IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-99

JUAN DAVID RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT 1

THE LOWER COURT ERRED IN DENYING MR. RODRIGUEZ A NEW PENALTY PHASE AFTER THE EVIDENTIARY HEARING

A. TRIAL COUNSEL'S CONSTITUTIONALLY INADEQUATE INVESTIGATION

> Mr. Rodriguez' lack of education and poor performance on the Bender Gestalt Visual Motor test raised the possibility that he may be suffering an organic brain syndrome. The presence or absence of such a disorder is best made following a complete neurological and neuropsychological test examination.

(Report of Dr. Leonard Haber, PCR Supp. 1920)(emphasis added).

The State contends that trial counsel's failure to investigate and present evidence of Mr. Rodriguez' brain damage, low IQ and mental retardation was not ineffective. With regard to Mr. Rodriguez' brain damage, the State contends that Mr. Rodriguez' counsel "did, in fact investigate and present all appropriate and applicable investigation." This contention is however clearly refuted by record of both Mr. Rodriguez' trial and by the post conviction evidentiary hearing.

The State bases its position on the fact that Dr. Haber, the court appointed expert, "recommended further neurological examination for Defendant due to the possibility of organic brain syndrome" and that the neurological examination conducted by Dr. Noble David showed nothing to indicate brain damage. However, the State omits to note that Dr. Haber had in addition recommended neuropsychological testing, testing which was never performed prior to Mr. Rodriguez' penalty phase. As Dr. Haber had noted in his report,

> Mr. Rodriguez' lack of education and poor performance on the Bender Gestalt Visual Motor test raised the possibility that he may be suffering an organic brain syndrome. <u>The presence or absence of such a disorder is best made following a complete neurological and neuropsychological test examination.</u>

(PCR Supp. 1920)(emphasis added).

Neuropsychological and neurological tests are not, as the State assumes, interchangeable. The two forms of testing do not function as substitutes for one another but are separate and distinct disciplines, conducted by different professionals. Furthermore, as Dr. Haber testified in his deposition, an EEG would not necessarily identify brain damage and that neuropsychological testing would be the recommended course of action.

> ..this is the full range of what can be done: a neurologic examination which probably would be negative. I'm not making an absolute prediction, but the likelihood is it would be negative because those examinations do not usually show positive results in the absence of other history. A brain scan, EEG, which might or might not be negative, but possibly it would be negative, also, <u>and a neuropsychological examination which has the best chance of being positive because it tests discrete functions which in an individual with this kind of performance might show out with some range of impairment.</u>

(PCR. Supp.1972)(emphasis added).

The trial record is unequivocal. Dr. Haber recommended neurologic testing, including EEG, together with neuropsychological testing. As Dr. Haber himself pointed out, brain damage cannot be ruled out without neuropsychological testing. Trial counsel's failure to request neuropsychological testing meant that easily available evidence was not presented to the trial judge or jury.

Dr. Haber's recommendation of neuropsychological testing was further supported by Dr.

Latterner's evidentiary hearing testimony which confirmed the need for such testing. At the evidentiary hearing she testified that a normal EEG in no way proves the absence of brain damage.

> [by Mr. Strand] So the brain operates like a hologram. Does this mean that you can't determine exactly where the damage is physically to the brain? Is it like there is a lesion in the brain or.. ?
>
> [by Dr. Latterner] You can determine exactly where it is, if you have a structural piece of evidence, such as an MRI, or PET scan, or specifics.
>
> [Q.] What about an EEG? Would an EEG measure the deficit that Mr. Rodriguez had exhibited incompetence?
>
> [A.] No. The EEG measures, usually its a surface EEG, and it neurologically assists in the brain and as a practical matter is used to route (sic) out seizure activity.
>
> ***
>
> [Q.] Could a person who maybe has a normal EEG, is it possible that they could do poorly and show organicity due to brain damage under psychological testing?
>
> [A.] Yes.
>
> [Q.] Would it be unusual?
>
> [A.] No.

(T. 126-127 Volume 10)(emphasis added).

The issue of whether or not Dr. Noble David found brain damage as a result of his neurological examination is entirely irrelevant. Both Dr. Haber and Dr. Latterner opined that neurologic testing including EEG examination, standing alone, would not necessarily rule out a diagnosis of organic brain damage. Only neuropsychological testing could have resolved the issue. The undisputed fact remains that Mr. Rodriguez' trial counsel did not follow up on Dr. Haber's recommendation for neuropsychological testing, and thus

did not conduct an adequate investigation into Mr. Rodriguez' brain damage, to his substantial prejudice. Dr. Latterner's finding of brain damage, based on her thorough neuropsychological examination of Mr. Rodriguez is refuted neither by Dr. Haber's evidentiary hearing testimony nor his report and deposition at the time of Mr. Rodriguez' penalty phase.

The State now contends that trial counsel was not ineffective for failing to investigate Mr. Rodriguez' low IQ and mental retardation. Its argument is based on the fact that Dr. Haber opined that Mr. Rodriguez is "clearly not mentally retarded". However the State ignores the fact that Dr. Haber conducted no form of psychoeducational testing and at no time offered an opinion as to Mr. Rodriguez' level of intellectual functioning. In fact, during his 1990 deposition, Dr. Haber went out of his way to disavow any opinion on Mr. Rodriguez' intelligence:

> I would--I would have trouble describing him as reasonably intelligent, and I wouldn't even try to estimate his intelligence. I would say he's able to read and write.
>
> ***
>
> I would not want to give an estimate as to his intelligence because I know the right way to do that is to administer a formal intelligence test which given some time could be done.
>
> ***
>
> He may be less than average intelligence.

(PCR. Supp. 665)(emphasis added).

The record reflects that at no time did Dr. Haber perform any psychoeducational testing to determine Mr. Rodriguez" intelligence levels. His testimony does not refute Dr. Latterner's finding of an IQ of 64, within

the range of mild mental retardation.

The State's assertion that Dr. Haber's deposition testimony shows that "he was certainly not retarded" (Answer Brief at 29), is also a mischaracterization of the DSM-IV[1] definition of retardation. As Dr. Latterner testified at the evidentiary hearing, according to the DSM-IV, for a patient to be diagnosed as mentally retarded, three criteria must be met: (1)IQ below 70; (2) deficits in adaptive functioning, and (3) onset before age 18. See T. 143, Volume 10). Dr. Latterner further testified that to meet the DSM IV criteria for impaired adaptive functioning:

> ..at least two of the following areas need to be impaired --and impaired meaning they are referring to the standard expected for his or her age, by his or her cultural group.
>
> These are the areas: Communication; self care; home living; social/interpersonal skills; use of community resources; self direction; functional academic work; leisure; health and safely.

(T. Volume 10. 143)

As noted in Mr. Rodriguez' initial brief, Dr, Latterner found, as a result of her objective neuropsychological tests, that Mr. Rodriguez was impaired in the areas of communication and functional academic skills, and therefore met the DSM-IV requirement of impaired adaptive functioning.

The portions of Dr. Haber's deposition which, according to the State show that "Defendant's mental and cognitive functioning was sufficient and that he was certainly not retarded" refer to Mr. Rodriguez' ability to write, and Dr. Haber's opinion that "he had sufficient alertness and sufficient intelligence that I regard him to be competent to proceed to trial". As explained supra, the DSM-IV definition equates

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[1]The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition).

mental retardation with neither illiteracy, nor competency to stand trial. Once again the State is seeking to redefine the DSM-IV criteria for diagnosing mental retardation to include a requirement that in addition to two areas of impaired adaptive functioning, that the patient must exhibit no areas of non impaired adaptive functioning. This is an inaccurate and misleading interpretation of the DSM-IV requirements.

In addition, the State attempts to show that Mr. Rodriguez is not mentally retarded by reference to his ability to drive a car and obtain a driver's license. In the same vein, the State attempts to refute Mr. Rodriguez' mental retardation by reliance on the testimony of various prison and police personnel who had interacted with Mr. Rodriguez during his time on Death Row. Again, the argument that Mr. Rodriguez' good adaption to prison routine somehow means that he is not retarded flies in the face of the DSM-IV definition of mental retardation. The categories of adaptive functioning detailed above do not include a category of adaptation to prison conditions, nor does good adaptation to prison rule out mental retardation.[2]

The State also asserts that trial counsel was not ineffective for failing to visit Cuba to obtain family background information. The contention is based in part on the lower court's finding that "Mr. Kalisch would not have been permitted to go to Cuba anyway" (PCR. 2724). However, as Mr. Rodriguez has made plain, the court's finding that Mr. Kalisch would not have been granted entry to Cuba is factually incorrect and refuted by the record. At no point in the evidentiary hearing did the State show that it was

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[2] In fact the reverse argument can be made. Adaptive functioning relates to everyday living, and an individual's abilities to make choices relating to daily life. In a prison environment, many of the routine choices of daily life are removed from the inmate and made by the institution. An individual with impaired adaptive functioning may respond well to the structured prison environment since the stress of having to make choices without the mental resources to do so is no longer present.

impossible for Mr. Kalisch to travel to Cuba to investigate Mr. Rodriguez' family background. Mr. Kalisch's evidentiary hearing testimony shows that he merely assumed that he would not be permitted entry by the Cuban authorities and did nothing to investigate the possibility of such travel:

> [by Mr. Strand] Now, did you interview any of or family members in his hometown in Cuba?
>
> [Mr. Kalisch] No, I did not.
>
> [Q.] And were you able to do that at that time?
>
> [A.] I don't know. I didn't make a request to go to Cuba. I had thought at that time we were not able to go down to Cuba.

(T.212 Volume 10)(emphasis added).[3]

The State also attempts to defuse Mr. Rodriguez' position that Mr. Kalisch was ineffective for failing to interview Mr. Rodriguez' family and others in Cuba. The State notes that at the evidentiary hearing, Mr. Rodriguez did not offer any testimony from family members that "Defendant did not fare better at producing the alleged witnesses in this evidentiary hearing" Answer Brief at 36. Again, the State misrepresents Mr. Rodriguez' arguments. The scope of the evidentiary hearing was limited to issues relating to Mr. Rodriguez' mental retardation. In the context of Mr. Kalisch's failure to investigate and develop mental health mitigation, the issue is whether the background information from such witnesses was discovered and made available to the mental health experts. This can be done in a variety of ways - through investigator reports,

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[3] The State's assertion that Mr. Kalisch testified that "he would not be able to travel to Cuba due to the political climate at the time of Defendant's trial" is a mischaracterization of the evidentiary hearing testimony. As the record reflects, Mr. Kalisch did not render any opinion as to the political climate in Cuba at the time of Mr. Rodriguez' trial. He merely stated that he did not think he would be able to travel and thus did not investigate the possibility. The State's attribution of a motive to Mr. Kalisch is improper, not borne out by the record and should be struck.

witness statements or live meetings between the witnesses and the experts. The issue within the narrow scope of the evidentiary hearing is that since Mr. Kalisch did not travel to Cuba, he was not aware of the true extent of Mr. Rodriguez' early developmental and learning problems. He was thus deprived of a valuable source of information that would have led a constitutionally effective attorney to actively investigate the possibility of mental retardation. The issue of whether of not live testimony was presented from the Cuban witnesses is therefore not germane to this point. Since Mr. Kalisch did not gather the family background information, he was not able to pass it on to Dr. Haber. Contrary to the State's assertion, this information was not made available to Dr. Haber.[4]

The State asserts that "Dr. Haber had been provided with some of the information related to Defendant's early life in Cuba, including Defendant's four year tenure in a Cuban prison for deserting the Merchant Marines and Defendant's migration to the United States via the 1979 Mariel Boat Lift." In view of the fact that nobody investigated in Cuba, clearly the vast majority of this information came from Dr. Haber's interview with Mr. Rodriguez and not from collateral sources in Cuba. However, a patient's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a patient's self-report is thus suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's

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[4] By contrast, the background materials that Dr. Latterner was provided with include detailed summaries of interviews with Mr. Rodriguez' mother, father, maternal grandmother, maternal grandfather, three sisters, three aunts, six uncles, five cousins, two schoolteachers, six assorted friends and neighbors and Mr. Rodriguez' former wife. See PCR Supp.1473-1504. These summaries show inter alia that Mr. Rodriguez suffered from long standing developmental and learning disorders and was considered to be retarded as a child.

> previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason v. State, 489 So. 2d 734, 737 (Fla 1986)).

The State asserts that Mr. Rodriguez' reliance on Deaton v. State, 635 So. 2d 4 (Fla. 1994) is misplaced. However, the parallels between this case and Deaton's are strikingly similar. Both cases involve failure by trial counsel to investigate mitigation. In the instant case, trial counsel failed to have neuropsychological testing performed, despite it being recommended by Dr. Haber. He failed to investigate family background which would have shown the extent and severity of Mr. Rodriguez' developmental and other difficulties. He failed to investigate possible causes of Mr. Rodriguez' own eccentric behaviors. As with Deaton, counsel's failures were sufficiently serious to have deprived [Mr. Rodriguez] of a reliable penalty phase proceeding. Deaton at 9. Furthermore, the State ignores the fact that trial counsel did not commence investigation into mitigation until after the guilt phase was over. This, in and of itself, constitutes ineffective assistance. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The State makes much of the fact that Mr. Kalisch moved for, and was granted a two week continuance of the penalty phase. This was however, not due to any desire to seek time to prepare for Mr. Rodriguez' penalty phase, but rather due to Mr. Kalisch's determination he had to work on a plaintiff's personal injury suit in U.S. District Court in Puerto Rico before he could make any attempt to prepare for the Mr. Rodriguez' penalty phase:

> The undersigned would respectfully request a short continuance of the death phase in this case because he has prior commitments to be in Santo Domingo during that week in connection with the mass disaster litigation arising form a fire which occurred in San Juan, Puerto Rico on December 31, 1986. The United States District Court for the District of Puerto Rico has those parties who are settling their claims to obtain releases from their respective clients not later than February 15, 1990. In order to obtain said releases in conformity with the directive sent out by the court, the undersigned must travel to Santo Domingo this week and obtain all of the necessary documentation...

(R.230-231). The extra time was not therefore of any benefit to Mr. Rodriguez' penalty phase.

Finally, the State asserts that Mr. Kalisch's decision not to present any mental health mitigation was strategic, based on the fact that any mental health expert would be subject to cross examination as to Mr. Rodriguez' prior convictions. First of all, Mr. Kalisch was not in a position to weight the relative benefits of the mental health mitigation against any possible detriment of the prior crime evidence coming into evidence, since, as explained supra, he was not aware of the full extent of mental health mitigation available, due to his failure to investigate. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See, Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). See also, Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). Secondly, as the recent case of Williams v. Taylor, 120 S.Ct. 1495 (2000) makes plain, there is no tactical justification to exclude compelling mitigation, merely because some unfavorable evidence might come in as a result:

> ..as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in

> Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession.

Williams 120 S.Ct. 1495 at 1514.

The failure by trial counsel to present the compelling evidence of brain damage, low IQ, mental retardation and the statutory mental heath cannot be attributed to strategy or tactic. Relief is warranted.

B. DR. HABER'S CONSTITUTIONALLY INADEQUATE EVALUATION

The State baldly asserts that there is no reasonable probability that additional information regarding the circumstances of defendant's childhood on Cuba would have affected Dr. Haber's assessment of Defendant as not retarded, insane, or under "extreme mental distress" at the time of the incident. However the State ignores Mr. Rodriguez' assertion that he was not afforded constitutionally adequate mental health assistance due to the complete absence of neuropsychological testing prior to Mr. Rodriguez' penalty phase. Had such testing been performed, evidence of Mr. Rodriguez' severe impairments due to organic brain damage would have been presented to the jury. Similarly, Dr. Haber's 1990 deposition reflects that he neither performed nor requested any psychoeducational or intelligence testing on Mr. Rodriguez despite his concerns about Mr. Rodriguez' low intelligence. Whether or not Dr. Haber considered Mr. Rodriguez to be mentally retarded, the fact that his full scale IQ at 64 is well within the parameters for mental retardation is compelling and could and should have been presented to the jury.

The State makes much of the fact that through Mr. Rodriguez' self report, Dr. Haber was able to glean a small quantum of information about Mr. Rodriguez' early life in Cuba. However, the State's assertion is inconsistent to the point of oxymoron. First of all, as noted supra, self report is inadequate since the patient's knowledge may be distorted by knowledge obtained from family and their own organic or

mental disturbance, and a patient's self-report is thus suspect. Second, and in marked contradiction, the State goes on to state that "as Defendant refused to cooperate with Dr. Haber in providing further information relating to his life in Cuba, Dr. Haber cannot be deemed inadequate for failing to consider such information in his assessment of Defendant" Answer Brief at 38. Whether or not Mr. Rodriguez had fully cooperated with Dr. Haber is not the issue here. The issue is whether trial counsel did adequate independent investigation into Mr. Rodriguez' background and provided such information to Dr. Haber. The record established unequivocally that he did not. As a result of trial counsel's failure to investigate, Dr. Haber's own superficial approach to his evaluation, and trial counsel's failure to follow up Dr. Haber's recommendation that neuropsychological testing be conducted, Mr. Rodriguez was rendered deficient performance of his trial counsel pursuant to Strickland v. Washington, 466 U.S. 668 (1984), as reinforced by Williams v. Taylor, 120 S.Ct. 1495 (2000). He was also denied effective mental health assistance as outlined by Ake v. Oklahoma, 470 U.S. 68 (1985). Due to both Dr. Haber's own cursory evaluation as well as counsel's failure to investigate Mr. Rodriguez' early life in Cuba, Mr. Rodriguez was denied effective mental health assistance at his penalty phase.

The State claims that the fact that Dr. Latterner's subsequent opinion, (more favorable to Mr. Rodriguez than Dr. Haber's) is insufficient grounds to grant a new sentencing. However, again, the State is obdurately ignoring the substance of Mr. Rodriguez' argument. It is not the mere fact of Dr. Latterner's findings that shows that Mr. Rodriguez was offered inadequate assistance by both trial counsel and Dr. Haber, but the qualitative difference in both the testing performed by the respective doctors and the information made available to them. Relief is warranted.

C. PREJUDICE

The State contends that Dr. Latterner could not establish that Mr. Rodriguez was mentally retarded based on her failure to establish that his adaptive functioning was impaired as required by the DSM-IV definition of mental retardation. To reach this position, The State has grossly mischaracterized both Dr. Latterner's testimony and the DSM-IV definition. Firstly, Dr. Latterner testified that Mr. Rodriguez met the DSM-IV definition of significant limitations in the areas of communication and functional academic skills, and therefore met the DSM-IV requirement of impaired adaptive functioning. Whatever Mr. Rodriguez' alleged strengths in other areas, Dr. Latterner's test results are not refuted buy any of Dr. Haber's findings The State's argument is inconsistent with the DSM-IV definition of impaired adaptive functioning. The fact that Mr. Rodriguez may function at a higher level than his IQ might suggest in some of the areas delineated by the DSM-IV does not refute the areas in which he is shown to have impaired functioning. As noted in Mr. Rodriguez' initial brief at 27, the State is attempting to introduce an additional prong to the DSM-IV definition of impaired adaptive functioning, namely that all areas of adaptive functioning must be impaired for a diagnosis of mental retardation. The attempts by the State to show that Mr. Rodriguez was not mentally retarded by pointing to specific incidents in his past history does not refute Dr. Latterner's test results which show impaired adaptive functioning in the areas of communication and functional academic skills.[5] Similarly the use of testimony from prison and police personnel cannot refute Dr. Latterner's test results showing Mr. Rodriguez' deficient functioning in these areas. This is especially

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[5] One of the instances suggested by Dr. Haber as being inconsistent with a diagnosis of mental retardation is the fact that he acted as a houseman while incarcerated in the Dade County Jail. It is noteworthy Dr. Haber did not opine as to the quality of Mr. Rodriguez' performance in this role. The fact that Mr. Rodriguez is able to mask his disability in some circumstances is not inconsistent with a diagnosis of mental retardation as Dr. Latterner indicated in her testimony. See T. 21, Volume 10, Hearing of April 5, 1999)

the case, since Dr. Latterner's testing was conducted in Spanish, and included testing specifically related to Mr. Rodriguez' Hispanic background, to take account of Mr. Rodriguez' cultural background.

Additionally, the State presented no evidence to refute Mr. Rodriguez' low IQ. As Dr. Latterner testified, Mr Rodriguez' full scale IQ was 64, which put him in the lowest percentile of the population. The State's assertion that this would not have made a difference is simply absurd, especially given that trial counsel himself admitted that had he known of Mr. Rodriguez' low IQ, he would have presented it to the jury.

> [by Mr. Strand] It's a --let's say hypothetically, below 70 ia considered mentally retarded. Would you have presented that to the jury?
>
> [by Mr. Kalisch] More than likely, yes. I think that I should know that.

(T. 210, Volume 10 hearing of April 5, 1999)(emphasis added).

Furthermore, nothing presented by the State refuted Dr. Latterner's findings as to Mr. Rodriguez' organic brain damage. As noted supra, Dr. Haber himself noted the possibility when he requested neurological and neuropsychological testing. Nothing presented by the State refutes Dr. Latterner's findings of brain damage nor the effects on Mr. Rodriguez' functioning. As Dr. Latterner testified,

> [Mr. Rodriguez] has some memory impairment. He has language impairment. He has difficulty in concentration. But his most significant impairment is his function limit of the higher cortical, that and reasoning problems involving judgment and organizational capacities.

(T.131, Volume 10)(emphasis added).

The State contends that there is a "total lack of support in the record" for Dr. Latterner's conclusions that Mr. Rodriguez was under extreme mental disturbance at the time of the crime. Once

again, the State is obfuscating the evidence. In fact, Dr. Latterner's conclusions that Mr. Rodriguez' low IQ taken together with the effects on his higher reasoning, judgment and organizational abilities severely impaired his ability to conform his conduct according to the law, and caused him to be under extreme mental disturbance at the time of the crime. The presence of these statutory mitigating circumstances, as evidenced by Dr. Latterner's objective scientifically sound testing would certainly have caused the jury to reach a different sentencing determination, contrary to the State's contention. Furthermore, even if Mr. Rodriguez' mental state did not rise to the level of statutory mitigation, it would still have provided valuable non statutory mitigation in relation to Mr. Rodriguez' low IQ, mental retardation, brain damage and other mental health issues. This omission cannot be harmless. If "the entire postconviction record, viewed as a whole and cumulative of []evidence presented originally, raise[s] 'a reasonable probability that the result of the [] proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams v. Taylor, 120 S.Ct. 1495, 1516 (2000). Mr. Rodriguez has demonstrated prejudice under the Strickland and Williams standard. Relief is warranted.

ARGUMENT 2

SUMMARY DENIAL OF NON MENTAL HEALTH PENALTY PHASE ISSUES

A. THE FAMILY, SOCIAL AND CULTURAL MITIGATION

The State contends that Mr. Rodriguez' trial counsel was not ineffective for failing to travel to Cuba to investigate family and social history mitigation, and that the lower court properly denied this portion of Mr. Rodriguez' Rule 3.850 motion without evidentiary hearing. The State contends that because Mr. Rodriguez did not carry his burden under this claim because he did not produce any witnesses from Cuba to support Mr. Rodriguez' evidence of his mental retardation. Here the State is confusing the use of family

and background testimony as a source of information that should be made available to mental health experts with its use as non mental health mitigation in its own right. In the instant case, the court granted an evidentiary hearing only on the mental health portions of Mr. Rodriguez' claim of ineffective assistance of counsel at his penalty phase:

> The Court in part grants defendant's request for an evidentiary hearing. Said hearing shall be limited to claims of ineffective assistance of counsel set forth in claims 3 and 8 of the 3rd amended motion for rule 3.850 relief. The issue defined is the question of mental retardation at the penalty phase.

(PCR. 2354)(emphasis added).

The effect of counsel's failure to travel to Cuba to gather collateral information for mental health experts is detailed in Argument 1 supra. However, the lower court's order is unequivocal in its limitation of the evidentiary hearing to ineffective assistance relating to trial counsel's failure to investigate Mr. Rodriguez' mental retardation. In particular, the court did not allow evidentiary development of facts that could have been discovered by trial counsel relating to evidence of non-statutory mitigation, especially evidence of abuse, neglect and poverty. See e.g. Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988), (sentence vacated after the Court found several mitigating factors, including the defendant's abuse by his mother's boyfriend and his mother's neglect during the abuse, outweighed the aggravators). . Ragsdale v. State, 720 So. 2d 203 (Fla. 1998) and Arbelaez v. State, 275 So. 2d 309, (Fla. 2000),(this Court remanded to the lower court for evidentiary development, not only on trial counsel's failure to present mental health expert testimony but also for failing to introduce evidence of his family history of abuse); Freeman v. State, 761 So. 3d 1055 (Fla. 2000). See also Williams v. Taylor, 120 S.Ct. 1495 (2000), in which the United States Supreme Court granted relief based on ineffective assistance of counsel because

"....the graphic description of [Mr. Rodriguez'] childhood, filled with abuse and privation....might well have influenced the jury's appraisal of his moral culpability."(Williams v. Taylor),120 S.Ct. 1495 at 1515). The same considerations apply equally to Mr. Rodriguez' case, and the lower court's refusal to grant a hearing on this evidence in its capacity as non statutory mitigation was error.

The State makes much of the fact that at the Huff[6] hearing, the lower court briefly discussed the possibility of securing the family member evidence by means of videotaped depositions in Cuba, rather than through live testimony in Miami. However, the State omits to note that Assistant State Attorney, Penny Brill vociferously opposed such measures. In a hearing held before the lower court on June 19, 1998, Ms Brill's position was unequivocal:

> [by Ms. Brill] First of all, I'm not sure--these people live in Cuba and I'm not sure how defense is planning on getting them over here, or how they are planning on presenting their testimony, which is an issue for them.
>
> [the Court] Even if you went there, you are talking about enormous expense.
>
> [by Ms. Brill] That's correct. And under the case, the Harold case, I'm not sure you can do videotaping because Cuba is not a country where we can extradite someone from. Therefore, you can't have perjury charges against these people in Cuba. So I'm not sure we can do a videotape that would be sufficient under the law now.
>
> That's kind of their problem, not necessarily mine....

(T.9-10, hearing of June 19, 1998)(emphasis added).

Given that the scope of the evidentiary hearing was limited to mental health issues only, Mr.

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[6]Huff v. State, 623 So. 2d 982 (Fla. 1993)

Rodriguez was able to provide the family information to his expert in the form of investigator summaries. See PCR Supp. 1473-1515. However had a full evidentiary hearing been granted on Mr. Rodriguez' penalty phase issues, Mr. Rodriguez would have been compelled to present witness testimony in some form, whatever the administrative and logistical hurdles. Ms. Brill's intransigence in this regard is in sharp contrast to the State's position as argued in its Answer Brief. The State's argument is flawed. The fact remains that the court's order setting to hearing was limited to mental health issues and did not encompass the non statutory mitigation that required family member testimony.

In addition to the family member testimony, Mr. Rodriguez was entitled to a hearing on his claim that trial counsel was ineffective for failing to present testimony from an expert on Cuban culture. The State, in its insistence that this omission was harmless however asserts that "Miami, especially the Cuban community, does not lack familiarity, language or cultural norms or values for persons emigrating from Cuba". The State's assertion is facile, simplistic and not borne out by the record. First of all whether or not "Miami" has a high concentration of Cuban immigrants and a consequent familiarity with Cuban culture is simply irrelevant here. "Miami" was not a trier of fact in Mr. Rodriguez' penalty phase. The majority of jurors in Mr. Rodriguez' case were by their names, probably not of Cuban descent[7]. The same consideration applies to the trial court, Judge Thomas Carney. The State's reliance on extra record assertions about "Miami" is simply irrelevant here. Secondly, even if the triers of fact had personal experiences of the Cuban community and culture in Miami, it is a leap of faith to suggest that the generalized "Miami" Cuban cultural experiences represent those of Mr. Rodriguez. Mr. Rodriguez was born in rural

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[7]The respective jurors were Pinkney, Meares, Garland, Cale, Croon, Rudnik, Wethy, Holbrook, Kyle, Sparks, Borah, Salvador, Cooper and Lengvel. See R. 524.

poverty in Cuba. After a traumatic early life he came to the United States via the Mariel boat lift. Mr. Rodriguez' early life experiences were inextricably shaped by the history, politics and culture of his home country as he was growing up. The State's assumption that expert testimony about such matters as they relate to Mr. Rodriguez' experiences would not be helpful to the triers of fact is flawed. The State's presumption that the triers of fact would be intimately familiar with the differences between Cuban and American culture, and the immigration experience is not only flawed, but flies in the face of well established case law. Counsel for non-English speaking clients should fully evaluate cultural defense issues as they relate to all phases of the criminal litigation. See, Mak v. Blodgett, 754 F. Supp. 1490 (9th Cir. 1991) (Trial counsel's penalty phase performance was deficient where counsel failed to present in mitigation the testimony of a cultural anthropologist concerning defendant's assimilation difficulties, which could have helped to explain both defendant's involvement in crime and apparent lack of emotion at trial.) See also Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992). The lower court's order clearly did not permit evidence of Mr. Rodriguez' cultural background and experiences to be presented. The State's confidence that the absence of such expertise is harmless is misplaced. Compelling cultural evidence exists in Mr. Rodriguez' case, which would have resulted in a life sentence recommendation, had it been presented. Relief is warranted.

B. THE SENTENCING ORDER ISSUE

The State contends that this claim is procedurally barred, since it was raised ore tenus at Mr. Rodriguez' Huff hearing . The State however omits to note that the issue was also raised in Mr. Rodriguez' Fourth Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend which was filed with the lower court at the same time as the Huff hearingAs the dialog at

the Huff hearing and the language of the fourth amended pleading made plain, Mr. Rodriguez had previously been precluded from filing a final version of his Rule 3.850 motion due to a variety of circumstances. These circumstances included, inter alia, matters relating to his public records requests, together with a large period of time during which Mr Rodriguez' counsel was unable to investigate Mr. Rodriguez' case because of a lack of funding for CCR and CCRC-South. The Fourth Amended Rule 3.850 motion was filed to reflect amendments resulting from Mr. Rodriguez' review of public records following the lower court's precipitous ore tenus order finding compliance with Chapter 119 and scheduling a Huff hearing on March 13, 1998. This fourth amended motion represented Mr. Rodriguez' attempt to include all new claims arising from public records received since to preceding motion was filed.

The State contends that the claim is untimely and procedurally barred due to the fact that "Mr. Rodriguez had been in possession of the State Attorney's files for nearly two years prior to the Defendant's Huff hearing". Answer Brief at 52. The State's position is based on the contention of Assistant State Attorney. Penny Brill who represented that the files had been in the possession of Mr. Rodriguez' lawyers for "nearly two years". This position was strongly refuted by counsel for Mr. Rodriguez, who responded to Ms. Brill's assertions:

> I understand what Ms. Brill is saying but I think that her argument is defeated by the fact that this court ordered Mr. Rodriguez to attend a Huff hearing and didn't give Mr. Rodriguez the opportunity to file an amended pleading based on any public records that he had received prior to the actual beginning of the litigation of the case, litigation of this Mr. Rodriguez' conviction and sentences. I'm not talking about the litigation of 3.852 issues, the public records issues.
>
> So what has happened is that Mr. Rodriguez was given a partial opportunity to search for and request and analyze public records.

(T. March 19, 1998 at 41).

Mr. Rodriguez would note that he has consistently raised the impossibility of effectively litigating his case in a piecemeal fashion. As early as 1995, counsel for Mr. Rodriguez noted that

> [U]ntil this office has had the opportunity to review not only the public records which your office has supplied but also those of other state agencies, we are unable to evaluate whether your claimed exemptions are valid <u>or whether you have fully complied with Chapter 119.</u>

(PCR.114)(emphasis added).

Furthermore, Mr. Rodriguez has constantly brought to the attention of the lower court the impossibility of filing numerous versions of his Rule 3.850 motion as records come in piecemeal. As Mr. Rodriguez noted in his third amended Rule 3.850 motion,

> It is counterproductive to proceed with the investigation when it would have to be redone after reviewing the files. CCR cannot afford the luxury of duplicative effort, particularly in light of the present budget limitations. <u>Unless and until counsel have had a full opportunity to review all of the records and fully develop all of his claims, Mr. Rodriguez will be denied his rights under Florida law and the Eighth and Fourteenth Amendments.</u>

(PCR.1673)(emphasis added).

At the time Mr. Rodriguez had filed this motion, numerous public records requests pursuant to the newly promulgated Fla. R. Crim.

P. 3.852 were outstanding. Mr. Rodriguez clearly anticipated being able to file a final motion, when the 3.852 litigation was complete, which would have included claims based on all the public records that had filtered in, piecemeal, over the preceding period. In fact that opportunity was never afforded Mr.

Rodriguez, with the lower court's denial of Mr. Rodriguez' motion to compel the 3.852 requests.

The record of Mr. Rodriguez' public records proceedings is tortuous. It reveals much obfuscation by the State. It is impossible to tell from the record when the portion of the State Attorney file containing the unsigned sentencing order was in fact received. Reversal is warranted. See Peede v. State, 748 So. 2d 253 (Fla. 1999) (Because we are unable to determine the merits of this claim on the present record...we remand without prejudice for Peede to again present this claim to the trial court"). Peede at 256.

ARGUMENT 3

SUMMARY DENIAL OF MR. RODRIGUEZ' GUILT PHASE CLAIMS

The State contends that the lower court did not err in failing to allow evidentiary development of Mr. Rodriguez' guilt phase claims. However, the State confuses the pleading requirements of Rule 3.850 with the burden of proof required to prevail given evidentiary development of the issues.

A. THE BRADY CLAIM

Regarding the Brady claim,[8] the State contends that "the claim is insufficiently pled, [and] the lower court correctly summarily denied it". (Answer brief at 54). At the outset, Mr. Rodriguez would note that a significant impediment to the pleading of this claim was the total failure of the State to turn over Chapter 119 materials relating to the unindicted codefendant, Carlos Ponce. However, even despite this handicap, Mr. Rodriguez contends that his Brady claim is sufficiently pled. In its analysis, the State overlooks the pleading requirements of Rule 3.850 and ensuing cases decided by this Court on this issue. In fact, Mr. Rodriguez has clearly met the burden under Fla. R. Crim. P. 3.850. As noted by this Court, "[w]hile the

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[8] Brady v. Maryland, 373 U.S. 83 (1963)

post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). See also Peede v. State, 748 So. 2d 253 (Fla. 1999), "The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion." Gaskin v. State, 737 So. 2d 509 (Fla. 1999).

The State makes much of the fact that Mr. Rodriguez did not name the cohort of the victim with whom Carlos Ponce was associated with. See Answer Brief at 54. This Court has made it plain that the naming of specific witnesses is not required:

> [w]e find no merit in the State's argument that some of Peede's claims were insufficient simply because he did not allege the specific witnesses who would testify at the evidentiary hearing. Rule 3.850 required defendants to allege" a brief statement of the facts(and other conditions) relied on in support of the motion" Fla R. Crim. P. 3.850(c)(6)

(Peede, 748 So. 2d at 253)(emphasis added).

Moreover the State alleges that "nothing in the record supports Defendant's contention". Answer Brief at 55. Once again, this is a misstatement of the standard by which courts are required to assess Rule 3.850 claims. The issue is not whether the record supports the claim,[9] but rather whether or not

> "the claims are either facially invalid or conclusively refuted by the record. See Fla. R. Crim P. 3.850 (d). Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record, Lightbourne v. Dugger, 549 So. 2d 1365 (Fla. 1989).

[9] Indeed, logic dictates that if a Rule 3.850 claim had to be actively supported by the trial record, no claims based on inter alia newly discovered evidence, ineffective assistance of counsel for failure to investigate or indeed Brady claims could be entertained.

(Peede at 253)

The State has not met this burden with regard to Mr. Rodriguez' Brady claim, and Mr. Rodriguez should be granted an evidentiary hearing on the issue.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND AKE CLAIM AT THE GUILT PHASE

With regard to ineffective assistance of trial counsel at the guilt and jury selection phases of Mr. Rodriguez' capital trial, the lower court completely failed to address Mr. Rodriguez' specific allegations as to trial counsel's ineffectiveness and failed to attach specific portions of the record to support his summary denial. See PCR. 2354. This is plainly erroneous.

With regard to defense witness Jose Montalvo, the record does not refute Mr. Rodriguez' allegations of ineffective assistance. The bald fact remains that Mr. Montalvo had made a statement exculpatory to Mr. Rodriguez. Mr. Montalvo had spoken with the victim before his demise and had made a statement that the victim had described his assailant as a "little fat one" in marked contrast to Mr. Rodriguez' physical appearance. The record reflects that trial counsel wanted to call Mr. Montalvo, and issued a standby subpoena. However, he failed to secure Mr. Montalvo's attendance, allegedly because Mr. Montalvo left the country. The only way to determine whether this was a result of trial counsel's ineffectiveness is through the testimony of trial counsel. The only way to determine if this omission was in fact prejudicial, is through the testimony of Mr. Montalvo and others. Mr. Rodriguez' claim is not refuted by the record and a hearing should have been granted on the issue.

The same considerations apply to trial counsel's failure to request a severance. As counsel for Mr. Rodriguez noted at the Huff hearing:

> [W]e should have the opportunity to have counsel, trial counsel on the stand and we should have an opportunity for the court to hear whether or not trial counsel made strategic and tactical decisions for the things that he did. For instance, Mr. Rodriguez' attorney never moved for a severance in this case. Did he not move for a severance because he didn't know the law? Or did he not move for a severance because he made a strategic decision?

(T. March 13, 1998 at 62). Evidentiary development is the only means to determine why trial counsel did not request a severance.

Likewise Mr. Rodriguez' mental health issues as they relate to guilt phase should have be the subject of evidentiary development in post conviction proceedings. As noted in Argument 1, supra, the evaluation conducted by Dr. Leonard Haber was totally inadequate to determine whether or not Mr. Rodriguez suffered from mental retardation and organic brain damage. The fact that a normal EEG was performed in no way rules out brain damage, contrary to the State's apparent position. Only competent neuropsychological and psychoeducational testing would have shown the jury the true extent of Mr. Rodriguez' disabilities and his consequent inability to be the "criminal mastermind" behind the crime in question. Evidentiary development of Mr. Rodriguez' mental health issues as they relate to guilt phase, including the issue of specific intent is warranted.

This Court has "no choice but to reverse the order under review and remand" Hoffman v. State, 571 So.2d 40, (Fla. 1990) and order a full evidentiary hearing on Mr. Rodriguez' guilt phase issues.

ARGUMENT 4

THE PUBLIC RECORDS ISSUE

The State contends that Mr. Rodriguez' Rule 3.852 supplemental requests were properly denied by the lower court because "The requests pertained to numerous individuals who Defendant had failed to show were unknown or could not have been known at the time of any earlier requests or how such persons were relevant to his post conviction proceedings. See Fla. R. Crim. P. 3.852 (m) and (n)." Answer Brief at 73. However the State's reliance on Fla. R. Crim. P. 3.852 (m) is misplaced in this context. Under this Rule, admittedly, there is a relevancy requirement for records to be obtained by a capital post conviction litigant. However, the State ignores the fact that the determination of relevancy is properly the provenance of the trial court. Because the trial court never even got as far as to hold a hearing on Mr. Rodriguez' motion to compel these supplemental records, the issue was simply never reached.

Furthermore, the State's attempted reliance on Fla. R. Crim. P. 3.852 (n)is also misplaced. Under Rule 3.852(n) only when the public records request has been made outside the time provisions of the rule must the defendant then demonstrate the records were unknown or could not have been known at the time of any earlier requests. Following the tolling of Rule 3.852, Mr. Rodriguez was entitled to file supplemental and additional requests and timely did so. Again, even if his requests were to be deemed untimely, it was for the lower court to determine whether the information was known or could have been known at the time of the original request. Again, since the lower court never heard the motion to compel, Mr. Rodriguez was unable to make such a showing. The State also makes much of its contention that Mr. Rodriguez failed to set a hearing on to motion to compel. Mr. Rodriguez has consistently maintained that it is the responsibility of the lower court to set hearings on public records matters. Mr. Rodriguez' position is borne out by case law. In Fuster-Escalona v. Wisotsky, 25 Fla. L. Weekly S1080 (Fla. 2000), Justice Harding's concurrence made plain that:

> judges...must be managers as well as adjudicators, especially in light of Florida's crowded trial dockets. Trial judges have a duty to periodically review their dockets and bring up matters which the attorneys have not set for a hearing.

(Fuster-Escalona) at 1083.

In summary, Mr. Rodriguez has been denied to opportunity to obtain public records pursuant Chapter 119 and Fla.R. Crim. P. 3.852. Relief is warranted.

CONCLUSION

Mr. Rodriguez submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, a full evidentiary hearing should be ordered. As to those claims not discussed in the Reply Brief, Mr. Rodriguez relies on the arguments set forth in his Initial Brief and on the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 29, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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