sisters demonstrated the pervasiveness and history of mental illness throughout Mr. Rodriguez's family. Just as in trial, the State here makes much of expert testimony regarding whether Mr. Rodriguez was a malingerer. However, the State conceded that despite any testimony that Mr. Rodriguez exaggerated his symptoms; the experts agreed that Mr. Rodriguez suffered from mental illness. Response at 18. The evidence by the family would have directly corroborated Mr. Rodriguez's diagnoses and unequivocally undermined the State's argument that Mr. Rodriguez was faking his illnesses.

Additionally, 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. Therefore, the State's reliance on Hill v. State, 515 So 2d. 176 (Fla. 1987) is misplaced. In Hill, this Court ruled that testimony relating specifically to the defendant's father's current poor health and job responsibilities were not relevant to the defendant's character. Id. at 178-179. The trial court's exclusions were affirmed for those limited reasons. Id. However, in Mr. Rodriguez's case, the

circumstances of the defendant's background and family history are directly relevant. This is not a case where trial counsel was attempting to put on testimony that Mr. Rodriguez's mother suffered from cancer or diabetes.[2] Rather, the testimony regarding Mr. Rodriguez's mother's suicide and a nine-year old child's diagnosis of a major mental disorder would have explained for the jury the history of mental illness in Mr. Rodriguez's family and illustrated the degree of severity that was suffered by each family member. Thus, the sisters' testimony was directly relevant and must be considered as mitigation. See eg. 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.

B. ARGUMENT IN REPLY TO CLAIM III: WHETHER APPELLATE COUNSEL WAS INEFFECTIVE TO CHALLENGE THE DENIAL OF THE MOTION TO SUPPRESS PETITIONER'S STATEMENTS

With regards to Mr. Rodriguez's claim that appellate counsel was ineffective in failing to challenge the trial court's denial of the motion to suppress statements, the State failed to recognize that Mr. Rodriguez has alleged two ***separate*** claims in both his post conviction appeal and his Petition for Habeas Corpus. Mr. Rodriguez's claim that ***trial counsel*** was ineffective in litigating the suppression of Mr. Rodriguez's statements is mutually exclusive from appellate counsel's failure

[2] However, it should be noted that the State was permitted to put on highly prejudicial victim impact testimony regarding the victim's battle with cancer. T. 1719-1720.

to challenge the ***trial court's*** improper denial of the motion to suppress. Despite the State's assertions, Mr. Rodriguez's claim is not an attempt to litigate trial counsel's failures during the litigation of his motion to suppress but rather Mr. Rodriguez's claim is specific to the issue that appellate counsel was ineffective for failing to challenge the trial court's erroneous ruling.

In addition, the State fails to understand the duties of appellate counsel in a ***capital case***. 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). The State never fails in its consistency throughout post-conviction appeals to remind the Court that a defendant is procedurally barred from raising a claim because appellate counsel has failed to properly raise an issue on appeal. Likewise, the suggestion by the State that appellate counsel's failure to challenge the improper denial of a motion to suppress was merely an effort to "winnow out" a weaker claim is outrageous. As stated by the United State's Supreme Court in Arizona v. Fuliminante, 499 U.S. 279 (1991):

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can

> be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." [CITATION OMITTED]

Id. at 296.

More importantly, the trial court clearly misapplied Colorado v. Connelly, 479 U.S. 157 (1986) in denying Mr. Rodriguez's motion to suppress. Just as the trial court did, the State clearly missed the point of the voluntariness issue and the implications of police coercion discussed in Connelly. It must be first understood that under Miranda v. Arizona, 394 U.S. 436 (1966), custodial interrogations are ***inherently coercive:***

> [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.

Id at 455. Additionally, this Court outlined the factors used to determine 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**, 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). There simply is no requirement for extraordinary police tactics, as the State suggested, placed upon custodial interrogations. Response at 29.

With respect to the waiver, what both the trial court and now that State misunderstood with regards to Connelly, are the links between mental illness, voluntariness, waiver, and *state action*. Contrary to the State's assertion, whether there has been state action when a mentally ill defendant offers a Miranda waiver is critical. In Connelly, a mentally ill defendant approached the police officer of his own volition and **solely** to offer a statement in connection with the crime, *without any prompt or interference by the police*. Colorado v. Connelly, 479 U.S. at 160, 165 - 167. One might describe Mr. Connelly's behavior as the epitome of voluntary. It was upon this key fact that the Supreme Court ruled that absent **heightened** coercive tactics by the police, the defendant's mental illness would not

taint the voluntariness of his waiver and subsequent incriminating statements to the police. Id.

Except for the fact that both Mr. Rodriguez and the defendant in Connelly both suffered from mental illness, the facts of each respective case could not be more different. As detailed in Mr. Rodriguez's Petition, the Miami-Dade County Police initiated the contact with Mr. Rodriguez when they picked Mr. Rodriguez up from the mental health prison facility, Tomoka Correctional Institution , and proceeded to engage in interrogating him and procuring a waiver with the explicit knowledge that Mr. Rodriguez was being actively treated for severe mental illness. See Petition at Claim III.

Additionally, the critical role of Mr. Rodriguez's illegally taken statements in his conviction is obvious. At trial, the State relied heavily on Mr. Rodriguez's statements as a critical piece of evidence to secure his conviction. T. 3305, 3315-3316. On direct appeal, this Court relied upon the statements when it 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 v. State, 753 So. 2d 29, 39 (Fla. 2000) (emphasis added). To argue that Mr. Rodriguez's coerced statements should be rejected as harmless error and

undermine the gravity of the admission of these statements, the State offers a completely illogical argument and misconstrues the holding of Arizona v. Fuliminante. Response at 29.

The State incredibly argues that the admission of the coerced statements is harmless error simply because the jury heard the statements through Detective Smith, one of the Detectives *responsible* for interrogating Mr. Rodriguez. In Arizona v. Fuliminante, the defendant gave a separate confession that was found to be admissible, thus providing an *additional, separate, and legal source* for the information. Arizona v. Fuliminante, 499 U.S. at 312. It was upon this key issues that the Supreme Court ruled that the improper admission of the defendant's statement was harmless error. As cited to by the State in their response, what the jury heard at Mr. Rodriguez's trial were the admissions that were specifically taken *during the interrogation in question.*

In further support, the State incredibly relies upon the fact **that the jury heard the *substance* of Ms. Malakoff's prior statement as additional evidence of Mr. Rodriguez's admission**. Response at 29. Ironically, the State argues in its response to Claim V of Mr. Rodriguez's Petition the State did not improperly argue Ms. Malakoff's prior statement as substantive evidence because it had been ruled upon and instructed by the trial court to be considered "impeachment evidence." ***Yet, here the State explicitly relies upon the substance of the Ms.***

Malakoff's prior statement.[3] In sum, absent the admission of Mr. Rodriguez's illegally taken statements to the police, there is **no other independent** source upon which the State can rely for a harmless error argument. Had the statements been properly suppressed it is clear that not only the outcome of the trial would have been different but presumably this Court's decision in affirming Mr. Rodriguez's appeal would have resulted in a different analysis.

CONCLUSION

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

[3] This argument confirms the improper argument offered by the prosecutor at trial. It was the State's position and its intention that Ms. Malakoff's prior statement was admissible as substantive evidence at trial. That is precisely what occurred and this improper argument is continued by the State in its Response.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to State's Response to Petition for Writ of Habeas Corpus 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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