Filing # 22011220 Electronically Filed 12/29/2014 04:07:42 PM

RECEIVED, 12/29/2014 16:08:44, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1446

ANA MARIA CARDONA,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY/CROSS-ANSWER BRIEF

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

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INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death. As in the inital brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T," and the penalty phase transcript as "P." Unless noted otherwise, all emphasis is supplied.

ARGUMENT

I. JURY SELECTION.

A. The Court Failed To Strike Two Jurors Despite The Fact One Could Not Presume Ana Cardona Innocent And The Other's Answers Raised Doubts To His Partiality.

1. Ms. Brizo

Ms. Brizo's statements created a reasonable doubt as to her ability to apply the presumption of innocence and the burden of proof. She formed an opinion that Ms. Cardona was guilty based on news reports at the time of the offense. (T. 106; 112). She told the judge she would "try" to set aside what she knew, and that she would "try to be fair also and try to listen to different sides of the story." (T. 107). Asked if she could decide the case solely on the evidence she said, "I think I can." (T. 108). She told the court, "I have to see what makes this person innocent in order for me to believe she is innocent." (T. 110). The judge immediately explained the presumption of innocence to her and secured a promise to apply it. (T. 113). Ms Brizo nevertheless promptly repeated her insistence on proof of

innocence: “Yes. I can imagine saying [she is not guilty] because if I see something that proves she is not guilty I have to say she is not guilty. It’s something that’s proven – “ (T. 115).

The State does not dispute that these statements raised a reasonable doubt about Ms Brizo’s ability to be fair and impartial. Instead it argues that subsequent statements rehabilitated her. Answer Brief, 80-81. “The rehabilitation of prospective jurors is a tricky business that often leads to reversal.” *Martinez v. State*, 795 So. 2d 279, 283 (Fla. 3d DCA 2001). The “rehabilitation” the State points to is either nonexistent or inadequate.

The State first relies on statements Ms. Brizo made while she was still proclaiming her need for proof of innocence. The State claims that after her “initial responses,” Ms. Brizo “subsequently and repeatedly” state she would set aside her personal feelings and decide the matter exclusively on the facts and the law.” Answer Brief at 80. It points to pages 108-11, 112, and 114-15. Page 112 is where Ms. Brizo stated: “I have to see what makes this person innocent in order for me to believe she is innocent.” On page 115 she stated: “[I]f I see something that proves she is not guilty I have to say she is not guilty.”

For further support, the State relies on Ms. Brizo’s responses when she was individually examined regarding the death penalty. It points to pages 293-94, 298, and 301. On pages 293 and 294 the judge introduced the topic of the death penalty

and asked whether Brizo could make a recommendation to the court. On page 298 Ms. Brizo assented to a (compound and leading) question on being comfortable with the responsibility to consider the appropriate penalty after a guilty verdict.[1] On page 301 the defense reminded Ms. Brizo that the defense did not need to prove anything. She replied: "**I'll try.**"

The State claims that Ms. Brizo made the disqualifying statements before the judge explained the presumption of innocence and burden of proof, citing pages 112 and 113. Answer Brief, 80-81. Those are the pages where the judge forcefully explained these concepts. As noted above, Ms. Brizo insisted on proof of innocence just two pages later.

The State goes so far as to rely on pages where *Ms. Brizo never even spoke*. It argues that, "Brizo consistently indicated that she would hold the State to the burden." Answer Brief at 81. For this it cites pages 296-97, 1986-90, 2005-17, and 2130-31. On pages 1986 to 1990 the judge asked the venire as a whole whether they understood certain broad principles, such as the fact that there might be exhibits introduced, that the jurors would be the judges of the facts, and that what

[1] [PROSECUTOR]: That is the only thing you consider in the first phase stage, has the State met its burden of proving guilt of the defendant and until that time comes if you're convinced by the evidence she is guilty and the jury votes her guilty that's when you consider the appropriate – you're comfortable with that responsibility?

MS. BRIZO: Yes.

the lawyers say is not evidence. In each case the venire as a whole agreed. None of the questions related to the presumption of innocence or burden of proof.[2] Ms. Brizo's name does not appear.

Pages 2005 to 2017 contain an excerpt from the State's questioning. Again, Ms. Brizo did not speak. The prosecutor observed that there was no burden on the defense, and asked whether anyone thought that was a problem, or that the defense should have a burden. (T. 2006). No one on the panel responded. *See, e.g.*, *Juede v. State*, 837 So. 2d 1114, 1116 (2003) ("[The juror's] silence to a question asked to the entire panel was not sufficient to overcome the reasonable doubt."); *Rodas v. State*, 821 So. 2d 1150, 1153 (Fla. 4th DCA 2002). The State asked the panel at large whether they agreed with the standard of proof beyond a reasonable doubt. (T. 2006-07). Again there was no response. The prosecutor proceeded to question a number of jurors on their attitudes toward the reasonable doubt standard. (T. 2007-17). Ms. Brizo was not among them. Pages 2130 and 2131 contain the State's parting remarks. The three-paragraph, twenty-two line peroration touched on the State's burden, reasonable doubt, the irrelevance of personal experience, and

[2] The court did mention that, "the plaintiff the State, person with the burden of proof will present witnesses …" The question eventually put to the venire, however, was: "During the course of the presentation of those witnesses, exhibit[s] may be introduced in evidence. An exhibit may be any object. It could be a photograph. It could be a piece of wood. It could be anything. Does everybody understand that?"

concluded by asking the panel if they were unable to set aside personal experiences or feelings. None of the jurors responded.[3]

The State finds further comfort in the fact that Ms. Brizo would not hold a decision not to testify against Ms. Cardona. Answer Brief at 81. This is a non-sequiter. The fact that Ms. Brizo could honor the right to remain silent does not remove a reasonable doubt as to her ability to abide by the presumption of innocence or her capacity to decide Ms. Cardona's fate without requiring some evidence of innocence.

2. Juror Gabriel

Preservation

The State claims that the issue on appeal differs from what was argued to the trial court. Answer Brief at 76. This is false. The Initial Brief argues that Mr. Gabriel could not assure the judge that he would not be influenced by his emotions as the father of a young child. Amended Initial Brief, 32-34. At trial the defense argued:

> Your Honor. The reason we move for cause on Mr. Gabriel specifically was that when asked whether or not he could remain

[3] Ms. Brizo did speak on pages 296 and 297. Page 297 contains the leading, compound question described above regarding Ms. Brizo's comfort with considering the appropriate penalty after the State meeting its burden of proof as to guilt. On page 296 the State observed that the prosecution had the burden of proof beyond a reasonable doubt, then asked: "If we do that then we got to the next phase. You understand that, right?" Ms. Brizo agreed.

> neutral in this case given the fact that he has a five-month-old, he said he was not sure how much a having child – I'm not sure how much having a child would impact me.
>
> When asked again, he kept saying not sure how it would affect him as of right now, I'm not concerned about it as of right now. So he couldn't give his guarantee that the fact that he had a five-month-old child and this case involves a victim who is a child and difficult pictures, couldn't assure us if it's going to affect him as of right now. And that creates a reasonable doubt.

(T. 1585-86). The State dismisses this as "an afterthought" because defense counsel first pointed out Gabriel's immaturity. Answer Brief at 76. It provides no authority for the curious principle that where a party makes an objection on multiple grounds, only the first ground argued is preserved for appeal.

The State also argues that the defense was required to specifically identify Gabriel as a juror whose cause challenge was erroneously denied. Answer Brief at 76. For this it cites *Matarranz v. State*, 133 So. 3d 473 (Fla. 2013). This stands *Matarranz* on its head. In that case the Court rejected precisely the same argument.

Matarranz found error in the failure to strike a particular juror for cause. When requesting additional peremptories, defense counsel pointed to the judge's failure to strike five *other* jurors for cause, naming each. The juror at issue on appeal was not among those named. "Before the jury was sworn, defense counsel renewed 'all our motions and objections and challenges previously made.'" *Id.* at 481. This Court rejected the State's argument that the challenge was unpreserved:

> *Carratelli*[4] and related case law demonstrate that it is the objection/re-objection process—not the re-listing of specific, individual, and previously objected-to jurors—that is the decisive element in a juror-objection-preservation analysis.
>
> * * *
>
> Once counsel has noted that he or she would strike a specific juror for cause, and again renews that objection before the jury is sworn, counsel has accomplished the purpose which underlies the *Carratelli* logic: to provide a trial court with notice that counsel believes a juror has been retained in error, and to provide the court with a final opportunity to redress the situation. *See Joiner*, 618 So.2d at 176.
>
> **Additionally, after moving to strike a juror for cause, precedent does not reflect that counsel is required to again list the juror by specific name a second time who should have been initially removed for cause, but was not.**

Matarranz, 483-484.

Merits

The State does not so much dispute the merits of this claim as reimagine them. Answer Brief 78-79. It argues that Gabriel said he could impartially consider both penalties, and that he was only unsure of how he would be influenced by Lazaro's injuries. These are not the issues on appeal. The question was whether Mr. Gabriel could decide Ms. Cardona's fate based on the facts and the law without being influenced by thoughts of his own young child. Mr. Gabriel's repeated and unretracted answer was, "I'm not sure."

[4] *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007).

II. COMMENTS ON SILENCE.

The prosecution elicited and extensively argued evidence of Ana Cardona's post-arrest silence. This silence was not the refusal to answer a question, or even to volunteer information. It was Ms. Cardona's failure to *ask* a question of her interrogators. The prosecution argued that Ms. Cardona was guilty because she failed to ask this question after she was arrested, both before and after she received *Miranda* warnings. None of this is in dispute.

The State argues that this was lawful because once police advised Ms. Cardona of her rights she waived them. Answer Brief, 81-83. The State is wrong. First, the State ignores the fact that the prosecution's comments referred to both pre- and post-*Miranda* silence. Second, the silence at issue here falls outside of this Court's exception for impeachment with the failure to answer "one question of many." *See Hudson v. State,* 992 So. 2d 96 (Fla. 2008); *Parker v. State*, 124 So. 3d 1023 (Fla. 2d DCA 2013). Last, Ms. Cardona had the right to refuse to answer individual questions (or indeed *ask* them) after voluntarily agreeing to speak with police.

The use of Ana Cardona's pre-*Miranda* silence was a straightforward violation of *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998), which forbids the use of

post-arrest, pre-*Miranda* silence, whether for impeachment or in the State's case-in-chief.[5] The State offers no argument to the contrary.

The comments on Ms. Cardona's silence are not excused by this Court's decisions in *Hudson v. State*, 992 So. 2d 96 (Fla. 2008), *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001), and *Valle v. State*, 474 So. 2d 796 (Fla. 1985), *vacated on other grounds* 476 U.S. 1102 (1986).[6] In those cases the Court held that where the defendant has waived his rights under *Miranda*, it is not improper to comment on his refusal to answer "one question of many." These decisions have no application in this case.

In *Valle* the Court adopted the premise of *Ragland v. State*, 358 So. 2d 100 (Fla. 3d DCA 1978), which explained:

> During this post-*Miranda* lengthy conversation, appellant refused to answer one question of many. We do not believe that comment upon the failure to answer a single question was violative of appellant's constitutional right, when said constitutional right was not invoked.

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[5] Only one of the questions referred exclusively to post-waiver silence. (T. 3774). The remainder of the questions and comments referred either to the time of the arrest, or to a time period including both before and after the waiver.

[6] The State also points to *Hutchinson v. State*, 882 882 So. 2d 943 (Fla. 2004), *abrogated on other grounds Deparvine v. State*, 995 So. 2d 351 (Fla. 2008). *Hutchinson* did not involve a comment on silence. *Id.* at 955 ("There was no comment about the content of Hutchinson's statement or his refusal or failure to answer any question." In dicta the Court cited to *Valle* for the proposition that there is no prohibition on comments on silence unless the right is invoked. *Id.*

Id. In relying on *Ragland*, this Court has underscored the fact that it relates to failure to answer just "one question of many." In *Valle*, the defendant declined to answer when asked who his employer was. This Court quoted *Ragland*, and placed its own emphasis on the narrowness of the rule: "During this post-*Miranda* lengthy conversation, appellant refused to answer *one* question of many." 474 So. 2d at 801 (emphasis in the original). In *Hudson* and *Downs*, the Court pointedly referred to the "one question out of many" language. 801 So. 2d at 911; 992 So. 2d at 111. In this case, the State did not simply refer to a failure to answer a single question. It did not even limit its comments to the failure to volunteer a single answer. Instead, it focused on Ms. Cardona's failure to question her own interrogators, and emphasized that she had not done so over the course of eighteen hours.

At least where the defendant does not take the stand, comment on the failure to volunteer information or to answer even "one question out of many" is still forbidden. This Court has not squarely confronted the State's use of this silence in its case-in-chief. In both *Hudson* and *Downs*, the defendant testified.[7] There is an important distinction between the use of a defendant's silence to impeach her testimony, and presenting it as proof of her guilt *See Hoggins*, 718 So. 2d 765 n.6. "Once a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and

[7] The Court's opinion in *Valle* does not discuss whether Valle took the stand.

prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)). Where there is no impeachment, there is no countervailing interest to alter the balance of interests limiting the privilege of self-incrimination.

Even so, the use of post-*Miranda* silence in response to even "one question of many" violates the United States Constitution. *Miranda* itself forbids comment where the defendant invokes the privilege *or* "stands mute" to a question: "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he *stood mute or claimed his privilege* in the face of accusation." *Miranda v. Arizona*, 384 U.S. 436, 468 n.37. The Fifth Amendment, "… usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer." *Kastigar v. United States*, 406 U.S. 441 (1972). The Constitutional guarantee to due process, moreover, forbids comment on any exercise of silence after *Miranda* warnings are given.

Doyle v. Ohio, 426 U.S. 610, 618 (1976), held that once a defendant is in custody and police have read *Miranda* warnings, "[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." The Court's

subsequent opinion in *Anderson v. Charles*, 447 U.S. 404 (1980), helped delineate the exclusion.

> But *Doyle* does not apply to *cross-examination* that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. *As to the subject matter of his statements*, the defendant has not remained silent at all.

Id. at 408. *Charles* rejected an extreme definition of "silence" that would preclude impeachment by actually contradictatory statements: "Each of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence' …" *Id.* at 409. The non-formalistic understanding of silence – failing to say something – is what *Doyle* governs.[8]

Florida's cases permitting comment on silence to "one question of many" are inconsistent with *Doyle* and due process. Those cases look only to whether the Fifth-Amendment was invoked. *See Hudson*, 992 So. 2d at 111; *Hutchinson*, 882 So. 2d at 955; *Downs*, 801 So. 2d at 911; *Valle*, 474 So. 2d at 801; *Ragland*, 358

[8] There is even less justification for the use of silence in the State's case-in-chief. In *Wainright v. Greenfield*, 474 U.S. 284 (1986), the prosecution used Greenfield's silence in its case-in-chief to rebut his insanity defense. The Court noted that in that case, "unlike *Doyle* and its progeny, the silence was used as affirmative proof in the case in chief." *Id.* at 292. Therefore, the constitutional violation might be especially egregious because, unlike *Doyle*, there was no risk "that exclusion of the evidence [would] merely provide a shield for perjury." *Id.*

So. 2d at 100. In so doing, they treat pre- and post-*Miranda* silence as if they were the same. *Doyle* says they are not. The Supreme Court reinforced this distinction in *Salinas, v. Texas*, 133 S.Ct. 2174 (2013) (plurality opinion). Pre-*Miranda*, Salinas answered questions for an hour, declining to answer only one. The Court wrote: "[R]egardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis*[9] applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." It noted that post-*Miranda* the result would be different:

> Petitioner is correct that *due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings, *Doyle v. Ohio*, 426 U.S. 610, 617–618 (1976), but that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him, *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).

Id. at 2182, n.3 (emphasis in the original).

III. DISCOVERY VIOLATION.

Dr. Souviron changed his opinion between the first and second trials. He did so on the basis of a photograph he had been shown in the interim depicting bone damage. He explained:

> So if you look at the socket of the teeth just soft tissue you will see these teeth were loss less than six months. When you look at the bone now you see a different story, now you say woe [sic], this one is

[9] *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

> definitely older than the other. One of them is less than six months. One is older than six months. **I didn't have that in 1990.**

(T. 3843). The trial court's failure to conduct a proper *Richardson*[10] hearing is preserved, erroneous, and the State has not proven it to be harmless beyond a reasonable doubt.

The defense preserved this issue by promptly bringing the discovery violation to the judge's attention. (T. 3842-43). As soon as Dr. Souviron said he had reevaluated the dating of the injuries based on evidence he didn't have in 1990, and confirmed that he had changed his opinion, the defense requested a sidebar and alleged a discovery violation. (T. 3841-43). The State argues that the defense nevertheless waived the issue by "waiting" to raise the issue until it had begun cross-examination. Answer Brief at 84. For this it cites *Guzman v. State*, 42 So. 3d 941 (Fla. 4th DCA 2010).

Guzman is not on point. In that case the State's analyst unexpectedly testified that the two contributors to a number of semen stains were likely related. *Id.* at 942. Guzman did not object. He cross-examined the analyst for an hour, but still made no reference to the new testimony. The *following day* Guzman raised a possible discovery violation. *Id.* at 943. The district court noted cases finding a discovery violation preserved by an objection before the State's direct

[10] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

examination, during the State's direct examination, after the State's direct examination, and during defense cross-examination.[11] *Id.* at 943-44. "However, we have not found a case in which the alleged violation occurs during the state's direct examination and the defendant completes his cross-examination before raising the alleged violation." *Id.* at 943-44. The court held "that a defendant does not preserve an alleged discovery violation for review when the alleged violation occurs during the state's direct examination and the defendant completes his cross-examination before raising the alleged violation." *Id.* at 944.

This case is nothing like *Guzman*. Dr. Souviron first suggested that one of the injuries might be older than six months during the last two pages of his direct examination. (T. 3830-31). After touching on other subjects, the defense sought to clarify whether Souviron was in fact changing his opinion. (T. 3838-42). Once it became clear that Souviron had in fact arrived at a new opinion based on different evidence, the defense formally alleged the violation. These facts more closely resemble *Barrett v. State*, 649 So. 2d 219 (Fla. 1994), where the State also argued, "defense counsel waived this issue by inquiring into the circumstances of the print comparison on cross-examination rather than objecting at the instant that the expert

[11] "*Richardson* only requires that the possible discovery violation be "brought to the attention of the trial court during the course of the proceedings.'" *Cliff Berry, Inc. v. State*, 116 So. 3d 394, 415 (Fla. 3d DCA 2012), *review denied sub nom. State v. Smith*, 133 So. 3d 528 (Fla. 2014).

revealed his comparison. In *Barrett* the defense did not immediately object to the new testimony.[12] On cross-examination, Barrett asked questions concerning the source and nature of the undisclosed evidence before calling the violation to the court's attention. *Id.* at 221. This Court found the objection to be timely. *Id.*

The State argues there were no material change in Dr. Souviron's testimony. Answer Brief at 86-87. The Initial Brief lays out the passages where Souviron originally opined that the injury was less than six months old and where he explained the reason for the change of opinion. The State carefully ignores these portions of the record and argues that other statements dating injuries within six months may not have referred to the teeth. (T. 87). To simplify: In his deposition Souviron testified, "There is definitely scarring in the area where the teeth used to be. The area is not completely healed over and therefore I'm going to say that a couple months for sure that they had been out **but they hadn't been out for six months or a year**." (T. 3855-56). In the first trial he was asked "But we do know with respect to the loss of the teeth they occurred within the last several months of the child's life?" and he answered, "In my opinion that's correct." (T. 3839-40). At the second trial Souviron testified that one of the teeth was knocked out more than

[12] "Defense counsel can hardly be faulted for not immediately comprehending that the State had withheld this information or that the expert was testifying about something that occurred *after* he had previously testified. This is precisely the type of trial by ambush that Florida's discovery rule is designed to prevent." *Id.* at 221.

six months before the child's death. (T. 3830-31). He acknowledged the change and explained why it happened. There is no ambiguity.

The State also argues that the record does not prove that the prosecutors were aware of the changed testimony. Answer Brief at 86. They were on notice of the changed testimony as a matter of law. The prosecution is charged with constructive knowledge of evidence known to other state agents. *See Gorsham v. State*, 597 So. 2d 782, 784 (Fla. 1992); *Tarrant v. State*, 668 So. 2d 223 (Fla. 4th DCA 1996). In *Rose v. State*, 787 So. 2d 786 (Fla. 2001), this Court considered a *Brady* violation concerning the failure to disclose photographs. The Court wrote:

> [E]ven where the prosecutor does not know about the existence of the exculpatory material, a suppression may still be deemed to have occurred if the State's agents possess the evidence and it is not disclosed. In this instance, **the medical examiner** for the State on this case became aware of the photographs in the State's possession but did not disclose them to defense counsel; thus, for the purposes of analysis the photographs appear to have been withheld.

Id. at 796.

Moreover, the record shows that the prosecution was aware of the changed testimony. *See State v. Evans*, 770 So. 2d 1174, 1182 (Fla. 2000) ("[T]he prosecution's questioning of Green clearly indicated that the State knew of the changes in Green's testimony."); *Collins v. State*, 671 So. 2d 827, 828 (Fla. 2d DCA 1996). In preparation for his testimony, Souviron met with the prosecutor and picked Exhibit 45 as a photograph that was "significant to [his] ability to

explain to the jury some of the injuries concerning the two front missing teeth." (T. 3824). While Souviron was testifying about that photograph, the prosecutor asked:

> Q. Did he lose that one how long, **a year, six months, thirteen months**?"
>
> A. Over six months for sure. Over six months. This would be probably less than six months.

(T. 3829). Even if the Court were to judge the record incomplete on this point, any shortcoming would be the result of the trial court's failure to conduct a full hearing into the discovery violation.

"An analysis of procedural prejudice does not ask how the undisclosed piece of evidence affected the case as it was actually presented to the jury." *Scipio v. State*, 928 So. 2d 1138, 1149 (Fla. 2006). Yet this was the only question the judge ever asked. He focused exclusively on how the discovery violation prejudiced the defense on the merits, "[i]n connection with the rest of the case all the evidence." (T. 3862). The State argues that this was the appropriate inquiry, citing *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996). *Consalvo* does not authorize a court to ignore a violation's impact on the preparation of the defense and instead focus on the ultimate impact on the factfinder. In *Consalvo* the Court held there was no discovery violation. *Id.* at 813. It added that even if there were a violation, Consalvo had not been prejudiced because Consalvo was not hampered in presenting his defense. The Court only addressed prejudice on the merits in one

respect: It pointed out that the new evidence was in fact helpful to the defense. *Id.* Nothing in the State's interpretation of *Consalvo* can overcome the Court's deliberate clarification that, "the inquiry is whether there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial preparation or strategy.'" *Scipio*, 928 So. 2d at 1150 (quoting *State v. Schopp,* 653 So. 2d 1016, 1020 (Fla. 1995)).[13] "One cannot consistently say, as we did clearly and repeatedly in *Schopp,* that the test for prejudice does *not* concern the impact of the undisclosed evidence on the fact-finder, and yet apply a test that does consider that impact." *Id.* at 1148.

"[W]here the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high." *Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002). The State complains that the defense "was unable to specify how the alleged change in testimony prejudiced her trial preparation …" Answer Brief at 89. As the Appellee must know, the burden to prove lack of prejudice is on the State. *See Thomas v. State,* 63 So. 3d 55, 59 (Fla. 2d DCA 2011); *Cliff Berry, Inc.*

[13] Scipio was charged with murder. In opening he suggested that an unknown third party was the culprit. Afterward he learned that an examiner had determined that eighteen of the forty unidentified fingerprints found in the victim's apartment belonged to her deceased boyfriend. The defense was able to depose the fingerprint expert before he testified. The State's argument relies on a single sentence: "In fact, because there still remained a substantial number of unidentified prints, even after Messick's further analysis, the defense's third party theory could still be asserted." *Id.* at 813.

v. State, 116 So. 3d 394, 418-19 (Fla. 3d DCA 2012). The defense pointed out that it had repeatedly asked if any State witnesses had changed their opinions, *or showed the witnesses any new evidence*.[14] (T. 3843, 3861-62). They asked this in order to determine whether they should re-depose those witnesses. (T. 3861-62). Counsel further explained that there still was not enough information for the defense to determine how else it had been procedurally prejudiced: "Had we known that prior to trial we might have proceeded differently. I can't tell you because I don't have – I don't know the full extent of everything he reviewed." (T. 3863). The judge never explored this question. Because the judge failed to conduct an adequate *Richardson* hearing, the record does not permit the Court to conclude beyond a reasonable doubt that Ms. Cardona was not procedurally prejudiced.

IV. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

The State argues that, "[w]hile Defendant acts as if she preserved issues regarding the propriety of the comments, this is not true." Answer Brief at 91. It maintains that even the most egregious comments were appropriate and that any error was harmless in view of the "overwhelming evidence." Answer Brief at 101.

[14] "The bottom line is if they showed him new information that he had not seen before that affects his opinion it's precisely what we have been asking of the state for months and months. If your experts have changed their opinion or gone over anything new we simply need the depose them. Had that been disclosed to us we could have done so. None of this would have happened today." (T. 3861-62)

It achieves this by ignoring the many objections and avoiding discussing many of the improper arguments or their context. The numerous preserved errors cannot be proven harmless beyond a reasonable doubt. When they are considered together with the other errors, it is the prejudice that is overwhelming.

A. "Justice for Lazaro"

The defense repeatedly objected to the State's claims that the case was about "justice for Lazaro." On page 5352 the prosecutor argued, "[W]e who labor seek only the truth. This trial is about justice for Lazaro." The defense responded, "Objection, inflames the jurors passion and misstatement of the law." The judge overruled the objection, and the prosecutor again intoned, "Justice for Lazaro." On the following page the prosecutor said, "[R]emember, this trial is about justice for Lazaro." The defense objected, "Objection, inflames the juror." This time the judge sustained. Undeterred, the prosecutor went on to conclude her argument by telling jurors they must find Ana Cardona guilty because "This is the only verdict that's going to give justice for Lazaro." (T. 5354). The judge then *overruled* the defense objection. Only two instances of the argument went unobjected-to.

Because the judge at least appeared to sustain one of the objections, the defense made a specific motion for mistrial on this basis. (T. 5356). The judge just as specifically ruled that the comments were appropriate, distinguishing *Gomez v. State*, 415 So. 2d 822 (Fla. 3d DCA 1982), and *Harper v. State*, 411 So. 2d 235

(Fla. 3d DCA 1982). (T. 5356-57).

The State maintains that these comments were somehow an appropriate reminder that it was unreasonable for the defense to argue that Ana Cardona was not guilty because she did not have custody of Lazaro at the time of his death. Answer Brief, 93-94. It makes no argument why the Court should overrule cases finding reversible error where the State "demand[ed] justice for the victim." *Dorsey v. State*, 942 So. 2d 983 (Fla. 5th DCA 2006); *see Shaara v. State*, 581 So. 2d 1399 (1st DCA 2009); *Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983); *Watts v. State*, 593 So. 2d 198, 203 (Fla. 1992).

B. Burden-Shifting

The State repeatedly urged the jury to decide the case by deciding what it thought the truth was, rather than proof beyond a reasonable doubt. It now maintains that the prosecutor merely stated that "the truth is she killed her little boy" as an introduction to the evidence, and "its comments on the truth at the end of its initial argument were based on the assertion that it had proven Defendant guilty based on the facts and the law." Answer Brief, 93-94. The record shows otherwise. The prosecution told the jurors that their duty in deliberating a verdict was to determine the truth of what happened. It told them the search for truth was part of the law they had agreed to "uphold and honor":

> And the judge is going to instruct you on the law in this case, and it's called jury instructions. And in it there's a whole bunch of law. **This is the law that during jury selection that you all agreed to uphold and honor. Because we who labor here seek only truth**, and the truth is she killed her little boy.

(T. 5329). It continued to remind them "we who labor here seek only truth." (T. 5341, 5352). And it ended by telling them that when they deliberated they had to "decide what's the truth here …":

> When you go in that jury room, you're going to be given, like I said, the jury instructions. Read the jury instructions, they'll look like this. Go over the law … you're going to get a verdict form because you're going to elect a foreman and you're going to deliberate … **When you elect that foreman, you have to decide what's the truth here**, but I'm going to ask you, remember, this trial is about justice for Lazaro.

(T. 5352-53). In rebuttal the prosecutor told jurors they were, "here to seek the truth based upon what you heard in this courtroom." (T. 5476).

The State believes that it was proper for jurors to decide a defendant's guilt based on a determination of what they believe truly happened. It complains that the Appellant has cited cases in which the prosecution argued that jurors should decide *which side* was telling the truth. Answer Brief at 94. In *Gibbs v. State*, 193 So. 2d 460, 462-63 (Fla. 4th DCA 1967), the judge told jurors that they should "have only one desire, and that is to seek the truth based on the evidence." The court held this to be error because it "could result in a juror **voting to convict a defendant because he feels that the defendant did, in truth, commit the offense, even though his guilt may not be proven to the exclusion of every reasonable**

doubt." In *Northard v. State*, 675 So. 2d 652 (Fla. 4th DCA 1996), the prosecutor stated its belief that the jury would, "come back with a verdict, a verdict that simply reflects the truth; that the defendant in this case was caught red-handed." The district court held: "Like the instruction in *Gibbs*, the prosecutor's comment could have resulted in a juror voting to convict appellant because the juror believed that in truth appellant committed the crime, even if the state had not met its burden of proof." Each cases cited in the Initial Brief stands for the same proposition: Proof beyond a reasonable doubt, not "truth," is the standard in a criminal trial.

The State also tells the Court it must review for fundamental error. Answer Brief, 94-95. At page 5352 the prosecution argued: "Remember this trial, we who labor seek only the truth. This trial is about justice for Lazaro." The defense objected that this was a misstatement of the law. It objected again when the State argued the jury was "here to seek the truth based upon what you heard in this courtroom." (T. 5476). The State must prove its misconduct harmless beyond a reasonable doubt.

C. Denigrating The Defense.

The State does not contest the preserved error in the prosecution's pervasive arguments ridiculing the defense as a "distraction" or "diversionary tactic." Answer Brief, 100-01. It admits these comments were "unfortunate," but protests that the prosecution's argument as a whole was "largely proper." Answer brief at

100. It argues that in light of the "overwhelming evidence" the error in "the **brief use** of the word diversion was harmless." Answer Brief at 101 (emphasis supplied). This argument ignores the facts and defies the law.

What the State calls the "brief use" of the word diversion was in fact the anchoring refrain of an argument intended to discredit the defense:

> The defense gave you this. They want you to play where's Gloria, where's Gloria? **It's a diversionary tactic**.
>
> * * *
>
> **It's a diversionary tactic** because they don't you to focus on this statement, the statement that, that woman made …
>
> * * *
>
> And you get to the conclusion of what really happened to Lazaro. **Diversionary tactics** and –
>
> * * *
>
> … **They don't want you to look at this frying pan**.
>
> * * *
>
> **Don't let them cloud that issue and muddle it.**
>
> * * *
>
> … I saw it on the news. I wanted to call you, but I didn't. Where is Gloria? **Diversionary tactic**.
>
> * * *
>
> **That's outrageous. That is outrageous.** Where is Gloria? **Diversionary**.
>
> * * *
>
> This is where the torture occurred the last two months of his life. **Diversionary**. That frying pan had his hair on it. **Diversionary**.
>
> * * *
>
> Premeditation. Let's talk about that. **Diversionary**.

(T. 5328-29, 5333-34, 5336, 5338, 5343).

The State does not acknowledge, much less defend, the prosecutor's statement, over objection, that the defense argument was, "**a magnificent display here, a real show here**." (T. 5435).

Faced with this, the State knows it cannot prove the error harmless beyond a reasonable doubt. It tries to change the rules instead. It tells the Court the error is harmless where there is "overwhelming evidence." Answer Brief at 101. This Court has mad it exceedingly clear that this is a false statement of the law. *See, e.g., Ventura v. State*, 29 So. 3d 1086, 190 (Fla. 2010).

The State willfully misconstrues some of the improprieties at issue. It argues it was fair to argue "that the feet kissing did not show coercion" and Mr. Lima had not been asked "the exact words." Perhaps it would have been. But what the prosecution *did* was criticize counsel for "making a big issue" of the fact Ms. Cardona was on the floor kissing the detectives feet and accuse counsel of trying to "poison your mind against Carlos Lima." (T. 5439, 5473). [15]

[15] The State avers that other arguments errors were unpreserved. In fact, the defense objected to the State's arguments that it was "interesting to note which witnesses [the defense] left out," and that the jury never heard about Susie Hernandez (T. 5435), that the jury had not heard about Marta Fleites's testimony from the defense (T. 5435), that, "We didn't hear anything this afternoon yet about that life and that woman" (T. 5437), that the defense tried to poison the jurors' minds against Carlos Lima (T. 5439). It noted a motion to the argument that after hearing from the defense the jury needed to "know the whole story." (T. 5440). The defense further objected to the arguments that the defense failed to discuss

D. Vouching

The State rewrites the improper vouching arguments in order to defend them. It says "the comment about reality" was merely a reply "that the claim that Defendant kissed Det. Matthews feet for threatening her was illogical." Answer Brief, 97-98. But what the prosecutor argued was: "You heard about everything that happened in that room in that conversation, because that's the reality. That's what was heard. That's what was done." (T. 5473). The State says the prosecutor merely stated, "it's a felony murder," as it transitioned to its discussion of premeditation. Answer Brief at 97. What the prosecutor said was:

> Because like I told you, **it's felony murder. Oh, you can rest assured of that**, because the kid died of aggravated child abuse but premeditation. Murder one, murder one. And it's going to get more painful. **You better believe it. This is what she did.**

(T. 5343). The prosecutor also simply told the jury Ana Cardona was guilty. (T. 5329, 5478). This Court has quoted the United States Supreme Court in explaining the dangers of arguments like these:

> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus *jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury;* and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's

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Susie Hernandez (T. 5440, 5433) and Debra Sabo (T. 5440, 5433, 5463, 5465), that it did not tell jurors about all the witnesses (T. 5465), and that the defense had made a "big issue" about Ms. Cardona kissing the dectecive's feet (T. 5473).

judgment rather than its own view of the evidence.

Martinez v. State, 761 So. 2d 1074, 1080 (Fla. 2000) (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)). This is precisely what happened in this case.

E. Personal Attacks On Ms. Cardona

The State claims that its degrading personal attacks were justified by the fact that Ana Cardona portrayed herself as pathetic, poor, and limited. Answer Brief, 98-99. The State avoids the actual comments at issue. It does not acknowledge or explain the decision to mock Ms. Cardona as a character in a telenovella ("Aye. Aye."). (T. 5342). It says it was important to show that "she was once found in a hotel," so it was appropriate to argue she was found, "in some hotel … with some man." (T. 5438). The Answer Brief does not explain how, precisely, sneering at the "me, me, me of her statement," or arguing "it's all about her," or that Ana Cardona cares only about herself, is fair reply to suggestions that a defendant is limited. It offers no citation or argument to explain why the Court should overturn three decade's precedent to the contrary.

F. Facts Not In Evidence

The prosecution's opening promised substantial evidence about Ana Cardona's life before Lazaro's birth. For the space of two pages, the defense briefly touched on this proposed evidence. (T. 2801-04). The State now argues that

this entitleld it to argue as evidence facts it had never proven, in order to "note[] that Defendant had not discussed this concession in closing." Answer Brief, 99-100. Here the State provides a very loose interpretation of its own argument. The prosecutor actually criticized defense counsel for not discussing these unproven facts: "We didn't hear anything this afternoon yet about that life and that woman. Let's talk about that woman." (T. 5436). The State offers no authority that would support its position.

These errors are subject to review for harmless error. The State argues that the trial court did not abuse its discretion. The defense, however, repeatedly objected the these comments. (T. 5436-37, 5452-53). The judge sustained only one objection. It permitted the prosecutor to argue these facts from outside the record, but concluded there was "no evidence she was partying." (T. 5485).

G. Harmful Error.

The defense repeatedly objected to inflammatory arguments about "justice for Lazaro," (T. 5352, 5353, 5354), arguments telling jurors to decide the case based on the "truth," (T. 5476, 5352), arguments denigrating defense counsel and the defense, (T. 5328-29, 5333, 5334, 5336, 5338, 5343, 5433, 5435, 5437, 5439, 5440, 5463, 5465, 5473), the argument vouching for the truth of what happened during the interrogation, (T. 5473), and arguing facts not in evidence, (T. 5452-53). The State must therefore prove beyond a reasonable doubt that the prosecutor's

misconduct did not contribute to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135-36 (Fla. 1986). This it cannot do. This misconduct was pervasive. The prosecution saturated its arguments with comments designed to inflame and mislead the jury, discredit the defense, and manufacture evidence. Moreover, the Court does not consider improper arguments "in isolation." *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). Instead, it considers "the properly preserved comments … combined with additional acts of prosecutorial overreaching …" *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999). In evaluating the harmfulness of the preserved errors, the Court must consider the effect of still more improper arguments in each of these categories, as well as the vituperative personal attack on Ms. Cardona.

V. PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE

A. Facts Not In Evidence

The trial court entered an order prohibiting argument of matters not in evidence as well as a second order prohibiting testimony or argument that there was no evidence corroborating the details of Ms. Cardona's life in Cuba. (R. 11095-96, 11151). The prosecutor argued it anyway. The defense objected that the prosecution had violated the pre-trial ruling. The issue is preserved.

The State maintains that it was simply suggesting categories of witnesses who *might* be available. Answer Brief at 103. What the prosecutor said was that the doctor's account "was totally unsubstantiated by any other outside source such

as family members **who were available,** friends **who were available**." (P. 1115).

B. Denigrating Defense Counsel

The State concedes that its arguments accusing counsel of "attacking" Officer Butler "may have been poor phrasing …" Reply Brief at 107. It claims only that this argument on its own could be found harmless. The Court does not consider improper closing arguments in isolation, however. *See Card*, 803 So. 2d at; *Delhall v. State*, 95 So. 3d 134, 169 (Fla. 2012).

C. Diminishing Mitigation

The State suggests that it made a fair comment when it compared jail to camp because people become homesick in both places. Answer Brief at 105. What it did was deride and belittle the mitigation witnesses, referring to them as her bunkies **as if it's camp**." (P. 1111). As to the prosecutor's comments on Ms. Cardona's relationship with her children, the prosecution did not confine itself to arguing the relative weight of this mitigation. Instead it argued it as though it were aggravation, treating "conduct that actually should militate in favor of a lesser penalty" as aggravation results in a denial of due process. *Zant v. Stephens*, 462 U.S. 862, 885 (1983)

D. Harmful Error

As observed above, the court does not consider improper prosecutorial

arguments singly. The Court further considers *guilt-phase* errors in determining the harmfulness of penalty-phase closing arguments. *See Delhall* at 167. In light of the bare 7-5 recommendation these improper comments together with the guilt-phase errors cannot be proven harmless beyond a reasonable doubt. *Id.* at 170.

VI. THE HAC AGGRAVATOR CANNOT BE BASED ON ACTS BEYOND THE IMMEDIATE CIRCUMSTANCES SURROUNDING THE DEATH.

The judge and jury relied on facts far beyond "the **means and manner** in which death is inflicted and the **immediate circumstances** surrounding the death," in determining HAC. *Hernandez v. State*, 4 So. 3d 642, 669 (Fla. 2009). The prosecution argued acts that could have or – without intervention – would have *but did not* cause Lazaro's death. Rather than just the "immediate" circumstances surrounding the death, the State relied on acts weeks and months before death.

The State counters that the Court has held "That HAC must consider the context of the death of the victim, including the torture inflicted on the victim before he was finally killed." Answer Brief at 109. The Court has not, however, extended this reasoning to any suffering no matter how remote from the cause of death. The State relies on *Hernandez v. State*, 4 So. 3d 642 (Fla. 2009) and *Lott v. State*, 695 So. 2d 1239 (Fla. 1997). Each dealt with the question of whether HAC applied where the defendant may have been unconscious at the time of death, but the victim was aware of her impending death immediately before that point. It also

points to *Gore v. State*, 706 So. 2d 1328 (Fla. 1997); *Preston v. State*, 607 So. 2d 404 (Fla. 1992). Both cases involve kidnappings and rely on the circumstances on the date of the crime. In *Hudson v. State*, 992 So. 2d 96 (Fla. 2008), the Court relied on the forty-five minutes preceding the killing. None of these cases authorizes reliance on events months before death.[16]

VII. ERRORS IN THE SENTENCING ORDER

A. Facts Not In Evidence

The trial judge *copied* portions of its sentencing order from an opinion this Court had already repudiated.[17] (R; 13714, 13718-20, 13722). He selected for regurtitation portions of that opinion that this Court later singled out as being sourced from Oliva Gonzalez's discredited testimony. *See Cardona v. State*, 826 So. 2d 968, 974, 976 (Fla. 2002) (*Cardona II*). The State defends this on the basis that some of the facts could be sourced in evidence other than Gonzalez's discredited, extra-record statements. The judge nevertheless relied on statements found only in *Cardona I* and Gonzalez's testimony. The judge's unabashed

[16] The outer limit reached by the Court appears to have been in *Hilton v. State*, 117 So. 3d 742, 753 (2013), in which the victim "was held anywhere from 2 days to a week prior to her murder, and that she was injured enough during that time to leave traces of her blood on several of Hilton's items." Like *Gore* and *Preston*, *Hilton* involved a kidnapping.

[17] *Cardona v. State*, 641 So. 2d 361 (Fla. 1994) (*Cardona I*).

incorporation of facts from *Cardona I* suggests he may have considered other facts from that decision in sentencing Ana Cardona to death.

- The judge concluded that Ms. Cardona abused Lazaro because "She considered Lazaro a bad birth and the cause of her going from riches to rags." (R. 13720, 13722). That testimony does not appear in the record, but in *Cardona I* the Court wrote: "Cardona blamed Lazaro for her descent 'from riches to rags,' and referred to him as 'bad birth.'" 641 So. 2d at 362. The State points to testimony from the postconviction hearing that Ana lived a "lavish lifestyle." Answer Brief at 112. This misses the point. The State *cannot* point to evidence that Ana Cardona *blamed* Lazaro for her impoverishment or that she considered him a "bad birth." The judge drew these from *Cardona I* and relied on them in sentencing Ana to death.

- The judge also found that Figueroa left Ana a "substantial sum of cash," which she quickly spent. (R. 13714). This information appears in *Cardona I*, but the State points to no record evidence to support the trial court. *See Cardona I* at 362.

- The judge believed that "the abuse did not commence when Gonzalez appeared in her life." (R. 13720). It based this conclusion on the "fact" that Lazaro's the abuse *began* when the family was living at the Olympia motel. (R. 13719-20). But Olivia Gonzalez already lived with Ana at the Olympia. (T. 3323). The State does not defend this misstatement, but claims there was evidence of abuse before the Olympia Motel. There was no evidence of physical violence prior to that time. Fleitas, Lima, and Hernandez only testified that Lazaro was relatively thin and hungry when they received him.

- The judge wrote: "When the Defendant was arrested in the Orlando/St. Cloud area, she gave statements that she abused Lazaro …" (R. 13718-19). She made no such statement. The State says this was supported by testimony from Dr. Haas that "Defendant confessed to abusing LF." Answer Brief at 112. This is not true. Haas testified: "I did have client acknowledgment she used corporal punishment." (R. 12024).

- The State has already admitted that without Olivia Gonzalez, "there would be no way to show that this defendant bound and gagged her own child and left him in this closet." *Cardona II* at 980. There was no evidence that Ms.

> Cardona tied Lazaro to a bed or gagged him. The lack of physical evidence negated the possibility that Lazaro was locked in the closet at the Piloto's.

B. Refusal to consider Codefendant's sentence

The State argues that the judge properly gave Olivia Gonzalez's sentence no weight because there was no evidence of her relative culpability. (T. 113-14). But there was also no evidence of *Ms. Cardona's* relative culpability. The Court has already spoken on this point:

> [In *Cardona I*], this Court concluded that the death sentence was proportionate because our review of the record led us to "agree with the trial court that, in light of the extended period of time little Lazaro was subjected to the torturous abuse leading to his death, the ultimate sentence is warranted in this case." [*Cardnona I*] at 365. We also rejected Cardona's claim regarding the relative culpability of Gonzalez because "the record in this case supports the trial court's finding that Cardona was the more culpable of the two defendants" and "[t]hus disparate treatment is justified." Id. On direct appeal, this Court did not have the benefit of the significant contradictory version of events that Gonzalez earlier gave to State investigators.
>
> * * *
>
> Gonzalez was the most important witness to testify as to which of the two defendants was the more culpable, and to the escalating abuse the State claimed Cardona committed against Lazaro.

Cardona II 970, 974.

C. The Trial Court Imposed a "Nexus" Requirement

The trial court *rejected* the mitigating circumstance that Ms. Cardona was a battered woman. It found the mitigator not proven *because being a battered woman did not cause the offense*, and there was "no evidence Gonzalez was more

culpable." (R. 13723). The State points to *Martin v. State*, 107 So. 3d 281, 318-19 (Fla. 2012), and *Cox v. State*, 819 So. 2d 705, 723 (Fla. 2002). In each case the Court approved a judge's decision to grant mitigation little or no weight. Here the judge found mitigation not to be proven, despite record support, because there was no causal connection.

The State argues that it is appropriate to give no weight to mitigation simply because others with similarly mitigating backgrounds did not go one to commit serious crimes, relying on *Williamson v. State*, 107 So. 3d 688, 698 (Fla. 1996). The State stretches *Williamson* too far. The Court has held that "the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000). In *Williamson* the Court approved the decision to give only "some weight" to the defendant's "dysfunctional upbringing" in light of his siblings' success. In the present case the judge rejected mitigation where, "plenty of other people" had endured similar hardships without committing capital murder. This could be said of any mitigating circumstance. If courts are permitted to read *Trease* and *Williamson* this broadly the Court will give judges license to give no effect to mitigation, no matter how strong it might appear.

VIII. INTELLECTUAL DISABILITY

According to the State, all *Hall v. Florida*, 134 S. Ct. 1986 (2014), did was

move Florida's IQ cutoff from 70 to 75. Answer Brief at 119. It did much more. The Supreme Court held that legal definitions of intellectual disability must be consistent with clinical definitions. "In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id.* at 1993. It rejected Florida's cutoff because, "the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70." It noted that "clinical definitions of intellectual disability" were "a fundamental premise of *Atkins*."[18] *Id*. at 1999. The Court repeatedly invoked clinical standards, citing to DSM-IV, DSM-V, the AAIDD manual,[19] and relied on the brief of the American Psychological Association. *Id.* 1990-91, 1994-95, 1998, 2000-01. For the reasons explained in the Initial Brief, the trial court's assessment of Ana Cardona's intellectual disability is incompatible with clinical definitions and medical opinion.[20]

The trial court concluded that a number factors that could have compromised testing rendered the tests "invalid." The Supreme Court, however, recognized the

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[18] *Atkins v. Virgina*, 536 U.S. 304 (2002)

[19] User's Guide To Accompany AAIDD 11th ed.: Definition, Classification, and Systems of Supports 22 (2012).

[20] The State maintains that the trial judge rejected the factor of onset before age eighteen. Answer Brief at 118. The trial court's order ruled only on the basis of intellectual functioning and adaptive deficits. (R. 6427-28).

existence of such factors and cited them as reasons clinical judgment must be brought to bear:

> An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.

Hall at 1995.

This Court's opinion in *Henry v. State*, 141 So. 3d 557 (Fla. 2014), supports Ms. Cardona's position. Henry's only IQ testing was a score of 78. The Court did not end its analysis based on that score, even though it fell outside the standard error of measurement. The Court looked to clinical judgment to confirm that the score effectively expressed Henry's intellectual functioning. *Id.* at 559-60. It pointed out that no doctor had every diagnosed Henry as intellectually disabled. It also relied on an expert opinion based on a clinical interview, which stated: "[Henry's] clinical presentation during the evaluation was consistent with intellectual functioning at or above what would be predicted based on his prior IQ test result of 78 (7th percentile). *Id.* at 559. The experts further opined: "Mr. Henry does not suffer from any DSM–5 psychiatric illness or intellectual disability (formerly referred to as mental retardation in DSM–IV) …" *Id.* at 560.

"Persons facing [the death penalty] must have a fair opportunity to show that the Constitution prohibits their execution." The State never comes to grips with the

central problem of the trial court's approach to intellectual disability. Some people come from populations for which there is no "valid" standardized IQ test. Some people have psychiatric and physical illnesses that will call any IQ result into question. Unless the Court applies an a test consistent with clinical standards, those people will never "have a fair opportunity to show that the Constitution prohibits their execution." *Hall* at 2001.

IX. DR. SUAREZ'S TESTIMONY

The trial court did not abuse its discretion in excluding Dr. Suarez as a penalty-phase witness. The Fifth Amendment permits use of a court-ordered psychiatric evaluation only insofar as it is tailored to rebut defense experts. *See Kansas v Cheever*, 134 S.Ct. 596, 603 (2013); *Buchannan v. Kentucky*, 483 U.S. 402, 423-24 (1987). "We have held that testimony based on a court-ordered psychiatric evaluation is admissible only for a 'limited rebuttal purpose.'" *Cheever* at 603 (quoting *Buchannan*, 483 U.S. 423-24).

The State failed to establish that Dr. Suarez's testimony would be the kind of "limited rebuttal" permitted by the Fifth Amendment. Immediately before the judge ruled, the prosecutor explained her position thus:

> But when we last visited the issue of Dr. Suarez Your Honor had expressed reservations as to what areas you thought that I would be able to get into in light of the fact that he had had contact, personal contact, had spoken with the defendant. Now our position at that time was that was relevant because their expert Dr. Toomer has had the

> conversations with the defendant and perhaps Dr. Suarez could also enlighten the jury as to the meat of those conversations and what the significance they would have regarding Dr. Toomer's, I can't even call it evaluations. He didn't evaluate. He had a conversation with her. That's essentially what he did; two conversations with her, two separate dates.

(P. 650-51). Given the opportunity to argue its position, the State proffered only that Suarez could "enlighten the jury as to the meat of those conversations." The State made no further proffer after Dr. Toomer actually testified. The trial court did not abuse its discretion in finding that this was not admissible under the Fifth Amendment.[21]

The inadequate proffer also renders any error unpreserved. In order to preserve for appeal the exclusion of testimony, it is necessary to make a proffer of what the testimony would be. *See, e.g., Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990).

[21] In a previous written pleading, the State had indicated that Suarez might rebut a diagnosis of depression and testify to testing indicating Ms. Cardona may have been malingering during testing for intellectual disability. (R. 10809-14). There would be no abuse of discretion in excluding this "rebuttal." Dr. Toomer did not testify to a diagnosis of depression, and he conducted no testing. Any error would be harmless in light of the fact that the court permitted Dr. Capp to testify at length about the deficiencies in Dr. Toomer's evaluation, including the failure to conduct tests for malingering. (P. 962-993).

X. THE NO SIGNIFICANT PRIOR CRIMINAL HISTORY MITIGATOR

The trial court did not abuse its discretion in instructing the jury on the mitigating factor of no significant prior criminal history. By the time the judge instructed the jury on this factor, jurors had heard evidence of Ms. Cardona's drug use, but no convictions for more serious offenses. Though the State now argues that it had additional evidence it could have presented to rebut this mitigating factor, this was not its argument below. It simply stated its belief that here had been no evidence to establish this mitigator. The court responded: "Established she has a history. It has to be significant. I'm going to give them the first statutory." (P. 1037-38). The State did not at this point proffer the evidence it would have presented or argue the point further. In fact, the "evidence" the State now points to amounts to double-hearsay statements in the form of arrest affidavits that did not lead to convictions, proffered at the *Spencer*[22] hearing solely to challenge the basis for Dr. Haas's opinions. Answer Brief at 124; (R. 12008-12). The Court has cautioned judges: "Regarding mitigating evidence and instructions, we encourage trial courts to err on the side of caution and to permit the jury to receive such, rather than being too restrictive." *Robinson v. State*, 487 So. 2d 1040, 1043 (Fla. 1986). The trial court did not abuse its discretion in obeying this Court's injuction.

[22] *Spencer v. State*, 615 So. 2d 688 (Fla.1993).

The trial court also properly found this mitigator, though he gave it only "little weight." (R. 13720-21). "[I]t is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it." *Teffeteller v. State*, 439 So. 2d 840, 846-47 (Fla. 1983). "Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." *Stano v. State*, 460 So. 2d 890, 894 (Fla.1984). In its sentencing memorandum, the State argued only:

> The testimony presented at the guilt and penalty phases of the trial established that the defendant may have engaged in acts of drug abuse, shoplifting and prostitution. The testimony also establishes that the defendant was arrested several times. Although these acts did not result in any conviction, the State submits that this mitigating circumstance does not exist. However, if the court finds that it does, this factor should be given little weight given the enormity of the offense in the instant case.

(R. 12786). This Court has upheld the finding of this mitigator where there is a history of prior drug use. *See, e.g. Craig v. State*, 685 So. 2d 1224, 1231 (Fla. 1996); *Cook v. State*, 542 So. 2d 964 (Fla. 1989).

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, this cause must be remanded for trial, and the cross-appeal must be denied.

Respectfully submitted,

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Fla. Bar No. 0446779

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee, Sandra Jaggard, Assistant Attorney General, Dept. of Legal affairs, 444 Brickell Ave, Suite #650, Miami, FL 33131 via the Court's e-filing portal on December 29, 2014.

/s/ Andrew Stanton
ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

/s/ Andrew Stanton
ANDREW STANTON
Assistant Public Defender