IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2143

MARBEL MENDOZA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

RACHEL L. DAY
Assistant CCRC
Florida Bar No.: 0068535

CARLA CHAVEZ
Assistant CCRC
Florida Bar No.: 0507318

LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

CLAIM I

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

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

The State conceded in their response that the victim was arrested for Bolito in 1987. This arrest led to victim's plea to racketeering (TRT. 786). Therefore, the victim's involvement in bolito is an established fact, not merely an allegation, as the State suggests in its response (Response at 5). Even if Mr. Mendoza did not have the right to collect a debt by using force, he is entitled to present evidence to support his defense and let the jury make the determination.

The State argues that appellate counsel was not ineffective because, according to the State, the fact that the men confronted the victim in order to collect a debt and not to rob him is not a defense to attempted robbery (Response at 8). However, evidence that Mr. Mendoza and the co-defendants were seeking to collect a debt owed by the victim negates the specific intent required to prove the alleged underlying offenses of attempted robbery and burglary (by negating the specific intent to commit theft). Furthermore, a defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982).

The State characterizes as "utterly ridiculous" the notion that Mr. Mendoza was acting in self-defense (Response at 8). The State tries to support its position by pointing to the evidence, which suggested that the men had planned their confrontation with the victim. Yet, the State agreed that the evidence failed to establish that this was premeditated murder. Evidence that the men planned ahead of time to confront the victim does not refute the fact that the victim instigated the gunfire by shooting first and that, according to Humberto's own testimony; Humberto instigated the violence by striking the victim over the head with a gun. "This was an unplanned, reactive murder that took place unexpectedly in a manner of seconds in a shootout initiated by the victim. In fact, it was the codefendant [Humberto] Cuellar who initiated the violence against the victim that in turn prompted the victim's attempt to shoot his assailants." Mendoza v. State, 700 So. 2d 670, 679 (Fla. 1997) (Anstead, Justice, Concurring in part and dissenting in part).

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"

The State asserts that there was no prejudice caused by the trial court's prohibiting the defense from presenting evidence that the victim was involved in bolito because the issue is irrelevant since, according to the State, the fact the men

intended merely to collect a bolito debt from the victim is not a defense to the charge of robbery. Contrary to the State's argument, negating specific intent in the commission of a theft crime is a viable defense. Bell v. State, 394 So. 2d 979 (Fla. 1981) (Holding specific intent is still a required element to the charge of robbery).

The State next contends that the trial court never ruled that the defense could not present evidence that the victim was a bolitero. The State overlooks the fine detail of the court's rulings. The issue at hand does not involve the trial court's ruling that the defense could not present the specific evidence of the victim's prior arrest and withhold of adjudication for bolito. As set forth in the Petition, the point is that, while the court so ruled pre-trial, the court also ruled pre-trial that the defense could present other evidence that that victim was a bolitero. The court did not limit its ruling only to evidence that the victim was a bolitero at the time of his death.

Subsequently, mid-trial, the court re-visited the issue and, at that time, limited its ruling allowing only evidence showing that, at the time of his death, the victim was involved in bolito. This mid-trial change in its ruling prejudiced the defense because the defense promised the jury that evidence would show that the victim had been involved in bolito, yet, because of the trial court's mid-trial change in its ruling, the defense could not do so. The mere fact the Humberto testified that Mr. Mendoza told him the victim was a bolitero does not render the trial court's

actions without prejudice. Defense counsel proffered that he had several witnesses who knew that the victim, prior to the time of his death, had been involved in bolito (TRT. 758, 797, 801, 804-5). Because of the trial's court's mid-trial change in its ruling, the defense count not present this evidence.

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.

The State omits from its quotation of the prosecutor's offending statements to the jury the rather significant phrase, "if you don't like the sentence, if you don't want to give him the death penalty, don't…" (TRT. 1338) (See Petition p. 24).

The State does not dispute the offending nature of the prosecutor's arguments. Instead, the State contends that the prosecutor's imploring the jury to convict Mr. Mendoza based upon the fact that the jury could later vote to recommend life was invited error. The State suggests that the comments were in response to trial counsel's pointing out the disparate treatment between Mr. Mendoza and the co-defendants. Contrary to the State's position, trial counsel's arguments did not invite the prosecutor's error.

While it was within the proper range of argument for the prosecutors to respond by pointing out why the State was treating Humberto differently than Mr.

Mendoza (which the prosecutor did), trial counsel's argument in no manner invited the response at issue here. The prosecutor unequivocally told the jury that it could find Mr. Mendoza guilty and "adjust" for the unequal treatment between the co-defendants and Mr. Mendoza not recommending the death penalty (TRT. 1339). This was improper and not invited error. Lentz v. State, 498 So. 2d 986 (Fla. 1st DCA 1986) the Court held that a new trial was not required when prosecutor's closing argument remark to jury "did not state or imply that [the defendant] could 'get off' with light sentence so that the jury should not worry about finding him guilty.")

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 State makes merely a conclusory argument that "there was nothing improper about the trial court's comments" because "[t]he trial court's comments to the jury venire properly reflected the rights accruing to Defendant" (Response at 19). Yet, the State does not even attempt to suggest why it is not a fairly susceptible comment on a defendant's right to remain silent when the presiding judge tells a capital case jury that there may be a number of reasons why somebody remains silent and does not testify, provides a list of possible reasons, including an

"inability to remember the facts" or "the lawyers' recommendation not to testify", and then tells the jury that "[t]here is nothing wrong" with the jury wanting to hear from the defendant (TRT. 285-6, 298). Nor does the State argue how a judge's comment suggesting that the jury must decide whether the defendant was "proven . . . not guilty" and a prosecutor's suggestion during argument to "[l]et [defense counsel] explain to you how it is that they have any evidence whatsoever that contradicts" the state's star witness (TRT. 278, 1317) do not act to improperly shift the burden of proof.

> A defendant has a constitutional right to decline to testify against himself in a criminal proceeding. See U.S. Const. amend. V; art. I, [s.] 9, Fla. Const. Therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985); see also, e.g., Heath v. State, 648 So. 2d 660, 663 (Fla. 1994); State v. DiGuilio, 491 So. 2d 1129, 1131 (Fla. 1986). The "fairly susceptible" test is a "very liberal rule." DiGuilio, 491 So. 2d at 1135. This constitutional principle is also incorporated in Florida Rule of Criminal Procedure 3.250, which prohibits a prosecuting attorney from commenting on the defendant's failure to testify on his or her behalf.
>
> Comments on a defendant's failure to testify can be of an "almost unlimited variety" and any remark which is "fairly susceptible" of being interpreted as a comment on silence creates a "high risk" of error. DiGuilio, 491 So. 2d at 1135-36.

Rodriguez v. State, 753 So. 2d 29, 36-7 (Fla. 2000); see also State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985) (any remark which is "fairly susceptible" of being interpreted as a comment on a defendant's failure to testify is an impermissible

violation of the constitutional right to remain silent). "[T]he Fifth Amendment. . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609 (1965).

The State's argument that the judge's comments had little or no effect on the jury because the comments "were made during the informal introductory portion of the trial in which the trial court addressed the jury venire informally" (Response at 19) is without merit. The mere fact that the judge made these comments during voir dire is of no avail to the State. See Varona v. State, 674 So. 2d 823 (Fla. 4th DCA 1996); Jackson v. State, 453 So. 2d 456, 458 (Fla. 4th DCA 1984).

To the extent the State suggests that the harm caused by the offending comments was nullified or reduced due to the judge's alleged "informal" manner (the State also refers to the judge's remarks as "conversational improvisation") (Response at 20), the State is simply incorrect. "[E]ven cursory references during voir dire to the right to remain silent are impermissible." Varona, 674 So. 2d at 825. Moreover, while the learned legal practitioner may recognize the judge's comments as "conversational improvisation", the jury had no reason to treat the comments with any less solemnity or significance than any other instruction by the judge. Here, the judge's comments were far from "cursory". The State's reliance on Kiley v. State, 770 So. 2d 1278 (Fla. 4th DCA 2000) is not persuasive. The

opinion in Kiley does not at all reveal the content of the trial judge's comments. See Id. More telling is that the district court concluded in Kiley that, "[a]t no time did the court, in the context of discussing a defendant's right to remain silent, devalue or demean that right." Id at 1279.

In Mr. Mendoza's case, the judge's comments clearly devalued his right to remain silent by telling the jury that a defendant may chose not to testify because he "can't articulate" himself, has an "inability to remember the facts", or because his lawyer recommended that he not testify (TRT. 285-6) and by telling the jury that "[t]here is nothing wrong with" wanting "to hear from him" (TRT. 298). In Varona, the prosecutor during voir dire told the jury that the defendant had a right to remain silent, did not have to testify if he did not want to and that the state could not compel him to testify. Varona, 674 So. 2d at 824. In finding the comments improper, the district court reasoned:

> Because of the common belief that the innocent have nothing to hide, courts vigilantly protect the right to remain silent against devaluation by innuendo or faint praise. On voir dire, it is a defendant's prerogative -- not the prosecutor's -- to first broach with potential jurors the sensitive area of not taking the witness stand. This preference is reflected in the Florida Standard Jury Instructions in Criminal Cases. Both the preliminary and general instructions indicate that the charge on the right to remain silent is given not automatically, but if the "defendant requests." Fla. Std. Jury Instr. (Crim.) p. 4, 19. [footnote omitted] Set against this legal backdrop, the prosecutor's comments were improper in that they tended to demean a constitutional right and called undue attention to appellant's decision whether or not to testify. The prosecutor's words spilled far over the line of propriety drawn by the cases quoted above.

Varona at 825. The judge's comment in Mr. Mendoza's case are far more demeaning and devaluing in nature than the comments by the prosecutor in Varona. Moreover, the fact that the presiding judge made these comments makes the comments far more harmful than had the comments been made by the prosecutor. The jury is taught that it is the duty of the court to explain the law to the jury. See Fla. Std. Jury Instr. 1.01 (Crim.). The egregious nature of the comments was not overcome by the trial court's other "proper" instructions regarding Mr. Mendoza's right to remain silent and the burden of proof.

The State misconstrues Mr. Mendoza's argument with respect to the prosecutor's comment urging the defense to "explain to you [the jury] how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you and that you should believe Humberto Cuellar" (TRT. 1319). Mr. Mendoza does not claim that this error alone entitles him to relief. Instead, this impermissible comment by the prosecutor contributed to the cumulative effect on the fairness of the proceedings in conjunction with the judge's improper comments.

As to the merits of the propriety of the prosecutor's comment, the State incorrectly argues that the comment "merely underscored that no evidence had been presented that contradicted Humberto's testimony" and, per the State, was a fair comment upon the evidence (Response at 22-3). Contrary to the State's

contention, this was not simply a comment on the evidence, it was a comment asking the jury to shift the burden to produce evidence to Mr. Mendoza -- "Let [defense counsel] explain to you how it is **that they have** any evidence whatsoever that contradicts what Humberto Cuellar told you and that you should believe Humberto Cuellar." (TRT. 1319) (emphasis added). The "they" referred to by the prosecutor is the defense. The jury naturally and reasonably would have interpreted the prosecutor's comment as asking the jury to place the burden on the defense to produce evidence that "contradicts" Humberto's testimony. See Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); see also Hayes v. State, 660 So. 2d 257, 265 (Fla. 1995).

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 State does not respond to Mr. Mendoza's argument that the combination of the prosecutor's argument quoted in the Petition amounted to a "safety of the community/future dangerousness" non-statutory aggravating factor (Petition at 33-4). Mr. Mendoza acknowledges that this Court on direct appeal considered the prosecutor's argument during the penalty phase that the jury should consider the pending robbery charges as a basis to recommend that the court order Mr. Mendoza's execution. The Court indeed found that the prosecutor's argument was

improper however, based on the record and arguments before it at the time, found the error harmless. See Mendoza v. State, 700 So. 2d 670, 675-8 (1997). Mr. Mendoza submits, however, that this Court should re-access this finding of harmless error in light of all the additional errors, preserved and unpreserved, including fundamental error, raised in the instant Petition. See Martinez v. State, 761 So, 2d 1074, 1082 (Fla. 2000).

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.

Guilt-Innocence Phase

As for the prosecutor's unequivocal personal attack on trial counsel in which the prosecutor explicitly told the jury that counsel intentionally presented false evidence ("[trial counsel] put that [witness] in front of you to try to confuse and mislead you to (sic) based an opinion on something that is not true.") (TRT. 1302-3); ("[trial counsel] purposely put it on to mislead you because they knew the right time.") (TRT. 1318-9) (emph. added)), the State argues that these comments were a "fair comment on the evidence adduced at trial" (Response at 37).

The State argues that the prosecutor's personal attack was justified because the State's witness, Gallagher, testified on rebuttal that he had stated in his

deposition that the swabs were taken prior to 9:00 a.m. and, therefore, implied that Criminalist Rao's report was in error (Response at 37-8). The State's argument fails because the mere fact that there was a discrepancy between two police department employees as to the time the swabs were taken does not justify the prosecutor's personal attacks and accusations of intentional misrepresentation and deception.

In Brooks v. State, 762 So. 2d 879 (Fla. 2000), the prosecutor's personal attack on defense counsel was far less blatant and egregious than the attacks in the instant case, yet, there, the Court held that the remarks "transcended the bounds of legitimate comments on the evidence and implied that the jury could not believe defense counsel or the arguments asserted by them." See Id. at 904-5. The Court agreed that the attack in Brooks constituted an improper personal attack on counsel and counsel's credibility. See Id. at 904. Under the authority of Brooks, as well as the cases cited therein (see Del Rio v. State, 732 So. 2d 1100 (Fla. 3d DCA 1999); Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988); Fryer v. State, 693 So. 2d 1046 (Fla. 3d DCA 1997)), the prosecutor's attacks in the instant case were improper and in no manner justified. See also Gore v. State, 719 So. 2d 1197 (Fla. 1998).

Moreover, even if the prosecutor had a legitimate complaint as to trial counsel's tactics (though she did not), it was still improper for her to attack counsel

in front of the jury. The proper method to handle such a situation would have been to address the matter outside the presence of the jury, possibly requesting some form of relief or sanctions from the court and to file a complaint with the Florida Bar.

As for the State's response to the prosecutor's misconduct in telling the jury during the guilty/innocence phase that the jury should consider the fact that the jury could later vote to recommend a life sentence and in shifting the burden of proof, as well as the trial court's improper instructions to the jury that shifted the burden of proof and unconstitutionally infringed on Mr. Mendoza's right to remain silent, Mr. Mendoza relies on his reply to these responses set forth in Claims D and E.

Penalty Phase

The State contends that the prosecutor's comments were justified as "an appropriate comment on the evidence presented at the penalty phase" (Response at 41). The State's position in simply untenable under the authority of Brooks in light of the totality of the prosecutor's comments, including her comments in which she repeatedly referred to the offered mitigation as "excuses" (TRT. 1674, 1657, 1658) and suggested that the jury should consider Dr. Toomer's testimony that Mr. Mendoza succumbed to crack cocaine, marijuana and alcohol in order to self-

medicate his mental problems, not as mitigation, but as "**garbage**" (TRT. 1660). See Brooks at 903-4; see also Gore.

The cumulative effect of the entirety of the prosecutor's and the trial court's improper conduct in both the guilt-innocence and penalty phases rises to the level of fundamental error such that had appellate counsel raised this issue on direct appeal, this Court would have granted him a new trial. At the very least, when viewed in conjunction with the jury's borderline seven to five vote to execute Mr. Mendoza, this Court would have remanded this case for a new penalty phase. See Brooks at 905.

CONCLUSION

For issues not addressed in the Reply, Mr. Mendoza relies on the arguments set forth in his Petition for Writ of Habeas Corpus. For all of the reasons discussed in herein and in his Petition, Mr. Mendoza respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Margarita I. Cimadevilla, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131 on May 5, 2006.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

RACHEL L. DAY
Assistant CCRC
Florida Bar No.: 0068535

CARLA CHAVEZ
Assistant CCRC-South
Florida Bar No.: 0507318

CCRC-South
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954)713-1284

Attorneys for Appellant