**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC00-1366**

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**ANA MARIA CARDONA,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# CORRECTED REPLY BRIEF OF APPELLANT

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### A. BRADY VIOLATION REGARDING OLIVIA GONZALEZ.

**1. The State's "Diligence" Argument.** The State first argues that trial counsel lacked diligence with respect to discovering both the withheld proffer letter and the interviews of Olivia Gonzalez (AB at 21-22). The State's argument overlooks binding legal precedent establishing that diligence is not an element of a Brady claim. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Kyles v. Whitley, 514 U.S. 419 (1995). See also Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (noting that "`due diligence' requirement is absent from Supreme Court's most recent formulation of the Brady test").

Notwithstanding controlling legal standards, the State argues that, as to the proffer letter, counsel "knew" that Gonzalez was "in the process of attempting to cooperate with the State" and thus "could have" obtained the letter "by requesting from the State copies of any letters from Gonzalez's attorney" (AB at 22).[1] As to the State investigator interviews, the State argues that counsel "knew" that she had been interviewed "by the investigators in the presence of Dr. Haber" and thus "could have reasonably obtained the

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[1]This argument presumes that counsel knew of the existence of the proffer letter, a presumption not borne out by the testimony of either of the trial attorneys (PCR. 1059; 1115-22), or by the law. Strickler, 527 U.S. at 285 ("Although it is true that petitioner's lawyers ... must have known that Stoltzfus had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews ... existed and had been suppressed").

substance of the interviews ... by simply deposing the investigators" (AB at 22).[2] However, the State fails to explain how this "knowledge" should have put reasonable counsel on notice of the existence of either an exculpatory proffer letter (which the State below argued it had no legal duty to disclose),[3] or 3 written interviews (the knowledge of which the prosecutors themselves denied). "Diligence ... depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate.... [I]t does not depend ... upon whether those efforts could have been successful." Williams v. Taylor, 529 U.S.

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[2]This argument has, at its premise, the illogical presumption that reasonable defense counsel "could have" obtained statements that the prosecutors themselves denied knowing about. See AB at 22 ("neither prosecutor attended the interviews or was aware of the existence of the two reports generated from the interviews"). If the prosecutors did not know the statements existed, the State is hard-pressed to argue that diligent defense counsel should have a higher burden. The State's argument also overlooks its concession below that it failed to turn over the reports (PCR. 1530-31). Moreover, "knowing" that Gonzalez's psychologist spent time with Gonzalez with investigators from the State Attorney's office is a far cry from knowing that Gonzalez was interviewed 3 times by the investigators and that reports were generated. Finally, the argument that counsel "could have" deposed the investigators overlooks that the investigators were never listed by the State as witnesses who possessed information relevant to the case.

[3]Below, the State contested its duty to disclose the proffer letter because it "was made in contemplation of plea negotiations" (PCR. 1531). The State does not explain how defense counsel "could have" obtained a document that the State itself argued it had no duty to disclose. Nevertheless, the State on appeal does not advance the argument that it had no duty to disclose the proffer letter, focusing instead on the materiality aspects of the document. The State has correctly abandoned its legal argument as to the duty to disclose the proffer letter in light of the case law on this point. See Cruz v. State, 437 So. 2d 692 (Fla. 1st DCA 1983), disapproved on other grounds, Edwards v. State, 548 So. 2d 656 (Fla. 1989); Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 557 (4th Cir. 1999).

420, 435 (2000). The State's *post-hoc* rationalization for its failure to disclose does not vitiate its duty to disclose.

**2. The Inconsistencies Between the Withheld Documents and Gonzalez's Testimony.**

The State argues that Ms. Cardona has not "specifically alleged nor did she establish at the evidentiary hearing" that there were inconsistencies between the withheld materials and Gonzalez's trial testimony (AB at 22-23). This argument is flawed on numerous levels, the most obvious being that it overlooks the finding of the trial court that the withheld materials "would have assisted defense counsel in impeaching Olivia Gonzalez Mendoza" (S.R. 935). This factual finding is due deference. Stephens v. State, 748 So. 2d 1028 (Fla. 1999).[4]

The State's argument that there is a "lack of proof" on the inconsistencies between the withheld information and Gonzalez's trial testimony is also flawed because it is false. The interviews and proffer letter were introduced below and were extensively addressed during closing arguments. Ms. Cardona simply does not understand what the State means when it argues that "no potential impeachment evidence was actually established at the evidentiary hearing" (AB at 23 n.3). The documents speak for themselves and led the lower court to conclude that they "would have assisted defense

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[4]While the lower court's finding that "it is abundantly clear to this Court that those reports would have assisted defense counsel in impeaching Olivia Gonzalez Mendoza" is a finding of fact due deference by this Court, the application of the factual finding to the materiality prong is reviewed *de novo*. State v. Huggins, 788 So. 2d 238, 242 (Fla. 2001); Way v. State, 760 So. 2d 903, 913 (Fla. 2000).

counsel in impeaching Olivia Gonzalez Mendoza" (S.R. 935).[5]

Next, the State, relying on Brockinton v. State, 600 So. 2d 29 (Fla. 2d DCA 1992), and Gross Builders, Inc. v. Powell, 441 So. 2d 1142 (Fla. 2d DCA 1983), argues that the information contained in the proffer letter would "not have properly been admissible as impeachment evidence against Gonzalez" because it was not "authorized" by Gonzalez (AB at 23). This argument overlooks the basic principle that "withheld information, even if not itself admissible, can be material under Brady if its disclosure would lead to admissible substantive or impeachment evidence." Rogers v. State, 782 So. 2d 373, 383 n.11 (Fla. 2001).[6]

Statements made during plea negotiations are not inadmissible when the accused seeks to impeach the witness with inconsistencies in those statements. Cruz v. State, 437 So. 2d 692, 695-97 (Fla. 1st DCA 1983), *disapproved on other grounds*, Edwards v. State, 548 So. 2d 656 (Fla. 1989). Cruz is not cited, discussed, or distinguished in the State's brief. Both Brockinton and Gross Builders are inapposite, as they address impeaching a witness with

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[5]In a similar vein, the State argues that Ms. Cardona's Initial Brief does not allege how the contents of the proffer letter "presented inconsistencies with Gonzalez's actual testimony at trial" (AB at 23. n.3). This statement is puzzling, as Ms. Cardona's Initial Brief discusses in detail how the proffer "provided a vastly different version" of events from Gonzalez's trial testimony. See IB at 24-26.

[6]See also White v. Helling, 194 F. 3d 937, 946 (8th Cir. 1999) (withheld information, although not necessarily admissible at trial, was nonetheless material under Brady because it "would surely have been the basis for further investigation"); Sellers v. Estelle, 651 F. 2d 1074, 1077 n.6 (5th Cir. 1981) ("the evidence here suppressed was material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not").

statements of third parties not attributable to the witness. Brockinton, 600 So. 2d at 30; Gross Builders, 441 So. 2d at 1143. Here, the proffered information came from Gonzalez herself (PCR. 1226-28).[7]

Comparison between Gonzalez's testimony and both the proffer letter and the investigator interviews undeniably establishes their impeaching quality, as the lower court expressly found and as the Initial Brief discusses (IB at 22-35), yet the State baldly asserts that Ms. Cardona has not demonstrated any inconsistencies (AB at 23-24). No reading of the Initial Brief or the record supports the

[7]In Spicer v. Roxbury Correctional Institute, 194 F. 3d 547 (4th Cir. 1999), the Court addressed an analogous claim of whether Brady was violated when the State failed to disclose statements of a witness made during plea negotiations when those statements were inconsistent with the witness' trial testimony. Id. at 555 ("Our task is to determine ... whether the prosecution in Spicer's case violated Brady when it failed to disclose to Spicer's attorney information that Brown--who told the prosecutor, the grand jury, and the trial jury that he witnessed Spicer fleeing Armadillo's on the day of the assault--had previously told his attorney on multiple occasions that he had not seen Spicer at all on that day"). In finding a Brady violation, the Court rejected the argument that the statements were "not of impeachment character" because they were made to the witness' attorney, not the state itself, noting that "the impeaching nature of the statements does not depend on whether the state was a direct or indirect audience.... [I]t is the content of the statements, not their mode of communication to the state, that is important." Id. at 556. Because the witness had made statements to his attorney, which the attorney thereupon communicated to the State during plea negotiations, and the witness testified in an inconsistent manner at trial, the withheld statements fell under Brady. Id. at 557 ("The discrepancy between Brown's testimony in court and his prior statements to his attorney would have provided Spicer with significant impeachment material"). Spicer is directly on point with Ms. Cardona's case, yet the State does not even address it.

State's sweeping statement.[8]

Next, the State argues that the withheld statements "are essentially the same as" and "cumulative to" Gonzalez's statements to the Slatterys (AB at 24). No attempt is made to explain these putative "consistencies."[9] For example, the State does not address

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[8]For the State's argument to have any validity, one has to ignore the withheld statements and hope that the affirmative misrepresentations made by counsel for the State will remain unverified. For example, the State asserts:

> The actual State Attorney investigator reports do not advise that Gonzalez made such an admission [of hitting Lazaro with a baseball bat] to investigators. Rather, it plainly reads only that `Ms. Gonzalez reports Lazaro Figueroa was physically abused with a belt, a broomstick, a plastic bat.'

(AB at 42). **This statement is completely false.** In the September 30, 1991, interview with Maria Zerquera, Gonzalez admitted that "she hit Lazaro with many objects. Ms. Gonzalez stated she recalls having hit Lazaro with her bare hands, with a belt, with a broomstick, and with a wooden bat." She claimed she would "usually aim at Lazaro's feet" when hitting him, but "she might have hit Lazaro in other parts of his body, including his head." In that interview, Gonzalez also stated that "she hit Lazaro at least two or three times with the wooden bat." She also acknowledged that, about a month before Lazaro's death, she again "hit Lazaro with the wooden bat" but could not recall where on his body she beat him or "how many times she struck him." The State's representations to this Court as to the suppressed statements are clearly false.

[9]The State points to nothing in the Slattery reports to support its argument of "essential" consistency between the reports and the statements from Gonzalez that were withheld by the State. In fact, inconsistencies abound. For example, in her September 19, 1991, withheld statement, Gonzalez reported that when she arrived home from work on November 1, 1990, Ms. Cardona was "screaming `He fell off the bed!'" and that when Gonzalez opened the closet, she saw Lazaro motionless on the floor and observed that he was not gagged but was wearing diapers. Gonzalez also claimed that Ms. Cardona was screaming "I killed him, we have to throw him away." In the version she told the Slatterys on July 24, 1991, however, Gonzalez reported that when she arrived home, all Ms. Cardona said was "He died," and that when Gonzalez looked into the closet, she saw that Lazaro was

the Halloween incident, graphically detailed by Gonzalez at trial (R. 2897-99), and discussed by the Court on direct appeal. Cardona v. State, 641 So. 2d 361, 362 (Fla. 1994). The Initial Brief describes the diametrically different version of the Halloween evening that Gonzalez provided to the State investigators, where she reported that nothing "unusual" happened and that Ms. Cardona “was in bed watching television” (IB at 30). Yet without even discussing the content of the statements, the State baldly asserts that this version is “essentially the same” as what she told the Slatterys. Nothing could be further from the truth. For example, in her July 24, 1991, interview with the Slatterys, Gonzalez reported that on the evening of October 31, 1990, "she saw Ana hit Lazaro with a bat, frying pan, dish, stick, and whatever else she had in her hand and Ana was also choking Lazaro" (S.R. 862). This is a far cry from "nothing unusual" happening, as she reported in the statements withheld from the defense, and hardly "essentially the same" as the withheld statements.[10] Her trial testimony on this point is also

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wearing diapers (S.R. 860). In another version provided to the Slatterys on December 27, 1991 (different from the July 24 version as well as the version provided to state investigators), Gonzalez reported that when she came home from work, she (Gonzalez) took Lazaro out of the closet and he began "crying and screaming" (S.R. 871). Gonzalez then hit Lazaro with her hand and picked up a bat to "scare" him (Id.). Then, according to Gonzalez, she took a shower and when she returned, found Lazaro lying motionless on the floor with paper in his mouth (Id.). Ms. Cardona then put Pampers on Lazaro and taped them on his waist (Id.). These versions could not be more inconsistent with each other, as well as with Gonzalez's trial testimony. See IB at 22-24.

[10]As noted in the Initial Brief, the Halloween incident was significant to the State, for it provided, in the State's view, the evidence of premeditation (IB at 31 n.16).

flatly contradictory to her September 30, 1991, interview with State investigators, when she stated that “the last time she remembers seeking Ms. Cardona with the wooden bat was approximately a week before [Lazaro’s] death.” Halloween was the day before Lazaro's death, not a week before. This is not "cumulative" impeachment; the defense could not cross-examine Gonzalez about the Halloween incident as it did not possess the suppressed statements.

Next, the State argues that defense counsel "aggressively" impeached Gonzalez with her "plea agreement, her statements to the Slatterys concerning her admission that she hit Lazaro in the head with a bat and other incidents in which she beat Lazaro, and with her deposition" (AB at 24). Thus, according to the State, the withheld statements "would merely have been cumulative impeachment evidence" (Id.).[11] However, "the fact that the jury was apprised of other grounds for believing that the witness ... may have had an interest in testifying against petitioner [does not turn] what was otherwise a tainted trial into a fair one." Napue v. Illinois, 360 U.S. 264, 270 (1959). Given the substance of the withheld information and the context in which the suppressed information was provided to the State, the impeachment "cannot automatically be

[11]The State writes that trial counsel Kassier testified that "he successfully impeached Gonzalez on cross-examination" and thus he did not call the Slatterys in the defense case-in-chief (AB at 25 n.5). This argument must be put in context. One of Ms. Cardona's claims is that counsel failed to call the Slatterys to testify to Gonzalez's statements to them (IB at 51-58). As his reason for not calling the Slatterys, Kassier testified that Gonzalez had already been impeached with her statements to the Slatterys (PCR. 1176-78). At no time did trial counsel testify that they would not have wanted to impeach Gonzalez with the statements that were suppressed by the State; in fact, the opposite is true (PCR. 1056-62; 1115-22).

categorized as cumulative." Crisp v. Duckworth, 743 F. 2d 580, 585 (7th Cir. 1984).[12]

To understand why the suppressed evidence in this case is not "merely cumulative," the entirety of Gonzalez's trial testimony and the State's closing arguments,[13] not just isolated references to Gonzalez's cross-examination, must be evaluated. For example, the State asserts that Gonzalez was impeached with statements to the Slatterys that "she hit Lazaro in the head with a bat and other incidents in which she beat Lazaro" (AB at 24). However, throughout her examination, Gonzalez repeatedly minimized and/or denied abusing Lazaro with the bat, particularly in the crucial last months and days. This is critical, as the key feature of the defense was that Lazaro's ultimate death was from head trauma caused by Gonzalez

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[12]The cases cited by the State for its "cumulativeness" argument, Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994), Jones v. State, 709 So. 2d 512 (Fla. 1998), and Buenoano v. State, 708 So. 2d 941 (Fla. 1998), are inapposite to the facts and circumstances of Ms. Cardona's case and the impeaching evidence at issue (AB at 24-25). Materiality "is a context-specific determination." Spicer, 194 F. 3d at 560. The cases relied on by the State all address claims of newly-discovered evidence, not Brady claims; the legal test is vastly different for these legal claims. See generally Robinson v. State, 770 So. 2d 1167, 1171 (Fla. 2000) (Anstead, J., concurring specially).

[13]See Kyles, 514 U.S. at 444 ("[t]he likely damage [to the State's case due to suppressed information] is best understood by taking the word of the prosecutor"); Arango v. State, 497 So. 2d 1161, 1162 (Fla. 1986) (suppressed evidence, "coupled with [] prosecutorial argument to the jury," required new trial); Wilson v. State, 363 Md. 333, 349, 768 A.2d 675, 683 (Md. Ct. App. 2001) (materiality established where "disclosure of the plea agreements by the witnesses on the stand was not entirely accurate, and that inaccuracy was compounded by the State's characterization of the agreements and the witnessess's motives to testify in closing arguments").

hitting him with the bat (R. 3343).[14] Even prosecutor Vogel conceded at the evidentiary hearing that "[t]he issue, the big issue was who hit Lazaro in the head with a baseball bat" (PCR. 968). The State's position at trial, supported only by Gonzalez's testimony, was that it was Ms. Cardona who beat Lazaro with the bat while Gonzalez went to "bathe" (R. 2902). While the issue of Gonzalez beating Lazaro was an important issue in the case, the overriding issue with respect to Gonzalez's physical abuse of Lazaro was the fatal blow of November 1, 1990, the abuse on Halloween of 1990, and the abuse suffered by Lazaro in the last few months of his life--abuse to which Gonzalez was the sole witness and which she blamed exclusively on Ms. Cardona.

With that in mind, the withheld statements are not "merely cumulative" of Gonzalez's trial testimony.[15] For example, when asked on cross about using the bat to hit Lazaro, Gonzalez denied that she pled guilty for causing broken bones and skull fracture; she only acknowledged that she "permitted the mother" to "do that" (R. 2943). When questioned about statements made to the Slatterys

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[14]In fact, this was the original cause of death established by the medical examiner (PCR. 1027-27) (Exhibit Q). It was later on that the medical examiner changed the cause of death from head trauma to child neglect, and at trial specifically disavowed the brain injury as the cause of death (R. 3302).

[15]The State also overlooks the fact that the withheld statements impeached Gonzalez's testimony that she had never spoken to the State prior to entering into her plea (R. 2944), and would also have been powerful evidence of coaching. Rogers; Kyles. In fact, during closing arguments following the evidentiary hearing, the prosecutor acknowledged it "probably would have been appropriate impeachment" for the defense to have questioned Gonzalez about her statements to the State Attorney investigators (PCR 1532-33).

as to "the truth that you murdered Lazaro Figueroa," she testified that she was "frightened" by them, they were "forcing" her to say things, and "that's why I said different things" (R. 2946-47). See also R. 2986 (when she told Slatterys that she struck Lazaro with bat several times, "I was under pressure, I didn't know what I was saying. I was frightened").[16] She admitted telling Brian Slattery that she hit Lazaro with a bat, but repeatedly denied that she hit him on the day he died and "didn't break his skull" (R. 2947-48; 2950). She only used a bat one time while they were living at the Piloto home and that was only to "tap" Lazaro on his feet (R. 2979-80). However, on redirect, Gonzalez affirmatively disavowed *ever hitting Lazaro with a bat, including on his head, during the months prior to his death*, and the prosecutor got her to physically point to Ms. Cardona as the person who did (R. 2993). Thus, the State rehabilitated Gonzalez as to this important issue, a fact which it hammered home during closing argument (R. 3385)(Gonzalez "admitted to you, "Yes I did hit him with a bat **but she has told you, "I did not hit him in the last couple months of his life**").

It is clear the withheld documents are material. For example, in the proffer, Gonzalez never mentions *anything* having to do with a baseball bat; rather, Lazaro was already dead when Gonzalez got home. In her interviews with Maria Zerquera, Gonzalez never places

[16]On redirect, the prosecution got Gonzalez to repeat that she did not believe that the Slatterys were "always working in [her] best interest" (R. 2993).

a baseball bat in Ms. Cardona's possession on November 1, 1990.[17] In fact, in her September 30, 1991, interview with Zerquera, Gonzalez stated that “the last time she remembers seeing Ms. Cardona hitting Lazaro with the wooden bat was approximately a week before his death.” These versions are in complete contradiction to her trial testimony (R. 2902), and are not matters on which she was "already" impeached at trial.

Moreover, in her September 30, 1991, interview, Gonzalez freely admitted, without the "fear" and "pressure" she testified to having felt from the Slatterys and her own attorney, that "she hit Lazaro with many objects," including "her bare hands, with a belt, with a broom stick, and with a wooden bat;" that "she thinks she hit Lazaro at least two or three times with the wooden bat," but did not "think she ever broke his arms or his legs." She also told investigators that approximately one month before his death, she (Gonzalez) "remembers having hit Lazaro with the wooden bat" but could not be specific as to "what part of Lazaro's body she hit him or how many times she struck him." This is in complete contradiction to her trial testimony, where she adamantly denied having struck Lazaro with the bat in the last months of his life (R. 2993). These were not matters already covered by the impeachment at trial, since the

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[17]An omission from a prior statement can be just as damaging to a witness's credibility as an affirmative inconsistency. See McGee v. State, 570 So. 2d 1079, 1080 (Fla. 3d DCA 1990) ("there was no error in permitting cross-examination of the defendant concerning the fact that in a statement freely given the police after the incident, she had *not* referred to a specific claim--that a shot had been fired before she stabbed the decedent--which was a feature of her testimony at the trial").

defense was unaware of the existence, content, and context of the prior statements. Particularly in light of the State's rehabilitation of Gonzalez on the issue of the baseball bat and its adamancy in closing argument that Gonzalez did not hit Lazaro with the bat in the last few months of his life (R. 3385), the materiality of her prior admissions in both the proffer and the investigative interviews becomes clear.

That Gonzalez was cross-examined on her plea deal and on other limited inconsistencies with prior statements "does not substitute for adequate disclosure" of the information withheld in this case. Wilson v. State, 363 Md. 333, 351, 768 A.2d 675, 684 (Md. Ct. App. 2001). The *completely* inconsistent versions of critical events that Gonzalez freely provided to state investigators prior to trial "would not have been merely repetitious, reinforcing a fact that the jury already knew; instead, `the truth would have introduced a new source of potential bias.'" United States v. Rivera Pedin, 861 F. 2d 1522, 1530 (11th Cir. 1988) (quotation omitted). The contradictory versions of significant events, as well as the mere fact that she had extensive prior contact with the State prior to entering into her plea, is ***qualitatively*** different from the matters on which Gonzalez was impeached, and thus not "cumulative" of matters already known to the jury. Brown v. Wainwright, 785 F. 2d 1457, 1466 (11th Cir. 1986); United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977).[18]

[18]See also United States v. Nichols, 242 F. 3d 391 (10th Cir. 2000) ("some of the government's assertions of cumulativeness ring

The withheld impeachment was also material in other areas discussed neither by the State nor the lower court. For example, in order to explain away Ms. Cardona's addiction to cocaine, a major theme of the State's case, presented through Gonzalez, was that Ms. Cardona **never** abused Lazaro while high on cocaine (R. 2799; 2800; 2817; 2844; 2855; 2860; 2863; 2870; 2886). However, in the proffer letter, Gonzalez's position on this issue was just the opposite. The letter reveals that when she arrived home on November 1, 1990, she found Ms. Cardona "in a crazed state of hysteria and perhaps

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hollow because it is at least arguable the defense could have been aided by more rather than fewer similar sightings of [John Doe #2] with Timothy McVeigh"); Washington v. Smith, 219 F. 3d 620, 634 (7th Cir. 2000) (the fact that one witness testified to defendant's alibi did not render additional alibi witnesses cumulative; the additional testimony "would have added a great deal of substance and credibility to Washington's alibi"); United States v. Scheer, 168 F. 3d 445 (11th Cir. 1999) (prosecutor's threatening remarks to his chief witness material, despite witness' impeachment with previous history of perjury, and compelling independent evidence against defendant); Singh v. Prunty, 142 F. 3d 1157 (9th Cir. 1997) (suppressed evidence of benefits promised key witness material, despite overwhelming independent circumstantial evidence against defendant); United States v. Smith, 77 F. 3d 511 (D.C. Cir. 1996) (suppressed dismissal of two counts against government witness material, even where dismissal of ten other counts was disclosed, witness had been impeached as drug user, drug dealer, and five-time convicted criminal, and witness' testimony was "merely corroborative" of other testimonial and physical evidence sufficient to prove defendant's guilt); Carriger v. Stewart, 132 F. 3d 463 (9th Cir. 1997) (where state's only direct witness impeached with burglary convictions, immunity agreement, and history of dishonesty, suppressed evidence of witness' violent crimes, psychiatric diagnosis, and prison disciplinary record material, notwithstanding significant independent inculpatory evidence, including defendant's fingerprints on tape binding victim and defendant's possession of fruits and implements of the crime); United States v. Brumel-Alvarez, 991 F. 2d 1452 (9th Cir. 1992) (suppressed DEA memo which was highly critical of credibility of chief prosecution witness was material, despite "already impressive quantity and qualify of impeaching evidence," and government contention that memo contained "gratuitous opinions" of individual agent).

under the influence of drugs." Moreover, in her September 30, 1991, interview with state investigators, Gonzalez again acknowledged that because Ms. Cardona "was doing a lot of drugs, [they] would make her crazy, and she would take it out on Lazaro." These admissions are in complete contradiction to her trial testimony, as well as to the central theme of the State's case, and would also have been cannon-fodder for the defense to argue that Gonzalez had been extensively coached to disavow any testimony that would have supported the defense position that Ms. Cardona's actions were the result of severe drug addiction.

**3. The Lower Court's Legal Analysis.** The State argues that the conclusion that "Defendant's trial would nonetheless have resulted in her conviction" is the proper legal standard (AB at 25). The State is now compounding the error by also employing the incorrect standard, which is *not* whether Ms. Cardona would "nonetheless" been convicted if the exculpatory evidence had been disclosed. Kyles, 514 U.S. at 453 (the question is "not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same").[19] Other than parroting the lower court's language, the State cites no law to support the lower court's legal analysis (AB at 25-26).

The lower court's materiality analysis is also flawed for

[19]Accord Young v. State, 739 So. 2d 553, 559 (Fla. 1999); Rogers v. State, 782 So. 2d 373 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Hoffman v. State, 26 Fla. L. Weekly S438 (Fla. July 5, 2001).

failing to consider the cumulative effect of the various errors alleged by Ms. Cardona; numerous Brady violations were asserted, as were other instances of information unknown to the jury due to the deficient performance of trial counsel. The law requires that all of this be considered cumulatively. Kyles; Young v. State, 739 So. 2d 553 (Fla. 1999).

**B. GIGLIO VIOLATION AS TO OLIVIA GONZALEZ.** The State's attempt to use the record to put into "context" what is patently false testimony, and a concomitant failure by prosecutor Vogel to correct it, is belied by the record itself. As to Gonzalez's denial of conversations with anyone about the case (R. 2932), the State argues that Vogel was attempting to "correct[] Gonzalez's misstatement" by referring explicitly to the Slatterys and Dr. Haber (AB at 27-28). This was done, according to the State, to "refresh" Gonzalez's memory of speaking to the Slatterys and of her "prior inconsistent statement" she made to them (AB at 27). However, after initially being asked if she had spoken to "other people" about the case, Gonzalez replied "no" (R. 2932). At that point, Vogel only "reminded" Gonzalez of her conversations with the Slatterys and Dr. Haber. Vogel never "reminded," Gonzalez of her 3 interviews with Maria Zerquera. Vogel certainly knew that Gonzalez had been interviewed by Zerquera and knew what Gonzalez had reported to her (PCR. 944; 947; 948; 965). Prosecutor Jamie Campbell was also aware of Gonzalez's interviews, as Campbell herself made the arrangements to have Gonzalez taken from jail to the State Attorney's Office (PCR. 911; 914; 918). Zerquera herself was present at and conducted

the interviews with Gonzalez, and was present in court during Gonzalez's testimony (PCR. 1005). All of these state agents, present in the courtroom during this testimony, knew that Gonzalez had falsely testified that she had spoken to no one about the case. Vogel's examination, in the guise of "reminding" Gonzalez that she had spoken with only the Slattery's and Dr. Haber, was intentionally misleading because it failed to fully correct Gonzalez's false answer. The rule prohibiting the presentation of false testimony "applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity." Williams v. Griswald, 743 F. 2d 1533, 1541 (11th Cir. 1984).[20]

The second instance of Gonzalez's false testimony (during her cross-examination) also revolved around lying about her contact with the State (R. 2944). The State's posits because Gonzalez did not talk to "the prosecutors, Ms. Vogel and Ms. Campbell," but rather only with the individuals sent to speak with her by Vogel and Campbell, there was no false testimony (AB at 29).[21] This argument

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[20]At the evidentiary hearing, Vogel refused to answer the questions posed to her below on this point, testifying that she "didn't know" and was "not going to tell you whether or not I think [Gonzalez's] answer is truthful" (PCR. 973-75). For Vogel to have corrected Gonzalez's testimony at trial would, of course, have revealed the contact between the State and Gonzalez to the defense, and therefore the interviews that had been suppressed would have come to light.

[21]At the evidentiary hearing, Vogel testified that she did not know whether Gonzalez "understood that Maria Zerquera was from the State Attorney's Office" (PCR. 974). This explanation cannot be squared with the facts or with logic. Is Vogel suggesting that she would send an investigator, who would not identify herself as an employee of the State Attorney's Office, to speak with a capital

is meritless, particularly in combination with the false testimony on direct examination that Vogel failed to correct. Clearly the intent of the defense was to establish that Gonzalez had had contact with the State prior to entering into her plea. See PCR. 1062 (testimony of lead counsel Ron Gainor) (the defense "would liked to have known who [Gonzalez] sat down with, who she spoke with, what she said. If she was honest in certain areas and dishonest in others, it may have been material in cross-examination" (PCR. 1062).

The State's position that prosecutors can send investigators in to speak with Gonzalez and thus do not need to correct Gonzalez when she denied having spoke with the "prosecutors," is incompatible with the law. Giglio focuses on "the `prosecution team' which includes both investigative and prosecutorial personnel." United States v. Antone, 603 F. 2d 566, 569 (5th Cir. 1979).[22] It is no defense that

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defendant? As Vogel acknowledged, the interviews were conducted "in furtherance of [Gonzalez's] proffer and her plea" (PCR. 970). Moreover, as Zerquera explained, the interviews were conducted in the Investigative Unit of the State Attorney's Office (PCR. 994). Zerquera was present at the interviews, as were Ramon Mier (also a state attorney investigator), Bruce Fleisher (Gonzalez's attorney), Steve Hernandez (the defense investigator), and Dr. Merry Haber (Gonzalez's court-appointed psychologist). Who would Gonzalez think she would be talking to about a plea besides members of the State Attorney's Office?

[22]In Boone v. Pakerick, 541 F. 2d 447 (4th Cir. 1976), a similar situation occurred as that in Ms. Cardona's case. A key witness and accomplice, Hargrove, was told by a police officer, Coffield, that if he cooperated with the police, Hargrove would not be prosecuted for the burglary at issue or for any other crimes Hargrove may have committed. Id. at 449. Coffield then related this promise to the prosecutor, Lyle. Id. No one ever disclosed this information to Boone or his counsel. Id. Boone's counsel, who "suspected" that a deal had been struck, attempted to prove Hargrove's bias by asking him if "they" had ever made any representations about prosecuting Hargrove for the burglary. Id. at 449 n.2. Hargrove denied that "they" had made him any promises.

the prosecutors themselves did not speak with Gonzalez, but rather sent in investigators in order to shield themselves from knowledge. "If the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely because the prosecuting attorney was not personally aware of this prosecutorial activity." Schneider v. Estelle, 552 F. 2d 593, 595 (5th Cir. 1977).

The State's argument also is inconsistent with the due process concerns underlying Giglio.[23] Unlike a Brady claim, which need not

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Id. The Fourth Circuit found a Giglio violation on these facts, rejecting the argument that Hargrove's reference to "they" as opposed to the prosecutor himself insulated the State from the error, particularly when the prosecutor made statements that "were clearly intended to give the impression" that Hargrove knew nothing about possible leniency. Id. at 450.

[23]Relying on United States v. Lochmondy, 890 F. 2d 817 (6th Cir. 1989), United States v. Bailey, 123 F. 3d 1381 (11th Cir. 1997), and United States v. Michael, 17 F. 3d 1383 (11th Cir. 1994), the State argues that Gonzalez's testimony merely presents "inconsistencies," not falsities (AB at 26). This argument cannot survive a reading of the record, as set forth above. Moreover, the cases are inapposite. In Lochmondy, a statement made by a witness was simply inconsistent with prior testimony, and did not amount to the knowing use of or failure to correct false testimony as "[t]he allegedly inconsistent statement given by [the witness] was disclosed to the defense by the government prior to the witness taking the stand." Lochmondy, 890 F.2d at 822. In Ms. Cardona's case, the State failed to disclose Gonzalez's prior contacts and interviews, and her denial of such was not "inconsistent" with anything except the truth. In Bailey, a law enforcement agent made consensual tape recordings of conversations with various witnesses, including a witness named Priest. In writing his reports, the agent "inadvertently forgot" to mention having taped the conversation with Priest. Bailey, 123 F. 3d at 1394. This was discovered during trial, however, and the agent's "alleged perjury was explored on cross-examination, which removed any possible prejudice to the defense." Id. at 1395. Because the agent's failure to mention the Priest conversation was "nothing more than a memory lapse, unintentional error, or oversight," relief was not warranted. Id. at 1395-96. Importantly, the court noted that "there was no incentive" for the agent to falsely testify "because it was not

result from knowing or intentional action, the presentation of false testimony, and the failure to correct it, is a "corruption of the truth-seeking process." United States v. Agurs, 427 U.S. 97, 104 (1976). When the prosecution "knew, or should have known, of the perjury," id. at 103, due process requires that it be corrected or that relief be granted if the false testimony "could ... in any reasonable likelihood have affected the judgment of the jury." Williams, 743 F. 2d at 1543 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). Gonzalez's false testimony was not corrected, and there is a more than reasonable likelihood that it could have affected the judgment of the jury at both the guilt and penalty phases of Ms. Cardona's trial.

**C. BRADY VIOLATION REGARDING DR. HYMA.** Although defense counsel

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helpful to the defense," as well as the fact that the agent "did not deny having a conversation with Priest; he merely failed to mention that he had taped it." Id. at 1396. The dissimilarity between the situation in Bailey and Ms. Cardona's case could not be clearer. Gonzalez had a clear incentive to falsely testify against Ms. Cardona, and the State had an incentive to not reveal its extensive prior contacts with Gonzalez. Finally, the State's reliance on Michael is misplaced. Michael involved three allegations of false testimony. The first was rejected because "[t]he government sought and was given the right to reopen its case" so that the witness could "correct his testimony." Michael, 17 F. 3d at 1385. In Ms. Cardona's case, this did not occur. The second instance involved a statement on direct examination that the witness, on cross-examination, "admitted that he had been mistaken" about. Id. In Ms. Cardona's case, Gonzalez did not "correct" her false testimony on direct; rather, she exacerbated its falseness by reiterating her denial that she had spoken with the State prior to entering into her plea. The third instance involved an inconsistency on a particular fact between one witness and another witness. The Court held that "[t]he fact that the witnesses' recollections varied ... falls far short" of establishing the knowing use of false testimony. Id. Here, there was no "inconsistent" testimony as to Gonzalez's contact with the State; her denials were unrefuted and could not have been refuted because the State suppressed the information.

could not recall whether he possessed the police report reflecting Dr. Hyma's different cause of death (PCR. 1139), the precise cause for the breakdown in the adversarial process is constitutionally irrelevant, as it is uncontested that the jury did not know that Dr. Hyma had changed his cause of death from head trauma to child abuse/neglect. Whether the report at issue was withheld by the State in violation of Brady or whether, as the State suggests, counsel could have "reasonably obtained the information in Officer Schiaffo's report" (AB at 31), and thus counsel were ineffective,[24] the fact remains that the jury was not presented with this important information. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Next, the State misrepresents the evidentiary hearing testimony, arguing that defense counsel "conceded he was aware of Dr. Hyma's assessment and that Dr. Hyma's testimony at trial was consistent with Officer Schiaffo's summary in the report" (AB at 30) (quoting PCR. 1163-64). What defense counsel *actually* said was that the information contained in Schiaffo's report was "consistent with one of the things [Hyma] said during the trial **and inconsistent with another thing that he said during the trial"** (PCR. 1165).

The inconsistency related by counsel centered on what Hyma concluded was the cause of death. The defense theory was that Lazaro died from a fatal blow to the head with a baseball bat at the hands of Gonzalez (IB at 40). Because of proof problems associated with placing the bat in Ms. Cardona's hands as opposed to

[24]Below, Ms. Cardona alleged either a Brady violation or ineffective assistance of counsel (Supp. PCR. 629).

Gonzalez's, the State's theory was that Lazaro died of child abuse and neglect. Thus, the actual cause of death became an important and contested issue. At trial, although acknowledging the existence of the head injury, Hyma emphasized that it "is not necessary to explain death" (R. 3267; 3302), and that the official cause of death was child abuse and neglect. As the withheld report establishes, however, Hyma originally reported that "the cause of death was from trauma to the head further being a massive ceribal [sic] hematoma to the front left lobe extending to the top of the skull" (PCR. 1027-29; Exhibit Q). This is not a "hypothetical inconsistency," as the State would apparently prefer it to be (AB at 34). Knowledge of a change in the official cause of death would have led defense counsel to further investigate this matter and constituted impeachment of Hyma's testimony and the entire theory of the State's case.

**D. FAILURE TO ADEQUATELY CROSS-EXAMINE DR. MERRY HABER.** Defense counsel unreasonably failed to impeach Dr. Haber's psychological conclusions with Olivia Gonzalez's prior criminal record (IB at 44-49).[25] The State baldly asserts that counsel would only have been

[25]The State argues that Ms. Cardona "misrepresents Dr. Haber's testimony" because she did not testify that "Gonzalez could never be violent toward someone else" (AB at 38). Ms. Cardona did not allege simply that "Gonzalez lacked the capacity to be violent" (AB at 38). As the State acknowledges, the "theme" of Haber's testimony was that "Gonzalez had a dependent personality that fixed in her a destructive relationship with Defendant" (AB at 38-39). The major thrust of her opinion was based on the fact that there was "no indication that [Gonzalez] participated in any antisocial behavior before meeting Ana and using drugs" (R. 3034), a point reiterated by the State in closing argument when telling the jury that Gonzalez had engaged in "nothing violent" until she met Ms. Cardona (R. 3368). Another theme of her opinion testimony was that Gonzalez was "afraid" and lacked the "the strength of character" to leave the

able to ask Haber "whether she was aware of Gonzalez's prior arrests"[26] and that the defense "would not have been able to impeach her beyond simply asking whether she was aware of the existence of such reports" (AB at 36).[27] However, the defense did not even ask Haber about her awareness of Gonzalez's prior arrests; apparently the State is conceding deficient performance.

The State is incorrect on the proper scope of impeachment. "Whether or not the expert explains during direct examination the

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relationship with Ms. Cardona (R. 3030), and that she could "fight back but will never win" (R. 3029). According to Haber, aside from Gonzalez's "dependent personality," one of the other major reasons she was incapable of leaving Ms. Cardona was that she feared "losing her mother's love" because Ms. Cardona supposedly threatened to tell her mother she was a lesbian (R. 3030). The circumstances of Gonzalez's prior run-ins with both her former lover and her own mother, described in the Initial Brief at pp. 45-48, would have provided the jury a powerful reason to discredit Haber's testimony, and would also have supported the defense theory about Gonzalez's alleged "fear" of being outed by Ms. Cardona, a theory which the State argued in closing was "absolutely ridiculous" (R. 3385-86).

[26]Unless the State is suggesting that different rules apply to the State and defendants, no reading of the caselaw supports this argument. See, e.g. Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) (no error for the State to cross-examine defense expert "about specific instances in prison for which [defendant] had not been convicted"; because the defense presented evidence that defendant would be a good prisoner, "it is clear that the state could introduce rebuttal evidence of specific acts of prison misconduct and violence"); Medina v. State, 573 So. 2d 293, 298 (Fla. 1991) (agreeing with lower court order that State would be allowed to cross-examine defense mental health expert "as to the information and records upon which their opinions were based," including Medina's release from a Cuban mental institution, and "numerous instances of Medina's resisting guards and fighting with other inmates which would have shown his violent tendencies").

[27]This was not an argument advanced by the State below, thus it is unclear how the "lower court properly denied this claim" on that basis (AB at 39). In any event, the State's argument is meritless.

data upon which his or her opinion is based, the expert may be asked on cross-examination about the underlying facts and data. During cross examination, the expert may be required to disclose all of the evidence relied upon whether or not it is otherwise admissible." Ehrhardt, FLORIDA EVIDENCE at§ 704.1 (2000 Ed.). The defense would clearly have been able to question Haber about the underlying circumstances of Gonzalez's arrests because they directly impeached the underpinnings of Haber's expert opinion.[28] "[E]vidence that happens to include prior misconduct still may be admissible when offered to show the witness' possible bias or self-interest in testifying." United States v. Calle, 822 F.2d 1016, 1021 (11th Cir. 1987). It is appropriate "for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis." Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1992) (quoting Parker v. State, 476 So. 2d 134, 139 (Fla. 1985)). Thus, in Jones, there was no error when the State cross-examined a defense expert about facts underlying prior misconduct such as skipping class, lying, stealing, setting his house on fire, and threatening a fellow Boy Scout with a hatchet; in the Court's view, "[t]he defense opened the door to this testimony thought the

[28]The State suggests that Ms. Cardona had to get Dr. Haber to "alter her opinion" in order to establish her entitlement to relief on this issue (AB at 36). Under the State's theory, no impeachment can be valid unless the witness crumbles under cross-examination and succumbs to what the cross-examiner wants him or her to admit. The purpose of the Sixth Amendment, however, is "to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." Berger v. California, 393 U.S. 314, 315 (1969). Ms. Cardona does not need to establish that Haber "altered her opinion" to demonstrate that the jury did not receive available impeaching evidence.

expert's reliance on Jones' background." Jones, 612 So. 2d at 1374.

These principles apply here. The State opened the door to Gonzalez's prior behavior by calling Haber to testify that, *inter alia*, Gonzalez had a "dependent" and "passive" personality (R. 3037), she never "participated in any antisocial behavior before meeting Ana and using drugs" (R. 3034), she lacked "the strength of character" to leave the relationship with "the lesbian queen" Ana Cardona (R. 3031), and was "afraid to lose her mother's love" because Ms. Cardona allegedly threatened to "out" her to her mother (R. 3030). The door was wide open to question Haber about the specific information introduced below and discussed in the Initial Brief (IB at 45-49). Had defense counsel presented this information, it would have "expose[d] the jury to a more complete picture of those aspects of [Gonzalez's] history which had been put in issue." Muehleman v. State, 503 So. 2d 310, 316 (Fla. 1987).

**E. FAILURE TO PRESENT SLATTERYS' TESTIMONY.** Ms. Cardona relies on her Initial Brief to address the State's arguments; one point must however be made. The State argues that the withheld interviews of Gonzalez "do not advise" that Gonzalez admitted to striking Lazaro with a baseball bat (AB at 42). **This is flatly false**. See supra at n.8.

**F. FAILURE TO OBJECT.** The State argues that Ms. Cardona's allegations regarding counsel's failure to object to a number of matters are procedurally barred as they could and should have been raised on direct appeal. This is erroneous. "[T]rial counsel's failure to object to reversible error, while waiving the point on

direct appeal, does not bar a subsequent, collateral challenge based on a claim of ineffective assistance of counsel". Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995).

**ARGUMENT II -- NO ADVERSARIAL TESTING AT PENALTY PHASE**

**A. OLIVIA GONZALEZ'S INVOLVEMENT.** The Brady and Giglio violations affect the penalty phase as well as the guilt phase. Gonzalez's involvement in the crime and her culpability vis-a-vis that of Ms. Cardona implicate the key issues in terms of sentencing: applicability and weight of the one aggravator (HAC), relative culpability, and Ms. Cardona's "moral culpability" with respect to the appropriateness of the death penalty, particularly in light of the close jury recommendation. Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000).

Citing Francis v. Barton, 581 So. 2d 583 (Fla. 1991), the State first argues that issues relating to the weight and/or applicability of HAC, as well as relative culpability, are procedurally barred (AB at 55). Citation to Francis is puzzling, as it involved a second postconviction motion and a second habeas petition which re-raised issues that the Court previously decided. Id. at 584. This is Ms. Cardona's first postconviction motion, and she had no opportunity to raise these arguments on direct appeal because the State withheld material evidence. Ventura v. State, 673 So. 2d 479 (Fla. 1996) ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act").

New evidence bearing on the applicability of aggravators, whether "new" because it was withheld by the State or because it is "newly discovered evidence," is cognizable in postconviction. See, e.g. Young v. State, 739 So. 2d 553, 560-61 (Fla. 1999) (suppressed evidence material to aggravating circumstances that were considered by jury); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999) (remanding for evidentiary hearing to evaluate cumulative effect of Brady evidence and newly discovered evidence because of "serious doubt about at least two of the[] aggravators"). New information bearing on the relative culpability of co-defendants is also cognizable in postconviction. See, e.g. State v. Mills, 788 So. 2d 249 (Fla. 2001) (newly-discovered evidence of impeaching evidence of co-defendant's testimony warranted relief); Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) (new evidence of co-defendant's life sentence warranted relief for defendant on proportionality grounds). Thus, the State's procedural bar argument is meritless, particularly in light of the lower court's factual finding that Ms. Cardona and Gonzalez "each and both" were equally responsible for the abuse (PCR. 934). This new finding should be contrasted to the court's sentencing finding that Ms. Cardona "was the more culpable of the two defendants." The lower court's new finding of equal culpability is purely a factual question and is due deference by this Court. Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997).[29]

[29]The State has not appealed the lower court's findings and thus any complaint would be waived. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (procedural defaults apply to the State as well as to defendants).

The State argues that the withheld evidence relating to Gonzalez's participation in the abuse of Lazaro and her overall credibility is a "thinly-veiled appeal to lingering doubt" and "not appropriate" mitigation (AB at 56). This argument is faulty on numerous levels. Gonzalez's credibility and participation in Lazaro's death was a *feature* of *the State's* penalty phase strategy: it was *the State* that argued that Gonzalez "was not the main abuser," that her "participation was not as much" as Ms. Cardona's, and that absent Gonzalez's testimony, there would be "very large holes" in its case (R. 3760-62). For the State to now assert that the evidence it suppressed could not have been admissible because it merely serves an "appeal to lingering doubt" is highly disingenuous.

Moreover, the withheld evidence of Gonzalez's involvement and credibility goes to the applicability and weight of HAC. This is not disputed by the State; the State simply labels this "lingering doubt." However, the State's Brady obligation extends to evidence which might affect the existence of aggravators. Young; Lightbourne. Impeachment unknown to the jury can be "mitigating," contrary to the position of the State (AB at 56). Mills. See also Smith v. Wainwright, 741 F. 2d 1248, 1255 (11th Cir. 1984) (failure of counsel to impeach key prosecution witness "may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial").

Finally, even if the evidence could be viewed purely as "lingering doubt," a blanket prohibition on admissibility violates the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586

(1978); Green v. Georgia, 442 U.S. 95 (1979). As the Eleventh Circuit recently wrote, "residual doubt is perhaps the most effective strategy to employ at sentencing." Chandler v. United States, 218 F. 3d 1305, 1330 n.28 (11th Cir. 2000). In fact, according to the Eleventh Circuit, a strategy by a capital attorney to pursue a "lingering doubt" theory at the penalty phase is "objectively reasonable." Id. at 1320 n.28. Underlying this conclusion is the assumption that lingering doubt evidence is admissible at the penalty phase, for surely the Eleventh Circuit could not condone as "objectively reasonable" a strategy by defense counsel to pursue constitutionally inadmissible evidence. Thus, to the extent that Florida law supports the intractable exclusion of "lingering doubt" evidence, it is is unconstitutional. See Way v. State, 760 So. 2d 903, 922 (Fla. 2000) (Pariente, J., concurring); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984).

Relying on State v. Townsend, 635 So. 2d 949 (Fla. 1994), and Henry v. State, 652 So. 2d 1263 (Fla. 4th DCA 1995), the State argues that Gonzalez's polygraph results would not be admissible at the penalty phase (AB at 57); however, neither case mentions a polygraph. The State then argues there is "no case in Florida" which allows polygraph evidence to be admitted at a penalty phase, and makes a huge leap that the lack of law establishes its inadmissibility (AB at 78).[30] Again, the State cites a number of

[30]Delap v. State, 440 So. 2d 1242 (1984), relied on by the State (AB at 78), only indicates that polygraph evidence is inadmissible *at trial*, absent stipulation. Of course, the rules of evidence are relaxed at a capital sentencing phase. Green v. Georgia, 442 U.S. 95 (1979).

cases, most of which again do not mention or discuss polygraph evidence;[31] the only case that does, United States v. Scheffer, 523 U.S. 303 (1998), does not support the State's argument and in fact supports Ms. Cardona's position. Scheffer held that a *per se* rule excluding polygraph results in court-martial proceedings did not violate the Fifth and Sixth Amendments because it did not "implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents." Id. at 309. The Court, however, reiterated that exclusion of such evidence might be unconstitutional where "it has infringed upon a weighty interest of the accused." Id. at 308. At a penalty phase, a defendant has "a right--*indeed a constitutionally protected right*--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams v. Taylor, 120 S.Ct. 1495, 1513 (2000) (emphasis added).[32] Scheffer does not

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[31]The State cites to Kokal v. Dugger, 718 So. 2d 138, 143 (Fla. 1988); Green v. State, 688 So. 2d 301, 304 n.3 (Fla. 1997), Groover v. Singletary, 656 So. 2d 424 (Fla. 1995), and Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). With the exception of Green, none of these cases mention a polygraph. The only reference to a polygraph in Green is a reference to an argument that the trial court erred in refusing to consider that Green passed a polygraph. Green, 688 So. 2d at 304 n.3. The Court granted a new trial on the basis of two issues, neither of which was the polygraph issue, and explicitly held "we will not address any of the other issues raised by Green." Id. at 307. This is hardly sound authority for the assumption that polygraph evidence is inadmissible at a capital penalty phase. It is certainly ironic that the State would cite to Green for the polygraph issue, as Mr. Green was subsequently acquitted on retrial due to the lack of any credible evidence of guilt.

[32]Even the cases addressing admissibility of polygraph evidence in Florida do not indicate that there is a *per se* exclusion of such; polygraphs are admissible with the stipulation of the parties. However, in terms of capital sentencing, any requirement of a stipulation by the State to introduce relevant mitigation in the

condone the constitutionality of a *per se* exclusion of exculpatory polygraph evidence at a penalty phase.[33]

**B. IMPROPER USE OF MENTAL HEALTH EXPERTS.** The State argues that Drs. Marina and Azan did not give conflicting testimony (AB at 60), yet it recognizes that "Dr. Azan did not diagnose Defendant with schizophrenia as Dr. Marina had" (AB at 62). If Marina and Azan did not conflict with each other, then the State is raising the specter that the prosecution provided false argument to the jury when it argued that their testimony *was* inconsistent and should be discredited (R. 3757-59).

The State argues that the defense made a reasonable decision to forego calling Dr. Nathanson because of the "arsenal" of State experts who could rebut his testimony (AB at 63). However, Dr.

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form of polygraph results is unconstitutional state interference. Lockett, supra.

[33]The State argues Rupe v. Wood, 93 F. 3d 1434 (9th Cir. 1996), is "distinguishable" because "the Washington Supreme Court had ruled that although polygraph tests were inadmissible in the guilt phase of a capital trial, they were admissible in the penalty phase" (AB at 78 n.17). This is not entirely accurate. Under Washington law, which had changed between Rupe's first trial and his resentencing, polygraph evidence was admissible at a penalty phase if (1) the State could cross-examine the reliability of the results, and (2) the trial judge was convinced that the polygrapher was qualified and the exam was done under proper conditions. Rupe, 93 F. 3d at 1439. Thus, polygraph evidence was not *per se* admissible in Washington. Moreover, Washington's rule was not what cause the Court in Rupe to grant relief; it was the fact that exclusion of polygraph evidence at the penalty phase would have violated the Constitution, and the holdings in Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982). Rupe, 93 F. 3d at 1440-41. Thus, the fact that Rupe was decided after Ms. Cardona's trial (AB at 78 n.17), is irrelevant, as it did not announce any new rule but rather was based on Lockett and Eddings, both of which were firmly established law at the time of Mr. Cardona's trial.

Nathanson found that Ms. Cardona was not only mentally retarded, but also suffered from organic brain damage. No state expert yet in this case has refuted the evidence of brain damage.[34] Insofar as the alleged "arsenal" of experts who could refute the mental retardation, this argument simply cannot hold up when the defense *affirmatively put on experts who contradicted themselves on the key issue of whether Ms. Cardona suffered from a major mental illness.* Because the defense affirmatively refuted its own case by calling experts who contradicted themselves, no "fear" that state experts would contradict the defense experts is reasonable under the facts of this case. "[C]ompetent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury." Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988).

Relying on Cherry v. State, 781 So. 2d 1040 (Fla. 2000), the State avers that "[d]efense counsel is not ineffective for failing to present evidence that is inconsistent" (AB at 64). This statement should give this Court serious pause; how many times has the State (successfully) argued that defense counsel in capital cases are *not* ineffective for failing to present mitigation when the mitigation would have been inconsistent with the defense theory? Certainly, Cherry provides no support for the State's stunning assertion. Id. at 1050 (no ineffectiveness for failing to present

[34]In fact, at the evidentiary hearing, State witness Dr. Garcia testified that he was not in a position to refute the findings of either Drs. Nathanson or Weinstein on brain damage, and confirmed that the testing instruments they used "are routinely utilized by a neuropsychologist" (Garcia Testimony, 4/18/00 at 653). He candidly admitted that there is a "[p]ositive correlation" between organic brain damage and mental retardation. Id.

mitigation which "would have been inconsistent with the evidence and testimony"); id. ("to argue in mitigation that Cherry was intoxicated ... would be wholly inconsistent with the theory of defense, and therefore counsel cannot be deemed ineffective for failing to present it").[35]

The State challenges Ms. Cardona's mental retardation,[36] relying on, *inter alia*, letters from Ms. Cardona's DOC files and the testimony of Vanda Martin, an assistant warden at Broward Correctional Institution (AB at 65). Most significantly, neither the files nor Martin were available at the time of the penalty

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[35]See also White v. State, 559 So. 2d 1097, 1099 (Fla. 1990) (no ineffectiveness for failing to present evidence which "would have been incompatible" with defense theory); State v. Williams, 2001 WL 950293 at *4 (Fla. Aug. 23, 1991) ("counsel cannot be deemed ineffective for failing to pursue the voluntary intoxication defense as such a defense would have been inconsistent with Williams' theory").

[36]This Court has regularly found low IQ scores and/or mental retardation to be significant mitigation warranting the imposition of a life sentence. Riley v. State, 601 So. 2d 222 (Fla. 1992) (borderline mentally retarded IQ score of 80 warranted a life sentence in an override case); Cochran v. State, 547 So. 2d 932 (Fla. 1989) (IQ of 70 warranted a life sentence in override case); Morris v. State, 557 So. 2d 27 (Fla. 1990) (borderline retardation with an IQ score of 75 warranted life sentence in override case); Duboise v. State, 520 So. 2d 260 (Fla. 1988) (IQ score of 79 along with other mitigation warranted a life sentence in override case); Brown v. State, 526 So. 2d 903 (Fla. 1988) (IQ score in 70-75 range classified defendant as borderline deficient and warranted life sentence in override case); Thompson v. State, 456 So. 2d 444 (Fla. 1984) (IQ between 50 and 70 warranted life sentence in an override case). As the Court is aware, the issue of whether the execution of the mentally retarded violates the Eighth Amendment is currently pending before the Supreme Court. Moreover, Ms. Cardona is aware of the recent Florida legislation regarding the execution of the mentally retarded. This legislation is not, at present, retroactive. Ms. Cardona would note that there is a request for briefing on the issue of retroactivity pending before this Court in Floyd v. State, No. SC97043.

phase, thus making reliance on this information dubious. The issue of the letters was addressed by Dr. Weinstein below, who explained that they in fact were *consistent* with Ms. Cardona's mental retardation (PCR. 1414). There is nothing inconsistent with Dr. Weinstein's findings of mental retardation and brain damage and Ms. Cardona's alleged ability to write simple letters or to prepare prison complaints in her native language of Spanish. Dr. Nathanson's pre-trial evaluations, Dr. Weinstein's evaluation, and all the intelligence testing done by state and defense doctors, as well as Department of Corrections records since Ms. Cardona's incarceration in 1990 establish that Ms. Cardona is mentally retarded, and that the lower court's conclusion is not supported by competent evidence. See IB at 81-87.

Reliance on Vanda Martin's ludicrous testimony is misplaced. Martin had 2 "conversations" in English with Ms. Cardona between November 1999 and May 18, 2000 (PCR. 1462). During those "conversations," which lasted "[p]robably a minute" (id. at 1463),[37] Ms. Cardona had asked about her neighbor, Virginia Larzelere, who was not feeling well (PCR. 1463-65). On cross, Martin acknowledged that she, not Ms. Cardona, initiated the "conversations," and took no notes of these "conversations" (Id. at 1466). She also admitted that it was common for non-English speaking inmates to "pick up some words" in English over the years (Id. at 1467-68). This was the extent of Martin's information, which was largely, if not

[37]Martin later clarified that the conversations were "[l]ess than a minute" (PCR. 1467).

completely, useless as it pertains to the issue of ineffective assistance of counsel.

The argument that Ms. Cardona has not established prejudice because the jury heard "exhaustive" testimony from Drs. Marina and Azan (AB at 68), is circular reasoning which ignores the fact that the experts provided materially contradictory diagnoses and the State urged the jury to completely reject their testimony. The nature and quality of the evidence presented below, alone and in conjunction with the other errors, would have completely changed the evidentiary picture, and prejudice is clear.

## REMAINING ARGUMENTS

Ms. Cardona relies on her Initial Brief as rebuttal to the remaining arguments advanced by the State.

## CONCLUSION

Ms. Cardona is entitled to a new trial and/or a resentencing, and/or a remand so that the lower court can address the many issues it failed to address.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail to all counsel of record on September 7, 2001.

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**CERTIFICATE OF COMPLIANCE**

Counsel certifies that this brief is typed in Courier-12 font.