IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,370

MARBEL MENDOZA,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

LAW OFFICES OF
JOHN H. LIPINSKI
1455 N.W. 14 STREET
MIAMI, FLORIDA 33125
(305) 324-6376

Counsel for Appellant

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INTRODUCTION

The appellant was the defendant and the appellee the prosecution, State of Florida, in the lower court. The parties will be referred to as they stood in the trial court. The record on appeal will be referred to by the letter "R". The trial transcripts will be referred to by the letter "T". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

The defendant was charged by indictment with the crimes of: First Degree Murder, Conspiracy to Commit Robbery, Attempted Armed Robbery, Armed Burglary with an Assault, Possession of a Firearm during the Commission of a Felony, and Possession of a Firearm by a Convicted Felon (R. 1).

The defendant proceeded to a jury trial wherein he was found guilty of First Degree Murder with a firearm (R. 474), Conspiracy to Commit Robbery with a deadly weapon (R. 475), Attempted Robbery, with a firearm, with a deadly weapon (R. 476), Burglary, occupied, with an assault, with a firearm (R. 477) and Possession of a Firearm during the commission of a felony (R. 478).

A sentencing hearing was held following which the 'jury returned an Advisory Sentence recommending the Death Penalty by a vote of 7 to 5 (R. 647).

The trial court thereupon entered a Sentencing Order (R. 931) imposing the Death Penalty as to Count I, 15 years imprisonment as to Count II, 15 years imprisonment with a 3 year minimum mandatory sentence as *to* Count III, a life sentence with a 3 year minimum mandatory sentence as to Count IV (R. 941-2). The three year minimum mandatory sentences were to run concurrently. All other sentences were to run consecutively (R. 942).

This appeal follows.

STATEMENT OF THE FACTS

At the trial of this cause during Voir Dire, the questioning of potential jurors revealed that some jurors believed so strongly in the death penalty that they would extend it to other crimes:

Mr. Bravo

I believe the death penalty should be used for more things than just murder,

(T. 354).

Mr. Calejo

Murder is a very serious crime, but it is not the only serious crime that we deal with, and the prisons are overcrowded. Let's clean it up little by little and get rid of some of those criminals who have committed so many heinous crimes. Why should my tax money be paying to keep persons alive that are going to be there a hundred years from now, anyway.

(T. 355).

Mr. Falcon

He would extend the death penalty to the rape of little children.

(T. 356).

Ms. Culp

I agree that the rape of a small child and kidnapping and things of that nature should be given the death penalty.

(T. 357).

The defense challenged these jurors for cause arguing:

The legal standard is to understanding impairment in their ability tc bc fair and impartial. If they are willing to extend the death penalty beyond first-degree murder, I think it's a case that makes less sense. We have agreed logically that their first-degree murder case is about a serious crime, and one can *comprehend* if they are willing to extend it to other crimes less serious, then there is a substantial impairment to their ability *to* be fair and impartial on the crime of first-degree murder. This is based on their view that the death penalty should be extended, and I would move for cause to exclude.

STATE

MS GAY: We would oppose the challenge for cause on Calejo, although we would not -- he stated that ha could be very neutral and hc would weigh everything. I think it wa5 Culp who originally brought up the idea of extending it to the crime of rape, but I do have a note that he said he could be fair.

(T. 420).

The court then denied the defense challenges for cause (T. 420, 422, 426).

The trial court ruled that the defense would be limited in its presentation of evidence that victim Calderon had had a bolita operation (T. 467).

At the trial of this cause:

Hialeah Officer Anna Camargo testified that she arrived at the scene (T. 618) and saw *Mr.* Calderon lying between a Bronco and a Cadillac with a blue money bag and a firearm next to him (T. 620), on the street (T. 621).

Technician Jim Olson did a sketch and measurements of the scene (T. 625). He processed *the* scene for latent fingerprints (T. 646) and found a projectile (T. 654). He observed Mr. Calderon "in a crouched-over position on his knees between the *two* vehicles" (T. 639). He later searched a 200SX impounded at the Hialeah Police Department and found a Taurus 9mm in the glove box (T. *658).*

Hialeah technician Richard Gallagher went to the Palmetto General Hospital where he photographed a car and a gun in tho car's glove box (T. 667).

At the hospital, he photographed and took a hand swab of Humberto Cuellar (T. *670).* He also did a hand swab of another man at the hospital (T. 674).

Detective John Allickson went to the Palmetto General Hospital (T. 676) where he impounded a car (T. 677). He went to the scene and processed the property of Mr. Calderon. Mr. Calderon had $2,089. in the bank bag (T. 679), $197. in his pants pocket, $106. in his wallet, a Rolex watch (T. 680), a gold ring, and a gold chain with a medallion (T. 681). He found three spent casings in Mr. Calderon's gun (T. 682).

Hialeah I.D. Technician Jeff Hirko went to the scene (T. 686) impounded Mr. Calderon's gun (T. 686) finding three spent casings and two live cartridges (T. 690). He examined the car transported to the police station (T. 694), and found a gun in the glove box (T. 695). He found and removed hair caught "under the slide" of the gun (T. 697). He found a beeper on a chain in the vehicle (T. 702).

Jack McColpin worked at the Palmetto General Hospital on March 17, 1332 (T. 724). At about 6 A.M. an individual with a gunshot wound accompanied by another man came in (T. 725). The wounded man was in pain, The other man was excited (T. 725). Later, a detective showed photos to him (T. 726) and he selected a photo of the man who was with tho wounded man (T. 727).

Marbel McCook was the medical records custodian for Palmetto General Hospital (T. 732) and produced the medical records of Humberto Cuellar (T. 735).

Rosario Estrada testified that she lived with Mr. Calderon (T. 763) who owned the Palmetto Supermarket (T. 764). On the day Calderon was shot, she heard a car alarm sound, then shots (T. 769). Calderon carried a gun with him that day (T. 770).

Detective Trujillo testified that he showed a photo lineup to Jack McCollin who selected Mendoza's photo (T. 813). He obtained a projectile from a car that had been awned by Calderon (Bronco) (T. 814).

Detective Ubeda testified that he saw a firearm in the glove box of a white Nissan 200SX that he found at the Palmetto General Hospital (T. 828). Both Lazaro Cuellar and Humberto Cuellar had their hands "swabbed" to detect gunpowder residue (T. 829-30).

Detective Royal testified that he found a digital pager in the impounded car and obtained telephone numbers from its "memory" (T. 846). One number was 643-4561 (T. 848).

Roberto Rodriguez who maintains Southern Bell records (T. *856)* testified that 643-4165 *was* registered to Nuirka Barrera (T. *862).*

Nilia Mendoza is Marbel Mendoza's mother (T. 864). Nuirka Barrera is the mother of the defendant's children (T. 865). In March, the defendant came to stay at her house for a few days saying that he had a problem *(T.* 874). Marbel Mendoza's left-handed (T. 875).

The medical examiner, Dr. Lew, did the autopsy (T. 888). Mr. Calderon had been shot in the chest and on each hand (T. 906). Eased upon the location *of* Mr. Calderon's body, the muzzle *of* the gun shooting him would have been to his left (T. 931). Based upon the directionality of the bullet holes of the entrance wounds and exit wounds, the wounds would be more consistent with the shooter being right-handed (T. 945).

Criminalist Thomas Quirk testified that no projectile on the scene was fired from a 9mm Taurus (T. 973). The projectiles that he found could have been fired from either a .38 Special or .357 caliber pistol (T. *978).* There was a third weapon involved (T. 977).

Firearms examiner Ray Freeman testified that Humberto Cuellar was x-rayed (T. 1014) and a projectile was found to be inside him (T. 1015). The projectile in Humberto Cuellar had a characteristic of a .38 Special projectile (T. 1018)

Humberto Cuellar testified for the prosecution (T. 1030). He was presently in state prison (T. 1030). He pled guilty to Second Degree Murder and was sentenced to 20 years imprisonment with a 3 year minimum mandatory Sentence (T. 1061). His brother is Lazaro Cuellar (T. 1031). Marbel Mendoza asked him if he wanted to make some money by robbing a boletero/bolita operator (T. 1034). He asked his brother, Lazaro, to drive him to the robbery agreeing to give Lazaro a portion of his share of the money (T. 1038). The three had driven by Calderon's house to observe his routine (T. 1039).

On the morning of the shooting, Mendoza beeped him and he picked Mendoza up (T. 1043). He and Mendoza drove to Lazaro Cuellar's house and picked up Lazaro Cuellar and Lazaro Cuellar's car (T. 1045). They then drove to Calderon's house (T. 1045).

They waited for Calderon to leave his house (T. 1047). When they saw Calderon leave, ha and Mendoza got out of the car and went in back of the bushes (T. 1047). As Calderon went to open the door of his car, a Bronco, he and Mendoza approached Calderon from the rear (T. 1048). He and Mendoza grabbed Calderon and struggled to

hold him down (T. 1049). While they struggled Humberto took out his gun and hit Calderon in the head. Calderon shot Humberto (T. 1050) in the chest.

Humberto ran to Lazaro's car (T. 1052). As he ran he heard other *shots* (T. 1052). He laid down in the back seat of Lazaro's car (T. 1052). Half a minute later, Marbel came to the car. Marbel "got in the front seat, he told me not to worry, that I was going to be okay and that he had shot the man" (T. 1055). No one got any money (T. 1055).

He was driven to the hospital (T. 1056). When he was discharged from the hospital, he was taken to the Hialeah Police Station (T. 1058). Mendoza told him "when we got to the hospital for me to *say* that I *got* shot when we *were* at the Pink Pussycat, that we were robbed, and that's how I got shot" (T. 1058).

Lazaro Cuellar pled guilty to manslaughter and received a 10 year sentence (T. 1086).

Over objection, the prior sworn statement of Humberto Cuellar was allowed into evidence (T. 1142) even though Humberto Cuellar stated that he never read that statement (T. 1144).

Technician John Lazaro testified that he took standard prints of Marbel Mendoza (T. 1150). Latent fingerprints taken from the passenger door of the Cadillac at the scene matched those of Marbel Mendoza (T. 1151).

The state rested (T. 1156).

From Cuba the family went *to* Costa Rica, then from Costa Rica to Peru (T. 1507). For two years and three months the family lived in a tent in an open air park. Sixteen to eighteen people lived inside each tent (T. 1507). The defendant contracted typhoid in Peru (T. 1508). The defendant's father lost his hearing and suffered a nervous breakdown (T. 1508).

From Peru the family went to Mexico *(T.* 1513) and crossed the Rio Grande into the United States. The family settled in Miami (T. 1514).

The defendant attended Miami High School. The defendant had problems at school (T. 1515). The defendant began to use drugs (T. 1516). The defendant stole from the family to obtain money (T. 1516).

The defendant married Nuirka Barrera and the couple had two children (T. 1516). The girl, Yurika, was born with a birth defect affecting the whole left side of her body where he head falls to *tho* side (T. 1517). She was operated on to "straighten her head" (T. 1517). Yurika has an arm she cannot extend. Yurika has four fingers on one hand. She is bent *to* the side and *a* spinal cord operation is necessary. Her hand was operated on to separate fingers (T. 1517). Her left side is bigger than her right (T. 1518). She is vary small for her age *(T.* 1518).

Marbel had a "nervous crisis" when Yurika was born "because we realized that the girl had a hanging finger and the doctor said that she had a small defect, but when we realized it was a big defect the next day when the doctor called us in" (T. 1518).

1477-80). He identified the defendant from a photograph as one of the robbers (T. 1483). Another robber had told the defendant to shoot Street (T. 1480), but the defendant didn't (T. 1484).

The defense stipulated as to the defendant's prior convictions (T. 1485).

The state rested (T. 1485).

Nilia Mendoza testified for the defendant (T. 1491). She is Marbel Mendoza's mother (T. 1493). She had a difficult birth with the defendant (T. 1494) in Havana. The defendant would "always get sick" as a baby (T. 1494). When the defendant was a year old he was operated on for water in the testicles (T. 1494-5). The defendant underwent another operation for the same problem (T. 1495). Growing up the defendant was always vomiting, had asthma, and had attacks where he would lose consciousness (T. 1495). The defendant was very restless and had problems at school (T. 1496). When he was 3 1/2 years old, she took him to a psychologist (T. 1496).

She took the defendant to the hospital for over two years for these problems (T. 1497). The defendant received medical help until he was 12 (T. 1504). At that time, the family took refuge in the Peruvian Embassy in Cuba (T. 1504). The whole family, including the defendant, was beaten by the defense committee in Cuba before the family was able to leave Cuba (T. 1506).

From Cuba the family went to Costa Rica, then from Costa Rica to Peru (T. 1507). For two years and three months the family lived in a tent in an open air park. sixteen to eighteen people lived inside each tent (T. 1507). The defendant contracted typhoid in Peru (T. 1508). The defendant's father lost his hearing and suffered a nervous breakdown (T. 1508).

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When the defendant has a nervous crisis, *he* becomes aggressive (T. 1521).

The defendant used marijuana in his room (T. 1522-3).

Through Gloria Dardy-Porter, the medical records custodian for Corrections Rehabilitation Services, the defendant's clinical/medical records were introduced (T. 1533).

Humberto Cuellar testified that the intention was only to rob Mr. Calderon. They did not know that he had a weapon (T. 1548). Mr. Calderon pulled out his weapon and *fired* first (T. 1549).

By stipulation, the judgements and sentences of Lazaro Cuellar and Humberto Cuellar were admitted into evidence (T. 1552).

Dr. Jethro Toomer, a psychologist, testified for the defense (T. 1552). Dr. Toomer was qualified as an expert witness (T. 1557).

Dr. Toomer had four meetings with Marbel (T. 1558).

Marbel related a psychiatric history as to receiving treatment in Cuba for multiple personalities (T. 1562). Marbel related "an extensive drug history that dated back to *the* age of nineteen involving the use of alcohol, marijuana and some crack cocaine (T. 1562). Marbel indicated that he used drugs as a "self-medication" (T. 1563).

Marbel's performance on the Bender Gestalt test was indicative *of* "some measure of brain damage or organic impairment" (T. 1571).

Dr. Toomer administered the Carlson Psychological Survey to Marbel (T. 1572 . It's results were:

What was reflected as inferiority, poor self esteem, impulsivity and irrational behavior and that is changes in mood shifts or behavioral changes from time to time.

Also with respect *to* the profile of Mr. Mendoza his profile was one that suggests that brain damage may be a problem in terms of overall functioning and in terms *of* overall -- in terms of influence and overall behavior.

(T. 1574-5)

Marbel fell in the *99* percentile groups as to chemical abuse (T. 1575).

Marbel "indicted to me that he had experienced auditory and visual hallucinations and that he was also experiencing those at the time that I saw him" (T. 1577).

Marbel fell in the *99* percentile range with respect *to* thought disturbance (T. 1577).

Marbel fell into an *85* percentile range with respect to *a* "tendency uf Mr. Mendoza towards violating societal norms with respect to those particular other dimensions that we talked about in terms *of* chemical abuse and thought disturbance (T. 1579).

Marbel scored in the *95* percentile range as to self depreciation, "the mention of poor socialization being reflected in poor development in terms of one's self worth ability *to* function, to grow and the like (T. 1580).

Over the four periods/meetings that Dr. Toomer had with Marbel, Dr. Toomer noticed a "gradual deterioration in terms of overall functioning (T. 1581). The deterioration "was reflected in heightened agitation, nervousness, sweating, a sense of being out of touch with reality in that he appeared not to be able to bridge from one meeting to another in terms of knowing who I was and why I was there and the like.

He complained of auditory and visual hallucinations. In some areas, there were a number of patterns of maladapted behavior that I termed decompensation over those four visits that I made" (T. 1581-2).

Marbel was prescribed Vistaril, Trilafon and Cogentin which is "psychotropic medication designed primarily to manage symptoms of mental illness" (T. 1582).

Dr. Toomer's opinion was that Marbel's "suffering some very significant defects in terms of his reality tasting and they are reflected in impairment both in terms of cognitive ability as well as affective or emotional ability" (T. 1583).

Dr. Toomer found some evidence of lack of organicity or brain damage (T. 1583).

As to rehabilitation, Dr. Toomer thought "that given his history and given what I saw and as I indicated I did not find anything indicative of anti-social personality disorder, I believe that he can (be rehabilitated)" (T. 1583-4).

On rebuttal, Detective Navarro, testified that when he met Marbel, Marbel said he did not use drug5 (T. 1642).

By a 7-5 vote, the jury recommended the imposition of the Death Penalty (T. 1694).

This appaal follows.

POINTS ON APPEAL

I

WHETHER THE EVIDENCE PRESENTED WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THIS DEFENDANT FOR BURGLARY REQUIRING THE VACATION OF BOTH HIS BURGLARY AND FELONY MURDER CONVICTIONS?

II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS SUBSTANTIVE EVIDENCE, THE PRIOR SWORN STATEMENT OF HUMBERTO CUELLAR?

III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING ITS OUT OF COURT COMMUNICATIONS WITH THE JURY?

IV

WHETHER THE TRIAL COURT ERRED IN DENYING CHALLAGES FOR CAUSE *TO* PROSPECTIVE JURORS PREDISPOSED TO IMPOSE THE DEATH PENALTY?

V

WHETHER THE TRIAL COURT ERRED IN EXCLUDING MITIGATION EVIDENCE DURING THE PENALTY PHASE?

VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUSTAIN DEFENDANT'S OBJECTIONS AND GRANT A MISTRIAL WHERE THE STATE BOTH ELICITED THAT MENDOZA HAD PENDING ROBBERY CHARGES AND ALSO COMMENTED ON PENDING CHARGES DURING CLOSING ARGUMENT?

VII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE INSTANT MURDER WAS COMMITTED FOR PECUNIARY GAIN?

VIII

WHETHER THE TRIAL COURT ERRED IN ENTERING ITS SENTENCING ORDER?

IX

WHETHER THE DEATH PENALTY IS PROPORTIONALLY WARRANTED IN THIS CASE?

SUMMARY OF THE ARGUMENT

The evidence presented was insufficient to prove burglary in the absence of evidence that the curtilage was enclosed.

The trial court erred in allowing the prosecution to introduce, as substantive evidence, the sworn statement of state witness, Humberto Cuellar.

The trial court erred in denying the defendant's motion for mistrial after the court disclosed that it had had out-of-court discussions with members of the jury.

The trial court erred in refusing challenges for cause to prospective jurors who wished to expand the death penalty.

The trial court erred in excluding defense mitigation evidence, the Mendoza family asylum application, during the penalty phase.

The trial court erred in allowing the prosecution to comment about pending robbery charges against the defendant during the penalty phase.

The trial court erred finding this aborted robbery/murder was committed for pecuniary gain.

The trial court erred in entering a sentencing order which ignored mitigating factors that had been proven by unrebutted evidence.

The death penalty is not proportionally warranted in this case.

ARGUMENT

I

THE EVIDENCE PRESENTED WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THIS DEFENDANT FOR BURGLARY REQUIRING THE VACATION OF BOTH HIS BURGLARY AND FELONY MURDER CONVICTIONS

The indictment in this cause alleged that Marbel Mendoza committed burglary by entering the "dwelling and/or curtilage" of Conrado Calderon (R. 1).

There was no evidence that Mendoza entered Mr. Calderon's home. The state's theory of burglary was that Mendoza entered upon the curtilage of Calderon's home.

Mr. Calderon was found lying between a Bronco and a Cadillac (T. 620), possibly on the street (T. 621). There is no evidence that Mendoza went into an enclosed curtilage surrounding Calderon's home.

In the recent case of State v. Hamilton, *660* So2d 1038 (Fla. 1995), this Court considered the question of curtilage under the burglary statute and stated:

Since it is undisputed in this case that the victim's yard was not enclosed in any manner other than "several unevenly spaced

trees", we must conclude that the evidence *does* not support the defendant's convictions far burglary of the dwelling, or his convictions for second-degree felony murder, predicated upon the burglary.

(p. 1046)

As there was no evidence of Mendoza's violation of an enclosed space, his conviction for Burglary cannot stand.

The indictment charging Mendoza with murder alleged that he killed Conrado Calderon "from a premeditated design to effect the death of the person killed *or* any human *being* and/or while engaged in the perpetration of or in an attempt to perpetrate any Robbery and/or Burglary by shooting Conrado Calderon, with a firearm" (R. 1).

At trial, the prosecution conceded that there was nu indication of premeditation (T. 1157).

The case, therefore, went to the jury upon a theory of felony murder "in an attempt to perpetrate any Robbery and/or Burglary". Tharc is nu way of knowing whether the jury convicted Mendoza of felony murder upon a misconception that Calderon was killed while Mendoza was attempting a Burglary. In Hamilton, supra, this Court reversed the defendant's felony murder conviction predicated upon a Burglary. In the instant case, there is no way of knowing what felony, either Robbery or Burglary, that this jury used as the predicate crime. As the jury *may* have predicated Mendoza's felony

murder conviction upon the predicate crime of Burglary, which was not proven on this Record, this defendant's murder conviction must be Reversed and this Cause remanded for *a* New Trial.

The penalty phase, likewise, was infected with error as to this Burglary count. As it did in the guilt phase (T. 1247), the defense objected to a jury instruction *as to* Burglary (T. 1467), to no avail. The jury was instructed as *to* Burglary and heard state argument as to Burglary. The argument and instruction as to this non-existent crime when the Death Recommendation was *7* to 5 was reversible error. *See*, Burr v. State, *576* So.2d *276* (Fla. 1991).

Mendoza's conviction for Burglary and Felony murder conviction possibly based upon that Burglary must be Reversed.

II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS SUBSTANTIVE EVIDENCE, THE PRIOR SWORN STATEMENT OF HUMBERTO CUELLAR

The record reflects that the state argued that it should be allowed to introduce the prior sworn statement of Humberto Cuellar, in its entirety. Initially, the trial court ruled against the state (T. 1130). Later, the trial court reversed itself ahd allowed the entire sworn statement of Humberto Cuellar to be admitted as substantive evidence (T. 1142, R. 306-343).

Humberto Cuellar gave his statement after he had been shot, taken to the hospital, had his hands swabbed and was in police custody. At the time, Cuellar made this statement, he had abundant reasons to make statements implicating Mendoza and extricate himself from a capital murder prosecution. Indeed, during tho statement (R. 340), Cuellar was thanked for his cooperation!

in Jackson v. State, 498 So. 2d 906 (Fla. 1986), this Court reversed that defendant's conviction when one William6 prior consistent statement was introduced holding that a witness's prior consistent statements are generally inadmissible to corroborate that witness's testimony.

In Parks v. State, 644 So.2d 106 (Fla. 4th DCA 1994), a victim was killed during a robbery. One Batten was questioned and implicated both himself and Parks in the robbery/murder. At trial, Batten testified about the murder. Over objection, Batten's

statement *to* the police was admitted. In *finding* the admission of the prior statement to have been error, the Court stated:

We agree with appellant that *the prior* consistent statement should not have been admitted into evidence.

(p. 108).

Similarly, in the instant case, Humberto Cuellar's prior consistent statement should not have been admitted as substantive evidence. *See,* also, Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988); Columtino v. State, *620* So.2d 244 (Fla. 3d DCA 1993); Le Blanc v. State, 619 So.2d 1021 (Fla. 3d DCA 1993).

Humberto Cuellar was the only eyewitness *to* the incident. Indeed, expert trial testimony showed that *it* was more likely than not that he fired a weapon (T. 1183-92). Allowing him to corroborate himself, on the facts of this case, by the introduction of his prior consistent statement was reversible error.

III

THE TRIAL COURT ERRED DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING ITS OUT OF COURT COMMUNICATIONS WITH THE JURY

Towards the end of the state's case:

THE COURT: *The* state *is* taking the witness outside. J.R. mentioned about the communication, and I was thinking that *I* should have mentioned *to* all of the lawyers, when I was having lunch the jurors *sat* down about two tables away from me. One juror said, "Why aren't we allowed to ask questions?"

I simply told them if they have any questions to write them down at the end of trial to see if they can be answered. I told them if they had any questions during the trial in terms of things that they should know that they should write them down, like I told them here in court.

Additionally, one juror gave me two shots of Cuban coffee and asked me if I wanted it with my lunch.

I am telling you these things because they happened at lunch and you should be aware so it doesn't come out later, something about an *ex pare* communication.

Thirdly, one juror said do I have any opinion on the Tonya Harding case, and I said, "You have *to* be fair and impartial and you have to wait until you hear everything."

Other than that, I read my newspaper and ate my lunch.

I just wanted you to be aware that that occurred.

MR WAX: Your Honor, may I inquire *as to* which juror wanted to know your opinion on the Tonya Harding *case* and which juror asked?

THE COURT: I think it is Juror No. 2, Mr. Randle. He has the tie and tho suit on.

MR WAX: Yes.

THE COURT: The juror that asked me about Tonya Harding I think was one of the women. I don't know who, but I can tall you I brought my own lunch, I didn't eat with them, but they are a friendly jury, as *you* have seen, and I just wanted to let you know a5 quickly as I could. I just wanted to bring it to your attention immediately in case there was any impropriety.

MR. WAX: In an abundance *of* caution, I move for a mistrial.

(T. 1073-4).

The defendant's motion was denied.

In Kemp v. State, 611 So.2d 13 (Fla. 3d DCA 1992), the Court held that per *se* reversible error was committed when the trial court communicated with the jury outside the presence *of* the *parties.* See, also, Ferreri v. State, 109 So.2d *578* (Fla. 2d DCA 1959).

In this case also, the trial court's out of court communication with the jury was reversible error.

IV

THE TRIAL COURT ERRED IN DENYING CHALLAGES FOR CAUSE TO PROSPECTIVE JURORS PREDISPOSED TO IMPOSE THE DEATH PENALTY

During Voir Dire, questioning of the potential jurors revealed some Jurors who believed so strongly in the Death Penalty that they would extend it to other crimes:

Mr. Bravo

I believe the death penalty should be used for more things than just murder.

(T. 354).

Mr. Calejo

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(T. 357).

The defense challenged these jurors for cause arguing:

The legal standard is to understanding impairment in their ability to be fair and impartial. If they are willing to extend the death penalty beyond first-degree murder, I think it's a case that makes less sense. We have agreed logically that their first-degree murder case is about a serious crime, and one can comprehend if they are willing to extend it to other crimes less serious, then there is a substantial impairment to their ability to be fair and impartial on the crime of first-degree murder. This is based on their view that the death penalty should be extended, and I would move for cause to exclude.

MS GAY: We would oppose the challenge for cause on Calejo, although we would not -- he stated that he could be very neutral and he would weigh everything. I think it was Culp who originally brought up the idea of extending it to the crime of rape, but I do have a not that he said he could be fair.

(T. 420).

The court then denied the defense challenges for cause (T. 420, 422, 426).

The defendant submits that it was error to deny these challenges for *Cause*,

In the case of Hill v. State, 477 So.2d 553 (Fla. 1985), the potential juror stated that he was inclined to impose the death penalty in the event of a conviction. Finding reversible error, this Court stated:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.
>
> (p. 556)

and,

> We find that such error cannot be harmless because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available him. Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to

force a party to use peremptory challenges on persons who should have been excused for cause, provided the pasty subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

(p. 556)

In Floyd v. State, *$69* So.2d 1225 (Fla. 1990), this court found that a potential juror's predisposition to impose the death penalty warranted excusal for cause.

in the case of state v. Dupree, *656* So.2d 430 (Fla. 1995), this Court found that a juror should have been excused for cause who "indicated that he was a strong supporter of the death penalty, and believed that if someone is guilty of first-degree murder the appropriate penalty is the death penalty and that a life sentence is too lensent".

In Robinson v. State, 487 So.2d 1040 (Fla. 1986), this Court found properly excused for cause prospective jurors who put themselves "in the end zone [with the death penalty opponents]", when asked where they would "place themselves figuratively on a football field with death penalty opponents and proponents in the opposite end zones".

The potential jurors in this case go beyond death penalty proponents for first-degree murder, they would actually extend the penalty imposed only on the most aggravated and unmitigated of most serious crimes to lesser offenses.

Tho defendant submits that he should not have been required to expend his precious preemptory challenges to excuse these jurors. They should have been excused for cause and the trial court's failure to do so requires that the defendant's Death Sentence be Reversed,

V

THE TRIAL COURT ERRED IN EXCLUDING MITIGATION EVIDENCE DURING THE PENALTY PHASE

During the defense case in the Penalty phase, the defense attempted to introduce the asylum application of Mendoza's family (T. 1509). The state's objection was sustained (T. 1510). The defense later again attempted to introduce the request for asylum (T. 1544) and, again, the trial court refused to allow the asylum request into evidence.

This Honorable Court has held that during a penalty phase the trial court should exercise the broadest latitude in admitting evidence, See, Messer v. State, 330 So.2d 137 (Fla. 1976); Alvord v. state, 322 So.2d 533 (Fla. 1975): Hodaes v. State, 595 So.2d 929 (Fla. 1992).

In Perry v. State, 395 So.2d 170 (Fla. 1980), this Court held that it was error to exclude the defendant's mother's testimony during the sentencing phase. Here, the defense sought to admit evidence that would corroborate Mrs. Mendoza's testimony as to the tumultous childhood that the defendant endured. The vote to impose the death penalty was 7 to 5. It is conceivable that confirmation of Mrs. Mendoza's testimony as to Marbel's background may have made the difference in convincing at least one juror to vote for Life. In this case, Marbel submits that the trial court's excision of this corroborative mitigation evidence was reversible error. He

must have a new penalty phase hearing. See, also, Cooper v. Dugger, 526 So.2d 900 (Fla. 1988); Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991).

VI

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN DEFENDANT'S OBJECTIONS AND GRANT A MISTRIAL WHERE THE STATE BOTH ELICITED THAT MENDOZA HAD PENDING ROBBERY CHARGES AND ALSO COMMENTED ON THEFT PENDING CHARGES PURTNG CLOSING ARGUMENT

During the state's cross-examination of Dr. Toomer, the defense expert:

Doctor, after reviewing the defendant's history you concluded and I believe this came out on direct by Mr. Wax, you concluded that you believe based on reviewing the defendant's history that he could be rehabilitated; correct?

A. Yes.

Q. In formulating this opinion did you review the circumstances and facts of the defendant pending cases?

MR. WAX: Objection.

THE COURT: Overruled.

MR. WAX: I have a motion I'd like *to* reserve.

THE COURT: 1 have reserved your right.

THE WITNESS: I'm speaking on his history. That's based on my evaluation of him and what I found a6 a result of my evaluation.

THE COURT; That doesn't answer the question.

THE WITNESS: why don't you repeat the question

BY MR. PERIKLES:

Q. Did you review the defendant's pending cases in coming to your conclusion, *yes or* no?

MR. WAX: Same objection.

THE WITNESS: No, I didn't

THE COURT: You have a continuing objection.

MR. WAX: I have to make it even if we agree it's an continuing one.

BY MR. PERIKLES:

Q. Were you aware that the defendant has a pending trial in other robberies --

MR. WAX: Objection.

Q. -- using a firearm.

THE COURT: Overruled.

MR. WAX: I have and objection.

BY MR. PERIKLES:

Q. Were you aware of that?

A. I was aware of other cases.

That other charges were pending against the individual, yea, Mr. Mendoza.

(T. 1618-9)

Later during closing argument, the State commented as to his cross-examination of Dr. Toomer:

And his answer was, "Well, 1 didn't consider that he was convicted of a robbery last year because either I didn't know about it" -- he didn't consider it even though that was part of his history.

"Did you consider that fact that he is in jail awaiting other robberies"--

MR. WAX: Objection.

THE COURT: Consistent with my ruling, I am going *to* overrule the objection.

Ladies and gentlemen, please remember that the defendant is presumed innocent on those charges and that was utilized in the course *of* tho trial solely for the purposes *of* impeaching the doctor. It is not an aggravating circumstance, that he may have pending charges.

MR. WAX: May we reserve a motion?

THE COURT: Yes, sir.

(T. 1662).

The defense subsequently moved for a mistrial which motion was denied (T. 1680).

In the case of Perry v. State, supra, this court held that error was committed when the prosecutor presented during a penalty phase evidence of pending charges of which Perry had not been convicted.

In Dougan v. State, 470 So.2d *697* (Fla. 1985), this Court found to be error evidence and argument that Dougan had been indicted for murder in another case.

In Robinson v. State, supra, this Court found it to be error for defense witnesses during a penalty phase to be crass-examined concerning crimes that Robinson had not been convicted of.

In Geralds v. state, 601 So.2d 1157 (Fla. 1992), this Court held:

> The State is nut permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment.
>
> (p. 1162-3).

The jury vote for death in this case was 7-5. It is conceivable that the repeated elicitation/comment as to pending robbery charges could have been the deciding factor to cause one or more jurors to vote for death. In this case, on these facts, the state's comments upon pending robbery charges was error requiring a resentencing penalty hearing.

VII

THE TRIAL COURT ERRED IN FINDING THAT THE INSTANT MURDER WAS COMMITTED FOR PECUNIARY GAIN

The only alleged eyewitnesses to testify, Humberto Cuellar, a state witness, testified that a robbery waa intended. He testified that he and Mendoza grabbed Calderon when Calderon shot him. Then he left and heard shots after which Mendoza came to the car. No property was taken from Calderon.

The defendant submits that there is no evidence that the murder was committed *for* pecuniary gain. The murder did not gain anyone anything. The evidence shows that Calderon was shot after he began firing at the defendants hitting Humberto Cuellar. Tho evidence shows that Calderon was shot while the defendants were escaping rather than in an attempt by the defendants to obtain anything.

Pursuant to the facts of this case, it is submitted that the aggravating circumstance of murder *for* pecuniary gain does not exist. See, Rogers v. State, 511 So.2d 526 (Fla. 1987); Scull v. State, 433 So.2d 1137 (Fla. 1988): Hill V. State, 549 So.2d 179 (Fla. 1989); Clark v. State, 609 So.2d 513 (Fla. 1992); Peterka v. State, 640 So.2d 59 (Fla. 1994).

The defendant submits that this non-existent factor was both improperly considered by the jury in voting for Death and relied upon by the trial court in imposing Death with a jury vote of 7 to 5. It is conceivable that, in the absence of argument and

instruction as to this factor, the jury may have recommended life.

The defendant must be Resentenced.

VIII

THE TRIAL COURT ERRED IN ENTERING ITS SENTENCING ORDER

The trial court entered its Order sentencing Marbel Mendoza to Death (R. 946).

It is improper far the sentencing judge to refuse to consider evidence of nonstatutory mitigating circumstances. *See,* Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court considered mitigating factors and held:

> When addressing mitigation circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case *of* nonstatutory factors, it is truly of a mitigating nature.
>
> (p. 419).

and,

> The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant.
>
> (p. 419)

In the case of Santos v. State, 591 So.2d 160 (Fla. 1991), this Court stated:

Mitigating evidence must at least be weighed in the balance if the record discloses it to be believable and uncontroverted, particularly where it is derived from unrefuted factual evidence.

(p. 164)

In Dailey v. State, 594 So.2d 254 (Fla. 1991), this Court held that, once established, a mitigating circumstance may not be given no weight at all.

A defendant's potential for rehabilitation is a nonstatutory mitigating factor. *See,* Cooper V. Dugger, 526 So.2d 900 (Fla. 1988): Campbell v. State, supra. Dr. Toomer testified that he believed that *the* defendant could be rehabilitated (T. 1583-4). There was no evidence to the contrary. In the absence of contrary evidence, the defendant's potential for rehabilitation was required to be addressed by the trial court. It's failure to address this proven mitigating factor was error.

The unrebutted testimony *of* Dr. Toomer was:

Marbel related a psychiatric history as to receiving treatment in Cuba for multiple personalities (T. 1562). Marbel related "an extensive drug history that dated back to the age of nineteen

involving the use of alcohol, marijuana and *some* crack cocaine (T. 1562). Marbel indicated that he used drugs as a "self-medication" (T. 1563).

Marbel's performance on the Bender Gestalt test was indicative of "some measure of brain damage or organic impairment" (T. 1571).

Dr. Toomer administered the Carlson Psychological Survey to Marbel (T. 1572). It's results were:

What was reflected *as* inferiority, poor self esteem, impulsivity and irrational behavior and that is changes in mood shifts or behavioral changes from time to time.

Also with respect to the profile of Mr. Mendoza his profile was one that suggests that brain damage may be a problem in terms *of* overall functioning and in terms of overall -- in terms of influence and overall behavior.

(T. 1574-5)

Marbel fell in the *99* percentile group as to chemical abuse (T. 1575).

Marbel "indicated to me that he had experienced auditory and visual hallucinations and that he was also experiencing *those* at the time that 1 saw him" *(T.* 1577).

Marbel fell in the 99 percentile range with respect to thought disturbance (T. 1577).

Marbel fell into an *85* percentile range with respect to a "tendency of Mr. Mendoza towards violating societal norms with respect *to* those particular other dimensions that we talked about in terms of chemical abuse and thought disturbances (T. 1579).

Marbel scored in the 95 percentile range as to self depreciation, "the mention of poor socialization being reflected in poor development in terms of one's self worth ability to function, to grow and the like (T. 1580).

Over the four periods/meetings that Dr. Toomer had with Marbel, Dr. Toomer noticed a "gradual deterioration" in terms of overall functioning (T. 1581). Tho deterioration "was reflected in heightened agitation, nervousness, sweating, a sense of being out of touch with reality in that he appeared not to be able to bridge from one meeting to another in terms of knowing who I was and why I was there and the like".

He complained of auditory and visual hallucinations. In some areas, there were a number of patterns of maladapted behavior that "I termed decompensation over those four visits that I made" (T. 1581-2).

Marbel was prescribed Vistaril, Trilafon and Cogentin which is "psychotropic medication designed primarily to manage symptoms of mental illness" (T. 1582).

Dr. Toomer's opinion was that Marbel's "suffering some very significant defects in terms of his reality testing and they are reflected in impairment both in terms of cognitive ability as well as affective or emotional ability" (T. 1583).

Dr. Toomer found some evidence of lack of organcity or brain damage (T. 1583).

The defendant submits that this evidence suggested that two statutory mitigating factors may be present. *These* are that Mendoza was under the influence of extreme mental *or* emotional disturbance, section §921.141(6)(b) and that Mendoza was substantially impaired in his capacity to conform his conduct to the requirements of the law, §921.141(b)(f).

In its order, the trial court refused to find that the mitigator of "under the influence *of* extreme mental or emotion disturbance "existed (R. 948). In the face of Dr. Toomer's unrefutcd testimony, as well as the testimony of Mrs. Mendoza as to the defendant's mental state while growing up, the defendant submits that this finding was error.

Likewise, the trial court found that the mitigator of the defendant being impaired in his capacity to conform his conduct to the requirements of the law did not exist (R. 951). Once again the defendant submits that the testimony *of* Dr. Toomer and Mrs. Mendoza require *a* contrary finding and appropriate weight to be given to this mitigating factor. *See,* Santos v. State, supra.

Mrs. Mendoza testified as to the defendant's traumatic chi1dhood:

She had a difficult birth with the defendant (T. 1494) in Havana. The defendant would "always get sick" as a baby (T. 1494). When the dcfcndant was a year old he was operated on for water in the testicles (T. 1494-5). The defendant underwent another

operation for the same problem (T. 1495). Growing up the defendant was always vomiting, had asthma, and had attacks where he would lose consciousness (T. 1495). The defendant was *very restless* and had problems at school (T. 1496). When he was 3 1/2 years old, she took him to a psychologist (T. 1496).

She took the defendant to the hospital for over two years for these problems (T. 1497). The defendant received medical help until he was 12 (T. 1504). At that time, the family took refuge in the Peruvian Embassy in Cuba (T. 1504). The whole family, including the defendant, was beaten by the defense committee in Cuba before the family was able to leave Cuba (T. 1506).

From Cuba the family went to Costa Rica, then From Costa Rica to Peru (T. 1507). For two years and three months the family lived in a tent in an open air park. Sixteen to eighteen people lived inside each tent (T. 1507). The defendant contracted typhoid in Peru (T. 1508). The defendant's father lost his hearing and suffered a nervous breakdown (T. 1508).

From Peru the family went to Mexico (T. 1513) and crossed the Rio Grande into the United States. The family settled in Miami (T. 1514).

The defendant attended Miami High School. The defendant had problems at school (T. 1515). The defendant began *to* use drugs (T. 1516). The defendant stole from the family to obtain money (T. 1516).

The defendant married Nuirka Barrera and the couple had two children (T. 1516). The girl, Yurika, was born with a birth defect

affecting the whole left side of her body where he head falls to the side (T. 1517). She was operated on *to* "straighten her head" (T. 1517). Yurika bas an arm *she* cannot extend. Yurika has four fingers on one hand. She is bent to the side and a spinal cord operation is necessary. Her hand was operated on to separate fingers (T. 1517). Her left side is bigger than her right (T. 1518). She is very small for her age (T. 1518).

Marbel had a "nervous crisis" when Yurika was born "because we realized that the girl had a hanging finger and the doctor said that she had a small defect, but when we realized it was a big defect the next day when the doctor called us in" (T. 1518).

When the defendant has a nervous crisis, he *becomes* aggressive (T. 1521).

The defendant used marijuana in his room (T. 1522-3).

Mrs. Mendoza's testimony was uncontradicted. A traumatic childhood can constitute a mitigating factor. *See,* Santos v. State, supra; Campbell v. State, supra; Larkins v. State, *655* So.2d *95* (Fla. 1995). Notwithstanding Mrs. Mendoza's uncontrovertsd testimony, the trial court rejected his childhood as a mitigating factor (R. 943). The defendant submits that the Court's finding was error.

As to Marbe *s* drug use and dependency, the trial court refused to take into account the *testimony* of Mrs. Mendoza (T. 1527-3) in giving this factor minimal weight. The defendant

submits that the trial court's omission in considering his mother's uncontradicted testimony as to this mitigator was error.

For the above facts, reasons and authorities, the defendant submits that the trial *court* erred in its consideration of the uncontroverted testimony provided by the defense as to these mitigators, that it erred in entering its sentencing order, and tho defendant must be Resentenced. *See*, also, Deangelo V. State, 616 So.2d 44U (Fla. 1993); Knowles V. State, 632 So.2d 62 (Fla. 1993): Nibert v. State, 574 So.2d 1059 (Fla. 1990).

IX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE

Calderon's death occurred during a robbery where he resisted, pulled a gun and fired first, seriously wounding Humberto Cuellar. Other shots were fired, some by Calderon and some supposedly by Mr. Mendoza. No money or property was taken from Mr. Calderon. The shots presumably were fired by Mendoza as Calderon fired at him or as Mendoza attempted to escape. The State's main witness, Humberto Cuellar testified that Calderon fired first. This was truly a robbery gone awry. There was no evidence of any hatred, anger or viciousness. 'This Court has stated that the death penalty is reserved for "the most aggravated and unmitigated of *most* severe crimes. *See,* State v. Dixon, 283 So.2d 1 (Fla. 1973). The defendant submits that this is not a case of the most aggravated and unmitigated of most severe crimes and that, therefore, the death penalty is not warranted.

In the recent case of Terry v. State, 21 Fla.L.Weekly S9 (Fla. 1996), this court considered another case of a "robbery gone bad" in which it found "although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances," In Terry also the court found the two aggravating factors of capital felony committed during the course of an armed robbery/pecuniary gain and prior

violent felony. In Terry, this Court found that the death penalty was not proportionately warranted for that robbery murder.

In Jackson v. State, 575 So.2d 181 (Fla. 1991), this Court considered a robbery/murder. There also the crime took seconds to occur and was a reflexive reaction to the victim's resistance. In reducing the defendant's sentence to life imprisonment this Court found "insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder". Here, too, the reflexive reaction to Calderon's resistance and shooting at the defendant's is insufficient to warrant the death penalty for felony murder.

In Livingston v. State, 565 So.2d 1288 (Fla. 1988), this Court also considered a robbery/murder. There also this Court found that the death penalty was disproportionate finding the record showed, as here, that the defendant had an unfortunate upbringing and mental problems. The defendant would argue that the uncontradicted testimony by Dr. Toomer and his mother (See, Point VIII) show the same mitigating factors to *be* present in the instant case. Here, too, *as* in Livingston, the defendant's sentence must be reduced *to* life imprisonment.

There is uncontroverted testimony that Marbel throughout his life has suffered extensive mental problems. Dr. Toomer testified that these problems had caused a gradual deterioration over the four occasions he had interviewed Marbel. It was uncontroverted that Marbel was taking three different psychotropic medications for

these mental problems. Marbel's history of physical problems causing a nervous condition was unrebutted. The tragic physical deformity of his daughter and its adverse affect on him was unrebutted. Marbel's unsettled early life as a "professional refugee" was not taken into account and properly considered. Dr. Toomer's assessment that Marbel had potential for rehabilitation was not considered. Dr. Toomer's unrebutted testimony as to his belief Marbel has organic brain damage was nut considered. Mrs. Mendoza's unrebutted testimony as to Marbel's drug use which corroborated Dr. Toomer's assessment of Marbel's drug problem was not considered.

The defendant submits when the unrebutted defense testimony as to his unfortunate life and its list of physical, mental and emotional problems and setbacks are considered, that these mitigating factors require a conclusion that the death penalty is not warranted in this case. *See*, also, Sinclai v. State, 657 So.2d 1138 (Fla. *1995);* Besaraba v. State, *656* So.2d 441 (Fla. 1995); Knowles v. State, supra: McKinney v. State, *579* So.2d *80* (Fla. 1991); Fitzpatrick v. State, 527 So.2d *809* (Fla. 1988); Deangelo v. State, supra; Nibert v. State, 574 So.2d 1059 (Fla. 1990).

This defendant's sentence must be reduced to life imprisonment,

CONCLUSION

Based on the foregoing facts, arguments and authorities, the appellant Respectfully submits, that his Convictions must be Reversed, Sentences Vacated and this Cause Remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at Post Office Box 013241, Miami, Florida 33102, on this 18 day of August, 1996.

Respectfully submitted,

LAW OFFICES OF
JOHN H. LIPINSKI
1455 N.W. 14 STREET
MIAMI, FLORIDA 33125
(305) 324-6376

Counsel for Appellant

JOHN H. LIPINSKI, ESQUIRE