IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1881

MARBEL MENDOZA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

ARGUMENT IN REPLY

ARGUMENT I

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

A. Introduction

The State first of all takes issue with the 2003 ABA Guidelines as the benchmark of what constitutes reasonable professional norms for the performance of trial counsel in capital cases. The State asserts without any authority that because the Guidelines were issued after Mr. Mendoza's trial they are somehow inapplicable. The State's position amounts to no more than mere wishful thinking. The State ignores the decision in Hamblin v. Mitchell, 354 F. 3d 482 (2003). "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel. The 2003 ABA Guidelines do not depart in principle or concept from Strickland [or] Wiggins." The State further complains that Mr. Mendoza's reference to Rompilla v. Beard, 125 S. Ct. 2456 (2005) is inapplicable because "the Court in Rompilla specifically cites the American Bar Association Standards in place in 1982. (Answer Brief at 51). Here, the State has misread Rompilla. While Rompilla does refer to the more general American Bar Association Standards for Criminal Justice in circulation at the time of Mr. Rompilla's trial, it also relies repeatedly to the specific Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases in both the 1989 and 2003 versions. See Rompilla at 2455 n. 7. These are separate and distinct documents, a fact to which the State appears oblivious. The State asserts that the application of the 2003 Guidelines in Rompilla was only relevant because the "State had cited to it in its brief". (Answer Brief at 51). In fact it is clear from the discussion in Rompilla that the State cited Guideline 11.4.1 D 2 (1989). The Supreme Court in rejecting the State's analysis stated that the correct Guideline for the Rompilla circumstance was 11.4.1 D 4. The Court then went on to note that "[l]ater and current Guidelines are even more explicit". See Rompilla 125 S. Ct 2456, 2455, n. 7 (2005). The Court then goes on to state that:

> Our decision is made precisely the same point by citing the earlier 1989 Guidelines. 539 U.S. at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence) quoting ABA Guideline 11.4.1 C (emphasis in original).

Rompilla, 125 S. Ct 2456, 2466, n. 7 (2005). Taken as a whole therefore note 7 of Rompilla shows that the court's analysis is predicated in large part on the 2003 Guidelines, however much the State may dislike the fact. The 2003 Guidelines as well as the 1989 Guidelines are the appropriate measure for what constitutes a reasonable investigation. The fact remains that in Rompilla, the Court used all the

various Standards and Guidelines including the 2003 revision, in connection with a 1988 trial for a crime which occurred in the same year. The exact same considerations should be applied to Mr. Mendoza's case.

The State next goes on to complain that trial counsel's failure to retain an investigator and his over heavy case load do not form the basis of claims for ineffective assistance of counsel. The State again misreads Mr. Mendoza's argument. Mr. Mendoza does not, as the State asserts, base a claim solely on either trial counsel's failure to obtain and use an investigator, nor on his overly heavy caseload at the time of Mr. Mendoza's capital trial. Rather Mr. Mendoza was setting the general context of the more specific claims that he raised to support his contention that he received ineffective assistance of counsel at his guilt phase. And while the fact that trial counsel did not obtain the services of an investigator is not in and of itself a ground for relief, it does show that counsel was not abiding by the professional norms that applied to capital trials at the time of Mr. Mendoza's guilt phase. Had an investigator been hired, it is likely that the numerous errors and omissions of trial counsel would have not occurred. The State's position is flawed.

B. Inconsistent arguments regarding the identity of the shooter

As Mr. Mendoza asserted in his initial brief, trial counsel dramatically

switched his theory of the case during the guilt phase, thereby rendering Mr. Mendoza's defense as a whole completely incredible.[1] The State seeks to minimize the effect of defense counsel's flip flopping by asserting that counsel's opening statement was "particularly vague" (Answer Brief at 54) and implied that as with "most opening statements" this was a "strategic choice" (Answer Brief at 54). However, the State cannot get around the fact that trial counsel did actually say that "we know you are going to find out from the evidence that Mr. Calderon [the victim], in fact, did fire his gun, three shots. And who gets hit by that shot? Not Marbel Mendoza, but Humberto Cuellar, because he's the one who did the shooting. That's who Mr. Calderon shot." (TRT. 609-10) (emphasis added). The State attempts to minimize this dramatic shift, but to no avail. The State asserts that counsel stated that his theory was to point to "the Cuellar brothers". If trial counsel really wanted to be vague in opening statements as the State suggests, he would have said " one of the Cuellar brothers" and not identified Humberto as the shooter. The State's attempts to characterize this shift in theory are to no avail. By the time the trial counsel attempted to pick up the pieces at closing with the

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[1]Trial counsel told the jury during opening statements that **Humberto** Cuellar was the person who shot the victim. However, in closing arguments, with no intervening justification and with not even the pretext of an explanation to the jury, counsel switched theories and argued that **Lazaro** Cuellar was the shooter.

argument that trials are "living things" the damage was done.

The State argues that because "the arguments were not truly inconsistent" and that because the change in theory was "caused by trial developments" there was no deficient performance. his is clearly wrong. There cannot be a more glaring example of inconsistency than a change in the theory of who the shooter actually was. This argument blindly ignores the reality of the significance of the subject matter at issue: Mr. Mendoza's defense asserted to the jury as to who really killed the victim. Mr. Mendoza never disputed the fact that he was present at the scene of the shooting. In fact, the State presented un-refuted evidence suggesting that Mr. Mendoza's fingerprints were found on one of the parked cars in the driveway. As a result, the jury undeniably believed that Mr. Mendoza knew who killed the victim. By first telling the jury in opening that Humberto was the killer, and then, in closing arguments, telling the jury that, well, no, Lazaro was the killer, counsel did nothing but convince the jury that Mr. Mendoza and his entire defense was nothing but falsehoods and lies. The State's attempt to justify and minimize trial counsel's egregious mistake is not persuasive.

As to the State's arguments regarding the change of the theory, counsel did not at any time during closing arguments make any attempt to explain why the defense flipped 180 degrees from Humberto killing the victim to Lazaro killing the

victim. Counsel was explicitly referring the physical evidence like the evidence suggesting that Mr. Mendoza's fingerprint was found on the car in the driveway. The State's argument that counsel "admitted" to the jury that the defense's theory as to who killed the victim had changed has no factual basis. Counsel never attempted to explain to the jury counsel's incredible and fundamental change in the defense's version of what had really happened. Even notwithstanding this important distinction, counsel should have been prepared and not boxed themselves in at the opening statement. Counsel admitted at the evidentiary hearing that the presentation of inconsistent theories was bad practice.[2] Under the ABA Guidelines, Strickland and Wiggins it constitutes deficient performance as well.

Moreover, the State's argument that Mr. Mendoza was not prejudiced by the diametric switch in counsel's theory is not persuasive. The State does not cite any authority for its assertion, rather it baldly asserts that the jury heard extensive challenges to the credibility of the State's main witness" (Answer Brief at 59), and thus there is no reasonable probability of a different outcome. The State's argument is absurd. Here it is not the credibility of the State's witness that is at

[2]Barry Wax testified testified that this situation was "… promising. You're not delivering. You're raising credibility on one hand with the jury…". (EH. 371).

issue. Rather it is the credibility of the entire defense team.[3]

The State's attempt to distinguish Bland v. California Department of Corrections, 20 F. 3d 1469 (9th Cir. 1994) overruled on other grounds Shell v. Witek, 218 F. 3d 1017 (9th Cir. 2000) is unavailing. In Bland, the state court denied and failed to inquire into Bland's request to substitute counsel on the grounds that his appointed counsel was incompetent. The federal district court later denied habeas relief. One of the issues on appeal was whether the defendant had to establish prejudice under Strickland in order to prevail on his habeas claim. The Ninth Circuit held the defendant did not have to establish prejudice under Strickland but that, even if he did, "we find that Bland has established the requisite prejudice as a result of [counsel's] representation." Bland at 1479. The court then concluded that counsel's "presentation of inconsistent theories" was prejudicial under the Strickland standard. Id. The State's attempt to distinguish Bland is not persuasive.

Moreover the State does not address the significant fact that while Mr. Mendoza was indicted on alternative theories of both premeditation and felony

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[3]Since the State's position appears to be that the ABA Guidelines are not applicable, it completely ignores the exhortation of Guideline 10.10.1 (2003 which states in pertinent part that: Counsel should seek a theory that will be effective in connection with both guilt and penalty and **should seek to minimize any**

murder, at the end of the State's case in chief, conceded that it had failed to establish a prima facie case for premeditation. Thus in order to find Mr. Mendoza guilty of first degree murder, it would be necessary for the jury to find Mr. Mendoza guilty of the underlying felony of burglary or robbery. The State never proved that Mr. Mendoza was the shooter.[4] It defies common sense to suggest that the identity of the shooter is not highly relevant in such circumstances.

Mr. Mendoza has established both deficient performance and prejudice. Relief is warranted.

C. Failure to present evidence of no robbery and failure to call Lazaro

The State claims that the record does not support the fact that the defense promised the jury that Lazaro would testify and points to a statement that "the Cuellar brothers or at least one of them is going to come to court to testify". (Answer Brief at 61). However the State blithely ignores the statement made just pages later in which counsel stated that Lazaro said in his deposition that the purpose of the visit to Calderon was to collect a debt and not to commit robbery. (TRT. 511-12). This is clearly an indication that counsel intended to show the jury

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inconsistencies. ABA Guideline 10.10.1 (2003) (emphasis added).

[4]Indeed the State in its answer brief acknowledges as much when it asserts that "one of the two [Cuellar brothers] fired the fatal shot. (Answer Brief at 72).

that the intent was not robbery, and that he intended to show it through Lazaro Cuellar. The only way that this statement can be construed is a promise that this testimony would be presented to the jury. Logic dictates that trial counsel would not have mentioned the deposition otherwise, and to suggest otherwise, as the State does, simply defies belief.

The State next contends that "counsel made a strategic decision after a thorough investigation" not to call Lazaro. (Answer Brief at 62). The State's argument should be rejected for several reasons. First of all, contrary to the State's representation, could not articulate any reason why they failed to call Lazaro after telling the jury in opening statement that they would be calling him.[5] In truth, they simply testified that, as reflected in the trial record, after the State rested, they had a discussion about it and then decided not to call him. Nowhere in the record of the trial or in the record of the instant post-conviction proceedings do counsel give any indication of the basis or rationale for their decision. Nor could they because Mr. Suri testified that, based upon his review of the case, they "had nothing to lose to put him on" (T. 442). In other words, counsel admitted at the evidentiary hearing that they had no reason for not calling Lazaro.

Secondly, the mere fact that Mr. Wax told the trial judge that the decision

not to call Lazaro was "strategic" does not make it so. See Miller v. Francis, 269 F. 3d 609, 615-16 (6th Cir. 2001) citing Strickland, 466 U.S. at 681 (1984). ([D]espite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable.) There is no objectively reasonable strategy for not calling Lazaro after counsel promised the jury that counsel would call him. Mr. Wax's assertion at the time of trial that the decision was "strategic" does not render it so.

The State engages in pure speculation in its assertion that counsel had a strategic reason for not calling Lazaro. Here, it is not simply that trial counsel could not remember what their strategy was, as the state suggests. (See Answer Brief at 62). Rather it is a question of trial counsel acknowledging that there was absolutely nothing to lose by calling Lazaro. This is a subtle but important distinction which the state appears not to recognize. Whatever the State's theory as to trial counsel's purported strategy, Mr. Suri effectively rejected all these as reasons when he testified that, upon his review of the case, they had "nothing to lose" by calling Lazaro. Significantly, on cross-examination, the State failed to ask

[5]See EH. 370. See also EH. 441-2 in which Mr. Suri testified that although

Mr. Suri if the reasons the State now argues were the basis for his decision not to call Lazaro were in fact the real reasons. Mr. Suri's admission that they had "nothing to lose" in calling Lazaro squarely rebuts the presumption that the decision was strategic. Counsel's having conceded that there were in fact no reasonable reasons for not calling Lazaro after telling the jury that they were going to do so, the State cannot now throw out speculative reasons and claim reasonable strategy.

The State disputes the credibility of Lazaro's deposition statement despite the fact that it jeopardized his plea deal, and characterized several of his statements as "incredible on their face". (Answer Brief at 64). As a result, the State asserts that the "cost far outweighed the benefit of his testimony". (Answer Brief at 64). Again, there is absolutely no basis for the State's assertion. Aside from trial counsel's admission that there was nothing to lose by calling Lazaro, the State is ignoring the fact that this testimony would have shown additional evidence that there was never a robbery. As it was, the only evidence that was presented that this was not a robbery was the circumstantial fact that the victim had indeed not been robbed of his watch. The testimony of Lazaro would have been crucial in casting reasonable doubt on the state's theory of robbery and thus felony murder,

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they discussed the matter, and that "didn't say what - - - why we didn't".

no matter what the state may assert. The State's speculation about Lazaro's lack of credibility is just that, since no credibility findings were made by the lower court.

The case law cited by the State in which counsel was not held ineffective for failing to call witnesses alluded to in opening statement is inapposite to this case. In each of the cases cited by the State there was a strategy asserted by trial counsel. Here the strategy is noting more than wishful thinking on the part of the state. Counsel's statement that there was "nothing to lose" by calling Lazaro demonstrates this conclusively.

The State next claims that Mr. Mendoza failed to establish prejudice in counsel's failing to call Lazaro because Lazaro's deposition (in which he swore under oath that they went to Mr. Calderon's house to inquire about a debt and not to attempt a robbery) because a deposition is not admissible and because Lazaro did not testify at the evidentiary hearing. The State's argument is without merit. The State ignored the fact that the United States Supreme Court has held that a defendant seeking post-conviction relief on the claim that his counsel was ineffective in failing to present evidence in his state court capital trial need not present in post-conviction the exact evidence that competent counsel would have presented at trial. Instead, the Court held that the defendant in post-conviction must establish "a reasonable probability that a competent attorney . . . would have

introduced [the evidence] . . . in an admissible form" Wiggins v. Smith, 539 U.S. 510, 535 (2003) (emph. added). The majority of the Supreme Court in Wiggins explicitly rejected the dissent's argument that relief was not warranted because the specific form of the evidence presented in the post-conviction would have been deemed inadmissible in state court. See Id. at 536. The majority reasoned that the court's role on post-conviction review is to evaluate the "totality of the evidence" deduced both at the original trial and during the post-conviction proceedings.

There is no dispute or question that Mr. Mendoza's claim is that trial counsel was ineffective for failing to call Lazaro as a witness as counsel promised the jury in opening statement. Mr. Mendoza certainly does not claim or assert that trial counsel should have sought to introduce into evidence at trial Lazaro's deposition. Contrary to the State's argument, Mr. Mendoza has not failed to establish prejudice simply because he did not call Lazaro to testify at the evidentiary hearing because Mr. Mendoza has established that there is "a reasonable probability that a competent attorney . . . would have introduced" the substance of Lazaro's deposition testimony "in an admissible form." Wiggins, 539 U.S. at 535. Specifically, in the form of trial testimony from Lazaro himself.

The State also argues that Mr. Mendoza has not established prejudice because the lower court did not hear testimony from Lazaro and, per the State,

cannot assess his credibility. This point by the State must also be rejected. Lazaro swore in his deposition that this was not an attempted robbery. The trial record establishes that Lazaro was deposed only after he entered into a plea agreement with the State in which he promised to provide truthful deposition testimony in exchange for the State agreeing to a 10 year sentence. Critical is the fact established in the trial record that the plea agreement called for Lazaro's sentence to be changed from 10 years in prison to 27 years if he did not tell the truth in his subsequent deposition. In the face of this very significant threat of adding an additional 17 years onto his negotiated prison sentence, Lazaro still maintained in his subsequent deposition that this was not an attempted robbery. Indeed, as a direct result of Lazaro's deposition testimony, the State sought to have his sentenced increased to 27 years. These circumstances as established in the already existing trial record - and which would be established on re-trial - make Lazaro's testimony highly credible. Nobody would risk having 17 additional years tacked onto his prison sentence by lying in his post-plea deposition.

The only evidence presented at trial supporting the charge of first-degree felony murder was Humberto's testimony. Humberto's position as a State witness who flipped in order to save himself. Given the inconsistencies between his trial testimony and his pre-trial statements as brought out by trial counsel on cross-

examination, and in light of Lazaro's heightened credibility due to the State's ability to add 17 years to his sentence if he did not tell the truth in his deposition, the only possible conclusion is that, had trial counsel called Lazaro to testify, there is more than a reasonable probability that the jury would have concluded that the State failed to prove its case for first degree felony murder beyond a reasonable doubt. Mr. Mendoza need only establish a reasonable probability of a different outcome. He does not have to establish that a different outcome is more likely than not (a preponderance standard). See Strickland. The State complains that Lazaro's testimony does not establish that there was not a robbery planned, merely that Lazaro was not told about a robbery, but then concedes that Lazaro's testimony would have impeached Humbero's testimony. This is enough to cast reasonable doubt, especially given the corroborating fact that no robbery was in fact committed. A reasonable probability of a different outcome has been established.

The State contends that the case law cited by Mr. Mendoza in support of his argument is inapplicable. It attempts to distinguish Harris v. Reed, 894 F. 2d 871 (7th Cir. 1990) because the factual scenario is not absolutely identical with Mr. Mendoza's fact pattern. However the minor inconsistencies do not make Harris inapplicable to the instant cause. In Harris, the court emphasized the devastating

effect o the jury of trial counsel not living up to his opening statement promise to cal la crucial witness. The Seventh Circuit held that trial counsel's decision not to present such testimony, after preparing the jury for the evidence through the opening", was unreasonable professional conduct. Id. at 879. In fact, counsel's opening [statement] primed the jury to hear a different version of the incident. When counsel failed to produce the witness to support this version, the jury likely concluded that counsel could not live up to the claims made in the opening. Id. at 879 (emphasis added). Exactly the same considerations apply to Mr. Mendoza's case. By the same token the state's distinction of Anderson v. Butler, 858 F. 2d 16 (1st Cir. 1998) is meaningless. The State asserts that Anderson is distinguishable because the testimony was "powerful" the testimony "significant" and almost facetiously, that the witness in question was a doctor. (Answer Brief at 69-70). As noted supra, the testimony of Lazaro would have been significant and powerful in showing that there was no robbery plan, and thus no felony murder. Whatever the State's suggestion this is both significant and powerful. Moreover the bald suggestion that the testimony of a doctor is somehow more significant than that of a lay witness defies common sense.[6] Again this is a distinction without a

[6]It also runs counter to much of the state's argument regarding counsel's ineffectiveness at Mr. Mendoza's penalty phase.

difference. The same considerations apply equally to the state's purported distinction of United States v. Gray, 878 F. 2d 702 (3rd Cir. 1989). Whether or not trial counsel conducted a deposition of Lazaro is not the issue here, but his broken promise to the jury. Not only did trial counsel fail to establish that there was not a robbery plan, but he tossed away all credibility by so doing. The effect on the jury cannot be underestimated. Relief is warranted.

D. Gunshot evidence

The State asserts that the fact that trial counsel did not know at what time Lazaro Cuellar's hands were swabbed does not constitute ineffective assistance. The State contends that this is because the jury might not have believed the state's rebuttal expert, Technician Gallagher, who testified that the time the swabs were taken was different to that to which the defense expert Rao had testified. The State argues that given the conflicting evidence presented the jury could reasonably have believed that neither time was accurate. (Answer Brief at 71). This argument again ignores the central part of Mr. Mendoza's claim in this respect. First of all, the record reflects that witness Rao did believe that the timing of the swab was important to his opinion that Lazaro had fired a gun that morning. He said so explicitly. (See TRT. 1207). Common sense alone dictates that his opinion testimony was thus invalidated by counsel's failure to know the time that Lazaro's

hands were swabbed. Whether the swabbing was done at 7.45 a.m. as the State's rebuttal witness asserted, or at 9.00 a.m. as Rao believed, the fact that counsel allowed such conflicting testimony to be presented seriously weakened Rao's credibility by evoking a question in the fact finder about Rao's assumptions. This could easily have been avoided had trial counsel only bothered to read his own deposition of Gallagher and properly prepared his own expert witness Rao. Furthermore, the state completely fails to address the attendant allegations made by the prosecutor, Flora Seff, in her closing argument. Not only was the credibility of the defense expert seriously undermined by an entirely avoidable omission, but the State was able to accuse the defense of deliberately misleading the jury by putting on false evidence. Ms. Seff's arguments that trial counsel "tried to get you to believe something different than they know to be the evidence in this case" (TRT. 1319); that trial counsel "purposely put on [the evidence] to mislead you" (TRT. 1341) and that "...they knew back in June 1992 that Criminalist's Rao's opinions were flawed, that he had the wrong information, that his opinions were based on something that wasn't true, and that his opinion was worth nothing. (TRT. 1341). Trial counsel's sloppy preparation left Mr. Mendoza dead in the water for the full ravages of the state's cloning argument. Whatever credibility the defense had retained in the eyes of the jury was completely shredded by them at closing

argument.

The State further contends that because Rao testified that in his opinion it was more likely than not that both Lazaro and Humberto had fired a gun, his testimony was intended to raise a reasonable doubt because "only one of the two [Lazaro and Humberto] fired". (Answer Brief at 72). This begs the question. Rao was the only witness called by the defense at trial. His credibility was paramount. It is immaterial what Rao opined regarding Humberto's swabs - the fact remains that he was badly hurt on cross examination and that the State was able to accuse trial counsel of lying to the jury, all of which were utterly prejudicial to Mr. Mendoza. The same is true, regardless of counsel's evidentiary hearing testimony that the time was "unimportant" to him. It was clearly very important indeed to the prosecutor and hence to the jury. The State's argument that counsel's failure to provide accurate information to his expert is simply not persuasive.

The State asserts that the additional testimony put on at the evidentiary hearing does not show that Rao's opinion would have changed had he been informed of the correct time that Lazaro was swabbed. It asserts that Mr. Mendoza should have put on Rao to show that his opinion would have changed. In order to prove prejudice, the State ignores the fact that Rao was blind sided by this very fact at trial on cross-examination. The prejudice is apparent.

E. Conclusion

None of the State's arguments against this Court granting a new trial on the grounds of ineffective assistance of counsel at Mr. Mendoza's guilt phase are persuasive. This Court must consider the cumulative effect of all the constitutional errors that occurred in this case. See Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996), and thereafter grant a new trial to Mr. Mendoza.

ARGUMENT II

INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE

A. Counsel's failure to investigate and present mitigating evidence

The State asserts that the fact that the sentencing judge, Judge Postman, explicitly found that counsel had established absolutely no mitigation whatsoever is not tantamount to showing ineffectiveness at Mr. Mendoza's penalty phase. However this is not the basis of Mr. Mendoza's argument. The State ignores the obvious: Dr. Toomer's opinion was based upon nothing but Mr. Mendoza's self-reporting and, as a result, the State in its cross-examination of Dr. Toomer and, most importantly, in closing arguments, vigorously attacked the validity and reliability of his opinions based on his sole reliance on Mr. Mendoza's representations to him. The fact that Judge Postman found that trial counsel had established absolutely no mitigation whatsoever is empirical proof that Judge Postman, and at least seven members of the jury were persuaded by the State's

closing argument that Dr. Toomer's opinion was not reliable because he relied on nothing but Mr. Mendoza's self-reporting. In fact, in his sentencing order, Judge Postman explicitly found as to the asserted mitigation of "Marbel's drug use and dependency": "The Court finds that there was no credible evidence of this mitigating factor other than the self-serving statements by the defendant to Dr. Toomer and Dr. Eisenstein." (R. 938-39).

The fact that Judge Postman did not find that Mr. Mendoza had a drug and alcohol addiction establishes that Mr. Mendoza was prejudiced by counsel's failure to present evidence that would have corroborated this fact. While Dr. Toomer asserted he was an addict, the State argued to the jury that this was "garbage" and a fabrication concocted by Mr. Mendoza in an attempt to avoid the death penalty. (See TRT. 1653-61). In sum, the State argued, and the trial court found, that the mitigation asserted by Mr. Mendoza in the penalty phase was simply a fabrication. Mr. Mendoza has now established that had trial counsel not been ineffective, counsel would have precluded such an argument by the State. Given the 7 to 5 jury recommendation in favor of death, and the two relatively weak aggravators employed to obtain a death sentence (prior violent felony and committed during an attempted robbery merged with pecuniary gain), there is more than a reasonable probability that one out of the seven jurors who voted for death instead would have

voted for life, thereby virtually assuring that the trial court would have imposed a life sentence. See Tedder v. State, 322 So. 2d 908 (Fla. 1975).

The State asserts that trial counsel's perception that this was not a death case is irrelevant. The State claims that "the record clearly reflects that counsel not only investigated but also presented evidence of [Mr. Mendoza's] mental state, his alleged drug abuse and his experience in Cuba. (Answer Brief at 77). Again the State misreads Mr. Mendoza's argument. The fact that trial counsel did not believe that this was a death case is evidence that they did not prepare properly for the possibility of a full blow and very contentious penalty phase. While they went through the motions of having Mr. Mendoza seen by psychologists, they did not properly investigate Mr. Mendoza's social history and thus left their expert exposed to the full fury of Ms. Seff on cross examination. The State contends that counsel was not ineffective merely by not being persuasive.

However, it is the State's argument that is not persuasive in the face of Ms. Seff's blistering closing arguments to the jury in which she vilified Dr. Toomer's opinions as unreliable because he grounded his opinions on nothing but Mr. Mendoza's self-reporting and labeled the content of Mr. Mendoza's self-reporting (mental problems and sever drug abuse) as "garbage (TRT. 1653-61). Ms. Seff argued to the jury in her closing arguments:

> Dr. Toomer didn't talk to the defendant's mother. She testified, so she was obviously here. He didn't talk to the ex-wife, didn't talk to the cops, didn't look at the police reports. Dr. Toomer . . .didn't talk to anybody except this defendant, trying to save his life. That is who he relies on when making his judgment as to whether or not he is mentally ill, whether or not he had a drug problem, whether or not he has emotional problems. He relies on him.

(TRT. 1659); See also (TRT. 1592) (Dr. Toomer's testimony that he did not speak to Mr. Mendoza's mother, father, ex-wife, or other family members, and did not look at any school records); (TRT. 1593-4) (Dr. Toomer's testimony admitting that Mr. Mendoza himself was the sole source of information Dr. Toomer used to formulate his opinions).

Not only did Ms. Seff attack Dr. Toomer's opinions, she went even further and personally attacked him as a "hired gun" who is "not a professional" because he says whatever the defendant wants him to say in order to convince the jury not to recommend the death penalty (TRT. 1658). Now, in post conviction in an attempt to support for his opinions that were lacking at trial, the State ignores its own stance on this issue argued so forcefully to the jury at trial and suggests that Dr. Toomer's opinions weren't so unreliable after all.

The State ignores the admonition in Wiggins v. Smith that a proper social history be conducted. The United States Supreme Court found Mr. Wiggins's trial

counsel ineffective even though, in Wiggins, the psychologist conducted interviews with some of Mr. Wiggins' family members, whereas in Mr. Mendoza's case, the retained psychologist did not. The fact remains that had trial counsel done a proper social history investigation and provided proper collateral information to Dr. Toomer, the prosecutor would have been precluded from vilifying Dr. Toomer so harshly. There is more than a reasonable probability that at least one additional juror would have not voted for death, and that a life sentence would have resulted.

The State defends the way the penalty phase was conducted because of counsel's expressed desire to avoid introduction of information regarding Mr. Mendoza's criminal history. (Answer Brief at 78). The State's argument is however is based on an incorrect statement of the facts. The State cites Mr. Wax's evidentiary hearing testimony at EH. 399-400. The State then goes on to imply that trial counsel deliberately "limited" the information they provided to Dr. Toomer in order to limit the jury's exposure to Mr. Mendoza's criminal history. Based on this incorrect assertion of the evidence, the State then concludes that trial counsel made a strategic decision to focus on Defendant's ineligibility for the death penalty. Contrary to the State's assertions, trial counsel did not intentionally "limit" information provided to Dr. Toomer in order to limit the jury's exposure to

Mr. Mendoza's criminal history. Counsel simply failed to provide Dr. Toomer with any of the information that Dr. Toomer could have relied upon as an expert to substantiate Mr. Mendoza's self-reporting of drug addition and mental health problems. Counsel also entirely failed to discover and present evidence that Mr. Mendoza suffered from Post Traumatic Stress Disorder ("PTSD"). Although the State cites to Mr. Wax's evidentiary hearing testimony for the proposition that counsel's mitigation approach was influenced by their desire to avoid presentation of Defendant's criminal history, the record establishes that Mr. Wax never said this. The Stet's argument is without merit.

The State trumpets the evidence that was presented at the penalty phase and asserts that Mr. Mendoza has not produced evidence that shows how Dr. Toomer would have changed his opinion. The State has once again missed the point. It is not whether Dr. Toomer would have changed his opinion that is relevant here. What is relevant is the fact that Dr. Toomer was exposed to an unnecessarily vitriolic cross examination and character assassination on closing argument that could have been avoided had he been provided with collateral materials by trial counsel. Indeed, Mr. Mendoza maintains that Dr. Toomer's opinions were correct. The problem is that - due directly to trial counsel's failure to investigate - his opinions were weak and subject to attack because he did not have the necessary

factual support to substantiate them.

The State next claims that much of the lay witness testimony at the evidentiary hearing was cumulative to that adduced at trial. (Answer Brief at 82). The State's argument is without merit. The State strongly urged the jury to reject Mr. Mendoza's asserted mitigation of mental health problems and drug and alcohol addiction on the grounds that it was all a lie (i.e. it was "garbage") concocted by Mr. Mendoza to avoid a death sentence. The State made this argument precisely because Dr. Toomer based his opinions upon Mr. Mendoza's self-reporting. The trial court agreed with the State's argument, concluding that "there was no credible evidence of this mitigating factor other than the self-serving statements by the defendant to Dr. Toomer and Dr. Eisenstein." (R. 938-39). Mr. Mendoza has now established that evidence other than Mr. Mendoza's own self-reporting existed and was available to trial counsel at the time of his trial and that this evidence would have established without question the mitigation that Judge Postman, and presumably the jury, found did not exist because, per Ms. Seff, it was "garbage".

Moreover, it was also established at the evidentiary hearing that Mr. Mendoza suffered from PTSD, a finding that the jury never knew about. The State cannot have it both ways. In the end, the State's unrelenting and highly successful attack on the validity of Dr. Toomer's opinions - an attack grounded on the State's

position that the asserted facts behind his opinions were "garbage" - establishes that Mr. Mendoza was denied the effective assistance counsel. Effective counsel would have discovered and provided the corroborating evidence necessary to convince the jury that significant mitigation truly existed and, at the same time, nullified the State's argument that this evidence was fabricated.

The State attempts to minimize the significance of the testimony of Dr. Eustace at the evidentiary hearing. Dr Eustace based his opinion in significant part upon his interview with Mr. Mendoza's ex-wife and his review of records that Dr. Toomer never saw. Dr. Eustace evaluated Marbel and concluded that he met the DSM IV's multiple criteria for having a Type Two addictive disorder, including addictions to alcohol, cannabis, and cocaine. As part of his evaluation, Dr. Eustace interviewed Marbel's former wife, reviewed medical, jail and prison records, and reviewed various statements and depositions of lay and expert witnesses. Dr. Eustace emphasized that need to obtain information from multiple sources especially the subject's spouse. Unlike Dr. Toomer, Dr. Eustace corroborated his opinion with available outside sources - most notably, his ex-wife - which, if presented to the sentencing jury, would have neutralized the State's argument that the entirety of the mental health testimony presented at trial was all a lie concocted by Mr. Mendoza to save himself from the death penalty.

The State contends that Dr. Eustace's testimony would not have prevented the State from rebutting defendant's claim of drug abuse. (Answer Brief at 83). However, Dr. Eustace formed his opinions in part based upon information he obtained from Mr. Mendoza's ex-wife and from Leonel Perez, Mr. Mendoza's friend from the neighborhood where Mr. Mendoza lived in Miami (Mr. Perez described his observations of substance abuse and relationship problems in Mr. Mendoza's household. He also described how he watched Marbel s go from an occasional marijuana user to smoking every day. Leonel also noticed that Marbel started hanging around with the wrong people and began to look dirty and unkempt Marbel started acting crazy and told Leonel to mind his own business when Leonel asked Marbel about Marbel's drug use. Leonel believed based upon the way Marbel looked and acted that Marbel was doing crack cocaine. After the State at trial berated Dr. Toomer's reputation and opinion for not talking to Mr. Mendoza's ex-wife or to anyone else who had knowledge of his drug use, the State now has taken the diametrically opposite position to argue that even with this additional support, the State would still have rebutted Mr. Mendoza's drug use. The State's argument is without merit.

The State next urges this Court to ignore the evidentiary testimony of post-conviction defense investigator Odalys Rojas in which she recounted her extensive

investigation into Mr. Mendoza's life because, according to the State, it is irrelevant "how" the investigation was conducted. (Answer Brief at 84). Contrary to the State's argument, it is indeed relevant to this Court's assessment of Mr. Mendoza's claims that trial counsel rendered deficient performance because counsel in this capital case failed to utilize the available assistance of an investigator to investigate mitigation. Trial counsel admitted that they obtained from the trial court approval and funding to hire an investigator yet counsel inexplicably failed to hire one. Ms. Rojas is an experienced mitigation investigator. Her testimony is relevant to establish that counsel failed to meet the minimum standards for capital case counsel by not hiring an investigator.

The State next mis-characterizes Mr. Mendoza's argument regarding the mental health investigation and states that the presentation of the new experts does not show deficient performance. However, contrary to the State's assertion, Mr. Mendoza is not arguing that counsel was ineffective simply because Mr. Mendoza has now presented in post-conviction new experts who have more favorable opinions. (Answer Brief at 86). The evidentiary hearing testimony establishes that counsel failed to discover and present available evidence that would have established without question the existence of mitigation. It cannot be dismissed as immaterial, especially given the fact that the trial court concluded that counsel had

established absolutely no mitigation in this case.[7]

During his direct examination at trial, Dr. Toomer admitted that his opinion was limited because it was not supported with corroborating information:

> Q. [Defense counsel]. Many times would it be beneficial for you to corroborate any of that information, that self reported information from the individual?
>
> A. [Dr. Toomer]. Yes.
>
> Q. And in this particular case did you or were you able to corroborate the self reported information which Marbel Mendoza provided to you?
>
> A. No, I did not.
>
> Q. Does that in any way affect your ability to conduct an evaluation and render an opinion as to mental status functioning?
>
> A. No.
>
> Q. Although it would enhance it if it were.
>
> A. Yes.

(TRT. 1560-61). Later, on cross-examination, Dr. Toomer clarified:

> It's not that corroboration is not necessary. What I was saying if, for example, you don't have all of the different elements, that will not necessarily preclude you from reaching an opinion.

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[7]This Court acknowledged **and explicitly relied upon** Judge Postman's finding of no mitigation to support its affirmance of Mr. Mendoza's death sentence on direct appeal. See Mendoza v. State, 700 So. 2d 670 (Fla. 1997).

(TRT. 1594). Despite Dr. Toomer's careful language obviously intended to downplay the impact on the reliability of his opinion caused by his failure to obtain corroborating evidence, based upon his own admission to the penalty phase jury, his opinion was negatively impacted as a result. There can be no credible argument that corroborating evidence would not have elevated his opinions as reliable and would not have nullified the State's closing penalty phase argument that the factual foundation of his opinions was "garbage."

The State next contends that trial counsel made a strategic decision not to have the experts speak with Mr. Mendoza because of the potential for giving the jury negative evidence about domestic abuse. (Answer Brief at 87). Similarly, the State argues that Mr. Perez's testimony would have opened the door to allowing the State to elicit the fact that Mr. Mendoza allegedly used Mr. Perez's name and lied about doing so. The point is without merit because this information of course would have been elicited during the penalty phase and any negative impact of these very minor points would be far outweighed by the benefit of presenting undisputed expert testimony of mitigation.[8]

The State claims that trial counsel was not ineffective for failing to present

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[8]The State presented absolutely evidence refuting Dr. Eustace's testimony or the expert testimony from Ms. Baker that Mr. Mendoza suffers from PTSD.

evidence of Mr. Mendoza's PTSD because the evidentiary hearing expert Claudia baker would not have been available at the time of Mr. Mendoza's capital trial. (Answer Brief at 88). However, according to Ms. Baker's unrebutted testimony, Mr. Mendoza's condition, PTSD, was caused by traumatic events and experiences that occurred well before both the date of the instant events and the date of his capital trial (his experiences in Cuba and Peru in the early 1980's and his getting shot in 1989). Therefore, had trial counsel been effective and in 1994 obtained an expert in PTSD, there can be no reasonable argument that such an expert would not have made the same diagnosis as Ms. Baker. PTSD was a recognized mental condition in 1994. See Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Text Revision (1987) pp. 247-51.

As a fallback argument, the State asserts that Ms. Baker's opinion is "not credible"[9]. The State's argument is without merit. Significantly, the State presented no expert testimony to rebut Ms. Baker's expert opinion. With no expert testimony to support its claim that Ms. Baker's opinion is "not credible", the State argument should be rejected.

Lastly, the State argues that even if all of the mitigation adduced at the

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[9]As noted elsewhere in this brief the lower court made absolutely no credibility findings against Mr. Mendoza's evidentiary hearing experts and it is mere wishful thinking on the State's part to do so.

evidentiary hearing had been presented at trial, the outcome would still have been the same given the two aggravating circumstances. (Answer Brief at 94). Again this is without merit. The jury recommendation was 7-5. Had only one more juror voted for a life sentence, Mr. Mendoza would not have been sentenced to death. There is a much more than reasonable probability that but for counsel's omissions, the outcome would have been different.

B. Trial counsel's opened the door to allow the State to present evidence of Mr. Mendoza's pending charges for robbery with a firearm

The State argues that Mr. Mendoza cannot claim that counsel was ineffective for opening the door during the penalty phase to his involvement in other armed robberies because this particular aspect of counsel's deficient conduct was not specifically asserted in the rule 3.850 motion. The State ignores that, at the evidentiary hearing, this issue was explored in detail with trial counsel without any objection by the State. In light of Mr. Suri's unobjected to testimony on this specific issue, Mr. Mendoza formally asserted this specific claim as set forth in the previously filed Post Evidentiary Hearing Closing Arguments. See PCR Supp. 86 et seq. pp.70-73. The State was not prejudiced because the State fully addressed the issue on its merits in its memorandum. The version of Rule 3.851(b) (3) applicable to Mr. Mendoza's case specifically provides that the one year time limitation for filing a rule 3.850 motion to vacate judgment and sentence of death

"shall not preclude the right to amend or to supplement pending pleadings". Fla. R. Crim. P. 3.851(b) (3) prior version of rule applicable to motions filed on or before October 1, 2001; See also Brown v. State, 596 So. 2d 1026 (Fla. 1992); Woods v. State, 531 So. 2d 79 (Fla. 1988). Regardless if this issue was formally raised, this Court must still consider trial counsel's deficient conduct in opening the door to this evidence as another example of counsel's inexperience and sub-standard performance. Furthermore, this Court ruled on direct appeal in Mr. Mendoza's case that Judge Postman improperly permitted the State to elicit and comment upon in closing arguments the fact that Mr. Mendoza had pending charges for armed robberies. This Court must factor into its prejudice analysis the cumulative effect of all the error that occurred at trial, including Judge Postman's error in allowing the State elicit and argue this highly improper and prejudicial evidence. See State v. Gunsby, 670 So. 2d 920 (Fla. 1997); Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

C. Trial counsel was ineffective for calling Humberto Cuellar as a witness in the Penalty Phase

The State points to the fact that counsel testified at the evidentiary hearing that counsel thought it was important for the jury to hear Humberto say that they did not intend to kill Mr. Calderon and then argues that, therefore, this was sound strategy and counsel was not ineffective. (Answer Brief at 98). Once again, the

State mis-states the real issue. The real issue is that counsel was ineffective for not eliciting this testimony during Humberto's guilt phase testimony and instead, calling him as a defense witness in the penalty phase. Mr. Mendoza rests on the merits of his initial brief on the remainder of the State's points.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Mendoza respectfully urges this Court to reverse the lower court order, grant a new trial and/or a new penalty phase and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Margarita Cimadevilla, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on May 5, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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