IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2143

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

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Mendoza was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees. Citations to the record on the direct appeal shall be as (R . . .) for citations to the record and (TRT . . .) for citations to the transcripts.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Mendoza requests oral argument on this petition.

PROCEDURAL HISTORY

A grand jury indicted Mr. Mendoza and two co-defendants, Lazaro Cuellar ("Lazaro") and Humberto Cuellar ("Humberto"), for first-degree murder, conspiracy to commit robbery, attempted armed robbery, armed burglary with an assault, and possession of firearm during the commission of a felony (R 1-4). The grand jury predicated the first-degree murder charge on both the theory of premeditation and felony-murder (R 1). However, at trial, the State abandoned the premeditation theory. (TRT 1157).

The felony-murder charge was based on the theory that the victim was killed while the defendants were engaged in committing or attempting to commit a robbery or burglary (R 1).

On May 20, 1993, prior to Mr. Mendoza's trial, Lazaro entered into a plea agreement with the State and the lower court in which he agreed to plead guilty to the lesser offense of manslaughter and plead guilty as charged to the offenses of conspiracy to commit robbery and attempted armed robbery (TRT 196-205). The court accepted the plea and agreed to sentence him to three (3) concurrent terms of ten (10) years in prison (TRT 202).

On January 18, 1994, approximately two weeks before the start of Mr. Mendoza's trial, Humberto entered into a plea

agreement in which he pleaded guilty to second-degree murder and was sentenced to twenty (20) years in prison (TRT 237).

In exchange for being allowed to plead to the reduced charge and for the twenty-year sentence, Humberto agreed to testify against Mr. Mendoza (TRT 241, 3 1086). If the prosecution thought that Humberto did not testify "truthfully", then the agreement called for Humberto to be re-sentenced to more than the agreed upon twenty-year sentence (TRT 1118-9).

The jury found Mr. Mendoza guilty of first-degree murder, conspiracy to commit robbery, attempted armed robbery, armed burglary with an assault, and possession of a firearm during the commission of a felony. See Mendoza v. State, 700 So. 2d 670 (Fla. 1997). The jury voted in favor of death by a vote of seven (7) to five (5). See Id. The court sentenced Mr. Mendoza to die in the electric chair and found the following aggravating circumstances: (1) prior conviction for a violent felony; and (2) committed while engaged in the commission of a robbery and for pecuniary gain (merger of aggravators) Id.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. See Id. Mr. Mendoza timely petitioned the United States Supreme Court for certiorari. This petition was denied on October 5, 1998. Mendoza v. Florida, 119 S. Ct. 101 (1998). Mr. Mendoza filed his final amended motion for

post-conviction relief on September 5, 2000 (PCR 231-391). The trial court subsequently denied Mr. Mendoza's motions to compel the production of public records and motion to disqualify Judge Postman (PCR 655-6, 798, 800).

At the Huff hearing held on January 26, 2001, the court orally summarily denied all of Mr. Mendoza's post-conviction claims (PCR 870-908). The court issued a written summary denial on March 5, 2001 (PCR 665-673). Mr. Mendoza filed a timely notice of appeal of the trial court's summary denial on March 27, 2001 (PCR 674-75).

Mr. Mendoza appealed the Court's summary denial; simultaneously he filed a petition for writ of habeas corpus. On April 3, 2002, this Court remanded the case with orders for the Court to conduct and evidentiary hearing on Mr. Mendoza's claims of ineffective assistance of counsel. Contemporaneously, the habeas petition was denied without prejudice.

The evidentiary hearing commenced in March 2004 and took place over several days. Following the submission of closing memoranda by both parties the lower court entered an order denying relief.

CLAIM

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES, WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.

A. INTRODUCTION.

Mr. Mendoza had the constitutional right to the effective assistance of appellate counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Because the constitutional violations which occurred during Mr. Mendoza's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Mendoza's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Mendoza's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. See Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and

fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Neglecting to raise such fundamental issues, as those raised herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." See Id. Had counsel presented these issues, Mr. Mendoza would have received a new trial, or at a minimum, a new penalty phase. Furthermore, fundamental error occurred that mandates relief. Mr. Mendoza is entitled to relief.

B. FAILURE TO RAISE TRIAL COURT'S ORDER PROHIBITING PETITIONER FROM PRESENTING EVIDENCE OF VICTIM'S PAST INVOLVEMENT IN "BOLITO".

The trial court committed reversible error by prohibiting the defense from presenting evidence of the victim's past involvement running bolito[1] operations (TRT 737-59). This evidence was relevant to the material issue of Mr. Mendoza's intent (specifically, his lack of intent) to commit the alleged underlying felonies that formed the basis of the felony-murder charge. The trial court abused its discretion by not allowing Mr. Mendoza to present this evidence. This issue was preserved. Had appellate counsel raised this issue on direct appeal, this

[1]"Bolito" is a type of illegal lottery. See Greater Loretta Improvement Association v. State, 234 So.2d 665, 672 (Fla. 1970); Carnagio v. State, 143 So. 164, 165 (Fla.1932).

Court would have been compelled to grant Mr. Mendoza a new trial.

The defense proffered evidence that the victim, prior to the time of his death, ran illegal bolito operations (TRT 758, 797, 801, 804-5). In fact, the prosecutor agreed that the victim had been arrested and prosecuted for racketeering as a result of his involvement in bolito in 1987 (TRT 786).

In addition to the proffers of Rosario Estrada (TRT 758), the victim's wife, and Detectives Trujillo and Royal (TRT 801, 804-5), which all substantiated the fact that the victim had been involved in bolito, defense counsel proffered that two additional witnesses could substantiate that the victim was involved in bolito, including one witness who could testify that the victim was involved in bolito one year prior to the victim's death (TRT 797).

As argued by defense counsel below, this proffered evidence was relevant to establishing the material fact that the victim owed a debt stemming from bolito operations (TRT 463-4, 468, 751, 792).[2] This in turn supports the crux of Mr. Mendoza's

[2]The court granted the defense leave to present evidence that, at the time of the shooting, the victim was currently conducting bolito operations (TRT 794-5). However, defense counsel presented no evidence of the victim's current bolito activity. In his rule 3.850 motion for post-conviction relief, the summary denial of which is pending in this Court concurrent with this petition, Mr. Mendoza alleges that defense counsel was

defense - that the men were not attempting to rob the victim but, instead, were trying to collect from the victim a bolito debt (TRT 463, 468, 751).

Had the jury believed that this was not an attempted robbery, the jury could not have lawfully convicted Mr. Mendoza for first-degree murder.

The State argued that the proffered evidence was not relevant (TRT 457, 738-9, 741, 751). The trial court ultimately agreed and ruled that the fact the victim ran bolito operations in the past, prior to the time of the shooting, was not relevant (TRT 795, 798).

By ruling that the defense could not present this evidence, the trial court denied Mr. Mendoza his fundamental constitutional right to present a defense. See Washington v. Texas, 388 U.S. 14 (1967); see Story v. State, 589 So. 2d 939, 943 (Fla. 2d DCA 1991).

All relevant evidence is admissible, except as provided by law. § 90.402, Fla. Stat. (1991). Relevant evidence is "evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat.(1991). "In Rivera v. State, [561 So. 2d 536 (Fla. 1990)], the supreme court emphasized that where relevant

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ineffective for failing to present available evidence that the victim was indeed involved in running bolito operations at the time of the shooting.

evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Story, 589 So. 2d at 942 (emphasis added); see also Palazzolo v. State, 754 So. 2d 731 (Fla. 2d DCA 2000) (noting "the well-established policy requiring the introduction into evidence of all probative evidence tending to prove a defendant's innocence."); Moreno v. State, 418 So. 2d 1223 (Fla. 3d DCA 1982). Here, the trial court excluded critical, relevant evidence relating to the issue of Mr. Mendoza's lack of intent to commit the alleged underlying felonies. See Story at 943.

In Vannier v. State, 714 So. 2d 470, 471 (Fla. 4th DCA 1998), the court concluded that the lower court erred by excluding evidence proffered by the defense which suggested that the alleged murder victim had been suicidal. The defense in that case was that the victim had in fact committed suicide. In concluding that the lower court had abused its discretion, the District Court reasoned:

> While the defense is bound by the same rules of evidence as the state, [footnote omitted] **the question of what is relevant to show a reasonable doubt may present different considerations than the question of what is relevant to show the commission of the crime itself. If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility.** [citations omitted] Because suicide was defendant's theory of defense . . . any

> evidence that tends 'in any way, even indirectly,' to show that the death did result from suicide is admissible, and it is error to exclude it.

Vannier, 714 So. 2d at 471 (emphasis added); see also Washington v. State, 737 So. 2d 1208 (Fla. 1st DCA 1999). The test for relevancy in the context of establishing reasonable doubt is broad and favors admission over exclusion. Even evidence that may be viewed as "equivocal" as to whether or not it establishes the material fact at issue must be admitted. See Vannier at 471. When such equivocal evidence "**arguably tends to show a fact that might lead a jury to exonerate a defendant**, the trial judge's discretion is reduced and it is up to the jury to decide which inference is correct." Vannier at 471 (emphasis added).

Here, the proffered evidence was relevant to establishing the material fact of Mr. Mendoza's intent, as well as the closely related issue of motive. See Story v. State, 589 So. 2d 939 (Fla. 2d DCA 1991) (error to exclude defense's proffered evidence relevant to the material issues of the defendant's intent and knowledge). The intent, or motive, behind the men's decision to confront the victim was a material issue at trial. The State alleged that Mr. Mendoza was guilty of felony-murder on the theory that the victim was killed while Mr. Mendoza was engaged in the perpetration of, or in an attempt to perpetrate,

a robbery or burglary (R 1). The State therefore had the burden to establish that Mr. Mendoza and the co-defendants intended to rob the victim or committed a crime that would support a conviction for burglary[3]. The indictment alleged a burglary based upon an intent to commit robbery or theft (R 2).

To establish either an attempted robbery or a burglary grounded on an intent to commit robbery or theft (as alleged by the State), the State had to prove that the men intended to commit theft. On the other hand, if the men did not intend to commit theft, then they are not guilty of attempted robbery or burglary, and, therefore, Mr. Mendoza is not guilty of felony-murder.

Since it is clear that Mr. Mendoza's (and the co-defendants') intent and motive was a material issue, the next question is whether or not the proffered evidence was relevant to that issue. In the context of Mr. Mendoza's case - a defendant seeking to present “reverse Williams rule” evidence -

[3]The alleged underlying offenses of robbery and burglary, or attempted robbery and burglary, are specific intent crimes, and, therefore the State had the burden to prove specific intent. See Craig v. State, 769 So. 2d 1087 (Fla. 2d DCA 2000) (robbery is a specific intent crime); Richardson v. State, 723 So. 2d 910 (Fla. 1st DCA 1999) (burglary is a specific intent crime); Brown v. State, 25 Fla. L. Weekly S792, 2000 WL 1472598 (Fla. Oct. 5, 2000) (the crime of attempt generally requires proof of a specific intent to commit the crime attempted as long as the state is required to show specific intent to prove the completed crime).

the question is whether the proffered evidence “tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt.” Rivera, 561 So. 2d 536, 539 (Fla. 1990).

Evidence that the victim had been involved in running bolito operations at the very least “tends . . . indirectly” to establish that the men confronted the victim in order to collect a bolito debt, and not for the purpose of robbery or burglary. Id. (This evidence corroborated with the fact that **no** property was taken from the victim). (See initial brief p. 14). This is because the proffered fact that the victim - merely one year prior to his death (see TRT 797) - had been running bolito operations tends to support the possibility that he may have still owed a bolito debt as a result and also tends to support the possibility that he was in fact still running bolito operations and, again, as a result, owed a debt that Mr. Mendoza and the co-defendants went to collect.

This evidence would have supported Mr. Mendoza's defense that this was not an attempted robbery, but, instead, an attempt to collect a bolito-related debt owed by the victim. All that is required is a “possibility of a tendency of [the proffered] evidence to create a reasonable doubt.” Vannier, 714 So. 2d 470, 471 (Fla. 4th DCA 1998).

The court in Story held that defendant should have been permitted to present evidence of prior misdeeds of third parties in order to establish that she lacked criminal intent and guilty knowledge. There, the defendant was on trial for entering into fraudulent contracts to buy and sell citrus fruit. The district court held that the trial court erred when the court prohibited the defendant from presenting to the jury proffered evidence that she herself had been victimized by two of her employees who had fraudulently sold to her fictitious groves of fruit. The defendant claimed that she conducted her transactions with other companies largely in reliance on the two employees who had defrauded her and that she relied on these two employees in signing the contracts forming the basis for the charges against her. The district court concluded that the jury should have been allowed to hear specific instances relating to her misguided alliance in entering the contracts upon the employees' recommendation. The court reasoned that these instances "may bear on [the defendant's] intent and knowledge in entering into the contracts at issue." Id. at 942. Similarly, in the instant case, Mr. Mendoza should have been permitted to present evidence that would have "tend[ed] . . . even indirectly" to establish that the he and the co-defendants did not intend to commit robbery or burglary.

"As the Court said in Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), '[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.' Although this quotation refers to 'witnesses', the principle obviously includes other forms of evidence as well." Vannier v. State, 714 So. 2d 470, 471 (Fla. 4th DCA 1998). By excluding the proffered evidence, the trial court deprived Mr. Mendoza of his right to present a defense. See Washington; Story.

The trial court never ruled, or even suggested, that the proffered evidence was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See § 90.403, Fla. Stat. (1991). The only basis articulated for excluding this evidence was relevancy (TRT 795, 798). The State maintained that the evidence was not relevant (TRT 457, 739-3). In fact, the prosecutor agreed that the evidence would be admissible if relevant ("Now, they obviously would have the right to introduce if it (sic) were to show some relevance" (TRT 739)).

Had appellate counsel raised this issue on direct appeal, the trial court's ruling could not have been affirmed on the basis of section 90.403. Because the proffered evidence tends,

at least, indirectly, to establish reasonable doubt, it was relevant and admissible. See Rivera, 561 So. 2d 536, 539 (Fla. 1990).

The trial court's error was not harmless beyond a reasonable doubt. See DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986). "**If proffered evidence would have any tendency, however remotely or indirectly, to convince a juror [that the defendant was not guilty], it must be deemed prejudicial.**" Vannier at 472 (emphasis added).

The only direct and meaningful evidence presented at trial that this was an attempted robbery and not an attempt to collect a debt was the dubious testimony of co-defendant Humberto Cuellar[4]. His credibility was highly suspect. Approximately two weeks before the start of Mr. Mendoza's trial, Humberto, who originally was also facing first-degree murder charges and potentially eligible for the death penalty (TRT 1063), entered a plea agreement to second-degree murder and was sentenced to twenty (20) years in prison (TRT 237).

In exchange for being allowed to plead to the reduced charge and for the twenty-year sentence, Humberto agreed to testify against Mr. Mendoza (TRT 241, 1086). As part of the

[4]The remaining evidence suggesting that this was a robbery was merely circumstantial and was at least, if not more, consistent with an attempt to collect a debt that went terribly wrong.

agreement, Humberto was required to testify consistent with the State’s robbery theory (TRT 244). If the prosecution thought that Humberto did not testify “truthfully”, then the agreement called for Humberto to be re-sentenced to more than the agreed upon twenty-year sentence (TRT 1118-9). As further inducement, the plea agreement provided that Humberto would not be required to testify against his brother, Lazaro (TRT 1086). Clearly the jury had reason to question Humberto's credibility based on his self-interest in testifying against Mr. Mendoza consistent with the State’s theory that this was an attempted robbery.

In addition to the State’s generous deal given to Humberto in exchange for his testimony, the jury had other reasons to doubt his credibility. Humberto was severely impeached during cross-examination. Defense counsel elicited the following testimony that strongly suggested Humberto's testimony on direct examination was not credible: The fact that Humberto admitted to failing to tell police in his initial statement that had hit the victim over the head with his gun (TRT 1076); that he lied when he told police that he, Humberto, never pulled out his gun (TRT 1078); that while he testified on direct examination that when Mr. Mendoza returned to the car, he told Humberto that he had shot the victim, Humberto told police that he (Humberto) passed out when he (Humberto) reached the car, that the next thing he

knew, he was in the hospital, and that he did not know what Mr. Mendoza did after the shooting (TRT 1079-80); that while he originally told police that he was unsure what caliber gun Mr. Mendoza was allegedly carrying at the time of the shooting.

He had since gone over the evidence discovered and investigated by police, including the fact that the bullets that killed the victim were .38 caliber, and now testified on direct examination that Mr. Mendoza carried a .38 Special Revolver (TRT 1067, 1084-5); that while he testified on direct that he did not know how many bullets were in the Taurus nine millimeter gun (the gun Humberto used to strike the victim over the head), he had told police that the gun contained 14 or 15 rounds (TRT 1089-90); that, contrary to his trial testimony that his brother, Lazaro, knew about the alleged planned robbery, he told police that Lazaro did not know about it (TRT 1091); that while he testified on direct examination that Lazaro brought the Taurus nine millimeter, Humberto told police that Lazaro was not armed (TRT 1087, 1092); that, contrary to his trial testimony, Humberto told police that he and Lazaro drove by the victim's house together before the day of the shooting (TRT 1093-4); that contrary to his trial testimony that it took Mr. Mendoza thirty seconds to one minute to return to the car after Humberto was

shot (TRT 1054), Humberto had told police that Mr. Mendoza came back to the car in “a few seconds” (TRT 1094).

Humberto testified that this was an attempted robbery. Given the fact that the jury had significant reason to doubt his credibility, it cannot be said that the trial court's error in refusing to allow the defense to present evidence that the victim in the past had run bolito operations - which would have tended to suggest the possibility that the men indeed had confronted the victim merely to collect a bolito debt (corroborated by the evidence that the victim’s property was not taken) (See Initial Brief p. 14) - was harmless beyond a reasonable doubt. See DiGuilio. Furthermore, this Court should consider all errors, both preserved and unpreserved, in determining whether an error is harmless beyond a reasonable doubt. See Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000).

C. FAILURE TO RAISE PETITIONER'S DETRIMENTAL RELIANCE ON THE TRIAL COURT'S MID-TRIAL REVERSAL OF ITS PRE-TRIAL RULING ON THE ISSUE OF THE VICTIM'S INVOLVEMENT IN “BOLITO”.

Appellate counsel was ineffective for failing to raise on direct appeal the argument that Mr. Mendoza was denied a fair trial when the trial court denied his motion for mistrial predicated on the court's mid-trial reversal of its pre-trial ruling on the extent to which the defense could present evidence of the victim's involvement in illegal bolito operations. After

the defense told the jury in opening statements that the evidence would show that the victim had been involved in bolito, the court reversed its pre-trial ruling to allow the defense to present evidence of the victim's prior involvement in bolito.

Defense counsel detrimentally relied on the court's pre-trial ruling when counsel gave his opening statement. The prejudice caused by the trial court's mid-trial reversal of its previous ruling denied Mr. Mendoza his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, including his right to a fair trial and to due process of law. The trial court should have granted the motion for mistrial.

The State filed a pre-trial motion asking the court to prohibit the defense from eliciting testimony or evidence regarding the victim's 1987 arrest and subsequent withhold of adjudication for the crime of racketeering (R 168). It was undisputed that the victim's racketeering involved his in “bolito” operations (during arguments on the matter, the prosecutor announced: “We know [the victim] was arrested in 1987 for bolito” (TRT 786)).

During pre-trial proceedings on the State's motion, defense counsel, in arguing that the fact that the victim had been arrested for bolito-racketeering activity was relevant to the defense's case, made the following motion:

> Respectfully, I ask that I be allowed to inquire of any witness, whether state witness or my witness, as to whether they knew that Mr. Calderone (sic) was employed as a bolitero in a bolitero operation.

(TRT 464). The court subsequently granted the State's motion in limine by prohibiting the defense from eliciting evidence that the victim was arrested and received a withhold of adjudication for racketeering (TRT 467, 469). However, the court repeatedly indicated the it would not prohibit the defense from inquiring whether the victim was involved in bolito:

> THE COURT: . . . It strikes me that [the State’s] request that [the defense] not mention Mr. Calderone's (sic) prior arrest for racketeering should be granted, but they should be allowed to ask either of the police officers if [the defense] knew he was a bolitero or involved in a bolito operation.

(TRT 466);

> THE COURT: I am going to deny [the defense's request to elicit testimony from the police that police knew the victim had a prior racketeering arrest and adjudication]. I didn't say you couldn't bring out the bolito issue.

(TRT 467);

> THE COURT: I don't have any problem with you asking her was he a bolitero.
>
> * * *
>
> THE COURT: I am granting that motion in limine, however, if they want to call the wife or son, they can ask them if they knew

> or know that the victim was a bolito operator.

(TRT 469-70). When the issue was later re-visited mid-trial, the court recalled its initial pre-trial ruling:

> THE COURT: Well, I directed the attorney's not go get into (sic) the racketeering or the withhold, but I did not limit them on bringing out that this gentleman was a bolito [sic].

(TRT 740-1).

In opening statements, and in detrimental reliance on these rulings, defense counsel told the jury, "We believe the evidence is going to show that [the victim] was involved in [bolito]" (TRT 611). After opening statements and during the State's case in the guilt-innocence portion of the trial, the court at the State's urging revisited the issue and ultimately reversed itself and ruled that the defense would be prohibited from eliciting proffered evidence that the victim had a history of being involved in illegal bolito activities (TRT 747, 794-5). The court changed its initial pre-trial ruling and restricted the defense to only presenting evidence that the victim was involved in bolito <u>at the time of his death</u> (TRT 747, 794-5). As the court acknowledged, this was clearly a significant change of its earlier pre-trial ruling:

> THE COURT: I thought that the asking of that question [bringing out the fact that the victim was a bolitero] and the simple answer

> was permissible. I think that was my initial ruling.
>
> * * *
>
> THE COURT: Now you [the State] are asking me to change my ruling in regard to the question and answer as to whether or not he was a bolitero or involved in this business.

(TRT 741). The court in fact wondered that the court "may have made a mistake" in the initial pre-trial ruling (TRT 797-8).

After the court changed its ruling, the defense moved for a mistrial on the basis that the defense had prejudicially relied on the court's pre-trial ruling to the contrary when it told the jury that the evidence would show that the victim had been involved in bolito. (TRT 744-5, 748-59, 795-8). The court denied the motion for mistrial (TRT 759, 798).

Irrespective of whether or not the trial court was correct in ultimately prohibiting the defense from presenting evidence that the victim had in the past been involved in bolito (see subsection B, supra), the trial court "pulled the rug out from under" the defense when the court, mid-trial, reversed its earlier pre-trial ruling and ordered that the defense could not present evidence of the victim's past bolito involvement. As the defense counsel argued at trial (TRT 744-5, 747-8, 750, 795), the defense detrimentally and prejudicially relied on the court's pre-trial ruling when defense counsel told the jury in

opening statement that the evidence was going to show that the victim was involved in bolito (TRT 611).

The jury reasonably could have reasoned that there was no such evidence when, after defense counsel’s opening statement, no such evidence came out at trial. More significant is that the jury likely considered the lack of this evidence as reflecting an absence of credibility on the part of the defense. The prejudice acted to deny Mr. Mendoza a fair trial. Had appellate counsel raised this issue on appeal, this Court would have been compelled to order a new trial.

D. FAILURE TO RAISE ON APPEAL THE DENIAL OF PETITIONER'S MOTION FOR MISTRIAL MADE AFTER THE PROSECUTOR, DURING THE GUILT-INNOCENCE PHASE, TOLD THE JURY IT SHOULD CONVICT PETITIONER BASED ON THE FACT THAT THE JURY COULD THEREAFTER VOTE TO NOT RECOMMEND THE DEATH PENALTY.

Appellate counsel was ineffective for failing to argue on direct appeal that the trial court committed reversible error when the court denied Mr. Mendoza's motion for a mistrial made after the prosecutor told the jury during guilt-innocence phase closing arguments that, in deciding whether to find Mr. Mendoza guilty or innocent of first-degree felony-murder, the jury should consider the fact that it does not have to recommend the death penalty. In support of the prosecutor's argument to the jury that the jury should find Mr. Mendoza guilty of first-degree murder, the prosecutor told the jury that it did not have

to recommend the death penalty. Specifically, the prosecutor told the jury:

> If you don't like the sentence, if you don't want to give him the death penalty, **don't**, but you promised in jury selection that this part of the trial is the guilt innocence phase. It has nothing to do with the penalty, nothing. And if you don't like the penalty the other guys got, then **adjust your recommendation then. Don't go for death**.

(TRT 1338-39) (emphasis added).

The trial court sustained defense counsel's objection but denied his motion for a mistrial (TRT 1339, 1349-50). Therefore, this issue was preserved for review. The prosecutor's conduct violated Mr. Mendoza rights under the Fifth, Eighth and Fourteenth Amendments, by urging the jury to lessen the State's burden of proof and convict Mr. Mendoza based on the fact that the jury could later elect to recommend a life sentence and not death.

Appellate counsel was ineffective for not raising this error on direct appeal. The prosecutor's arguments vitiated the fairness of the guilt-innocence proceedings by directly inviting the jury to consider the available sentence possibilities in deciding whether or not to find Mr. Mendoza guilty or not guilty of first-degree murder. The prosecutor specifically invited the jury to rely on the fact that it could later vote to recommend a

life sentence as a basis to find Mr. Mendoza guilty of murder. This clearly is improper.

While the trial court attempted to give a curative instruction (TRT 1339), the instruction failed to address the evil at hand, and thus failed to prevent the very real possibility that the jury did exactly as the prosecutor asked and voted to convict based on the fact that the jury could later recommend a life sentence. In an attempt at a curative instruction, the trial court simply told the jury that it must not decide the case based on sympathy for anyone or anger and that it is the jury's duty to determine guilt or innocence “in accord with the law” (TRT 1339).

The trial court's curative instruction did not include the instruction that the jury must base its verdict only on the evidence and not on anything having to do with the possible sentence that Mr. Mendoza could receive. Even with the trial court's curative instruction, there is a substantial likelihood that the jury based its guilty verdict on the fact that it could later vote to recommend a life sentence. Had appellate counsel raised this issue on direct appeal, this Court would have been compelled to grant a new trial.

E. FAILURE TO RAISE ON DIRECT APPEAL THAT THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY SPECIFICALLY TELLING THE JURY THAT THE JURY COULD PROPERLY SPECULATE AS TO WHY MR.

MENDOZA ELECTED TO REMAIN SILENT AND BY SUGGESTING THAT MR. MENDOZA HAD THE BURDEN TO PROVE HIMSELF NOT GUILTY.

The trial court rendered Mr. Mendoza's trial unfair and violated his rights under Fifth, Sixth, Eighth and Fourteenth Amendments, including his right to remain silent, his right against being compelled to testify, and his right to due process of law when, during voir dire, the trial court advised the venire:

> You will understand that the defendant has an absolute right to remain silent and you are not to draw any inferences in this conduct. **There may be a number of reasons why anybody remains silent; that is, somebody may not testify, and I am sure you can give many reasons why they have chosen to do that, whether they can't articulate themselves, or perhaps it is their inability to remember the facts, or the lawyers' recommendation not to testify.**
>
> * * *
>
> **Now, you may personally feel that you would like to hear from him [Mr. Mendoza]. There is nothing wrong with that as long as you understand that he doesn't have to do anything or say anything.**

(TRT 285-6, 298). The trial court openly invited the jurors to speculate as to the reasons why Mr. Mendoza did not testify in clear violation of the long-standing and well-settled prohibition on calling attention to and exposing juries to any and all comments regarding a defendant's right to remain silent. See State v. Hoggins, 718 So. 2d 761 (Fla. 1998).

In the court's misguided effort to instruct the jury to disregard and draw no conclusions from Mr. Mendoza's invoking his constitutional right to remain silent, the trial court did just the opposite by giving the jury "reasons" why Mr. Mendoza might not testify. While defense counsel did not object, the gravity of this wholly improper commentary - commentary that came from the court, not from counsel - rose to the level of fundamental error. Not only did the court instruct the jury that it was proper to want to hear from the defendant, the court espoused a list of possible reasons why a defendant might not testify, including the "inability to remember the facts" and "the lawyer's recommendation not to testify" (TRT 285-6). These two particular "reasons" the judge gave for a defendant not testifying plainly suggested to the jury another reason that, although not articulated by the judge, was clearly inferred: That the defendant is guilty.

The shear magnitude of the court's comments in terms of the degree to which they constitute improper comments on Mr. Mendoza's exercise of his right not to testify, when considered with the quite frankly astonishing fact that **the court** made these comments, compel the conclusion that fundamental error occurred. Had appellate counsel raised this issue on direct appeal, the Court would have granted Mr. Mendoza a new trial.

The trial court's error was not harmless beyond a reasonable doubt. See DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986). Mr. Mendoza exercised his constitutional right to not testify at his trial. The State's theory was that this was an attempted robbery and not, as the defense argued, simply an attempt by the men to collect a debt that went terribly wrong. The State's case hinged virtually entirely on the dubious testimony of Humberto Cuellar. Given Cuellar's self-interest in testifying consistent with the State's theory and his highly questionable veracity demonstrated by defense counsel on cross-examination (see subsection B, supra), it cannot be said beyond a reasonable doubt that the trial court's improper comments, when combined with Mr. Mendoza's decision not to testify, did not contribute to the jury's verdict.

In addition to the court's improper comments discussed above, the trial court improperly suggested to the jury that Mr. Mendoza had to burden to prove himself not guilty. The trial court during voir dire told the jury:

> Now I told you the defendant is presumed innocent. That presumption stays with him throughout the trial until those jurors who are selected go into the jury room and find that he has **been proven** either (sic) **not guilty** . . . ."

(TRT 278). This comment strongly suggests that the jury during its deliberations must consider whether the defendant has proven

himself not guilty. This comment acted to improperly shift to Mr. Mendoza the burden of proof in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The prosecutor added to this constitutional error when she argued to the jury, “Let [defense counsel] explain to you how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you . . . .” (TRT 1317). The combination of the court’s improper instruction and the prosecutor’s improper invitation for the jury to consider that the defense presented no evidence to contradict the State’s case, rose to the level of fundamental error. When considering all errors, both preserved and unpreserved, and in light of the fact that, as argued above (see subsection B, supra), the State’s case depended entirely on the highly questionable testimony of Humberto Cuellar, these errors are not harmless beyond a reasonable doubt. See Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000); DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986).

F. FAILURE TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S ERROR IN NOT GRANTING PETITIONER'S MOTIONS RELATED TO THE PROSECUTOR'S VIOLATION OF THE RULE OF WITNESS SEQUESTRATION.

Appellate counsel was ineffective for failing to argue on direct appeal that the trial court committed reversible error by denying both Mr. Mendoza's motion to exclude the rebuttal testimony of Technician Gallagher and motion for a mistrial

after the prosecutor deliberately violated the rule of witness sequestration by informing Gallagher of the substance of defense witness Rao's testimony before the prosecutor called Gallagher in rebuttal. As a result, the trial court violated Mr. Mendoza's right to due process of law under the Fifth and Fourteenth Amendments, as well as his rights under the Eighth Amendment. Had appellate counsel raised this issue on direct appeal, Mr. Mendoza would have been entitled to a new trial.

Mr. Mendoza presented powerful and compelling evidence that he did not shoot the victim. Police department criminalist Rao testified that, based upon gun-shot residue hand swabs taken of Lazaro following the shooting, it was "more likely than not" that Lazaro had fired a gun (TRT 1205, 1207). Rao's opinion was based on the quantity of lead particles found on the swabs of Lazaro's hands (TRT 1207). Significantly, Rao believed that the number of particles found on Lazaro's hands indicated that it was more likely that he had fired a weapon, as opposed to having merely handled a weapon that had been fired (TRT 1205).

In rebuttal, the State called police department technician Richard Gallagher. Gallagher had taken the swabs of Lazaro and Humberto and testified that he took the swabs of Lazaro's hands at 7:45 a.m. instead of 9:00 a.m. (TRT 1181-2, 1194, 1283). Because Rao specifically grounded his opinion on his belief that

Lazaro's hands were swabbed at 9:00 a.m., the State asked the jury to discredit Rao's opinion that the evidence showed that it was “more likely than not” that Lazaro had fired a gun. On cross examination of Rao, the State had elicited from Rao that his opinion depended significantly on the length of time between the shooting and when police swabbed Lazaro's hands (TRT 1208).

In closing arguments, the State argued that, because Rao based his opinion on the incorrect time that police swabbed Lazaro's hands, Rao's opinion was worthless (TRT 1302-3, 1341)[5]. Thus, the prosecutor used Technician Gallagher's rebuttal testimony to severely impeach the reliability and credibility of Rao's opinion that Lazaro more likely than not fired a gun.

The trial court erred by not excluding the rebuttal testimony of Technician Gallagher and denying Mr. Mendoza's motion for a mistrial (TRT 1291) after the prosecutor deliberately violated the rule of witness sequestration by informing Gallagher of the substance of Rao's testimony before Gallagher was called in rebuttal.

When defense counsel raised the issue and moved to exclude Gallagher as a rebuttal witness, the prosecutor admitted talking to Gallagher about the times the swabs were taken but claimed

[5] The fact that Rao was incorrect about the time the swab was taken did not invalidate his opinion. (See Initial Brief p. 56, 58)

she did not remember if she “told him about Rao” or spoke “in reference to Rao” (TRT 1259, 1261, 1291). The court at defense counsel's request then permitted voir dire of Gallagher, who testified that the prosecutor indeed had advised him as to the substance of Rao’s testimony regarding the residue tests in direct and blatant violation of the rule (TRT 1263-4).

Given that Gallagher's testimony was used by the State to impeach the reliability of Rao's opinion that it was “more likely than not” that Lazaro had fired a gun, the error in no manner can be considered harmless beyond a reasonable doubt. See DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986). Furthermore, this Court should consider all errors, both preserved and unpreserved, in determining whether an error is harmless beyond a reasonable doubt. See Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000). Appellate counsel was ineffective for not raising this issue on direct appeal.

G. FAILURE TO RAISE ON DIRECT APPEAL THAT FUNDAMENTAL ERROR OCCURRED DUE TO THE STATE'S IMPROPER INTRODUCTION OF AND ARGUMENT ON NON-STATUTORY AGGRAVATING FACTORS.

The judge and jury, which sentenced Mr. Mendoza, were presented with and considered nonstatutory aggravating circumstances. The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the

constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Mendoza's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989).

It has long been the law of Florida that a capital sentencer may not consider non-statutory aggravating circumstances. Yet, the prosecutor pointedly suggested that the jury impose the death penalty because Mr. Mendoza was a threat to the community and had pending robbery charges. The prosecutor started off by telling the jury that "certain people . . . warrant the death penalty" (TRT 1647). Later, the prosecutor emphasized that Mr. Mendoza's "actions and activities in this community" warrant the death penalty (TRT 1651) and that he committed violent crimes "against people in this community" (TRT 1656). Finally, and most significantly, the prosecutor improperly argued to the jury about Mr. Mendoza's pending robbery charges that involved using a firearm (TRT 1662) (See Mendoza v. State, 700 So. 2d 670, 677 (Fla. 1997) (finding improper the prosecutor's asking Dr. Toomer about Mr. Mendoza's

“pending trial in other robberies” and “using a firearm” and in repeating the question in closing argument).

By making these arguments, the State effectively encouraged the jury to impose the death penalty because, according to the State, Mr. Mendoza was on a local crime spree that threatened the safety of the community. Since Florida has no “future dangerousness” aggravator, this clearly amounted to a non-statutory aggravating factor. This constituted fundamental error and appellate counsel was ineffective for failing to raise this issue on direct appeal.

The prosecutor’s argument went beyond a review of the evidence and permissible inferences. She intended her argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 108 S. Ct. 2934 (1989). These improper arguments were harmful also because they urged the jury to apply aggravating circumstances in a manner inconsistent with this Court's narrowed interpretation of those circumstances.

The prosecutor effectively urged the jury to apply the alleged aggravating factors in a vague and overbroad fashion. As a matter of law, the Eighth Amendment was violated. See Richmond v. Lewis, 506 U.S. 40 (1992); Espinosa v. Florida, 505 U.S. 1079 (1992).

These improper arguments misled the jury and acted to place a thumb on “death's side of the scale.” Stringer v. Black, 503 U.S. 222 (1992). In Stringer, the United States Supreme Court held that relying on an invalid aggravating factor, especially in a weighing state like Florida, invalidates a death sentence.

Under Florida law, the sentencing jury may reject or give little weight to any particular aggravating circumstance and may recommend a life sentence because the aggravators are insufficient. See Hallman v. State, 560 So. 2d 223 (Fla. 1990). Thus, the jury's understanding and consideration of aggravating factors may lead to a life sentence. Yet, as a result of the prosecutor’s improper arguments, Mr. Mendoza's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. The prosecutor pointedly suggested that the jury impose aggravating circumstances in an impermissible manner. Had appellate counsel raised these issues on direct appeal, the Court would have been compelled to order a new sentencing.

H. FAILURE TO RAISE ON DIRECT APPEAL THAT FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT ERRONEOUSLY INSTRUCTED MR. MENDOZA'S JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY.

The Court instructed the jury on expert witnesses as follows:

> Expert witnesses are like other witnesses, with one exception, the law permits an expert witness to give his or her opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which **you** believe him or her to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 1378-9) (emphasis added). Mr. Mendoza was denied his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, including his right to due process of law and equal protection. Appellate counsel was ineffective for not raising on direct appeal this fundamental error.

The Court's instruction was an erroneous statement of law. The decision whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. It is a matter of admissibility, to be decided by the judge, rather than a matter of weight, to be decided by the jury. Murray v. State, 692 So. 2d 157 (Fla. April 17, 1997); Brim v. State, 695 So. 2d 268 (Fla. 1997); Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction here permitted the jury to decide whether an expert was truly an expert. In addition to judging his credibility, the jury was

permitted to judge the expert’s expertise; solely the judge must make that determination.

By permitting the jury to accept or reject an expert's qualification in a field, a question of law reserved exclusively for the Court, the instruction at issue here allowed the jury to reject the expert's opinions with no legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984). In so instructing the jury, the Court violated Mr. Mendoza's fundamental right to present a defense, guaranteed by the Sixth and Fourteenth Amendments.

This erroneous jury instruction was not harmless when considering that the State strenuously attacked the expertise of the defense’s expert, Dr. Toomer, going so far as to telling the jury that he was “not a professional” (TRT 1584-1620, 1658, 1659-61). Given this attack on Dr. Toomer’s expertise, it cannot be said beyond a reasonable doubt that the jury did not improperly discount Dr. Toomer’s testimony because the jury determined per the court’s instruction, and as the State urged, that he was not a true expert (i.e. “not a professional”). Had appellate counsel raised this issue on direct appeal, this Court would have been compelled to grant Mr. Mendoza a new trial, or, at least, a new sentencing hearing.

I. FAILURE TO RAISE THAT FUNDAMENTAL ERROR OCCURRED WHEN THE PROSECUTOR'S ARGUMENTS AND THE TRIAL COURT'S STATEMENTS AT

THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER.

Improper prosecutorial argument and commentary by the trial court during Mr. Mendoza's trial and sentencing proceedings violated Mr. Mendoza's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper and misleading comments. The trial court made bold and direct comments on Mr. Mendoza's right to remain silent and right to not testify. The court and the prosecutor both directed the jury to require Mr. Mendoza to prove himself not guilty, thereby unconstitutionally shifting the burden of proof.

Considering the jury's borderline 7 to 5 vote to impose the death penalty, these fundamental constitutional errors deprived Mr. Mendoza of a fair trial and sentencing. See Brooks v. State, 762 So. 2d 879 (Fla. 2000). Appellate counsel was ineffective for not raising this fundamental error on direct appeal.

GUILT INNOCENCE PHASE

The prosecutor openly and improperly accused trial counsel of deliberately attempting to perpetuate a fraud upon the jury. A significant issue at trial was the results and meaning of the gunshot residue ("GSR") tests done on Humberto and Lazaro Cuellar a few hours after the shooting. Criminalist Rao of the

Metro-Dade Police Department testified for the defense that it was his opinion that, based on these tests, Lazaro fired a gun. Rao testified that, according to the police department's own information sheet, Lazaro's GSR swabs were taken at around 9:00 a.m. of the morning following the shooting (TRT 1176). He concluded that, more likely than not, Lazaro had fired a gun (TRT 1183, 1205, 1207).

Closing argument "must not be used to inflame the minds and passions of the jurors so that [the] verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So.2d 130 (Fla. 1985). The State attempted to discredit Rao's testimony by presenting evidence that the swabs had been taken an hour or so earlier (TRT 1283).

The prosecutor engaged in misconduct when, in closing argument, she told the jury that trial counsel was intentionally trying to "confuse and mislead you" (TRT 1302-3) and that "they [trial counsel] purposely [called Rao to testify] to mislead you because they knew the right time" (TRT 1318-9). The prosecutor effectively told the jury that trial counsel, and by association, Mr. Mendoza, deliberately attempted to present false evidence.

The prosecutor's argument was highly improper and prejudicial:

> A lawyer shall not:
>
> > (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage . . . other lawyers on any basis . . . .

R. Regulating Fla. Bar 4-8.4. The police department's own employees and records conflicted as to the exact time the swab was taken. The record establishes that the defense had a good faith belief to rely on Rao's expert opinion as a Metro-Dade Police Department Criminalist.

Based on the police department's own documents, Rao had reason to believe that Lazaro's swab was taken at 9:00 a.m. Defense counsel had the professional obligation to require the State to prove its case. See R. Regulating Fla. Bar 4-3.1. The prosecutor's disparagement of trial counsel was uncalled for, prejudicial and improper.

This misconduct on the part of the prosecutor, which included a specific reference to counsel by name (TRT 1302), also transcended the bounds of legitimate comment on the evidence and implied that the jury could not believe defense counsel or the arguments asserted by them. See Brooks v. State, 762 So. 2d 879 (Fla. 2000).

The prosecutor also flagrantly violated the rule of witness sequestration by blatantly informing Technician Gallagher of the substance of Rao's testimony prior to the State calling Gallagher in rebuttal on the issue of the timing of the gun shot residue tests (TRT 1264) (See subsection F, supra). The prosecutor violated the rules of discovery regarding the medical examiner's opinion that the laceration on Calderon's head was consistent with having been caused by the Taurus nine millimeter (TRT 894-904).

During closing argument in the guilt-innocence phase, the prosecutor engaged in misconduct when she told the jury that if the jury had doubt regarding the State's case, it should still find Mr. Mendoza guilty because the jury could later "adjust your [penalty phase] recommendation" (TRT 1339) (See subsection F, supra).

The prosecutor boldly told the jury that, "[t]he Court is required to read to you a lot of instructions and many of them do not apply . . . ." (TRT 1300). Such denigration of the law in the eyes of the jury by the prosecution cannot be said to have not affected the jury's application of the law.

The prosecutor improperly shifted the burden to Mr. Mendoza to produce evidence when she argued, "Let [defense counsel] explain to you how it is that they have any evidence whatsoever

that contradicts what Humberto Cuellar told you . . . .” (TRT 1318) (see subsection E, supra). The prosecution’s comments were clearly improper. Wainright v. Greenfield, 474 U.S. 284 (1986).

This assertion that Mr. Mendoza had the burden of proof was made even worse in light of the trial court's blatant misstatement of the law on this issue during voir dire, which included:

> Now I told you the defendant is presumed innocent. That presumption stays with him throughout the trial until those jurors who are selected go into the jury room and find that he has been **proven** either (sic) **not guilty** . . . .”

(TRT 278).

The trial court further tainted the fairness of the proceedings by directly commenting on Mr. Mendoza's right to remain silent. As argued in subsection E, supra, the trial court’s comments highlighted here in and of themselves rose to the level of fundamental error and require a new trial.) During voir dire, the trial court advised the jury:

> You will understand that the defendant has an absolute right to remain silent and you are not to draw any inferences in this conduct. There may be a number of reasons why anybody remains silent; that is, somebody may not testify, and I am sure you can give many reasons why they have chosen to do that, whether they can't articulate themselves, or perhaps it is their inability

> to remember the facts, or the lawyers' recommendation not to testify.
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> * * * * *
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> Now, you may personally feel that you would like to hear from him. There is nothing wrong with that as long as you understand that he doesn't have to do anything or say anything.

(TRT 285-6, 298).

The trial court invited the jurors to speculate as to the reasons why Mr. Mendoza did not testify in clear violation of the long-standing and well-settled prohibition on calling attention to and exposing juries to any and all comments regarding a defendant's right to remain silent. State v. Hoggins, 718 So. 2d 791 (Fla. 1998). In this misguided effort to instruct the jury to disregard and draw no conclusions from Mr. Mendoza's invoking his constitutional right to remain silent, the trial court did just the opposite by giving the jury "reasons" why Mr. Mendoza might not testify.

The trial court permitted the jury to take notes during the trial. The prosecutor improperly encouraged the jury to compare their notes during deliberations (TRT 1301). Although it is within the trial court's discretion to allow the jury to take notes, courts should instruct the jury on the proper use of notes. See U.S. v. Rhodes, 631 F.2d 43 (5th Cir. 1980). The danger is that the jury will place undue importance on their

notes and that jurors who did not take notes will rely not on their own view of the evidence but on the view of the jurors who did take notes. Comparing notes during deliberations clearly is an improper use of notes. The prosecutor improperly encouraged the jury to do so.

PENALTY PHASE

The prosecutor improperly denigrated the case for mitigation presented by Mr. Mendoza when she repeatedly referred to the mitigation offered by Mr. Mendoza as "excuses" (TRT 1647, 1657, 1658) and characterized Mr. Mendoza's mitigation as "garbage":

> Then [Dr. Toomer] comes up and says [Mr. Mendoza] used drugs as a form of self-medication. Where does he come up with that? Now the defendant is treating himself, medicating himself when he has mental problems using crack cocaine or marijuana or alcohol. We should consider that as mitigating?
>
> **I suggest to you it's garbage**.

(TRT 1660). She further implied that the defense's expert, Dr. Toomer, was nothing but a hired gun who would say anything and stated directly that Dr. Toomer was "not a professional" (TRT 1658). The prosecutor's denigration of Mr. Mendoza's case for mitigation constitutes prejudicial misconduct. See Brooks v. State, 762 So. 2d 879 (Fla. 2000) (prosecutor's characterization of the mitigating circumstances as "flimsy," "phantom," and

repeated characterization of mitigation as “excuses” was clearly an improper denigration of the case offered by the defendants in mitigation).

During the testimony of Dr. Toomer, the prosecutor deliberately elicited the highly improper and prejudicial fact Mr. Mendoza had pending robbery charges involving the use of a firearm (see subsection G, supra). The prosecutor again mentioned this fact in closing argument. On direct appeal, the Florida Supreme Court found this conduct improper. See Mendoza v. State, 700 So. 2d 670, 677 (Fla. 1997).

The prosecutor falsely told the jury that, with regard to the incident involving Mr. Street that led to Mr. Mendoza's prior conviction, Mr. Mendoza “threatened to kill” Mr. Street (TRT 1648). This was an incorrect and misleading statement of the evidence. Mr. Street **never** testified that Mr. Mendoza threatened to kill him (TRT 1476-85).

The prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of emotion and fear. The prosecutor opened her penalty phase closing argument by telling the jury that the citizens of this country and of the State of Florida “have decided that certain people . . . warrant the death penalty” (TRT 1676-7). The prosecutor subsequently emphasized that Mr. Mendoza's “actions and activities in this

community" warrant the death penalty (TRT 1651) and that he committed violent crimes "against people in this community" (TRT 1656).

The prosecutor went on to bring the jury's attention to Mr. Mendoza's pending robbery charges that involved using a firearm. This was improper. (TRT 1662) (See Mendoza v. State, 700 So. 2d 670, 677 (Fla. 1997) (finding improper the prosecutor's conduct in asking Dr. Toomer about Mr. Mendoza's "pending trial in other robberies" and "using a firearm" and in repeating the question in closing argument). These comments set the stage for the prosecutor's ultimate concluding impassioned plea: ". . .**Marbel Mendoza is a violent killer and robber who doesn't care what happens to other people**" (TRT 1663). This argument was clearly an improper appeal to the jury's emotions and fears. See Brooks v. State, 762 So. 2d 879 (Fla. 2000).

The prosecutor apparently believed nothing was wrong with appealing to the jury's emotions in order to persuade the jury to return with a death sentence ("I could stand here in my closing remarks and argue to you emotional reasons why you should give the death penalty." (TRT 1647) (emphasis added)). Although a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of

Stevens, J.), here, because of the prosecutor's inflammatory argument, death was imposed based on emotion, passion, and prejudice. See Cunningham v. Zant, 928 F.2d 1006, 1019- 20 (11th Cir. 1991).

Arguments such as those presented in Mr. Mendoza's case have been long condemned as violative of due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460 ("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character ...."); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984) (because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires"). See also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986) ("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances ... and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law'") (citations omitted).

There can be no denying the State's conduct was highly improper. In light of this, as well as the trial court's highly improper and prejudicial comments, appellate counsel was ineffective for not arguing that the totality of these errors rendered Mr. Mendoza's convictions and death sentence fundamentally unfair, arbitrary, and capricious.

J. THE TRIAL COURT'S EX PARTE COMMUNICATION WITH THE JURY VIOLATED MR. MENDOZA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Direct appeal counsel was ineffective in the manner this issue was argued on direct appeal. Mr. Mendoza was denied his fundamental rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, including his right to a fair trial and an impartial jury when the trial court had out-of-court, ex parte communications with the jury (TRT 1073-4).

The judge engaged in and out-of-court, ex parte conversation with the jury was directly related to instruction they would receive during trial proceedings. When the judge was asked about the Tania Harding criminal case his [Judge's] response was "you have to be fair and impartial and you have to wait until you hear everything". In addition, judge was asked why jurors were not allowed to ask questions, the judge responded by telling them to write their questions down.

This communications took place with the jury after previously instructing them that outside communication with the lawyers was discouraged, and that the judge accepted a juror's gift of coffee, prejudiced Mr. Mendoza. Cf. U.S. v. Parks, 937 F.2d 614 (9th Cir. 1991). Mr. Mendoza submits that a trial judge's acceptance of gifts from a juror (here, two shots of Cuban coffee), without the defendant's knowledge or consent, vitiates at the least the appearance of fairness and violates the defendant's right to due process of law and equal protection.

The fact that the communication occurred before deliberations is not dispositive. Cf. Rushen v. Spain, 464 U.S. 114 (1983). That the ex parte conduct occurred before the verdict supports the conclusion that the improper conduct affected the subsequent verdict.

K. THE TRIAL COURT'S ERROR IN ALLOWING THE STATE TO ARGUE TO THE JURY TO CONSIDER MR. MENDOZA'S PENDING ROBBERY TRIAL IN DECIDING WHETHER TO RECOMMEND THE DEATH PENALTY VIOLATED THE EIGHTH AMENDMENT.

This Court concluded on direct appeal that the State's questions and argument concerning Mr. Mendoza's pending trial in other robberies using a firearm was error. See Mendoza v. State, 700 So. 2d 670, 677-8 (Fla. 1997). This error violated the Eighth Amendment because the jury in all probability considered this improper information in deciding whether or not to

recommend that Mr. Mendoza be put to death. A sentencer's consideration of improper non-statutory aggravating factors violates the Eighth Amendment. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); see also Penry v. Lynaugh, 108 S. Ct. 2934 (1989).

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate the crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla.1977).

To the extent appellate counsel failed to raise this Eighth Amendment argument on direct appeal, counsel was ineffective. Mr. Mendoza is entitled to a new sentencing with a jury that can decide his case free of such blatantly improper influence.

CONCLUSION

For the reasons set forth above, Mr. Mendoza respectfully requests this Court to grant him a new direct appeal and, thereafter, remand for a new trial, or, in the alternative, a new sentencing proceeding.

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 Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on November 28, 2005.

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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