IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-774

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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INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

A. Inconsistent arguments regarding the identity of the shooter

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 complains that just because trial counsel could not remember the reason why they changed tack in the middle of the trial, it is still presumptively a strategic decision. Answer Brief at 59. However, the State ignores the fundamental principle that a strategic decision based on ignorance is not necessarily reasonable. If trial counsel truly wished to exculpate Mr. Mendoza as the actual shooter and inculpate one of the Cuellar brothers, they could simply have couched the opening statement in general terms and avoided the whole debacle. There was no strategic reason for boxing themselves into a corner by specifically identifying the shooter, given the inconsistencies in the statements and depositions given prior to trial by Humberto and Lazaro Cuellar.

Once again, the State chooses to argue with what it would like Mr.

[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.

Mendoza's position to be rather than what it actually is. Mr. Mendoza is not arguing that changing strategies mid trial is always *per se* ineffective assistance. As both trial counsel testified, sometimes changing strategies in the face of changing circumstances can be itself a valid strategy decision. However, if the only reason that trial counsel changed strategies is because of circumstances that trial counsel should have anticipated but for inadequate investigation, the decision cannot be reasonable. If, at the commencement of the trial, they had not been sure of the shooter's identity, they should not have promised the jury that they would show that it was Humberto. If they had followed up and been aware of the content of the depositions of Rao and Gallagher, they would not have been forced into a corner by the damaging cross examination of Rao. This claim essentially involves a failure to do an adequate investigation of the State's case, a fact which the State does not address.

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. By the time that trial counsel attempted to pick up the pieces at closing with the argument that trials are

"living things," the damage was already done.

There cannot be a more glaring example of inconsistency than a change in the theory of who the shooter actually was. The State's 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.

The State's attempt to suggest that the ABA Guidelines do not provide "a guide to what is reasonable" strategy is also without merit. As Strickland v. Washington, 466 U.S. 668 (1984), Rompilla v. Beard, 545 U.S. 374 (2005), and Wiggins v. Smith, 539 U.S. 510 (2003), all make plain, the Guidelines are just that—a guide to what is reasonable. While adherence to the Guidelines is not mandatory in every circumstance, they are a guideline and should be considered, which trial counsel clearly did not do.

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, 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 issue. Rather it is the credibility of the entire defense team.[2]

[2] 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)

The State's attempt to distinguish Bland v. California Dep't 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, 20 F.3d 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.

Contrary to the State's assertion, the State never proved that Mr. Mendoza was the shooter. The only evidence to this is the testimony of Humberto Cuellar. The State attempts to get around this inconvenient fact by asserting that Humberto's testimony was supported by physical evidence. Answer Brief at 60. What this apparently boils down to is the fact that Mr. Mendoza's inverted hand

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

print was found on the car next to Calderon on the lower part of the door with his hand pointed down" Answer Brief at 57. This assertion is utterly misleading. First of all the State does not mention which hand the print originated from. In fact, as the trial testimony makes plain, it was Mendoza's right hand. See TRT 1151. Given this scenario, it is clear that if Mr. Mendoza were the shooter, he would have necessarily shot the victim with his left hand. This, however, does not comport with other facts in evidence. The second area in which the State's argument is misleading is that it does not make plain which car the hand print was taken from, merely referring to "the car next to Calderon." However, the record is clear that the victim was between two cars—the Cadillac and the Bronco. Mr. Mendoza's right hand print was found on the Cadillac. See TRT 1151. Yet the crime scene photographs in evidence and the testimony of the medical examiner show that the victim was standing with the Bronco on his left and the Cadillac on his right. The fatal bullet entered his body on the upper left side and exited on the right side of his back. For Mr. Mendoza to have shot at this trajectory with his left hand, while crouching with his hand on the Cadillac at Mr. Calderon's right side, would have required him to have the flexibility of an octopus. Clearly the shot came from the victim's left side at a sharp angle, and not from Mr. Mendoza's position. Contrary to the State's argument, the hand print does not inculpate Mr. Mendoza as the shooter but rather exculpates him and inculpates the other individual who got out

of the car and joined the affray—who is none other than the State's star witness Humberto Cuellar. 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.

B. 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." However, the State blithely ignores the assertion in opening statements 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 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. If trial counsel's decision not to call Lazaro was really the product of a "thorough investigation," it should have been made long before opening statements and not after promising the jury that Lazaro would be called. A "thorough investigation" does not take place in the middle of the trial. Once again, if counsel had the slightest doubt as to whether they would be calling Lazaro, they should not

have explicitly promised the jury that they would do so.

The State's argument should be rejected for several reasons. First of all, contrary to the State's representation, neither Mr. Suri nor Mr. Wax could articulate any reason why they failed to call Lazaro after telling the jury in opening statement that they would be calling him. (PCR3 1681, 1773). 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 does counsel give any indication of the basis or rationale for their mutual decision. Nor could they because Mr. Suri testified that, "I can't think of why we didn't do it." (PCR3 1682). As Mr. Suri reiterated, "…[F]rom his deposition it was quite clear that as one of the participants that he himself didn't put a gun in Marbel's hand. That he had heard and understood that this was not a robbery, and we thought that was very important evidence." (PCR3 1679). In other words, counsel admitted at the evidentiary hearing that they had no reason for not calling Lazaro.

Second, the mere fact that Mr. Wax told the trial judge that their 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.[3]

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. 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.

The State claims that Lazaro would have been unavailable to testify at the trial and so Mr. Mendoza cannot prove prejudice. However, this is based solely on Lazaro's statement that he would have been unwilling to testify at Mr. Mendoza's trial. This statement does not imply that he would not have testified at all, merely that as in the evidentiary hearing, he would have been reluctant to testify. Lazaro's

[3] The State suggests that trial counsel strategically decided not to call Lazaro because it might implicate Mr. Mendoza as the shooter. In fact as the deposition shows, it is clear that Lazaro testified that Mr. Mendoza said "lo mato" This means "he killed him." Lazaro's native language is Spanish. His English is heavily accented. The error in transcription was the court reporter mishearing "He" as "I."

plea agreement in fact required him to testify at Mr. Mendoza's trial, and if the State had called him he would have been required to do so at the risk of revoking his plea agreement. To suggest that he would have been unavailable is simply not the case. 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. 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.[4]

[4] The State contends that Lazaro would not have testified because he would have invoked his right not to incriminate himself is also without merit. The State cites to the motion to vacate Lazaro's plea agreement in support of this. However the State fails to acknowledge that the motion to vacate was only filed after Mr. Mendoza's trial and death sentence, and after the time that Lazaro would have been called. At the time of Mr. Mendoza's trial, Lazaro's plea agreement was a done deal.

The State also contends tht counsel cannot be held ineffective for failing to put on inadmissible evidence, because it constitutes hearsay. Answer Brief at 62. However the State ignores the fact that this evidence from Lazaro is not only substantive but also constitutes admissible impeachment evidence against the State's star witness Humberto Cuellar. As such it would have cast doubt on the veracity of his testimony that there was a plan to commit a robbery. This in turn would have cast a reasonable doubt on the State's case for a first degree felony murder conviction.

Even if the Court finds that the new evidence would not be admissible, it must consider the constitutional impact of failing to allow Mr. Mendoza to present this defense at any new trial. The United States Supreme Court has recently re-emphasized that while state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, that:

> This latitude has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or the Confrontation clause of the Sixth Amendment, the Constitution gives criminal defendants a meaningful opportunity to present a complete defense. This right is abrogated by evidence rules that infringe upon a weighty interest of the accused and are "arbitrary or disproportionate to the purpose they are designed to serve.

Holmes v. South Carolina, 126 S. Ct. 1727, 1731 (2006)(internal citations omitted).

The case law cited by the State in which counsel was held not 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 nothing more than wishful thinking on the part of the State.[5] Mr. Mendoza has established that there is a reasonable probability that a competent attorney would have introduced Lazaro's testimony. The only evidence presented at trial supporting the charge of first-degree felony murder was Humberto's testimony. Humberto was a State witness who flipped in order to save himself. There were numerous inconsistencies between his trial testimony and his pre-trial statements which were brought out by trial counsel on cross-examination. Lazaro had 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. Thus, 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. Lazaro's testimony would have cast a reasonable doubt that a robbery was planned

[5] The State completely ignores the fact that counsel should have had a strategy ready at the time of opening statement and if there was a shadow of doubt as to whether they would actually call Lazaro, they should not have promised the jury with specificity that they would call Lazaro.

and attempted, and caused members of the jury to doubt Humberto's testimony. He does not have to establish that a different outcome is more likely than not (a preponderance standard). See Strickland v. Washington, 466 U.S. 668 (1984) . 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 Humberto'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 urges this Court to defer to the lower court's finding that Lazaro was not credible. However this Court must determine whether the lower court applied the correct legal standard in denying this claim, which is a legal question to be determined de novo. The lower court did not address the effect Lazaro's testimony, even if not totally credible, would have in relation to the testimony of Humberto, who was also thoroughly impeached on cross examination. The lower court simply did not engage in this analysis. There is a reasonable probability of a different outcome. Prejudice has been established.

C. Gunshot Residue evidence

The State has missed the point of Mr. Mendoza's arguments regarding counsel's ineffectiveness with regard to the gunshot residue evidence. First of all

the State asserts that Mr. Mendoza has not proved that Rao had a "duty of loyalty" to the State. Whether or not Mr. Rao actually had a duty of loyalty is not at issue here. Answer Brief at 67. The fact remains that he was a witness who had testified umpteen times for the State, which is why defense counsel sought to utilize him. However precisely because he was a police technician, and because he had testified for the State on numerous occasions, the duty to investigate his evidence was even more enhanced than otherwise.

The State next takes issue with the fact that Mr. Mendoza refers to the ABA Guidelines as authority for the proposition that counsel should have consulted with an independent expert. Answer Brief at 67. However Mr. Mendoza did not argue that non compliance with the ABA Guidelines is per se ineffectiveness. They are not an absolute blueprint or cookbook for what must be done on every case. However they should be considered in the Court's overall analysis of whether trial counsel did a constitutionally adequate job in representing Mr. Mendoza.[6] The State also complains that Rao was not a State witness but a defense witness so

[6] See also Padilla v. Kentucky, 559 U.S. __, Slip. Op. at 5 (2010) (in which Justice Stevens for the majority reiterated that "We long have recognized that prevailing norms of practice are reflected in American Bar Association standards and the like… are guides to determining what is reasonable. Although they are only guides and not inexorable standards these standards may be valuable measures of the prevailing professional norms of effective representation.")(internal citations omitted).

there was no need to investigate this evidence. This is splitting hairs to the point of absurdity. Rao was listed as a State witness and as such he was deposed by defense counsel. The State cannot get around the point that trial counsel put on Rao with an inadequate investigation and no preparation for cross examination, to Mr. Mendoza's extreme prejudice.

The State next complains about Mr. Mendoza's use of expert Celia Hartnett to show prejudice. Answer Brief at 68. The State also argues that Mr. Mendoza did not prove prejudice because Mr. Mendoza's expert, Ms. Hartnett, based her opinion on unauthenticated information. This is not the case, since Ms. Hartnett's testimony was interrupted very close to the beginning because the lower court made a remark which formed the basis of Mr. Mendoza's motion to disqualify the court. The question of authentication simply did not arise as to the vast majority of documentation reviewed by Ms. Hartnett, so the State's position here is disingenuous in the extreme. Ms. Hartnett's declaration shows prejudice to Mr. Mendoza through counsel's failure to consult an independent GSR expert.

The State attempts to argue that Ms. Hartnett's affidavit does not show that Humberto got primer on to his hands. However the State overlooks the fact that significantly, only Humberto had the primer elements on the backs of his hands. A review of Rao's data (and his testimony) "shows that in actual fact particles comprised of lead, antimony and barium were found on the samples from the backs

of Humberto Cuellar's hands in addition to particles comprised of two of the three critical elements." (PCR3 1166).

The State next asserts that the reason trial counsel changed tactic was the exclusion of the bollito evidence rather than the discrediting of Rao. Answer Brief at 69. Here it is the State not Mr. Mendoza that is indulging in speculation. The State attempts to downplay the effect on Mr. Mendoza's defense of the impeachment of Rao. It states that the timing discrepancy "did permit the State to comment about the gunshot residue evidence" and "it allowed the defense to argue that the State had hidden evidence." Answer Brief at 69. However this attempt to minimize the impact of the GSR debacle is to no avail. The trial record amply shows that the credibility of Rao was torn to shreds at trial. Not only was the credibility of the defense "expert" Rao 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. The State argued that trial counsel "tried to get you to believe something different than they know to be the evidence in this case" (TRT1319); 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 closing argument. Whatever credibility the defense had retained in the eyes of the jury was completely shredded by the closing argument.

The State next complains that there was no harm to Mr. Mendoza from the closing argument because he "had no real defense to the murder charge." Answer Brief at 69. This is not true as is demonstrated by Argument IB *supra*. Without an underlying felony there could not be a first degree felony murder conviction. Absent trial counsel's ineffectiveness, Mr. Mendoza could have cast a reasonable doubt on the felony and thus a reasonable doubt as to his guilt of first degree felony murder.

The State next complains, without any record references, that the reason that the lower court denied this claim was because Mr. Mendoza did not show prejudice. However the court did not address the failure to investigate, and failed to consider the case law that is clear that strategy based on inadequate investigation is not defensible.[7] Only after a thorough investigation into the potential pitfalls of Rao's work could a "strategic" decision to use Rao been considered reasonable. Relief is warranted.

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[7] See Miller v. Francis, 269 F.3d 609, 615-16 (6th Cir. 2001) (citing Strickland, 466 U.S. at 681) (". . . 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.").

D. 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 first of all exhorts this Court to affirm the lower court's denial of penalty phase relief because this Court must give deference to the lower court on findings of fact. However, as the State is well aware, the question of ineffective assistance of counsel is a mixed question of fact and law. The State ignores the fact that the lower court's legal analysis of the evidence adduced at the hearing did not comport with the analysis required by Strickland and its progeny.

The State next asserts that trial counsel was not ineffective for failing to hire an addiction specialist because they requested the services of Dr. Trop, but were denied the request by Judge Postman. Answer Brief at 73. However the State ignores the argument that because attorney Wax made the request and was denied, his performance was rendered deficient by the actions of the lower court. The State

relies on Dr. Toomer's testimony as to Mr. Mendoza's drug use in its attempt to suggest that the specialist neuropharmacology evidence was cumulative. Likewise the State trumpets counsel's use of neuropsychologist Hyman Eisenstein, notwithstanding the fact that he was not hired until after the penalty phase jury had made a death recommendation. However the State ignores the fact that the sentencing judge, Judge Postman, explicitly found that counsel **had established absolutely no mitigation whatsoever.** The State complains that the fact that Judge Postman was not persuaded by the mitigation presented at trial does not mean that counsel was ineffective. However this is not the basis of Mr. Mendoza's argument. It is not the opinion of the trial expert that was jeopardized by counsel's inadequate investigation but his credibility both to the jury and the judge. Had trial counsel conducted a proper investigation they would have been able to present credible evidence as to mental health statutory and non statutory mitigation.

While trial counsel went through the motions of having Mr. Mendoza seen by mental health experts, they did not properly investigate Mr. Mendoza's social history and thus left their expert exposed to the full fury of the prosecutor 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 the State's blistering closing arguments to the jury in which it 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 severe drug abuse) as "garbage." (TRT 1653-61). The State argued to the jury in 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 1593-94)(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 the State attack Dr. Toomer's opinions, it 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 lend support to 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 makes much of the fact that Dr. Toomer testified that his opinion as to the conditions suffered by Mr. Mendoza is the same now as it was then. Answer Brief at 76. However it manifestly ignores the testimony of Dr. Toomer that his report was based on very preliminary findings. The State completely ignores the fact that Dr. Toomer testified that his opinion was "provisional" and only could be confirmed by further follow up testing that should have been done. He was clear that in particular, Mr. Mendoza's preliminary test results should have suggested the need for neuropsychological testing and neurological testing. (EH 6/16/08, p.38).[8]

Even during his direct examination at trial, Dr. Toomer admitted that his opinion was limited because it was not supported by corroborating information. See 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.

(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

[8] As noted *supra*, this was not done until after the penalty phase.

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."

In addition to the need for neuropsychological testing and a neurological evaluation, Dr. Toomer indicated that he had specific concerns about Mr. Mendoza's possible mental decompensation. This concerned him to the extent that he contacted the jail clinic and "informed them of my concern, with regard to what I considered to be a decompensating level of mental status function." (EH 6/16/08, p.33).[9] As Dr. Toomer later stated, this is significant because it is not something that he would automatically or routinely do. However the significance of the seriousness of this situation was apparently lost on trial counsel. Contrary to the State's contention, trial counsel did not follow up upon this significant observation by Dr. Toomer.

The State also ignores the fact that the evaluation done by Dr. Haber suggested that Mr. Mendoza was suffering from some kind of mental illness, which should have been investigated further. Dr Haber had conducted an

[9] Dr. Toomer's report indicates that there appeared to be "some deterioration in the subject's overall mental status functioning as reflected by his increasingly depressed state, disjointed communication, responsiveness to internal stimuli, tearfulness and reports of auditory and visual hallucinations." See Defense Exhibit B.

evaluation of Mr. Mendoza and in his report had indicated that Mr. Mendoza had "a history of psychiatric problems from childhood, his self reporting of substance abuse, past history of paranoid alienations, visual hallucinations, auditory hallucinations" See Defense Exhibit C. However, despite these indications of major mental illness, counsel did not request further experts to investigate Mr. Mendoza's mental illness. He did not request a neurologist or neuropsychologist to evaluate Mr. Mendoza's brain functioning prior to the penalty phase. Instead, counsel took the route of having Mr. Mendoza evaluated for competency.

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. Answer Brief at 76. 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, and if counsel had done a constitutionally adequate investigation of Mr. Mendoza's mental health. Indeed Dr. Toomer's opinions were correct in so far as they go. The problem is that his opinions were weak and subject to attack because he did not have the necessary factual support to substantiate them. As Dr. Toomer testified, his evaluation was very preliminary, and he

expected that follow up investigation would be done.

Had a proper mental health mitigation work up been conducted, counsel would have been able to present additional expert testimony to the jury to show that Mr. Mendoza suffers from several major mental illnesses including Post Traumatic Stress Disorder (PTSD), that he has severe frontal lobe dysfunction, and that his level of addiction to cocaine and alcohol was severe. However, the State dismisses the additional expert testimony elicited at the evidentiary hearing because it asserts that "a defendant does not prove that his counsel was ineffective by showing that he has located new experts who have more favorable opinions." Answer Brief at 74. Once again, the State mischaracterizes Mr. Mendoza's argument. It is not a question of whether Dr. Rothe, Dr. Weinstein, and Dr. Mash gave "more favorable opinions" than Dr. Toomer. It is a question of follow up mental health investigation that should have been done but was not.

The State attempts to downgrade the testimony of Dr. Rothe, Dr. Weisntein, and Dr. Mash by asserting that "the facts of both this case and Defendant's prior violent felony show that they were not impulsive acts but planned criminal activity." Answer Brief at 77. The State does not cite any authority for this proposition, nor can it because absolutely nothing in the record supports it. It is no more than the State's wishful thinking that causes it to advocate this position.

The State next attempts to minimize Dr. Rothe's testimony relating to Mr.

Mendoza's PTSD because he testified that "the symptoms of PTSD usually disappear within 5 years of the events that cause the PTSD." Answer Brief at 78. The State misrepresents the opinion of Dr. Rothe regarding Mr. Mendoza's PTSD. Dr. Rothe testified that even today in 2008, Mr. Mendoza exhibits signs of mild but chronic PTSD, which logically would have been even more acute at the time of the crime. Furthermore, the severity of Mr. Mendoza's condition at the time of the crime does not preclude it from being considered mitigating. The State wants to impose a nexus between all mental health mitigation and the facts of the crime in contravention of well settled Eighth Amendment jurisprudence. In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court set forth the rule that "the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor **any aspect of record**..." 438 U.S. 586, 604 (1978).[10]

The State also asserts that the evidence of PTSD would not have been favorable because it made Mr. Mendoza violent and aggressive. This again is absurd. The purpose of mitigation is in large part to provide an explanation of a

[10] See also Penry v. Lynaugh, 492 U.S. 302, 319-22 (1989); Payne v. Tennessee, 501 U.S. 808, 822 (1991); Boyde v. California, 494 U.S. 370, 377-78 (1990); Eddings v. Oklahoma, 495 U.S. 104, 114 (1982). The United States Supreme Court has explicitly rejected the requirement of such a nexus between the mitigation and the crime in Tennard v. Dretke, 542 U.S. 274 (2004). Specifically, no nexus between the handicap and the crime is required.

defendant's behavior. If the State's argument were to prevail, very little mental health mitigation would ever be presented.

The State contends that Dr. Weinstein's opinion is cumulative to Dr. Toomer's because Dr. Toomer suggested that Mr. Mendoza suffers from brain damage. Answer Brief at 77. However, Dr. Toomer did not conduct any neuropsychological testing and his testimony indicated that his opinion was provisional, and would require neuropsychological testing to confirm it.[11]

It is also noteworthy that the State did not present any other witness to counter his findings even though it listed Dr. Aguilar Puentes who had evaluated Mr. Mendoza at the State's behest prior to sentencing. Dr. Hyde testified at the evidentiary hearing that had he received Dr. Aguilar Puentes's report he would have required further testing, because the tests chosen by her did not screen for frontal lobe dysfunction. Dr. Weinstein's opinion is un-rebutted and must be considered by this Court.

[11] The State also notes that Dr. Hyde did not find anything neurologically wrong with Mr. Mendoza. Answer Brief at 77-78. However the State ignores the fact that Dr. Hyde testified that he wanted to see neuropsychological testing especially with regard to the frontal lobe function, and that in his opinion as a behavioral neurologist the neuropsychological tests done by both Dr. Eisenstein and the State's psychologist Dr. Aguilar Puentes after Mr. Mendoza's penalty phase were inadequate, because Dr. Eisenstein did not speak Spanish, and because Dr. Puentes did not do frontal lobe testing. Dr. Hyde also recommended that Mr. Mendoza be evaluated by a Spanish speaking PTSD expert which is exactly what post conviction counsel arranged through Dr. Rothe.

The State next complains that Dr. Mash's testimony should be disregarded because trial counsel requested an addictionologist, and the issue should have been raised on direct appeal. This argument is without merit. Dr. Mash is a molecular and cellular neuropharmacologist, rather than an addictionologist. While both disciplines deal with drugs, and overlap slightly, they are separate and distinct areas of practice, contrary to the State's assertion. The State also faults Dr. Mash for relying of Mr. Mendoza's self report. However the State blithely ignores the fact that Dr. Mash reviewed collateral materials and talked to a third party, Alexander Suarez. However due to the State's misreading of the evidence law (see Argument III *infra*) Dr. Mash was not allowed to testify about this part of her evaluation. The State cannot exclude this testimony and then make argument that the work was not done.

The State takes issue with Mr. Mendoza's contention that trial counsel should have obtained a social history and suggests that they in fact did so. Answer Brief at 75. The State ignores the admonition in Wiggins v. Smith that a proper social history be conducted. 539 U.S. 510 (2003). The United States Supreme Court found Mr. Wiggins's trial counsel ineffective even though the psychologist conducted interviews with some of Mr. Wiggins's 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. The fact that they spoke with Mr. Mendoza's mother does not constitute a proper social history, whatever the State might wish. Had a proper comprehensive social history been conducted, the jury would not have voted for death and a life sentence would have resulted.

The State complains that the evidence presented at the evidentiary hearing was "cumulative" to that presented at trial. As noted *supra*, it was not. This is especially true given Dr. Toomer's testimony that his opinion was "provisional," and the State's savage depiction of his opinion as "garbage" to the jury. It is also true of the lay testimony. The State refers at length to the fact that trial counsel elicited testimony from Mr. Mendoza's mother at the penalty phase. However in fact her testimony as to Mr. Mendoza's early life was sketchy at best.[12] The State ignores the substantial case law that is applicable to cases such as Mr. Mendoza's in this regard. As with the United States Supreme Court analysis in Wiggins, this Court has not hesitated to determine that a capital defendant received ineffective assistance of counsel despite the presentation of some mitigation at the time of

[12] In fact Mr. Mendoza's mother, had she been alive, would have been able to testify to a wealth of additional information. Unfortunately she is now deceased. At the State's bidding this Court excluded the only way for Mr. Mendoza's post conviction counsel to present this evidence to the Court—through Odalys Rojas, his post conviction investigator who spent many hours with Mr. Mendoza's mother.

trial, particularly when the trial courts in those cases found no mitigation to exist, as is the case here. See, e.g., State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991) (affirming a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase").

Moreover, it was also established at the evidentiary hearing that Mr. Mendoza suffered from PTSD, together with numerous other psychiatric conditions, frontal lobe dysfunction and severe addiction to cocaine and alcohol, 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 of 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 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.[13]

The State attempts to distinguish the case of Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008) cited in Mr. Mendoza's Initial Brief. Answer Brief at 79. The State misunderstands Mr. Mendoza's use of the case. The point of Williams is that even where some mitigation evidence was presented at trial, when the post-conviction court gives a much more detailed picture for additional family members, and where the post-conviction expert(s) is/are better prepared with collateral information, the different picture cannot be wiped clean, merely because the State mouths the word "cumulative." The quality and persuasiveness of the evidence must be considered by this Court.

The jury recommendation in Mr. Mendoza's case was seven to five. 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

[13] 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).

The State argues that counsel were not 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 3.851 motion. Answer Brief at 80. 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 trial counsel's testimony on this specific issue, Mr. Mendoza formally asserted this specific claim as set forth in the first closing arguments filed after the first evidentiary hearing. 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 3.851 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. Regardless of whether 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.[14] This Court must factor into its prejudice analysis

[14] 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.

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).

The State claims the counsel was not ineffective for "opening the door" because Dr. Toomer "stated that he had obtained a social history." Answer Brief at 81. This is utterly misleading. In fact Dr. Toomer stated that he had obtained a "psycho-social history" which was at the subject's "own discretion." (TRT 1539. He did not obtain any criminal history that should have been the subject of cross examination as the psychosocial history. Had trial counsel not opened the door, the damaging evidence would not have been admitted.

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. Once again, the State misstates the real issue. The real issue is that counsel was ineffective for not eliciting this during the guilt phase and instead, calling Humberto as a defense witness in the penalty phase. Premeditation was off the table by the time of the penalty phase. The State had conceded that it had not proven first degree murder under a theory of

premeditation. Mr. Mendoza was found guilty of first degree murder based on felony murder alone. This testimony further discredited the credibility of Mr. Mendoza and his defense team, and prejudiced Mr. Mendoza.

ARGUMENT III

MR. MENDOZA WAS DENIED A FULL AND FAIR HEARING

The State contends that the lower court properly denied the motion to disqualify itself because it was predicated on a ruling on the evidence. Answer Brief at 82-84. This is misleading. However, it was the court's pronouncement that trial counsel had made a "strategic" decision in calling Rao that led to the motion to disqualify the court. As such it represented a predetermination of the issues and represented actual bias against Mr. Mendoza. Therefore it does not matter whether the motion was successive or not because Mr. Mendoza has demonstrated that Judge Tunis was not capable of a fair determination of the facts.

As to the exclusion of witnesses, the State is again misstating Mr. Mendoza's argument. Steven Potolsky Esq. would have testified as to the factual standards of representation in capital cases in Dade County in 1994. He would not have been testifying as to whether trial counsel met the standards for ineffectiveness set forth in Strickland. This is permissible. The State's assertion that Mr. Potolsky's testimony would not have assisted the court's fact finding (Answer Brief at 85) is without merit. This appears to be based on the lower

court's representation that it had represented capital defense defendants. Notably absent is any indication of the lower court's success rate as a defense attorney. In any event, to practice as a capital defense attorney does not show that an attorney is aware of the prevailing professional standards as to reasonable investigation.

As to witness Holly Ackerman, the State does not evince any credible reason for excluding her testimony. She is an expert on the historical events that surrounded Mr. Mendoza's experiences in the Peruvian consulate in Havana and in the Peruvian refugee camp. Trial counsel would have wished to consult with such an expert. The issue is not whether Dr. Ackerman would have been available to testify at the time of the trial but whether trial counsel should have investigated this type of historical evidence in his social history investigation. The State's argument as to hearsay is also redundant. As Dr. Ackerman's affidavit shows, she would have been able to assist counsel in understanding the historical, social, and cultural aspects of this case. That is not hearsay, and the State would have ample opportunity to refute her testimony.

Similar considerations apply to the exclusion of the testimony of Odalys Rojas and Alexander Suarez, and the evidence improperly excluded. The State's attempt to refute Mr. Mendoza's argument is without merit. Mr. Mendoza relies on the arguments in his Initial Brief.

CONCLUSION

Mr. Mendoza respectfully requests this Court to vacate his convictions and grant him a new trial. But for trial counsel's ineffective assistance during the guilt-innocence phase of his capital trial, there is a reasonable probability that the jury would have found Mr. Mendoza not guilty of first degree felony murder.

Mr. Mendoza is also entitled to a new penalty phase. But for counsel's ineffectiveness, and in light of the jury's seven-to-five vote and the trial court's conclusion that counsel failed to establish **any** mitigation whatsoever, there is a reasonable probability that the outcome of the penalty phase would have been different.

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, Florida 33131-2407, on April _____, 2010.

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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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