IN THE SUPREME COURT OF FLORIDA

NO. _____

ERNESTO SUAREZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

SUPPLEMENTAL BRIEF

APPEAL FROM DENIAL OF POST-CONVICTION RELIEF,
MOTION FOR STAY OF EXECUTION, AND MOTION FOR
STAY OF EXECUTION PENDING PETITION FOR WRIT
OF CERTIORARI

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PRELIMINARY STATEMENT

This is an appeal from the circuit court's denial of post-conviction relief. Most of Mr. Suarez's claims were summarily denied and were briefed by counsel last Friday. As indicated at that time a review of the transcript was necessary to the briefing of other issues. The instant brief undertakes a discussion of those claims.

ISSUE II

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIMS II, III, IV, V, VI, VII, VIII, XIX, AND XII IN HIS RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING. THE COURT FURTHER ERRED IN LIMITING EVEN THE EVIDENCE ON THE ISSUE OF DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE AS TO THOSE CLAIMS.

The appellant, Ernesto Suarez, hereby supplements the claim that he was denied a full and fair evidentiary hearing with references to the transcript of the hearing on the motion to vacate the judgment and sentence.

In respect to the issue of ineffective assistance of counsel, the court repeatedly limited the testimony.

Not only did the court sustain objections to specific questions but made general rulings that restricted the scope of presentation of evidence regarding ineffective assistance of counsel. The court sustained the State's objections to testimony on numerous occasions on the grounds that it was "discovery":

CONTINUED DIRECT EXAMINATION

BY MR. McCLAIN: Do you recall prior to sentencing, anything about the sentencing order being read to Mr. Suarez in advance? Do you recall anything in that regard?

A I understand that it was.

MR. KRAUSS: Your Honor, I believe that counsel has just asked -- if he asked whether Mr. Martin had objected or attempted to have reviewed that, how could counsel be ineffective if he attempted to get a ruling favorable for this type of matter. Therefore, it's irrelevant, this can't show ineffective assistance of counsel if --

MR. McCLAIN: Ineffective assistance of counsel is a question of fact at the point in time.

It's a matter of clarification for the record and -- whatever the Court wants to rule.

THE COURT: Well, the State seems to -- they've made a point that if in fact the motion was filed, it appears that it wouldn't reflect ineffective assistance of counsel, so --

MR. McCLAIN: What I'm trying to find out is what circumstances he knew about in order to determine whether the motion was properly foiled or properly stated. The circumstances and et cetera in that regard.

MR. ANDERSON: This isn't a discovery hearing --

THE COURT: I agree with that. I think that he answered the question for the record, the best he could. And so --

A I think I already answered.

THE COURT: So I also agree with the State, your presentation of proof, rather than discovery so -- if we can move on with this.

(T. 426-427)(emphasis added).

The court also restricted counsel's examination of trial counsel, Lawrence Martin, on the grounds that it was improper to "impeach his own witness":

Q Do you recall having conversation over the phone with Judy Dougherty with regard to Dr. Lombillo's testimony?

A I recall speaking with her, I don't remember anything that -- maybe you can tell me specifically about Dr. Lombillo that may ring a bell.

Q Do you recall indicating to her that you remember that he had testified at the guilt/innocence phase of the trial?

MR. KRAUSS: Your Honor, we are now objecting. He's clearly impeaching his own witness. We've had evidence to the contrary before.

MR. McCLAIN: Your Honor, I'm entitled to impeach this witness, the whole reason that we're here is because in Claim 15 I have alleged this witness was ineffective.

This witness has been called by me in order to establish my case. I'm entitled to impeach him.

THE COURT: That's clearly what you're claiming to do, I guess.

MR. ANDERSON: He hasn't had the Court declare him a hostile witness yet.

THE COURT: That's true, if you are going to do it, you have to have the witness

declared as a hostile witness.

MR. ANDERSON: I'm not sure that there's a basis for declaring him a hostile witness.

MR. McCLAIN: I'm going to ask to have him declared at least an adverse witness.

After all, the AG's office has indicated that they would like to represent [sic] him in their letter.

MR. ANDERSON: Objection, Your Honor.

MR. KRAUSS: Objection, Your Honor.

And we would move to introduce a copy of that letter if the Court wishes to see it. This insinuation is typical of CCR's tactics to cloud the issues.

MR. McCLAIN: Your insinuations are the same.

MR. KRAUSS: They are after yours were.

THE COURT: I agree, you probably asked for that one.

I have a problem with that, declaring him a hostile witness or an adverse witness.

I'm not sure that just because you claim that there's ineffective assistance -- I assume that there is not very much case law in this area.

Quite frankly, and -- specifically if that's true.

There was something that I thought about earlier when you all were calling your witnesses, I was surprised that nobody ever addressed it because if they were an adverse or hostile witness, you could have been asking leading questions all along throughout this whole procedure.

MR. McCLAIN: I've always maintained that I could, and occasionally the Courts have agreed that there has been a split of authority on that point.

I haven't made an issue of it in this case.

MR. KRAUSS: Your Honor, it is our position, I don't see anything other than the ordinary rules of evidence would apply.

If you call a witness, and it's your witness, you can impeach him. And I don't see any grounds to declare this witness adverse.

MR. McCLAIN: Your Honor, the rule -- actually the evidence code Section 90.608 sets out who may impeach.

THE COURT: I'm fairly familiar with that ruling.

MR. McCLAIN: And in subsection 2, it says that "A party calling the witness shall not be allowed to impeach his character provided in 90.609 or 90.610. If the witness proves adverse such party may contradict the witness and other evidence, or make it clear that the witness has made inconsistent statements at another time, without regard to whether the party was surprised by the testimony of the witness."

In that case, I submit that I'm not arguing that this witness is a hostile witness. Clearly he's not been hostile in the layman's definition of the word.

I submit that he is adverse at this point in time in that he obviously isn't going to agree that he was ineffective during his representation of Mr. Suarez.

He obviously is going to be disagreeing with me, and taking a different position than

the position that I'm taking on behalf of my client.

That makes him an adverse witness.

I would submit that under the circumstances that impeachment through a prior inconsistent statement is proper.

MR. ANDERSON: That's just -- that just hasn't happened. This has been the most cooperative witness he's had.

MR. RIVERA: It's a surprise, cooperation, it's a surprise answer that came and Mr. Martin is entitled to examine a witness when he is calm, even if he has called the witness himself. When the witness gives an answer that is a surprise.

THE COURT: That used to be the rule under 608, you don't have to have surprise.

MR. McCLAIN: Your Honor, I would still submit that the witness is an adverse witness and I have not heard him -- I suppose I could ask him if this is what is necessary to establish adverseness. Whether he believed that he was ineffective at the time that he represented Mr. Suarez.

I assume that his answer is not going to be "Yes, I was ineffective and I think that relief should be granted."

I submit as a result he is adverse.

THE COURT: I can see the logic in what you're saying, but in reality, I can agree with the State, if anybody takes the time to read this transcript as I'm sure they will, I can't imagine -- I just can't imagine that they would find but what Mr. Martin has been more than cooperative in everything. I don't believe that he actually has been impeached on anything at this point. At this point he hasn't proved adverse or hostile or any of those categories.

I don't believe quite frankly that you're protected by 608 in this case. So I will sustain the State's objection at this point.

MR. McCLAIN: For the record, I will take exception to the ruling.

(T. 724-729)(emphasis added).

The trial court also restricted evidence offered at the hearing due to a lack of specificity in wording of the motion to vacate:

Q Was there any effort made to get a court appointed investigator in this case?

A I don't recall, I think so.

Q Any particular reason?

A No, I -- I don't really recall it coming up. I don't know if it did or not.

Q Was it something that you would have liked to have had if you had the money to have it investigated?

A Well, I mean in retrospect --

MR. ANDERSON: Your Honor, I would object to this line of questioning. There's no claim there's a deficiency of not having an investigator. There's no claim as to the prejudice that resulted from it, in that an investigator would have turned up thus and such.

MR. McCLAIN: Your Honor, if reference is made to -- let me check and see what the claim is. On page 115, Claim F., there very much is a claim that an investigator is needed in order to prepare for the penalty phase, in order to find the family members, and it discusses in detail what the family

members would have said if they had been found.

MR. ANDERSON: Your Honor, that's just not true. It says counsel failed to investigate mitigating circumstances. That doesn't say about anything reading any investigations.

MR. McCLAIN: Investigator. You read the next couple of pages, it's detailed exactly what the family would have said if they had been located.

MR. ANDERSON: It doesn't say anything about investigate. It looks like they are trying to pull the same stuff that they pulled in Blanco.

MR. McCLAIN: Your Honor, an investigator isn't a man from Heaven that comes out of the sky. Either you have an investigator that is appointed or you retain an investigator. It's up to counsel in the course of investigating the case to decide whether or not they need the assistance of an investigator and to obtain that assistance. My line of inquiry is about whether or not an investigator was attained, and if this witness believes that an investigator would have been helpful and useful in locating the family.

THE COURT: I would agree with the State at this point. I think that there's no allegation about the investigator here.

MR. McCLAIN: There's not?

THE COURT: Quite frankly, there's no allegation that this -- the information you've listed on pages 115 through roughly 120, 21, had to come through an investigator or whether it would come through interviewing the Defendant or -- I think, technically, the State's objection is well-founded.

MR. McCLAIN: I may, just for the record, I would note that the allegation is made, that counsel failed to investigate in developing mitigating circumstances. Several pages of mitigating circumstances are set out detailing the family background, specifically referencing to the Defendant's family. And we are prepared tomorrow to call members of the Defendant's family in order to present what would have been found, had the investigation been undertaken. I submit that it has been properly pled and it is evidence which is properly presented at this proceeding.

THE COURT: Well, if -- I'm sticking with the language that you have and the page that says, "If counsel had investigated," and I think you have covered that part, whether they did investigate the claim but not -- I can't read this, it's garbled, but it said, "That if counsel investigated by hiring an investigator," so I think the State's objection at that point is correct.

(T. 429-431)(emphasis added).

Even when Mr. Suarez's counsel established that hiring an investigator is one way for an attorney to investigate a case, the court continued to sustain the State's objection:

Q Mr. Smith, as an attorney, how do you investigate a case?

A Well, you know, there are any number of ways.

Q Does one of the ways include hiring an investigator?

A It depends on the case, yes. I have the cases where I hired investigators; I have cases where I don't hire investigators.

Q Is one of the possible ways as far as pursuing the duty to investigates[sic]

A Yes, it is. It's an option which is available.

MR. McCLAIN: Your Honor, I would submitted that in the line of the question of the witness, that since it is one of the possible ways of investigating a case, that attorney has available, that it is something that can be pursued as to whether or not that option was used in this particular case.

MR. BROCK: Your Honor, he hasn't established from the witness, any sort of -- he's just assuming that this particular witness saw something that was there that would have caused him to believe that it was necessary in order to hire an investigator to begin with. I mean a series of questions apparently assumes that. It doesn't appear that that has been established.

MR. McCLAIN: Your Honor, what has been established from this witness is that he wanted to investigate the mitigating circumstances. There was a lot of time pressure during the course of the trial and beforehand in which infringed upon counsel's abilities to at least be present for the trial. And I believe the testimony also indicated his ability to investigate. I'm simply asking if this option was pursued as far as obtaining an investigator. I think that what the --

THE COURT: I think he said he did not.

MR. McCLAIN: Okay. And I believe that my question was, would that have been useful to have had an investigator? I asked the question that was objected to, and that's what -- where we got started.

MR. BROCK: But that was a hypothetical question that -- you know, if we're going to talk about the need for an investigator, it should be confined to the facts in this particular case.

> THE COURT: I agree, I agree, because obviously 20 investigators couldn't have been helpful, but in confining it to the facts in case, I think that that hypothetical is beyond the scope. I would sustain the objection. I ought to retract that statement. In some cases 20 investigators wouldn't do you any good, so there's a presumption that it might.

(T. 431-433)(emphasis added).

In addition to the general restriction of the evidence Mr. Suarez was permitted to adduce regarding ineffective assistance, the trial court repeatedly sustained the State's objections regarding specific issues. Some examples follow:

> MR. BROCK: Your Honor, I think that he's getting into the Caldwell matter which is not subject to this hearing. The delineation of the role of the jury.
>
> THE COURT: Is that where you're heading?
>
> MR. McCLAIN: Yes, Your Honor.
>
> THE COURT: All right, I agree, we have covered that area.
>
> MR. McCLAIN: I'm simply trying to establish whether there was a basis for objecting, and whether the defense attorney involved properly considered asking for further clarification to the instructions to the jury, as to the significance of their rile, and the great weight that would be given to their recommendation.
>
> And that it was a substantial part of the responsibility of whether penalty was actually imposed rested with the jury.

THE COURT: I think that he's on the record and that was for the record.

. . .

Q Do you remember the prosecutor in his opening statement referring to the fact that the victim was a family man, and had children?

A I don't recall that.

But if I know Jerry, I know if he has anything to say, he will definitely get to it.

Q I discovered that also.

Would you have objected to such material, if it had been presented in your presence?

A Objection, Your Honor. This is the Booth issue again.

THE COURT: Sustained.

MR. McCLAIN: I would state for the same reasons as I stated on the Caldwell issue.

CONTINUED ON DIRECT EXAMINATION

BY MR. McCLAIN:

Q Were you aware of a polygraph examination that had been given the defendant?

A No, I don't recall that.

I may have been I don't recall if we ever did -- I don't seem to recall that he had one. But he could have --

Q Do you recall what the state of law was at that time in regard to whether the aggravating circumstances needed to outweigh the mitigating circumstances for the jury to

recommend death, or if the mitigating circumstances needed to outweigh the aggravating circumstances for the jury to recommend life? Do you recall anything along those lines?

MR. KRAUSS: Objection, Your Honor. There is no case law that -- we have argued that, that is the standard jury instruction, it improperly shifts the burden that there is any law to say that the standard jury instructions are incorrect, and that is not failing, to object to them --

MR. McCLAIN: In the motion I relied on Randall [Arango] versus State, which establishes that -- that was 1982 decision which was long before the incident involved here, and long before the trial.

It was upon that case that I relied.

MR. KRAUSS: We asserted that we don't believe that the case stands for the proposition that the jury instructions are improper --

THE COURT: The State's objection is sustained.

MR. McCLAIN: I would reply on the same records that we just built on that. I can take exception on the same basis that has already been established.

(T. 422-424)(emphasis added).

Q In the course of voir dire, would you recall discussing the death penalty at all?

A No, I do not recall that.

Q Was that an area of inquiry that you were to make along with insanity?

A Not to my recollection. But I may have asked a question or two about it.

I think that Nelson Faerber or Dan Monaco inquired extensively in those areas.

But again, I'm not sure.

Q At that point in time, did you understand, or what was your understanding of the relationship between the judge and jury in the death sentencing process?

A (No response.)

MR. BROCK: I object, I don't see any relevancy to that at all.

MR. McCLAIN: Again for purposes of the record, a question is to the extent that on the Caldwell issue, the State contended that there was no objection. There was a basis for objection in the law at that point in time. And I think that the inquiry is proper to determine whether the defense was aware or the basis for objection, and what reason they had for not making the objection.

MR. KRAUSS: Your Honor, the law in Florida is clear that even if it wasn't barred the Florida Supreme Court doesn't buy the Caldwell argument.

The case law is clear and therefore counsel could not be ineffective for them he would be granted relief under this underlying claim.

THE COURT: I agree.

MR. McCLAIN: Again for the record, I would take exception to the Court's ruling.

THE COURT: Okay.

CONTINUED DIRECT EXAMINATION;

BY MR. McCLAIN:

Q Were you present for the State's opening statements?

A Yes.

Q Do you recall a discussion in the course of the opening statements with regard to the victim and his age and his family?

A No, I don't recall that.

Q Would a statement like that be objectionable in a capital case?

A (No response.)

MR. BROCK: Objection, Your Honor, it's not -- there's no relevancy, it's hypothetical question, there's no basis for which to be asking such a question as that.

MR. McCLAIN: Again Your Honor, I think it is a proper area of inquire under Booth, to the extent that the Florida Supreme Court has indicated that objections on the basis of Booth, could have been made. There was a basis for making them and historically, and at the point in time, 1984, that the failure to make the objection is a procedural bar.

I submit that it is a proper area of inquiry to ascertain whether the defendant was aware of that availability of that objection, and the reason why that objection was never made.

MR. KRAUSS: Your Honor, the same basis as before. It's clear when he discussed the Booth issue, which we talked about the fact that this is not a Booth type claim, this did not affect the sentencing body during the deliberations as to whether death was an appropriate sentence.

Additionally, Your Honor, the law of this state exemplified in Grossman calls it a "harmless error analysis would be available," and I think that it is clear, I think that the Supreme Court could see that this would

> have had no effect whatsoever on the decision to impose death.
>
> And on that basis, counsel could not have been ineffective because he would not have warranted relief under the underlying claim, again.
>
> THE COURT: I agree.
>
> MR. McCLAIN: Again I would take exception to the Court's ruling.

(T. 322-325)(emphasis added).

The trial court went on to restrict testimony in regard to the following issues:

The admonishment delivered by the court to the jury (T. 701-702).

Failure to address the issue of racism where a Latin defendant is tried by an all-white jury for the death of a white policeman (T. 721).

Testimony surrounding the failure to raise a sixth amendment claim regarding statements taken by the State from Mr. Suarez without the knowledge or presence of counsel (T. 310-313, 338, 405-506.

Evidence in regard to the obtaining of a handwriting exemplar by trickery (T. 417).

Evidence regarding the lack of a translator for communication between counsel and Mr. Suarez during the testimony of the co-defendants who testified for the State (T. 302-304, 454).

Evidence regarding polygraph evidence showing that Mr. Suarez did not have a premeditated intent to kill (T. 657, 688).

Prior to Mr. Martin's testimony the State made a motion in limine seeking to limit the areas of inquiry. The State contended some claims of ineffectiveness could not be gotten into while others could. Although there was no rhyme or reason to the State's argument, the circuit court granted the motion.

> MR. ANDERSON: Your Honor, before the examination of this witness gets under way we would like to make a motion in limine, that counsel be provided from bringing up the interpreter issue, the Sixth Amendment issue regarding the statements, the handwriting exemplar issue, Caldwell and the Booth issues.
>
> THE COURT: All right. I agree.
>
> MR. McCLAIN: Just for clarification, let me -- okay. Is this with regard to all of the issues other than Claim 15 that --
>
> MR. ANDERSON: This is with regard to determine the issue, the Sixth Amendment issue regarding statements. Here, I have got a list.
>
> MR. McCLAIN: Do you have the numbers?
>
> MR. ANDERSON: No, I don't have the numbers?
>
> MR. McCLAIN: Just for clarification, I thought that -- that the State's position, and I wanted to clarify the State's position and the Court's position. With regard to the other claims, for example, my understanding was the co-Defendant's Fifth, which is Claim No. 12. was the one that was precluded; is that correct?

MR. ANDERSON: Yes, that was resolved on direct appeal.

MR. McCLAIN: Okay. And I understood that you had indicated Claim 13, which was the acknowledgement issue, that's dealing with the instruction, the Court's instructions to the jury, you had claimed that was barred, also. Do you know which one I am talking about?

MR. ANDERSON: With regard to that issue it's our contention that it's insufficiently pled that there was any prejudice.

MR. McCLAIN: The allegation by the State is that I can't get into that issue because there's not been any showing of prejudice?

MR. ANDERSON: Right.

THE COURT: Which number is this? I have a sheet like this. I think it's typed up, that I have been writing my response on.

MR. McCLAIN: This would be No. 13.

MR. ANDERSON: The Petitioner's Claim No. 13.

THE COURT: Unfortunately, I have lost the one that I was writing on.

MR. McCLAIN: And as to No. 13, the State's position apparently is that I cannot get into it because there's not been sufficient showing of prejudice?

MR. ANDERSON: Pleading prejudice.

MR. McCLAIN: And is that Courts [sic] ruling?

THE COURT: This was on the Court's admonishments to the jury?

MR. McCLAIN: That's correct, Your Honor.

THE COURT: I already ruled on that and denied that.

MR. McCLAIN: That's I think what the State's contending, is that -- my understanding of what the State was contending, that your ruling precluded me from developing that in terms of ineffective assistance of counsel; that was my understanding.

THE COURT: I'll allow you to go into it, only because we have already gone through it with Mr. Smith, I guess. So I'll -- it has been ruled on, however, but we did go into it to some extent with Mr. Smith, so I will allow it.

MR. McCLAIN: And also Claim No. 9, that's the self-defense instructions. I just wanted to clarify, is that something I am allowed to go into?

MR. ANDERSON: Sure. We have no problems with that.

MR. McCLAIN: How about Claim No. 2, Estell versus Williams?

MR. ANDERSON: No problem with that.

MR. McCLAIN: Claim No. 20.

THE COURT: I think you can go into that. We have with Mr. Smith.

MR. McCLAIN: Also Claim No. 21, I can go into that?

THE COURT: Gentlemen, you can go into it. It's already been covered and ruled on, as far as that's concerned.

MR. McCLAIN: So the State has no objection to my talking in terms of that?

THE COURT: Anybody see any problem with that?

MR. ANDERSON: I believe the Court has ruled that you can go into that.

(T. 610-13).

Mr. Suarez was precluded from calling numerous witnesses in support of his ineffectiveness claim. These included Helen Miller, the interpreter at trial (T. 484-86), Deputy Isaac, the jailer who illegally obtained a handwriting exemplar from Mr. Suarez (T. 4386), County Judge Turner, who Mr. Suarez appeared before at his first appearance when he invoked his sixth amendment right to counsel which was prior to his making any statements to law enforcement (T. 488), Deputy Ortega who was the interpreter at the April 1, 1983, statement (T. 490), former Assistant State Attorney Jerry Berry, who took statements from Mr. Suarez (T. 491), Raymundo Reyes, Mr. Suarez's co-defendant who was willing to testify at Mr. Suarez's trial (T. 493), and Jorge Carroll, an expert on Cuban law (T. 496).

Mr. Suarez was also precluded from presenting evidence regarding a polygraph exam and its availability as mitigating evidence (T. 657-661). There the State successfully argued that the evidence was inadmissible until the predicate was established. This predicate was prejudice.

At other times the State argued just the opposite -- evidence of ineffective assistance was inadmissible until the

predicate of deficient performance was established. On this theory Mr. Suarez was precluded from presenting any psychiatric testimony (T. 468-69, 473-84, 918-39). The State clearly took inconsistent positions as to the order of proof. However, the law does not require that ineffectiveness be established in any particular order. The State was simply trying to disrupt Mr. Suarez's case and to force his counsel to present witnesses for which they were not prepared. The court allowed this to occur.

Under the circumstances Mr. Suarez was denied a full and fair hearing. He was also denied the effective assistance of counsel, when counsel was forced to proceed in the fashion that occurred. Counsel was even precluded from arguing certain matters in his closing argument (T. 1160-6212). A new hearing must be ordered.

ISSUE XXIX

MR. SUAREZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION: EVALUATING MR. SUAREZ' CLAIM

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable

adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his 3.850 motion Mr. Suarez pled each prong of the Strickland standard. Given a full and fair evidentiary hearing, he could no doubt prove each; even given the very limited hearing he did receive, he proved both unreasonable performance and prejudice. Mr. Suarez is entitled to a new trial and a new sentencing based on what has already been shown. But before this Court can disagree, Mr. Suarez is entitled, at a minimum, to a full evidentiary hearing on all aspects of his claim.

1. The Guilt-Innocence Phase

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and

knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Counsel, to perform his duty, must know the law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980). Thus, an attorney is obligated to make timely and proper objections to inadmissible evidence which is prejudicial to his client's interest. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

Defense attorneys have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper

prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, counsel has a duty to ensure that his or her client is competent to stand trial. See, Hill v. State, 473 So. 2d 1253 (Fla. 1985). And he has a duty of loyalty and zealous advocacy. King v. Strickland, 748 F.2d 1462 (1984).

The performance of Mr. Suarez's trial counsel failed with regard to each of these duties. These failures undermine confidence in the outcome of the judicial process because they create the substantial likelihood that but for counsel's failures a different result would have occurred. Counsel's failures rendered the trial an unreliable adversarial testing; as a result; Mr. Suarez's conviction and sentence of death must be reversed.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle 642 F.2d 903, 906 (5th cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994

("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

Each of Mr. Suarez's counsel's errors were sufficient, standing alone, to have warranted Rule 3.850 relief. Each undermined confidence in the fundamental fairness of the guilt-innocence determination. Taken together they establish the likelihood a different outcome would have resulted but for counsel's deficient performance. The allegations were more than sufficient to warrant a Rule 3.850 evidentiary hearing as to all aspects of the claim in order to allow consideration of the cumulative effect of counsel's many failings. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986); see also, Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

At his hearing, Mr. Suarez has already established what his motion alleged: that the unreasonable errors, omissions, and failings of his court-appointed trial counsel, singularly and collectively, warranted Rule 3.850 relief. However, Mr. Suarez has more proof that the circuit court refused to consider and refused to hear.

2. The Sentencing Phase

Beyond guilt-innocence, defense counsel must also discharge

very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, ____ U.S. ____ (1984), 81 L.Ed.2d 358, 104 S. Ct. 3575, adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, ___ U.S.___, 85 L.Ed2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded,

____ U.S. ____, 82 L.Ed.2d 874, 879, 104 S. Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, ____ U.S. ____, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards. Cf. King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S. Ct. 1051 (1984), adhered to on remand, 748 F.2d 1402 (11th Cir. 1984); see also O'Callaghan v. State, supra; Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S. Ct. 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984); Thomas v. Kemp, supra, 796 F.2d at 1325. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted). Mr. Suarez was entitled to the same relief.

Mr. Suarez's case was also similar to O'Callaghan v. State, supra, 461 So.2d at 1354-55. There, the Florida Supreme Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present mental health mitigating evidence. 461 So.2d at 1355. Specifically O'Callaghan alleged as to the penalty phase

> that O'Callaghan's counsel called no witness in mitigation or for any purpose at the sentencing hearing; that O'Callaghan's counsel never contacted O'Callaghan's parents prior to the trial; that if his parents had been contacted, his counsel would have discovered that O'Callaghan suffered a harsh and alienating childhood, serious physical and psychological abuse as a child, a serious drug problem as a teenager, and had a family history of mental illness; and that a mental health professional's affidavit asserts he exhibits likely evidence of brain damage and mental illness.

461 So. 2d at 1355-56. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing. Mr. Suarez's counsel's non-efforts reflected similar fundamental flaws. On the basis of the undisputed evidence that the court refused to hear, at the very least the case must be remanded for a full and fair hearing.

Despite the recognized importance of sifting through a capital defendant's background in order to unearth mitigating evidence, Mr. Suarez's counsel conducted a wholly inadequate penalty phase investigation--he conducted no adequate

investigation at all into the critical issues surrounding the jury's and judge's determination of whether his client should live or die. The only explanation for this is that counsel did not believe that the death penalty was a serious possibility in Mr. Suarez's case (T. 388, 620, 673).

Simply put, counsel did not prepare, and presented nothing of relevance at trial and sentencing, although powerful guilt-innocence defenses and a plethora of substantial mitigating evidence were available. Here, counsel was indifferent to his duty. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, supra, 106 S. Ct. at 2588-89 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) (failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision

made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

Mr. Suarez's court-appointed counsel failed in his duty. The wealth of significant evidence which was available and which should have been presented never got to the court. Counsel operated through ignorance; he did not believe this was really a death case. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Nealy v. Cabana, supra; Kimmelman v. Morrison, supra. Mr. Suarez's capital conviction and sentence of death are the resulting prejudice. In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an

individualized determination.

796 F.2d at 1325. A full and fair evidentiary hearing, O'Callaghan, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), and, thereafter, Rule 3.850 relief are proper.

B. FAILURE TO PREPARE PENALTY PHASE

At Mr. Suarez's trial, he was represented by three attorneys. These were Paul Erickson, Harold Smith, and Larry Martin. All three testified at the limited evidentiary hearing, although Mr. Suarez was precluded from eliciting testimony regarding certain aspects of his claims of ineffectiveness. Larry Martin was lead counsel. "Larry was the guy who made the decisions, the final decision as to what actions were taken and not taken." (T. 408).

Mr. Martin, after his appointment to the case, in November, 1983, had concerns about his ability to handle the case alone. "In that regard I had Harold Smith and Paul Erickson come in and help me on the case." (T. 628). Prior to trial, Mr. Smith and Erickson were appointed as co-counsel. Mr. Martin could not recall whether that was at his own behest or at the behest of the prosecutor Joel Diefek who had concerns about protecting the record (T. 666). The record reflects that this motion was on March 7, 1984, a week before trial commenced on March 14. The motion indicated that the request was being made because "Primary counsel, LAWRENCE D. MARTIN, has several conflicts during the

time in which this matter is set for trial." (R. 174). At the hearing on the motion, Mr. Smith explained that the motion was made "at the request of Mr. Deifik." (R. 1656).

Paul Erickson was a 1983 law school graduate. He began practicing law in October of 1983 (T. 275). He first became involved in Mr. Suarez's case about a month before trial. (T. 278). It was his first jury trial (T. 282).

Harold Smith was a 1979 law school graduate (T. 371). Prior to the trial in Mr. Suarez's case, Mr. Smith "did not have extensive criminal practice, but you know, a good amount." (T. 373). He had "some felony work and [ ] was involved in two second-degree murder trials. One as sole counsel, one as co-counsel with Larry." Id. Mr. Smith commenced working on Mr. Suarez's case with the expectation that his role "would be the preparation of the case." (T. 378).

As to the penalty phase preparation, Mr. Smith testified in the following fashion:

> Q Now, as far as preparing for the trial, did that also include preparation of the possibility of the penalty phase?
>
> A Well, the preparation, I'm sure you know, is a kind of a fluid thing that goes on from the beginning of the time that you get the case until the time that you start the trial. And then through the trial and then everything.
>
> My recollection was that the very first -- we didn't really think of this as a

capital case, you know, it wasn't that much in our feelings about it. We realized that it was, you know, a possible felony murder, and all things like that.

Q Yes.

A But as things started rolling along and -- yeah, we looked into it, what you have to do in a penalty phase.

Q Timewise, when would that have occurred?

A That was -- specifically, I don't recall, but I'm sure that it was closer to the trial than in the beginning of the -- when we first --

Q But the trial occurred in the middle of March, does that give you any idea as to an approximation of how -- when the penalty phase would have been done, something that you were concerned about?

A No, not really.

Q You recall what efforts you undertook to establish mitigating evidence?

A Well, we tried to find any relatives, anything that we could -- I'm afraid that the position that we were in with our client, that he was essentially pretty much alone.

As I understood it, his friends were the co-defendants, and they were at that time testifying against him.

We talked to him, but you know, about what might be some mitigating circumstances, and we understood that probably our -- if we were going to do it, our best shot would be some sort of medical testimony or evidence of expert testimony.

But it is not -- as if he had a

sister or mother that you could put on the stand, and you know, or something like that.

Q You were never able to locate any family members?

A No.

Q Do you recall if there were any attempts made by family members to contact you?

A I don't recall. I must say that I have some recollection, but it could very well be that I'm getting it mixed up with one of my second-degree murder cases, in which we had someone that called the very last minute from New Jersey.

And I can't recall for sure, I do recall something like that. That would have been -- that could very well be the case that I'm getting it mixed up with someone else. In fact he looked very much like Mr. Suarez.

(T. 388-90).

Larry Martin received his law degree in 1969. After spending time with the Judge Advocate General's Corp., Mr. Martin began practicing law in Naples, Florida, in 1973 (T. 614-15). He testified that approximately fifty percent of his practice had been criminal (T. 616). [T]here was a time when there was a very high concentration of drug cases." (T. 617). Throughout his experience, Mr. Martin has handled six or eight homicide cases, of those four may have been involving charges of first degree murder. However, "the Suarez case was the only capital case that I actually took to trial with a -- you know, I had 12 jurors and so on, that's my only -- all the way through." (T. 619).

Q Now, in the other cases, how many times prior to Mr. Suarez did you have a case where you thought that the death penalty was a real possibility?

A Frankly, I didn't think the death penalty was a real possibility in the Suarez case, so I guess you would say none.

(T. 619-20)(emphasis added).

Prior to Mr. Martin's involvement in the case, Mr. Suarez had been represented by Dan Monaco, his co-defendants' attorney. Mr. Monaco had been appointed to represent all three defendants charged with capital murder. Prior to his withdrawal as Mr. Suarez's attorney, Mr. Monaco had discovered the whereabouts of Mr. Suarez's sister:

Q Now, when you were appointed to this case, did you know it was a Capital Case?

A Yes.

Q Did that affect you at all as to how you handled it?

A I realized the import of the consequences, and I think that I devoted a maximum amount of time to it. But I hesitate to say that I gave that case any greater consideration that I would give any client.

I felt that I had a duty to the Defendant to give the optimum of my knowledge and my ability. And I tried to do that.

Q You indicated that you contacted Reyes' family, did you make any effort to contact Mr. Suarez's family?

A Mr. Suarez had given me some information, and I believe that he had a sister in Miami. And I tried to contact her on occasions, but I don't believe that we ever had a conversation.

I tried to contact a girl that he was living with, but she was being represented by another lawyer at that time. And he did not want me to have contact with her. And I respected that request.

And it ended up that he had some family in Cuba, but -- I did not make any contact with them.

Q Okay.

. . .

Q Was it urgent at that point in time to get in touch with the sister, that you --

A I don't remember any sense of emergency, I think that the case -- I was initially involved in the case at that time, and I think that -- that I was doing my initial background work on the case.

Q As far as contacting the sister on this case, why would you have been wanting to do that?

A I think that my primary reason at that time was to get some background on Ernesto. And determine from her if there was any way that I could help him or she could say something in his defense.

(T. 507-09)(emphasis added).

However, Mr. Martin did not recall getting any information from Mr. Monaco as to the whereabouts of Mr. Suarez's sister (T. 629). After going through his file in preparation for testifying, Mr. Martin was unable to locate the phone number

of Mr. Suarez's sister which had been provided to Mr. Monaco (T. 631).

In regards to the pre-trial preparation, Mr. Smith testified:

> Q Do you feel that you would be able to do an adequate job of preparing for the trial, particularly for the penalty phase?
>
> A Well, it depends on -- I guess in retrospect you can say anything. Maybe we didn't, if there were things we didn't bring out-- you know, I don't know what we didn't bring out. Because there wasn't that much.
>
> Like I say, you can't bring the grieving mother up on the stand and try to humanize the defendant and things like that if you don't have one.
>
> At that point, as I recall Mr. Suarez was pretty much alone.
>
> . . .
>
> Q Did you communicate your desire to get in touch with the family members to Larry Martin?
>
> A I don't recall specifically discussing it with him. But gosh, that's something that everybody would want to do if you could.
>
> Q Did he ever inform you that he had "family members trying to get in touch with me"?
>
> A Did Larry Martin ever inform me that Larry Martin had family --
>
> Q That Mr. Suarez had family members trying to get in touch with him, regarding the case.

A Oh -- I don't recall that coming up. There was a case very similar where there was a gentleman who was a defendant, who looked very much like Mr. Suarez, also of Hispanic descent.

And we had a sister from New Jersey call up at the last minute and -- you know, my mind is getting very confused between those two things. At least on that point.

Q Was that a death penalty case?

A No, that was second-degree murder case.

Q Would the penalty phase have been an issue in that case?

A No, the penalty phase certainly wouldn't -- you know, but we would want to put them on if you could, to get a -- if you could get one.

Q In this case if you had a phone number to contact Mr. Suarez's father, would you have done that?

A Gosh, I would have tried, as I said, we would have done anything. We were grasping at straws and we knew that the State had a very strong case against him and we knew that -- our quivver was fairly empty at this point.

Q Even beyond the guilt or innocence question, would you have used family members in the penalty phase?

A Yes, I'm sure of it. Any time, as I said, if you can make any defense lawyer know that you can make a defendant look human, to show he has human ties, and things like that, it can't hurt. It might not be decisive, but it sure can't hurt.

(T. 419-21)(emphasis added).

Mr. Martin who again was lead counsel testified as to his contact with family members as follows:

> Q Now, is there a difference in the way you prepare for a Capital case versus you a noncapital case?
>
> A Yes.
>
> Q Can you explain what that difference is?
>
> A Well, the difference that you have to present a case to the jury concerning the sentence, and of course in a noncapital case that isn't necessary.
>
> Q At the time were you aware of the mitigating circumstances that you may have to be presenting on behalf of Mr. Suarez if he reached the penalty phase?
>
> A I don't know. I don't know what was going on in my mind at that time. I could tell you that I didn't, and this may have been erroneous on my part, I didn't perceive this as a great probability of a Capital punishment type of case. This is not the kind of guy that normally gets the chair. That was what was going through my mind at the time, and I still feel that way.
>
> Q Were you wanting to come up with ways of conveying that to jury, if you got to that point?
>
> A I'm sure I was. You know, I'm sure it was a matter of concern.
>
> Q In terms of specific mitigating circumstances, did you have any plan to do that?
>
> A I don't recall what it was.
>
> Q Were you aware of the difference between statutory mitigating circumstances

and nonstatutory mitigating circumstances?

A I believe so.

Q In preparing for that the penalty phase -- in preparing for a Capital case do you have to prepare for the penalty phase in advance of trial?

A You don't have to.

Q Is it --

A It's probably advisable.

Q And why would that be?

A Beats me.

Q If the Defendant is, in fact, convicted --

A Uh-huh.

Q -- do you need to be ready to go with mitigating circumstances?

A Sure.

Q In connection with nonstatutory mitigating cicumstances, would background material on the Defendant be important?

A If it were mitigated.

Q What would be mitigating background information?

A Well, I don't know. I think in this particular case the fact that he had, you know had grown up under communist regime and had been forced in the military service and so on was significant.

Q And that was information he had related to you?

A Yes.

Q Did you want to make any efforts or attempts to back up that information, support it with family and/or friends?

A Yes.

Q What efforts did you make in that regard?

A That's where I am drawing a bit of a blank. I -- the lead that I asked Ernesto about other family members or something and didn't get a -- either didn't want to involve them or I couldn't get a straight answer from him or something, but I mean he had been in jail for this for such a long period of time. Normally, family members come to me, you know, when it's that much time going on, and nobody here surfaced, and I can't remember just exactly what went on between us there.

Q Do you recall have having any contact from Mr. Suarez' family?

A Yes.

Q What contact did you have with Mr. Suarez' family?

A I think somebody, an uncle or somebody appeared in my office after the trial was over.

Q Do you recall having any contact prior to the trial?

A I don't remember it, no.

Q Let me hand you this and see if you recognize that?

A Okay. These are phone messages.

Q And who would the phone messages be to?

A To me.

Q And when are all of those phone messages, what month are they from?

A Looked like January.

Q Does it indicate what the year is?

A One of them does, yes. One indicates January of '84.

Q Are any of those phone messages from the family?

A Well, there's one here says Ernesto, Ernesto's uncle.

Q Okay. Does it give a phone number?

A Yes.

Q And does it indicate that you're to call the uncle, or does it indicate one way or another?

A No, but that's what I would have taken it to mean.

Q Would this have been before the trial?

A Yes.

Q Do you recall whether or not you returned that phone call?

A I think I did. I don't remember doing it, but the fact that it's punched and back in the file, I don't -- I don't return my messages to the file unless I, you know, unless I call, somebody just call at -- you know, I call back, and then, then I put the message back. So this would indicate to me, although I don't have any recollection of it, that I spoke to these people sometime at or about the time that I received those messages.

Q Here's another page. Do you recognize those as being phone messages for you, also?

A Uh-huh.

Q Now, what date do those phone messages have?

A January 3rd, January 6th.

Q Do they have a year?

A These leave messages do not.

Q Do they indicate who they're from?

A Yes. Again, a Mr. Alverez.

Q In comparing the date of those phone messages and the phone number to the phone message appearing on the other sheet, --

A Uh-huh.

Q -- does it -- is the phone number the same?

A Yes.

Q And would the time period, if it's the same year, be approximately the same time?

A Yes.

Q And what do these phone messages indicate?

A To call Mr. Alverez as soon as possible. They're going back up north soon and wanted some information on Suarez. That's what one of them says; another one says wants just to call.

Q And do you remember returning any of those phone messages?

A I don't have any recollection of returning them, no.

Q Do you recall having any information from the family prior to trial?

A I don't remember any, no.

Q Was that something you would have wanted?

A Yes.

Q And there's another sheet; do you recognize that?

A Yes.

Q Can you indicate for the record what that is?

A These are more phone messages.

Q Are any of those regarding the Suarez case?

A Yes, uh-huh.

Q Is there one from a family member?

A Yes, one says Suarez' father.

Q And what is the date of that?

A March 2.

Q Okay. Is there any indication of the year on any of those phone messages?

A No.

Q Do you have any way of telling what year that would have been?

A Not really, not that I can see. You know, that may be the way they were arranged in the file or something like that.

> If they were all sort of around the same time, I would assume it woule be the same year rather than a year later or year earlier.

(T. 673-79)(emphasis added).

Lasero Alberto Alverez (Alberto), Mr. Suarez's first cousin, was called to testify at the evidentiary hearing. Alberto, who spoke English well enough to testify without an interpreter explained the circumstances of the phone calls to Mr. Martin from Mr. Suarez's uncle, who is also Alberto's father.

> [Q] Do you recall at the time that [Mr. Suarez] was coming to trial, whether anyone in the family tried to call down to talk to the lawyer?
>
> A Right. I was the one who was calling. And I calling in 1984, and we were -- and my father knew that he was in prison. That he had this trouble in 1983 when Clarabell's mother [Clarabell was Mr. Suarez's girlfriend] called over there in New Jersey, and I still call and my father asked me to -- my father came here. And then they saw them -- they saw him here but then he got to leave, he had to leave back. And then he was trying to call the lawyer Martin, and I was the one who was trying to call him and he never call me back, he never call anyone back. Martha, a friend of my father, she try to call him because she was translating and he never get in touch with her. Just --
>
> Q Now where did Martha live at that time?
>
> A The same address that she lives now. That's --
>
> Q Where is that? I don't know the address, just the city?

A Oh, Miami.

Q So Martha was in Miami?

A Yeah, Martha was in Miami and we were in Jersey.

Q And you were calling from both places?

A Right, from Jersey. Martha, she was calling from the house and I was calling from Jersey.

(T. 867-68).

The undisputed evidence presented at the evidentiary hearing was that defense counsel wanted and needed family background information to pursue mitigating evidence to present to the jury. Counsel knew that such evidence was needed to humanize Mr. Suarez if the case proceeded to a penalty phase before a jury. Also clear from the evidence was the fact that the defense attorneys did not believe that the case was really a death penalty case. Finally the undisputed evidence showed that counsel received numerous phone calls from family members of Mr. Suarez. There were numerous phone calls in early January from Mr. Alverez, Mr. Suarez's uncle. There was a phone call in March prior to trial from Mr. Suarez's father. None of these phone calls was returned. In addition Mr. Monaco had the phone number of Mr. Suarez's sister. This phone number was not passed along to Mr. Suarez's trial counsel. As a result, defense counsel never spoke to any of Mr. Suarez's family. This was despite

repeated attempts by the family to contact the attorneys.

This case is in sharp contrast to Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987), which the circuit court relied upon in this case to say that there was no duty to go to Cuba to investigate mitigating evidence. Order, p. 13. Here what was available to counsel was the opportunity to contact family members in the United States who were obviously concerned about Mr. Suarez and who wished to help him. In Blanco defense counsel unsuccessfully and repeatedly made efforts to locate family members. This Court found no ineffectiveness. However, here the family members sought the attorney out; they wished to testify for Mr. Suarez. The reason they did not was because counsel failed to return any of the numerous phone messages. He did not take the time to prepare in advance of the trial for the penalty phase. As Mr. Martin testified, preparation for the penalty phase might be "advisable", but as to why "beats me." (T. 674). Under the circumstances here counsel's performance was deficient. See, Bertolotti v. State, ___ So. 2d ___ (Fla. April 7, 1988), where this Court found deficient performance because counsel had reason to question the defendant's sanity but did not seek the assistance of a mental health expert.

The question that remains is whether this deficient performance failed to "render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. at 688.

First, it should be noted that all of the defense attorneys involved testified that this was not properly a capital case. They shared the opinion that the prosecution could not be serious in attempting to obtain the death penalty. This is in sharp contrast to the circuit court's opinion that there were "overwhelming aggravating factors." Order, p. 13. Certainly an eight to four jury recommendation without the family's testimony is not overwhelming when compared to other cases; only two jurors needed to change their position after listening to mitigating evidence that would have resulted from contacting the family. Furthermore, the aggravating factors here were certainly not as significant as those in Bertolotti v. State, supra, while the mitigating evidence which would have been available was much more significant than in that case.

Several family members testified at the evidentiary hearing. Mr. Florencio Alberto Alveraz testified that Mr. Suarez was his nephew and that he (Mr. Alvarez) knew how to contact the family and friends in February 1984:

> Q Ask him if he knows Raphael Alvarez.
>
> A Yes, I do, he's my brother.
>
> Q And does he know Christina Alvarez?
>
> A Yes, she's my wife.
>
> Q And does he know Ricardo and Alberto Alvarez?

A They're my two children. Two sons.

Q Does he know Martha Sanchez?

A I met her here, I -- it's the stepmother of Ernesto.

Q I think that you ought to ask him -- I think that's a mistranslation.

A The stepsister, the halfsister of Ernesto.

Q And does he know Pastore Gonzalez?

A Yes, he is my buddy of fights and prison, and was where we met with Ernesto.

Q And does he know Ficundo Dagraf (phonetic)?

A It is the first cousin of my wife.

Q Is -- how is he related to Ernesto Suarez?

A He is my nephew on my mother's side.

Q And did you know all of these people that I have listed, did you know them in February 1984?

A Yes.

Q And did you know where to find all of the persons that I have named in February 1984?

A Yes.

Q If Ernesto's attorney had asked you to find them in February of 1984, would you have done so?

A Of course.

(T. 751-52).

Mr. Alvarez also stated that:

Q Do you know Ernesto when he was born?

A Yes.

Q And where was that?

A He was in the fortress of LaCabana, in Havana, Cuba.

Q And was his mother married at that time?

A They was [sic] living together, his mother fell in love with his father and after a little while, that naturally together, Ernesto was the result.

Q Was -- did Ernesto's father leave before he was born?

A Immediately after, two or three months, later.

Q Did Ernesto's mother, Maria, have mental problems?

A (No response.)

. . .

Q Did she have mental illness?

A Yes.

Q How do you know what happened that made you think that she had mental problems?

A She had been admitted several times at the Mazorra Hospital in Havana.

And when she used to come see me in the jail, political jail, she used to say that she had the power to put me free anytime. Because she used to control the

judges and all the authorities.

And some other occasions she used to tell me that she was being watched and that in the inside of the walls of her house there was microphones. And in the walls and everyplace.

And that constantly she's been pursecuted. That's when I noticed that she was not good in her head.

Q Okay. I have a question.

What kind of hospital in Mazorra Hospital?

A Only for schizophrenic people.

Q And did she have medicine that she took for her mental problems?

A Yes, she was in the medication in the hospital.

Q Did it affect her ability to be a good mother?

A The mental problems?

Q Yes.

A She was a good mother, but of course with her mental problems sometimes she used to go berserk. She used to get out of hand.

Q Did his mother remarry and did Ernesto have a step-father?

A Yes.

Q Did Ernesto get along with his step-father?

A No, that was one of the things they -- the husband and wife used to fight an awful lot, over Ernesto most of the time.

Q Did Ernesto fight with his step-father?

A Yes, on many occasions.

Ernesto was an introverted type of individual and he used to create things that never existed. Since he was a little boy he had inclinations to great adventures, and things that never existed, that he used to invent.

Q Okay.

Do --how old -- did he feel that Ernesto had mental problems?

A Sure. Yes, all the family used to think that way.

Q What did he do that -- tell us something that he did that made him think that?

A Sometimes we used to have a family conversation and we used to talk about things, and Ernesto used to get the lead and start talking about -- maybe laughing out loud and maybe talking about things that were not related to what we were talking about.

Q Did Ernesto look to him as a father-figure, look to Florencio? Did Florenzio feel like a father toward him?

A Yes, Ernesto -- especially the mother.

Q And did he try to advise Ernesto as a father would?

A Yes, of course.

Q And was Ernesto able to do the things that he had advised him to do?

A On the contrary, sometimes he used to have problem or fights with me because he wouldn't understand me.

Q Did Ernesto live with him when his sons were 12 and 13 years old?

A Yes.

Q And how did Ernesto compare to his sons; in his maturity and understanding?

A My children used to be more mature then he was.

Q Did he ever see Ernesto in the prison in Cuba?

A When I used to be in the prison called Combinado Del Estes -- not in the prison, because I was not finished yet, but on the outside.

Q Did --

A We were concentrated over there, because the political prisoners, to put us inside the prison.

He arrived from the eastern part of the island, where they had been prisoners and he came with a big group of prisoners from the east.

Q Was that Ernesto?

A Yes.

Q When was that?

A A year of 1976 almost at the end of around 1976.

Q Did he know that Ernesto had been in prison before that?

A Yes, he had been in prison since he was 15 years of age, just because of the

political problems.

Q And was he -- does he know that he was in prison after that?

A He was in prison until through 1976, and until the end of '77. Almost the beginning of '78, because he was in prison with me.

Q Ask him if Ernesto ever got an injury to his head when he was a boy?

A In prison he was hit in the head by a buckle, a buckle of a belt, because of a big brawl. I don't know how that happened exactly, I knew that he was wounded.

Q Were there other people in his family that had mental problems?

A A cousin of my father died in Mazorra in the same hospital, for the schizophrenic.

And my brother, a younger brother of mine had to be placed in a naval hospital.

Q And why did his brother have to go to the naval hospital?

A He was studying at the military academy, to study merchant marine, and he went berserk.

Q Did he ever say what his mental problems were?

A No, I went to prison and then I lost track of him.

Q Okay.

What kind of person was Ernesto, was he a mean person or a kind person or what sort of person was he?

A He's a very noble person. But he

has changes of personality and all of a sudden he's violent.

And then all of a sudden he's a noble individual he thinks or imagines big adventures, apparently he believes that he's living in a great big action, and someone that doesn't know him believes that he's right. But that's not the way.

Q Ernesto says that he went to Angola and to Nicaragua; did that happen?

A That never happened.

Q Was he ever a soldier?

A Never.

Q Did he ever have a gun when he was in Cuba?

A Never, none.

Q Was he in the civil service; do you know?

A When the political persons used to come out of prison, the government used to get them and used to get them in a collective type of work, but never military.

Q What kind of work did they do?

A Construction. That's what they used to put it, mainly put it into construction.

Q Did they wear a uniform?

A I don't believe so, but I'm not sure.

I was in prison for a long, ling [sic] time and from there I came directly to here.

Q And when Ernesto came to the United States, who did he live with?

A With him.

Q And how did he get here, did he come on the boat lift?

A By the Mariel Boatlift.

Q And how long did he live with you?

A Just around two years.

Q Okay --

A Because of the situation, the economic situation, in Florida back then, things became a little bit difficult and -- my trade is electrician and there was no work and I had to go up north.

Q Was there a lot of feelings in the Florida community, against the Mariel Cubans?

A Yes.

When something used to happen, even if it didn't happen because of a person from Mariel, they used to charge him to people from the Mariel. Not only the Americans, but even ourselves the Cubans.

Q Did it make it harder for him and his family after the Mariels came?

A Yes. There was no work.

Q In going back to Ernesto telling him fantastic stories, what kind of stories?

A In his imagination he used to build the sort of thing, like a movie or adventure. Like if he was participating in it. But it was not reality, sometimes we used to go visiting other people and he used to create all of a sudden a place where he had never been.

Q What kind of a place; can he think of one?

A Always, like to be a soldier he would -- and the adventure was in wartime -- war time adventure. And the problems with -- like the sports, like karate, and he used to get emotional about it.

Q How did he --

A And then by doing those things he believed that he used to live those moments.

Q What could happen when he would get violent; when he mentioned that he became violent?

A I used to be the one that used to calm him. I tried by all means when he used to become violent, I just used to soothe him down; cool him down.

Because in those moments he was not himself. But he -- then he ten minutes later, just like nothing happened.

Q When they would -- he has told him bad news, what is Ernesto's reaction?

A When I used to talk to him about problems in the family, he used to become nice and relaxed. But all of a sudden he started creating new things again, things that were not related to what we had been talking to him about.

Q Did he tell him that his mother was sick one time?

A Repeat the question for me?

Q Was there a time when he told him that his mother was very sick?

A When?

Q Any time.

A Besides the medical problems she used to be affected by asthma.

Q No, I was asking if -- did he tell to Ernesto, "Your mother is very, very sick."?

A Yes, I did.

Q And what did Ernesto do?

A Sometimes he used to react in some ways, and some times he used to react in other ways.

Q Did it seem that he didn't understand how serious the problem was?

A Yes.

Q Did Mr. Alvarez come to see Ernesto here at the Collier County Jail?

A Yes, he want to know which one is the Collier -- this one here?

Q Yes.

A Yes.

Q Did he go to see his lawyer?

A After what he did?

Q After the trial?

A Yes.

Q What did the lawyer tell him?

A That he could not defend Ernesto, and the way that he wanted to because due to the way that he gave him all the details. That if I would give him $20,000 for an appeal, that he would try to do the sentence that he had. Because he had known that many things were mitigating at the trial.

(T 762-72).

Q I want to know who was the government that put him in jail?

A This one now --

Q No -- was it Castro?

A Castro, Castro, he was the government, yes.

Q Why would Ernesto destroy phones?

A Because he was against the government.

Q And why did -- he was --

A It was a way of showing they they didn't like the system, subversive activities.

(T. 776). Pastor Gonzalez, the next witness to testify, was who had met Ernesto while he was in prison:

Q Do you know Ernesto Suarez?

A Yes, ma'am.

Q And how did you first know him?

A In a political prison.

Q Are you related to him?

A No.

Q When did you first see Ernesto in prison, the political prison?

A Just around the middle of 1976.

Q And did he ever see Ernesto or listen to Ernesto talking?

A In few occasions I could listen to him and -- on few occasions.

Q Okay.

When he heard him speaking, what was Ernesto talking about?

A It has been so many years and in prison you speak of so many things. I cannot recite with exactness what we used to talk about.

Q Did he ever notice anything unusual about Ernesto, when he --

A Well, without offending Ernesto, a few times I listened to him, and I noticed that he was full of fantasy.

According to what I could appreciate in him, I could see that he could not adjust himself to the reality that we were living.

And in the very few occasions that I listened to him, because in prison he was not a person that would speak too much, mainly he used to withdraw from the rest of the people.

He used to withdraw from the rest like he used to like solitude someplace else.

Q Did you believe the stories that he was telling?

A With me directly he didn't talk about anything unless it was the natural regular things. "Good morning; how are you.", the family --

Q Did he believe the stories that he heard him telling to other people?

A I couldn't believe him even if it was not my concern, but I could not believe it.

Q What is his occupation?

A (No response.)

Q What did he do for a job in Cuba?

A I was a teacher of primary school.

Q And does he feel that Ernesto may have had some kind of mental problems?

A I am not a medical doctor to determine that. But according to the knowledge that I have obtained from my school years, teaching school, I would appreciate that he's a person full of fantasy.

And certain times, in some other times, he has a complete different personality that is hard to believe.

He's sometimes -- he's quite reserved and he doesn't communicate too much.

Regularly a person like that, is not a person that then creates a big fantasy.

Q Did he act like he was superior to other people?

A Yes, you will excuse me, that is what I noticed as a fault in him, if you can call that a fault.

Q Yes.

A And in the short time that we were together, he used to want to make believe that he was superior to anyone else. He felt important.

In the inside situation that he was living in, at that moment, yes.

Q Did he ever make any comments to the guards?

A He used to look at the guards with contempt.

With political prisoners, that's against the communism, he could not see with respect, a political guard.

But he used to exceed himself at times; he used to exceed himself in this matter.

Q How did he exceed himself?

A Because he used to look at the guards, not only with contempt, but also as not only as a political guard, but as his enemy.

Q Okay --

A But on the other side was the respect for the political prisoners, and he used to be nice and decent and quiet, correct. But with the guards he used to be imperative.

Used to clash with them.

I would like to stand myself, but I'm not a lawyer for the defense, and besides that, they told me to 'make it short'.

Q How long was Ernesto in prison with him?

A He was approximately in prison one year with me.

Q Just --

A I cannot say with exactness, exactly.

. . . .

Q Which lead you to believe that they were fantasies?

A I heard him many times talking and I vaguely remember -- about his military life. Like if he knew many things about the

military. Knowledge that even if I was not a military man, I used to conspire inside of the army, and I used to know how the whole system worked. And I used to know a military man, only if I listen to him. You know, that if he was a military man or not.

So I knew that he was ignorant completely ignorant person concerning that matter.

He used to express himself like he knew an awful lot about the military life.

Q Do you recall anything that he said, did he do anythig that you remember, say anything that you remember that he was in the military?

A No, I cannot precisely say so.

If I would say anything else, I would be lying.

(T. 777-86).

Mr. Suarez's step-sister, Marta Sanchez, also testified at the evidentiary hearing.

Q And do you know Ernesto?

A Yes.

Q And is he related to you?

A He is my brother.

Q Okay.

Do you have the same mother?

A No.

Q Do you have the same father?

A Yes.

Q Did you know Ernesto in Cuba?

A Yes.

Q When did you meet him?

A In '78.

Q Okay.

And did you see him fairly often?

A Quite often.

Q And when did you leave Cuba?

A 1980.

Q Was that with the Mariel Boatlift?

A Yes.

Q So you knew him from 1978, until you left in the boatlift?

A Yes.

Q About how often would you see him?

A Almost every week.

Q And did you ever notice that Ernesto had any kind of problems?

A With his family, with his father.

Q What problems with his father?

A With his step-father, he didn't get along at all.

Q What would happen?

A Always arguing with one another because the step-father didn't love him at all.

Q Did you feel sorry for Ernesto

because his family had trouble?

A Yes, because my -- his father didn't get along with my brother at all. And the mother was suffering quite a little bit.

Q What was wrong with his mother?

A She used to suffer problems of the father and Ernesto, and the -- the step-father.

Q Did she know if Ernesto's mother ever went to see a psychiatrist?

A Yes.

Q And did she take medicine?

A Yes.

Q Does she know if she ever gave any of that medicine to Ernesto?

A Yes, she used to give him her medicine.

Q Did the family think that Ernesto had mental problems?

A Yes.

Q What kind of things did he do that made her upset?

A Because his childhood was not as pleasant -- not at all, like a normal person. He was raised practically alone, he didn't have the support of the father.

Q And what did this do to him?

A He was greatly affected, because he used to seek the refuge of friends and other people, but not at home.

Q And did he say things that made her think he had mental problems?

A Yes.

Q Such as?

A He used to say one thing and then he used to twist things around and say other things.

Q Did he have problems keeping things straight when he was talking?

A It depended on the way he was, that he woke up that day.

Q Did he have good times and bad times?

A Yes.

Q Okay.

Did he ever laugh when it didn't seem to be the right thing to do?

A Yes, he used to laugh at everything.

Q Did he ever talk about Angola?

A Not to me, no.

Q Not to you --

A He never went to Angola.

Q He never went to Angola?

A That's what she said.

Q Do you know that?

A He never went to Angola. I met him in '78 --

Q Okay.

To get in the army, do you have to

belong to a communist organization?

A They have the military service they all have to belong to.

Q To be a communist, or --

A No, you're forced to belong to the army anyway.

Q Why didn't Ernesto belong to the army?

A Because he was not well. I don't know, but I don't think that he was in the service and he was not well anyway.

Q Did she see Ernesto here in this place, in Naples?

A Yes, right here in Naples.

Q Was he in jail?

A Yes, right here in jail.

Q What was his attitude about his charges?

A Normal, he said not to worry about it.

Q Did you think that he was taking it seriously enough?

A No.

Q Do you think that he realizes how serious his charges were?

A No, he didn't.

(T. 789-93)(emphasis added).

During cross examination, Ms. Sanchez stated that:

Q And Ernesto's mother is crazy?

A She's had very serious mental problems and she was in Mazorra Hospital.

* * *

Q And --

A The step-father [Mr. Suarez's] used to mistreat him.

Q Would he hit his step-father?

A No, he never hit him.

Q Then what was the violence that she was talking about?

A They were arguing because he was the son of another man, and the step-father would not accept that he was the son of another man.

Q Did you see him change moods?

A When the step-father used to arrive, it was a different person.

Q And how would he be when the step-father would arrive?

A Because as soon as the step-father used to come in, used to have problems with the mother, and Ernesto used to come in and defend the mother.

Q So he intervened in quarrels between his mother and his step-father?

A Yes, because the step-father always rejected him.

Q Okay.

(T. 794-95).

Mr. Ricardo Alvarez, a cousin of Mr. Suarez testified at the hearing.

Q Do you know Ernesto Suarez?

A Yes.

Q And how do you know him?

A I know him -- I know him about maybe when I was 11 years old.

Q Okay.

And how are you related to him?

A Yes, he's my cousin.

Q He's your cousin?

A Yes.

Q And where did you first meet him?

A Well, I saw him once in Cuba.

Q In Cuba?

A Yes.

Q When did you come from Cuba to the United States?

A I came in 1979, 1979 and then after that -- I was 11 years old and then I -- about maybe a year, I saw him, you know, come from Mariel. You know, from those -- how you call it -- from --

Q From the boatlift, the Mariel boatlift?

A Yes.

Q All right.

And why was it that you didn't see him more when you were in Cuba?

A (No response.)

Q Where was he?

A Well, I guess he was in prison in Cuba.

Q And how old are you now?

A I'm nineteen.

Q Okay.

And when he came with the Mariel, did he come to live with you?

A Yes.

Q And how old were you then?

A I was about 11 or 12 at that time.

Q How did Ernesto act when he was with you?

A Well, he acted, you know, very good.

He took us to a lot of places, he played around too much with us.

Q He played around with you a lot?

A Yes.

Q All right.

Was there ever a time when you thought that he told things that weren't true?

A Yes, he always was telling me stories, fantasies, you know. And he was telling me stories about movies, you know, that -- I can't believe that -- you know, these was really existing and about wars and all.

Q He told you stories about movies, as if it was real, as if it had happened to him, is that what you're saying?

A Yes.

* * *

Q I'm sorry, I didn't understand your answer. I was trying to clarify that.

Do you know what kind of stories he would talk about?

A He would tell stories about war, about karate and all that.

And then he -- sometimes he makes up, you know, the stories like if he was reliving that.

And that's in -- you know, if he really was there like. You know.

Q And in these stories was he an important person?

A Yes.

Q And did any of the stories -- was there anything about the way that he -- his conversation was, that you thought was unusual?

A Yes.

Q What was that?

A He'd been inventing things, you know, that would not be possible. And he was -- he said some things that he doesn't -- you know, make good sense with.

And, you know, but even telling people, when they say -- that the stories, you know, is not --

Q Okay.

When he -- did you feel that -- how old was he about then, was he older than you?

A Yes.

Q About how old?

A About nine or ten, maybe more.

Q Years older than you?

A Yes.

Q And -- did he act -- how did he act in comparison to you, as being an adult, mature, type of person?

A He used to be like if he was playing, and you know, and I was nine or ten or something like that, and just -- baseball and things like that, he was thinking like me, like a little kid.

Q Was there ever a time when you noticed him playing with little toy cars or anything like that?

A I -- yes, once.

Q And what had happened then?

A He was playing like a little kid with the cars, he also like to see too many movies on the TV. Like cartoons.

Q Okay.

Did he ever do adult things, like read the newspaper, watch the news on the TV, or that sort of thing?

A No, I never seen him do that.

Q Did he ever -- lose control of himself, or have any violent problems?

A Sometimes, yes.

Q Would that happen over big things, little things, when would that happen?

A Little things.

Q Little things -- was there a time when he did something with you that was -- oh, -- violent, or a little scarey for you?

A Yes, once I was playing right and when I was doing something, you know, really -- that doesn't make any sense, he might get angry. And I might get scared.

So --

Q Was there something involving the swimming pool?

A Yes, once, you know, we was playing and I might -- I told him something, and throwed something at him and hit his forehead. So he got angry, so he jumped up and then he was trying to drown me, you know, in the water. But I was just playing, you know, and that scared me.

Q What about when you would be playing around fighting with him, just in play?

A Oh, playing around -- sometimes his -- he would be playing, but he would lose control. He didn't know -- and he would start hitting hard, hard. he didn't know he was just like playing.

Q Well, were there times when he was nice?

A Oh, yes, yes.

Q Was he normally a nice person?

A Yes, quiet, he was always quiet and laughing all the time.

Q And was he -- during this time, was he easy to get along with?

A Yes.

Q And what would happen, when -- how would it happen that -- when he wasn't nice, was it sudden or was it slow or how did that happen?

A When he wasn't nice, he just would get mad and then he would just get out. You know, just go away and then he might come back about two or three, few minutes you know, and then he might forget about everything.

Q He would forget what had happened?

A Yes.

Q Were there ever times when he thought strangers were trying to hurt him or were bad people?

A Yes.

Q How did that happen?

A Well, I seen in -- you know, we went to the store and then there was two persons there, and then there was -- like looking at us. And he was looking at them.

And then he said, you know, to get back. He said -- he wanted me to get back, that maybe they wanted to start a fight or something like that, or start trouble.

Q Did you see anything wrong with those two people?

A No, I don't -- no.

Q That was in his mind?

A Yeah.

Q Did he ever make up stories about being a soldier?

A Soldier --

Q Or about being in the war?

A No.

Q He never told you any stories about that?

A Yeah, he told me -- he told me that he had been in other places, but I didn't -- you know, I didn't pay attention to that.

Q Did you believe these stories that he told you?

A Well, --

Q About Ninja and karate?

A No, not really, no.

Q Did he ever tell you about that he saw something that wasn't real?

A One time he was talking about -- about -- we was talking about space ships and all that. And then the other day he came and he said -- he told me something that he heard a tremendous noice [sic], and his car starting functioning, started by itself. And it was -- making, you know, strange sounds, like you know, like that -- just look like that he was starting the car.

And I seen -- you know, I heard something like some real, real strange. And I was seeing something in the sky, you know -- like that was a space ship or it sounded like it.

Q He was telling you this?

A Yes.

Q Now, if you had been asked to tell these same things back at his trial in 1984, would you have been willing to do that?

A Yes.

(T. 832-40).

Cristina Alvarez, Mr. Suarez's aunt also testified at the evidentiary hearing.

Q And do you know Ernesto Suarez?

A Yes, I know him for 20 years.

Q Are you related to him?

A I am his aunt.

Q And how old are you now?

A Forty-one.

Q And how did you first meet Ernesto?

A When I married Ernesto's uncle, I met him for the first time?

Q And did you know Ernesto's mother?

A Yes.

Q And what was her name?

A Teresa Alvarez.

Q And was there anything about Teresa that made you think that she had a mental problem?

A Yes, Teresa Alvarez was mentally disturbed.

Q Was there anything that you know that she did that made you think that she had a mental problem?

A She used to say that there were hidden microphones all over the house, under the table, under the bed, and in the walls. And that she was being chased or watched by

many people.

Q Did she ever have to go to the hospital for that?

A Yes, she was admitted to the psychiatric hospital for mental patients.

Q Was there anything about Ernesto that made her think that maybe he might have some mental problems?

A He used to speak -- but he could not coordinate. He used to imagine many things that were not true.

Q Explain what you mean by "he could not coordinate."

A He used to speak and then he used to invent an awful lot of things.

And when he started talking he used to transport -- he was a completely different person, he wasn't the same one.

* * * *

He used to say that he had been in many different places, but that was not true. Pure imagination.

Q What places?

A He had been in Angola and in different places. It was a lie. It was not true.

He had an awful lot of imagination.

Q Did Ernesto always have this problem with telling stories?

A Yes, always, always.

Q Did he have to go to prison in Cuba?

A Yes.

Since he was 15 years old, he was in prison in Cuba.

Q And why did he have to go [sic] prison?

A He was against the regime, and he used to break telephones. And he was against the government, and that's why he was put in jail, because of political reasons.

Q Were things very hard for Ernesto after Castro took over the government?

A Yes, very difficult.

Q Was the family very poor?

A Yes.

Q And what did they have to eat?

A More of [sic]less sometimes rice, beans, sometimes meat, more or less that.

Q What was the meat ration, how much meat did people get?

A I don't recall -- but we used to get meat every 15 days, very small amount.

Q How many meals a day were you eating?

A At least one.

Q Did Ernesto ever tell her anything about that he thought he had cancer?

A He called me here from prison, and he told me that he had a tumor in the head, that he thought it was a cancer because of thinking so much.

He had a wound in the leg, and that he had taken 24 stitches.

And -- he knew that I knew that was a lie, because he used to invent things quite often.

Q Were there other people in the family besides Teresa that had mental problems?

A Yes, Peter Alvarez, an uncle, Ernesto's uncle. And another uncle -- but on the other side of the family.

Q If you had been asked to come to Court in 1984 at Ernesto's trial, would you have been willing to testify to these same things?

A Yes, I would. I would have.

Q When Ernesto came to the United States, did he come -- how did he get here, how did he come?

A He came out of the political prison in Cuba in '77. And he came over here in 1980. And he was living with us for about 18 months.

* * * *

Q Did you stay in touch with your family that is still in Cuba?

A Yes.

Q And when we contacted you, did you give us telephone numbers where we could reach the [sic] Ernesto's family that lives in Cuba?

A Yes.

Q And who did you tell us how to contact or who we should talk to in Cuba?

A Some very close friends of ours that live in Cuba. That way we could communicate with the family.

Q Could you give us the names of some of the people you told us we could talk to in Cuba?

A Mrs. Elba, E-l-b-a, Morejon, M-o-r-e-j-o-n.

Q And who could she find for us to talk to?

A Ernesto's family.

Q I need to know their names?

A Maria Gonzalez, Orpedro Alverez, Marcella, Rosalon, R-o-s-a-l-o-n.

Q Who else?

A Only those three.

Q And is it your -- were some of the phone calls to Cuba made from your house, or did Francisco tell you? Did you have any knowledge of the phone calls to Cuba?

A Yes, we called Cuba sometimes.

(T. 845-51). During redirect she stated:

Q Christina, you mentioned that Castro had done bad things to Ernesto's family; is that correct?

A Yes, to the family, yes.

Q Did he put your husband in jail?

A Yes, and my brother-in-law.

Q Were they important people to Ernesto?

A Yes.

Q Did he feel that because of that --

A Yes.

Q --is that why he was against the Castro government?

A Yes.

Q Did you ever visit him in prison?

A When he was in the Combinell (phonetic) he was in prison with my husband.

Q Did you visit him there?

A Yes.

Q When he told fantasies or stories, did you think that was normal?

A No.

Q Did the family think that he had a mental problem?

A Yes, they thought that way because of the things that Ernesto said.

Q Did he have a hard family life?

A Yes.

Q Why; what was -- explain.

A He was raised without a father, and then he started having trouble with the stepfather, and then he used to run many times to grandmother's house.

Q Did he run to his grandmother's house to get away from his stepfather?

A Yes, yes, to the grandfather because he used to mistreat him quite a lot.

Q And did his mother also -- did he have problems in his family with his mother?

A Yes, because he used to see the

condition the mother was. She was sick.

(T. 856-57). Another one of Mr. Suarez's cousins, Lasero Alberto Alvarez, also testified:

Q . . . Do you know Ernesto Suarez?

A Yes. I have known when [sic] I was about like nine years when he got out of prison in Cuba.

Q And when he got out of prison, how would you happen to see him?

A Well, he was going to my grandmother's house quite often. He was living with his mother. And he always, you know, he looks like when he talks like -- when he talks like in front of my grandmother, he was like strange. Something like nervous, something like that.

Q So you could tell from the way he acted?

A Right. I was young but I can tell by, you know, by looking at him.

Q Did you ever have -- go to prison to visit or see him?

A Well, when my father was in prison I went over there and he was with my father in prison. I saw him a couple of times.

Q Do you know how old you were when you came to the United States?

A Yes, I was about 11.

Q And how old were you when Ernesto came to live with you?

A Twelve.

Q Was that right after he came, too?

A Right. I came 1979, he came in the year after.

Q Now, when you lived with him in -- or knew him in Cuba, did you remember anything about him having trouble getting along with people?

A Well, I used to stay with his mother. I don't -- weekends and he was staying, he was living there. From then on I always appreciate. I was, you know, taking a look at him and he was and always just like doesn't get [sic] with his, his stepfather. He was always, you know, he was always, like, fighting with his stepfather.

Q They didn't get along?

A They didn't get along to well. And his mother, he told that his mother was -- he told that his other were like telling him to drop off, to get out of house, and he was like crazy. He was like, you know, like he couldn't stand it.

Q Because they didn't want him there.

A Right. She want him but he knew he didn't, you know, he didn't realize that her mother -- his mother was trying to get along with both of them and he only knew that him -- his mother didn't defend him. You know, that he was putting in another side, and that's why he was, you know, finally step -- he never got along with his stepfather, never.

Q Was there anything else? I don't know if there is or not. Was there anything else that happened in Cuba that made you think that he might have a mental problem?

A In Cuba. Well, from I know, he was -- well, from what I know, the family always said that, and then he was always out of his mind. He was, like, strange, like, you know, he was talking to you in some way and then

change to a different kind of talk. He was calm, and five minutes he will start yelling or something for nothing.

Q Would that happen suddenly?

A Yes.

Q Would it be over an important thing or a little thing?

A Well, important thing or little thing, it doesn't matter. It won't matter.

Q Would you be able to talk to him sensibly when he got upset like that?

A Well, sometimes yes, sometime no, because he got more angry, and you can -- you know, you just got to keep talking to him just like he wants to be, he wants the thing be.

Q In other words, you had to go along with him?

A That's right, along with him, right.

Q When he came to live at your house in Miami, what did you observe about him then?

A Well, he became, he came to our house to live 1980 when he came from Mariel, and then I -- I was bigger. I can appreciate more what Ernesto was doing. He used to play with me when little and with me and my brother with little cars, playing like cowboys. He used to get real angry, sometimes, and then you cannot contradict him.

Q Did he, when he was playing with you, --

A Right.

Q -- was it like a grown-up playing with little children?

A Well, it was like me, it was like me, because I was small and I had more sense than him. I was more, you know, I were -- and I had more responsibility than him. He just, he acted like a little boy.

Q Did he ever make up stories?

A A lot of times.

Q What kind of stories did he tell?

A Well, like he had been to training, to training service. That he had been in -- in service, military service, and he always be the leader. That he, you know, he was making like a movie, he was making like a movie, and try to -- to put it in real life.

Q Did he --

A I wasn't sure but I couldn't tell because he was a lot of strange things that he said that wasn't really true.

Q Like what were some of the stories; give us an example?

A Well, he says, like he been in armed forces and he was the captain, that -- and he was the leader . That he was -- that he had a special training in everything, something like that.

* * * *

Q Did he ever say that he had gone to Angola?

A Yes, many times. And I don't think so because I don't think that political prisoners in Cuba can be sent to Angola, no way.

Q Why is that?

A Because he didn't represent -- first of all, when in prison, he's political prisoner in that country. They can be, you know, like Castro. He can be, you know, trusting to go Angola to fight for him. That's impossible.

Q So if you are against Castro --

A Right, if you were against Castro, no way you can be civil and no way you can be in [sic] soldier and no way you can be anything.

Q Did he ever have any fantasies that had to do with Castro?

A Well, he told a lot of time that he were in -- that he were a soldier for Castro, that -- but he -- I'm telling you, it wasn't true. I can't be true.

Q It can be --

A He was a political prisoner.

Q Did he ever say he had been in the secret police?

A Yes.

Q Was that true?

A No.

Q Did he ever say he was a "Ninja"?

A Yes. A couple of times he would say that he were, like, he knew karate a couple of time. And he used to make story like he had been karate, and which wasn't true.

Q Did he seem to believe these things?

A Yes, he seems like real but it was all a fantasy. He get -- he was watching

a movie, he used to watch a lot of cartoon movies. He was watching a movie, and in that movie he will make a story for him. Like, he was him. All the kind of movie that he made, he was the leader. He pretend to be the leader, you know, the main man.

Q Would he make up a lot of details to prove --

A Yes, a lot of details. He seems true, it seems true but we knew it wasn't true.

Q When he would lose control or get angry --

A Right.

Q -- did he look any different?

A Yes.

Q How is that?

A His eyes. You can see how his eyes goes like very big. He look at you and in some way that you get scared. And well, sometimes he was starting with him, and then he look at me. And then I was, like, going -- but he now, he was talking to you and then from minute to minute he changed.

Q He changed the subject?

A He changed the subject, right. He's talking to you for one thing, and then he changed to another thing.

It doesn't make any sense.

A He used to make story that doesn't make any sense, either. He used to tell something about this and then something about that. And now you can't tell him no because he get angry and you can, you know, tell him no but --

Q So you had to go along with it?

A Right, more mature than him, and I was like 12 years old, that's it. Things that I didn't do, he would, you know, he always do it. Like playing with him, when I was 12 I didn't play with little cars and he did. And played like cowboys with plastic machine guns and all that kind of things.

Q If you had been asked to come to his trial in 1984 and tell these things about Ernesto, would you have been willing to do that?

A Of course I would.

(T. 858-67). Alberto also testified as set out previously that he had placed calls to Mr. Martin on behalf of his father.

Mr. Facundo Legras Leyva, a friend of Mr. Suarez, testified on his behalf:

Q And do you know Ernesto Suarez?

A Yes.

Q And how long have you known him?

A Since 1980.

Q And did you live with him for a while?

A Approximately six months.

Q After that did you keep in touch with Ernesto?

A We used to see each other frequently.

Q After the Alvarez family moved to New Jersey, did you still see Ernesto?

A Once in awhile I used to see him.

Q And when you saw Ernesto, was there ever anything that made you think he might have mental problems?

A About a week after I met him I noticed that.

Q And what was something that made him think that?

A The change in character.

Q Please explain.

A The change in moods. One day he was happy, the next day he was looking at you in a funny way. And things like telling a story that was not related with what we were talking about at that moment.

* * * *

Q Did you observe him playing with the Alvarez boys?

A On many occasions.

Q Did he interact with them like another adult would?

A The adult will play with the child as an adult. But he was also with little cars and things like that, like a small child.

Q Was Ernesto a nice person?

A A good fellow, but with that problem.

Q Did he ever observe anything about why Ernesto had problem working with his occupation as a carpenter?

THE INTERPRETER: Will you repeat that again?

BY MS. DOUGHERTY:

Q. Did he ever observe that Ernesto had any troubles with his occupation as a carpenter?

A. He was a carpenter and I went to, I even went one time to where he works.

Q. And what happened?

A. I went to see him there because I had no work at that time. And then he left the carpentry and he said, "Come with me to see if we can find some work for you."

Q. And then what happened?

A. And he said that, he was bragging, that he knew the way every machine worked over there. Which was not true because he had a little separate compartment over there.

Q. Did he do anything with these machines?

A. The circular saw he used to work one, but not all the other ones. He was a helper to a carpenter. An apprentice.

Q. Was Fagundo [sic] at all concerned about what was going on when Ernesto showing him these machines?

A. Yeah. When he showed me the place there was another man, was the real head man of the establishment, and he didn't fool around with any machine because they were off at that moment. But the way he bragged about that, he knew all those machines, he could run all of them.

Q. When Ernesto would go, did Fagundo [sic] ever go out in public with Ernesto?

A. Yes.

Q. Would he act strange around, did he act unusual around strangers as well?

A. Yes.

Q. Did people seem to recognize that he had a mental problem?

A. Yes. Many of our friends, they used to say "That guy's crazy, he's not well."

Q. Was it common knowledge that he had a mental problem?

A. Yes.

Q. Did he make up stories?

A. Effectively, yes.

Q. If the lawyer, if Ernesto's lawyer had asked you to say these things in Court in 1984, would you have been willing to do it?

A. Yes. Of course.

Q. Okay. Would there be other people in the community or that you know of that could say that Ernesto had mental problems?

A. Yes. If you go to Miami, yes.

(T. 875-78)(emphasis added).

Mr. Humberto Pujals, the court appointed translator, asked to testify on Mr. Suarez's behalf. As a Cuban National, he had personal knowledge regarding activities to disrupt the Cuban communist government. He felt personally offended by the State's claim that damaging phones or other Cuban government property was nothing more than vandalism. Mr. Pujals thus testified:

Q. State your full name for the

record.

A. Humberto Andrea Pujals.

Q. Dr. Pujals, where are you from?

A. Cuba. Originally.

Q. What is your age at this time?

A. 67.

Q. And how old were you when you left Cuba?

A. About 40, 41.

Q. And did you have personal knowledge of the activities of people and organizations trying to disrupt the Castro government?

A. I was in the, a counter-revolution movement in Cuba and we tried to disrupt anything that would help [sic] the system.

Q. And what did that include?

A. Well, it includes little things like we didn't have any money anyway, so the only thing that we could do -- I never did it -- but he said about ripping the seats in a bus. Everything belongs to the government, so any little thing that you would do it would hurt the government, who was having economical problems. I remember going to the Radisson Hotel or any one of the big hotels in Havana, putting the nickel in the machine, and what time I was talking to no one, just unscrew the mouthpiece and take the magnet that was inside and just take it with me.

And that would be, we would have done that 10,000 times every day. Was a big problem for the government, interrupting any communication, cutting the wires in any place that we could find them. And of course, we would run into trouble, big trouble, if we were caught. Fortunately, I didn't get

caught.

(T. 893-94).

If Mr. Martin would have returned the phone calls made to his office by the Alvarez family, he would not only have discovered this information but he also would have been put in contact with the family members who remained in Cuba and who provided additional information useful as mitigating factors. The information would have also warned Mr. Martin, and put in question Mr. Suarez's competence to stand trial. These affidavits would have described Mr. Suarez's and Mr. Suarez's mother's mental problems. They would have shown a family history filled with relatives who had been treated for mental illness. Medical certificates corroborating the information would have been available to Mr. Martin if he would have just returned the phone calls. Mr. Martin's failure to contact the family, under such circumstances, cannot be excused.

Further, the information from the family would have led to further evaluation of Mr. Suarez's mental health (T. 713). This in turn would have led to the development of additional testimony in mitigation. Proffered by Mr. Suarez was the testimony of Dr. Krop. He indicated that in light of Mr. Suarez's mental illness that statutory mitigation was present. He found Mr. Suarez had both extreme mental or emotional disturbance and a substantial impairment of his capacity to appreciate the criminality of his

conduct or to conform his conduct to the requirements of the law.

It is clear in this case that counsel's failure to return the phone messages from Mr. Suarez's family was deficient performance which undermines confidence in the outcome. Substantial mitigation was kept from the jury. There exists a reasonable likelihood that but for the deficient purpose the jury would have recommended a life sentence. As a result Mr. Suarez's sentence of death must be vacated.

C. DUTY TO RAISE INCOMPETENCY

At the hearing on the motion to vacate judgment and sentence, the trial judge refused to permit evidence regarding Mr. Suarez's competency in that there were no reasonable grounds to trigger a request for a competency evaluation. In support of this position, the court cited Blanco v. State, 507 So. 2d 1377 (Fla. 1987). Initially, Blanco does not justify the denial of an evidentiary hearing to determine whether sufficient circumstances exist to trigger a competency hearing. Secondly, unlike Blanco, Mr. Suarez suffered an ongoing major mental illness with active symptoms from childhood to the time of the offense.

A criminal defendant is entitled to post-conviction relief if he can demonstrate that he was not legally competent at the time of his trial. See, e.g., Hill v. State, 473 So. 2d 1253 (Fla. 1985). Mr. Suarez was not competent at the time of his

1983 trial. However, no one conducted the requisite evaluation -- counsel failed to ask. A request was made to have Mr. Suarez evaluated and treated following a suicide attempt; however there was no competency evaluation requested or obtained. As an indigent whose mental capacity is at issue at all stages of a capital case, Mr. Suarez was entitled to a competently conducted psychiatric or psychological evaluation. Defense counsel failed to obtain a competency evaluation despite evidence readily available to counsel that would have established, at a minimum, the need for a professional competency evaluation and a hearing on the defendant's competency. Defense counsel failed to recognize obvious signs and symptoms of Mr. Suarez's mental deficiencies and emotional disturbance which was compounded by his inability to speak English and his lack of basic knowledge concerning the American criminal justice system. Counsel failed to obtain his client's jail records -- records raising serious doubts about Mr. Suarez's competency. Counsel did not recognize the obvious signs of mental illness in a statement which Mr. Suarez prepared at the request of his attorney. Counsel failed to return telephone calls from family members who could have explained a history since childhood of deprivation and serious head injury as well as delusions, fantasies, paranoia, and a family history of schizophrenia. Family members also testified that Mr. Suarez, after being incarcerated by Fidel Castro for

anti-communist activities, was placed in the mental ward of a Cuban prison. This history when coupled with Mr. Suarez's inability to speak English and his lack of knowledge and understanding of the basic concepts of the American criminal justice system established his inability to function as competent in a trial setting. Mr. Suarez was not competent under Rule 3.211 and counsel failed to raise the issue.

Trial counsel Larry Martin requested that Mr. Suarez prepare a written life history. This written statement was then translated from Spanish to English and reviewed by Mr. Martin. The English translation was introduced as evidence during the hearing on the motion to vacate as defense exhibit #1.

This statement by itself, should have alerted Mr. Martin to Ernesto's mental condition. The statement reads like an adventure story straight out of a James Bond novel. It relates numerous heroic deeds, all a product of Mr. Suarez's delusional mind.

Mr. Suarez claimed to have been a member of the Marine Infantry in Cuba, to have escaped the military service and to have been allowed to join the army again. (Defense exhibit 1, page 2). He claimed to have been sent to Angola where he was involved in over 14 combat missions. (Defense exhibit 1, page 2-3). He said that he was called the gypsy, "because I had more than seven lives." (Defense exhibit 1, page 3). He wrote that

while in Angola, he feared that he would be thrown into the sea, "or end in the cauldron of some cannibal, or undergo the experiments that the pygmies make on their prisoners," that they had to fight like lions (Exhibit 1, page 3).

Mr. Suarez then claimed to have been returned to Cuba as a prisoner, but nevertheless offered a job as a soldier or policeperson or to "hunt crocodiles in the swamps" (Defense exhibit 1, page 3), and that he decided to work for the Department of the Interior because "going on wearing green was logical" (Defense exhibit 1, page 4). He then claimed to have been an electrician with a military unit, and later a member of a branch of the Cuban Security force, among other police-related jobs (Defense exhibit 1, page 4).

Mr. Suarez wrote that he then left Cuba to immediately join guerrilla groups and that he participated in "<u>millions of infiltrations in Cuba</u>" (Defense exhibit 1, page 5). He claimed that the FBI had proof of his activities and that he was returned to the U.S.A. by a Korean boat, and by a plane chartered by the British Army on another occasion (Defense exhibit 1, page 5).

He then claimed to have been at the Bay of Pigs, and that later he joined the Nicaraguan army under the command of ex-General Zomosa, [sic] the deposed ruler of Nicaragua, where he was the leader of an armored division (Defense exhibit 1, page 5). Mr. Suarez also claimed to have been promoted to sergeant-

major and chief of the military police (Defense exhibit 1, page 5).

Mr. Suarez then related to Mr. Martin how since he had been in the United States, he had been kidnapped to be taken back to Cuba and how he had to escape by jumping out of a moving car, that he was knocked down by a car while the driver yelled viva Fidel, and that he was shot at (Defense exhibit 1, page 8).

Mr. Suarez also indicated to Mr. Martin that the night of the incident he felt as if he were driving a truck on a battlefield with grenades being thrown around him (Defense exhibit 1, page 10).

These stories should have alerted Mr. Martin. A cursory check on some of the claims made by Mr. Suarez would have revealed that the stories were not true. Immigration and other official records would have revealed to Mr. Martin the make-believe nature of Mr. Suarez's biographical tale. The inconsistencies and the larger than life tone in Mr. Suarez's biographical story are hard to ignore. Further, it is unlikely that a person that possessed the skills claimed by Mr. Suarez would have resorted to picking tomatoes in order to make a living. Obviously, Mr. Suarez lived in a fantasy world.

Mr. Martin never checked Mr. Suarez's claims and in effect presented a defense based on a paranoid delusion. If he had done the requisite checking he would have discovered that Mr. Suarez

lived in a fantasy world and was in fact incompetent.

Six family members testified at the hearing on the motion to vacate that they were present in the United States and would have been willing to testify at Mr. Suarez's trial had they been asked to do so. Further, they testified that they had called Mr. Martin's office on numerous occasions prior to trial beginning over two months before trial but that their calls had never been returned. Mr. Martin agreed that he had received these calls and had still not contacted the family (R. 676-79).

Had trial counsel contacted the family, he would immediately have been informed that Ernesto suffered from a long term mental illness. He would have learned that Ernesto had suffered from delusions of grandeur and adventure since childhood. He would have learned that family members who had lived near Ernesto continuously could conclusively state that he had never been a soldier. The family would have informed counsel that numerous family members, including Ernesto's mother, had suffered from acute schizophrenia.

However, even without contacting the family or checking into the truthfulness of Mr. Suarez's delusional claims, there was ample evidence in the records of the Collier County Jail to indicate serious mental illness which should have triggered an incompetency inquiry.

Included in the Collier County Jail medical records, there

is a letter to Dr. Lombillo stating that Mr. Suarez had attempted suicide, that he had requested, in two separate occasions, to speak with the psychiatrist again and that he had been prescribed anti-psychotic medication (Defense exhibit 4, letter to Dr. J.R. Lombillo from John P. Kmetz, PA-C, dated July 6, 1983). These records were available to Mr. Martin throughout but he failed to check them.

The records also reveal that Mr. Suarez had tried to hang himself while imprisoned (Defense exhibit 4, June 14, 1983 Incident Report, and also Jail Medical narrative, June 14, 1983). Notes from several inmates expressed concern, Mr. Suarez was reported to be crying and trying to hang himself (Defense exhibit 4, Attachments to June 14, 1983 Incident Report). Mr. Suarez tried to kill himself a second time with a torn sheet and had to be "cut down" by a jail officer (Defense exhibit 4, March 26, 1984 Incident Report).

In addition to the above events, the jail medical records also record numerous symptoms of mental illness that should have alerted Mr. Martin. The records indicate that Mr. Suarez complained of pain around the heart and hands, nervousness, tension and that he did not eat for seven days upon incarceration (Defense exhibit 4, Jail Medical Narrative, April 1-6, 1983). The Medical Narrative described an inability to sleep, nightmares "with scenes of the war" and revealed that Mr. Suarez had been

prescribed medication (Defense exhibit 4, Medical Narrative, April 18, 1983). According to the records, he complained of being bitten by cockroaches and that when he awoke in the mornings he was covered with biting roaches (Defense exhibit 4, Jail Medical Narrative, August 25, 1983).

Mr. Martin would have also learned that Mr. Suarez was experiencing fever, headaches and chills every night and that he heard noises in his ear (Defense exhibit 4, Jail Medical Narrative, November 9, 1983). He also felt pain around the heart and nervous, when he tried to eat he vomited (Defense exhibit 4, Jail Medical Narrative, November 25, 1983).

The jail records refer to sudden flashbacks, and to seeing a soldier on top of him "cutting him with a bayonet" and thinking that he is bleeding (Defense exhibit 4, Jail Medical Narrative, March 9, 1984).

The final entries indicate a history of hallucinations and flashbacks, and document that Mr. Suarez was placed on antipsychotic medication, Mellaril (Defense exhibit 4, Jail Medical Narrative, March 26, 1984).

Ernesto's fantastic stories were seemingly without end. He advised Dan Monaco that

> Q Now, in the course of your talking with Mr. Suarez, did you discuss with him his military experience in Angola?
>
> A Yes.

Q Did you every check to verify the accuracy of that report?

A I attempted to.

Q What attempts did you make?

A He gave me the name a purported CIA Agent that he had dealt with throught -- apparently through his background. That I don't recall now.

He had a card of some sort with somebody's name on it in his wallet, and I attempted to contact ther (sic) person on the card but I never could get in touch with him.

He apparently told Dr. Lombillo the same story. And I attempted to verify with Dr. Lombillo.

And I believe that Dr. Lombillo thought that he had been telling the truth about it.

Q Now, as far as the phone number that you were given in Miami, did anybody ever answer.

A No.

Q You just never got anybody to answer? You never got in touch with anybody. Okay.

Can you recall whether you made any attempt to contact the CIA directly to see if you could tract (sic) down the Agent?

A I did not. No, I did not.

Q Did you have doubts about the creditability of the story with regard to having the CIA Agent that would be able to verify that?

A I had some doubts, yes. I had some doubts about the story. But I was -- you

know, it was an interesting story.

Q Earlier you indicated that you attempted to contact the sister, is this something that you would have talked to the sister about, if you would have been able to locate her.

A I don't know if I would or not. I don't know.

Q How important was it to you to find out whether, what Mr. Suarez was telling you was real, or not real?

A At that point in time, I think I was approaching the case from two points of view. Either he was, you know, either he was -- he had some mental problems or that he may have been suffering from poststress syndrome disorder of some type. Due to his military involvment.

(R. 514-16)(emphasis added).

Certainly trial counsel should have questioned Mr. Suarez's competency when in addition to the information which was known to them, Mr. Suarez insisted on calling the State Attorney and giving the prosecutor two statements against the express advise of his attorney. The comments made by Mr. Suarez in these statements show a definite lack of understanding and contact with reality:

Q. You have the right to have an attorney present. We have gone through this before, do you wish to have your attorney present?

A. I do not have a lawyer.

Q. Okay. I know that you do not have a lawyer at this point but there is going

to be another attorney appointed to represent you. Do you want him present before you talk to me?

A. It's the same.

Q. I just want to make sure that you understand that you have the right to have him here.

A. I do not know him. I cannot ask for a lawyer. It's the same to me to speak with you.

Q. Okay. That is just your right to have either him or another attorney here. What is your response?

A. It's the same.

Q. It's the same. That means you can speak to me without your attorney.

A. Yes as I do not have a lawyer.

Q. I am not sure but I believe the attorney that is being appointed for you will be Larry Martin, do you know who Larry Martin is?

A. No Sir.

Q. He is with George Vega's firm.

A. George Vega?

Q. Do you want him here before you talk to me?

A. It's the same in final at the end what I will speak to you is to give you the proof that I was not the one that shot the policeman.

Q. Okay. But you do want to talk to me without Larry Martin or any other attorney being here?

A. I will speak with you.

Had trial counsel obtained a competency evaluation pursuant to the standards enunciated in Rule 3.211, Florida Rules of Criminal Procedure, they would have discovered that in fact Mr. Suarez was not competent to aid in his defense.

Mr. Martin also testified that he had received a memo which stated "Bob Price's secretary said that our client had been interviewed by Herman Castro and Jerry Berry. Quite a few people thought he was crazy." (T. 645).

Mr. Martin was also aware of Mr. Monaco's motion to withdraw which indicated that Mr. Suarez refused to follow advice and was uncooperative (T. 644). However, he chose to ignore Mr. Monaco's allegation as simply "window dressing."

Dr. Harold Krop is a qualified clinical, forensic psychiatrist whose report and testimony was proffered at the hearing. After conducting an evaluation, reviewing the background material, and reviewing the results of the Minnesota Multiphasic Personality Inventory, Dr. Harry Krop determined that Ernesto Suarez suffered from a major mental illness at the time of the offense and trial, namely, paranoid schizophrenia. The MMPI results ruled out malingering and indicated a serious thinking disorder characterized by hostility, suspicion, and delusions consistent with a diagnosis of paranoid schizophrenia. Mr. Suarez had a history of paranoia schizophrenia and was

suffering from this illness at the time of the incident, while working with his attorneys and at the time of making various statements. The diagnosis was borne out by corroborating data including a family history of schizophrenia, the jail records and Mr. Suarez's fantasies.

In regard to his competency to stand trial, Dr. Krop found that Mr. Suarez lacked competency to assist counsel at the time of trial. In particular he did not have the ability to understand the adversary nature of the legal process, the capacity to disclose pertinent facts surrounding the alleged offense, and the ability to relate to his attorney. Mr. Suarez was impaired as related to his ability to assist his attorney in planning his defense, his capacity to realistically challenge prosecution witnesses, his capacity to testify relevantly and his capacity to cope with the stress of incarceration prior to trial.

Mr. Suarez also proffered the testimony of Dr. Anastasia Castillo, a forensic clinical psychiatrist. Dr. Castillo was of the opinion that there were numerous indications that Mr. Suarez should have been evaluated for his competency to stand trial. The suicide attempts and the aberrant behavior which caused the jail personnel to place him on antipsychotic medication, indicated the need for a mental health evaluation of competency to stand trial. Further, it was Dr. Castillo's opinion that Mr. Suarez' ability to relate to his attorney was substantially

impaired due to his paranoia and grandiosity.

Mr. Suarez was forced to proceed to trial and required to make critical life and death decisions although he lacked the mental capacity to make such choices. He was forced to trial when he did not understand the adversarial process nor the role of his counsel. He could not relate to his attorney because he did not understand the process. In addition, Mr. Suarez's mental illness precluded him from knowing reality from delusion and thus defeated his capacity to relate the pertinent facts surrounding the alleged offense to his attorney.

Mr. Suarez could not aid in his defense, nor aid counsel, nor testify rationally, nor realistically challenge prosecution witnesses, nor understand the proceedings transpiring before him. He could not even follow the advice of his counsel in regard to making statements to the prosecutor, or testifying at trial.

None of this was professionally assessed, considered, or analyzed prior to trial. There was no professional competency evaluation. Mr. Suarez was represented by a court-appointed attorney who failed to raise his client's lack of competency, although his client's mental deficiencies and disturbances were obvious. Even the jail personnel recognized Mr. Suarez's deficiencies and obtained medication in order to try and control Mr. Suarez's disruptive delusions. No assessment was ever made of the impact of these medications. In no other single instance

is it more important for an attorney to protect his client than when a client is mentally ill and unable to protect himself. No one protected Mr. Suarez.

Lay testimony, documentary evidence and background information existed and/or should have been developed which would have demonstrated that Mr. Suarez should not have been forced to proceed to trial, should not have been convicted of first degree murder and should not have been sentenced to die.

In Bertolotti v. State, opinion #71,432 (Fla. April 7, 1988), this Court held that when sufficient factors exist to trigger a competency inquiry, it is ineffective for counsel not to request such an evaluation by a competent mental health expert:

> In light of the above factors, all of which Mr. Wolfe and Mr. Kenny were either aware of or should have been aware of, it is apparent that both attorneys had reason to question their client's sanity. Although it may not be necessary to have every defendant who is charged with a capital offense evaluated by a mental health expert, where there is sufficient evidence to bring a defendant's sanity into question, defense counsel is deficient in his performance if he fails to seek and follow through with a mental evaluation of his client.

(opinion at 7).

Further, Mr. Suarez meets the second prong of the Strickland v. Washington test in that there was no conflicting evidence, Mr. Suarez did not refuse to see a mental health expert, no

competency evaluation addressing the issues stated in Florida Criminal Rule 3.211 was even conducted, and trial counsel gave no strategy reasons for failing to request such an evaluation.

A competency evaluation was never conducted. Certainly, Dr. Lombilla in his deposition did not indicate he was conducting a competency determination. However, to the extent that the circuit court raised the issue, Ake v. Oklahoma, 105 S. Ct. 1087 (1985), would apply and an evidentiary hearing should have been permitted.

Mr. Suarez should be permitted a full, fair, and adequate opportunity to prove his claim -- his claim should not be ignored now, as it was by counsel at the time of trial, and by the trial court at the evidentiary hearing on his motion to vacate.

Mr. Suarez's conviction and sentence of death stand in violation of the fifth, sixth, eighth, and fourteenth amendments, see, e.g., Pate v. Robinson, 383 U.S. 375 (1965); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Ake v. Oklahoma, 105 S. Ct. 1087 (1985), and his claim should now be heard.

D. DUTY OF LOYALTY

On March 7, 1984, Lawrence D. Martin, appointed counsel for Ernesto Suarez moved the trial court to appoint co-counsel. This motion was made pursuant to a request by Joel Deifik, an Assistant State Attorney, prosecuting the case (App. 15). Mr.

Martin requested that Messrs. Paul Erickson and Harold S. Smith, II, both being members of the same firm (Vega, Brown, Nichols, Stanley & Martin, P.A.) be appointed. Attorney Martin wrote in his motion that he "ha[d] several conflicts during the time in which this matter [was] set for trial." Ibid.[1] On March 9, 1984, Mr. Martin, at a pretrial motion hearing, stated:

> I don't know if this is necessary that I do this, but I have informed the Court that I would like to have Harold Smith and Paul Erickson as co-counsel with me in this case. They've been working on the file with me and I'm going to have to be doing a lot of running in and out, doing things that I have to do in this case, and we've got the labor divided up among us.

(R. 1655)(emphasis supplied).

The court regarded the motion as unnecessary and was concerned only about the "cost involved" (R. 1655). The appointment was made, however.

Mr. Martin testified at the post-conviction hearing that he has been a member of the (Fla.) bar since 1969 (T. 614). His criminal law experience includes "six or eight homicide cases," of which four were first degree murders. Of these, Mr. Suarez's case was the "only capital [sic] case that [he] actually took to trial . . . ." (T. 615-19). Mr. Smith testified that he started

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[1]No motion for continuance due to these "conflicts" was ever made.

his practice of law a decade after Mr. Martin (T. 371). His most significant criminal trial experience was when he was "sole" counsel in a second degree murder case (T. 373). Mr. Erickson had only recently joined the bar. Martin asked Smith and Erickson to help him and they divided the various tasks (T. 628, 666). Smith's job was to concentrate on cross-examination of the various witnesses (T. 400, 408). Martin's responsibility was the "defense case" (T. 408). Martin, of course, was unquestionably "lead counsel," hence "he was the guy who made the . . . final decision as to what actions were taken and not taken (T. 408). Erickson, on the other hand, due to his lack of experience was relegated to assisting Smith and Martin in whatever way he could. This included Smith making depositions for possible impeachment matter, doing research and some leg work (T. 282, 407-08).

Voir dire in this case took place on March 14, 1984 (R. 1654-1957). Attorney Martin was not present (T. 669, 738) but Messrs. Smith and Erickson were and conducted the examinations (See R. 1796-1836, 1941-1954). Mr. Erickson, who had been a member of the Florida Bar since November, 1983 and a member of the firm since February, 1984, and who had never until then eye-balled a jury (T. 282), started out as follows:

> Ladies and Gentlemen, my name is Paul Erickson. I, along with Larry Martin and Harold Smith, II, represent Ernesto Suarez over here. I'm new at this so I may give up a couple of times. I hope you'll excuse that.

> I got a few questions I'd like to ask. Let's see, I'll start off kind of generally. I'd like for you to each tell me if you subscribe to or buy any magazines, what type of magazines it is that you might subscribe to or buy.

(R. 1941)(emphasis supplied).

The complicated issue of insanity was to play a critical role in the defense strategy. Smith testified that he was "not very clear" on the "standard for insanity," but claimed that he had "a better understanding" of it at the time of the trial (T. 400-01). Erickson apparently had done some research on the insanity defense and diminished capacity (T. 282, 287). Martin therefore entrusted him with the responsibility of conducting the related voir dire (T. 298). At the post-conviction hearing Erickson could not recall what the law "with regard to the insanity defense" "is at this ponit in time," nor what it was (T. 300). His voir dire on the subject illustrates a palpable ignorance of even the rudiments of the defense. (See R. 1948 et seq.). As he proceeded, Mr. Erickson inadvertently conveyed his ostensible lack of regard for the defense. He said to a juror:

> Even though you disagreed with the law and, say the Defendant was technically insane according to the law, you could acquit him on the insanity basis?

(R. 1949)(emphasis supplied).

And to another juror, he stumbled through the same question.

> MR. ERICKSON: You seem to have -- you don't like the law, a particular law in the case of maybe insanity? You have a reason why you do not like -- if the Judge tells you what the law is and that you have to apply that to the facts in this particular case, and if you look at the facts and according to the law as judged by the court, one of the parties is insane in your mind or meets the technicalities, then you would have difficulty or would not be able to render a verdict of innocent if that's what the Court charges?

(R. 1950)(emphasis supplied).

Moments later he found himself confused as to which party had the burden of proof as to insanity.

> MR. ERICKSON: That would be all -- the Defense does not have to prove innocence or insanity. I believe the Defense -- the Defense does have the burden in that respect. As far as the insanity goes the Defense would have to prove that a Defendant was insane according to --

(R. 1951)(emphasis supplied).

Following a state's objection and the state's request that the court merely read the pertinent insanity instructions to the jury, Attorney Erickson, without being stopped by the judge curtailed any further voir dire on this matter (R. 1952). His unrelated voire dire ended moments later (R. 1954).

Attorney Erickson showed himself to be the quintessential new lawyer. Not only did he not know what to do next, he hardly knew what to do first. His feeble attempt at effective voire dire demonstrated this. It is inexplicable why the least

experienced member of the defense team was relegated the most complicated subject (insanity) on which to voire dire the jurors. He demonstrated he had no particular expertise in this area as he tripped through his questions and butchered a critical one regarding the burden of proof as to insanity. Erickson admitted at the post-conviction hearing that he "felt prepared to ask a few questions on the insanity issue, [but, he did] not feel [he] was prepared to handle the voir dire, ..." (T. 320). His inquiry of the prospective jurors never included a discuss[ion] of the death penalty . . . ." (T. 322).

As is pointed out elsewhere in this brief, the defense team somewhere decided to abandon the insanity defense. One of several explanations tendered for this according to Martin, was due to "a real bad vibe from one of the jurors . . . ." (T. 708). Martin "distinctly remember[ed] Paul [Erickson] coming back and saying, 'They really don't like the insanity defense.'" (T. 708), and that the "defense did not appear to be popular." (T. 717).

The jury having been impaneled, the time had come for them to meet Mr. Suarez's lead counsel.

OPENING STATEMENT BY MR. MARTIN

> MR. MARTIN: May it please the Court, ladies and gentlemen. I'm Lawrence D. Martin, I'm an attorney with the law firm of Vega, Brown, Nichols, Stanley and Martin here on Airport Road in town.
>
> Trying the case with me will be Paul Erickson who's an associate in the firm and

> Harold Smith, who is also an associate in the firm.
>
> By way of introduction, I'd like to let you know that I'm here for the same reason that you are. The Court has ordered me to be here to ensure that Ernesto Suarez is properly represented and to be sure that he received a fair trial.
>
> Now, my job is to represent him, your job is to see to it that he receives a fair trial. This is something that lawyers do, it's something that doctors do as a matter of, partially public service, where we donate our time to the representation of people who do not have sufficient assets to hire their own attorneys.

(R. 512)(emphasis added).

The Eleventh Circuit has spoken forcefully on attorneys distancing themselves from their indigent clients.

> In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. "[R]eminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused." Goodwin v. Balkcom, 684 F.2d at 806, cert. denied, ___ U.S. ___, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime. [emphasis supplied]

King v. Strickland, 714 F.2d 1481, 1491 (1983), vacated and

remanded 104 S.Ct. 2651. Opinion on remand 748 F.2d 1462 (1984), cert. denied, 471 U.S. 1016 (1985).[2]

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[2]The Court upon remand stated:

> We have already decided that Cole's closing argument "unnecessarily stressed the horror of the crime and counsel's status as an appointed representative." Id. at 1491. The reconsideration on remand from the Supreme Court requires us to apply the legal standard set in Washington v. Strickland, not to conduct another review of the facts of this case.
>
> [5] We conclude that King has satisfied both the performance and the prejudice prongs of the Washington standard. The two specific deficiencies in Cole's conduct at the sentencing hearing both fell outside the range of reasonable professional assistance. Cole's attempt to separate himself from his client in closing argument represents a breach of his duty of loyalty to his client stressed by the Supreme Court. Washington, ___ U.S. ___ at ___, 104 S.Ct. at 2065, 80 L.Ed2d at 694. King has established that Cole's errors were prejudicial to his defense. Circumstantial evidence cases are always better candidates for penalty leniency than direct evidence convictions. Cf. Washington, at ___, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").
>
> There is a sufficient probability that effective counsel could have convinced a sentence that the death sentence should not be given to undermine confidence in the outcome. Resentencing is constitutionally required.

(footnote continued on following page)

Although it is said that actions speak louder than words, in this instance counsel's words spoke loudly, but his subsequent actions roared. Mr. Martin literally became a walking violation of the sixth amendment when he walked out on his client. After his opening statement, Mr. Martin was rarely a participant at the trial. His absence is reflected in the transcript in various ways and it created obvious difficulties for the other parties and the smooth flow of the trial. More importantly, however, was the harm that his absence caused Mr. Suarez.

After the trial was well under way the court felt compelled to get a more definitive answer from the defense as to their position on Mr. Suarez's insanity plea.

> THE COURT: I want to get something on the record -- I'm not still very comfortable, quite frankly, with the answer I received

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(footnote continued from preceding page)

> Upon reconsideration in light of Washington v. Strickland, the district court's denial of the petition for habeas corpus relief is reversed as to the death penalty. The prior opinion of this Court is reinstated. The case is remanded to the district court for entry of an appropriate writ.

Id. at 1464-65. See also, Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1984), vacated and remanded, 468 U.S. 1206, adhered to on remand, 739 F.2d 531 (1984).

> from Mr. Martin on the issue of the insanity defense.

(R. 752).

> I want to know when we come back, for the record, whether Mr. Martin or the defense in this case is raising the issue of insanity under Rule 3.216, ...

(R. 753).

When court resumed after a recess, Mr. Martin still did not appear so the judge asked co-counsel whether they had "a chance to talk to Mr. Martin" regarding the insanity plea and the appointment of additional experts (R. 754). Martin, at the post-conviction hearing said that he had no recall of any conference during the course of the trial on the matter of the insanity defense (T. 684).

Mr. Martin was in court so infrequently that co-counsel moved for the immediate preparation of the trial transcript of two key state's witnesses (Kuhl and Waller, officers who were present when the homicide occurred). Attorney Smith explained that it was needed for "preparation of [Mr. Martin's] closing argument," amongst other things (R. 840-841). On March 21, Mr. Smith renewed his motion. Mr. Martin again was absent. The request was denied (R. 982-85).

At another point in the trial, the state indicated it wished to break off its examination of a witness and pick up later so that a ballistics expert could be called before the evening

recess. The state wished to allow cross-examination of the witness on the stand as to the foundation which had been laid for the ballistics expert, and immediately thereafter call the expert. Attorney Erickson asked that the court recess before the state called its ballistics expert because the defense preferred that Martin do that particular cross examination (R. 948). The prosecutor registered his displeasure,

> MR. DEIFIK: Judge, I just want to get on the record Mr. Martin was appointed for this case. His co-counsel, Mr. Erickson and Mr. Smith, second or third, were appointed as co-counsel. Okay. If Mr. Martin -- we got this here. We want to go. I'm just bringing this up as a point. Larry [Martin] is over there in his office across the street doing whatever he is doing coming in and out, you know. The trial is continuing on.

(R. 948-49)(emphasis supplied).

The judge resolved the problem by allowing the state to call its expert without delay. Attorney Erickson was relegated to doing the cross-examination of the foundational witness which turned out to be very brief. And the judge in the meantime called Mr. Martin who arrived at some point during the ballistic expert's testimony. However, obviously he had missed the foundational matters covered by the previous witness (R. 949-50).

Attorney Martin affirmed that he "was not present in the courtroom for up to as much as 50% of the time." See App. 17. A review of the record indicates that Mr. Martin did the cross-examination on only three of the state's twenty-five witnesses.

See App. 18.

Martin's frequent absence left him vulnerable. In his closing argument the prosecutor remarked:

> Now, Mr. Martin likes to, whenever he's explaining things to you, he talks on this testimony of Montoya and Rodriguez. Now, like our whole case is built on the testimony of Montoya and Rodriquez. I guess maybe that's because, except for those three witnesses, he wasn't here during the rest of the trial, he didn't hear the other witnesses that testified.

(R. 1356-57)(emphasis supplied).

Mr. Martin, of course, felt compelled to respond to a personal swipe. His retort turned out to be more shocking than his opening remarks:

> MR. MARTIN: Ladies and gentlemen, I think it's about time that we got back to the evidence rather than what we speculate upon or what we expect, what we draw out of the area. Also I feel constrained to respond to a personal remark made by the prosecutor about my absence during this trial. I don't see any reason to return the remark, but I do feel that an explanation is necessary.

(R. 1368).

> As you know, I'm a private lawyer. Mr. Smith and Mr. Erickson are private attorneys with me. We represent people in criminal matters, civil matters, estates, taxes, et cetera. We have a large overhead to pay, we can't afford the luxury to have two or three lawyers in this court the whole time.
>
> For that reason I have delegated responsibility, anybody in private enterprise would do, and I apologize for the

> fact that I, personally, was not here during all the testimony. But I can assure you that I have been briefed on the evidence by Mr. Smith and Mr. Erickson, that I was present during pretrial discovery in this case, and that if any mention of the facts is contrary to what you heard on the witness stand or what you heard from Mr. Brock, then you go by what's heard on the witness stand. And, let's move away from personal remarks about counsel in this case.

(R. 1369)(emphasis added).

Attorney Daniel Monaco, who had represented Mr. Suarez before Mr. Martin and later represented the co-defendants, affirmed that Mr. Martin "was rarely in the courtroom and left the trial to one lawyer with little experience and one lawyer with no experience." See App. 16. Attorney Monaco, amongst other things, swore that Mr. Suarez had not "been defended to the standard of legal practice normally practiced in [their] community." Ibid. In his opinion, this case was not a "death case," Mr. Suarez "had a viable defense," and that this was "certainly not premeditated murder." Rather than a "team effort" for Mr. Suarez, Monaco described the Martin, Smith, Erickson trio as a "tag team effort." Ibid.

Attorney Martin's opening statement that he had been "ordered" to court and that he was representing Mr. Suarez as a matter of "public service" was reprehensible. Distancing oneself from one's client can only disadvantage the client. His closing response to the prosecutor's criticism was even more egregious.

The message was clear. The proverbial pocketbook was more important than a man on trial for his life.

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

Griffin v. Illinois, 351 U.S. 12, 19 (1956).

Granted Mr. Suarez was not without representation while Mr. Martin was absent. But the disregard implicit in his rather lackadaisical approach to the case had to have had an affect on the jury. The prejudice to Mr. Suarez was extreme. Why should the jury pay particular attention to the case or give Mr. Suarez the benefit of the doubt in guilt/innocence or any special consideration in sentencing when his lead counsel seemed not very interested.

Martin decided to "divide the labor" on the case. His absence was not, he explained, because he anticipated being "unavailable". He simply chose to be in court only part of the time. He had not conflicts elsewhere such as with other "trials" or "vacation" (T. 666). Smith was probably at the trial more than either Martin or Erickson. And even he could not provide a reasonable explanation for why Martin was absent (T. 409). Smith's own practice conflicted somewhat with his presence at the trial (T. 411). Erickson's recollection was that he was present for "30 percent" of the trial (T. 365), that both Martin and Smith had "conflicts" which kept them away (T. 317) and that it

was a rare occasion for the threesome to be in court simultaneously (R. 353).

In gauging counsel's singularly disgraceful conduct and deciding whether the judgment and sentence here are reliable, it bears restating that defense counsel was representing a man who was on trial for his life. The fact that Martin and Smith shared Monaco's view that this case was not a capital case, provides no solace for Mr. Suarez, nor alleviates his plight. Smith testified that they "didn't really think of this as a capital case, . . . it wasn't that much in [their] feelings . . . ." (T. 388). Martin intoned that "[f]rankly [he] didn't think the death penalty was a real possibility in the Suarez case . . . ." (T. 620). Because Martin admitted that he "didn't perceive this as a great probability of a Capital [sic] punishment type of case, [that Mr. Suarez] is not [the] kind of guy that normally gets the chair." and that this was what was "going through [his] mind at the time," he defended the case accordingly (T. 673). Mr. Suarez recognizes that he was not entitled to a "perfect" trial, but neither should his trial have been the equivalent of a "sacrifice of [an] unarmed prisoner to gladiators." United States ex. rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975).

Mr. Martin's representation fell below an objective standard of reasonableness when he distanced himself from his client and his cause. The prejudice is inherent in the separation itself.

But Mr. Suarez was prejudiced in other palpable ways both due to and as a result of Mr. Martin's absence and poor preparation and deficient performance. Mr. Suarez's sixth, eighth and fourteenth amendment rights were violated, thus he is entitled to habeas corpus relief.

E. DUTY TO PROMOTE DEFENSES

Counsel certainly has a duty of advocacy. This duty requires that counsel present the accused's side of things. This duty would certainly include making sure the evidence and witnesses are available and the jury is instructed properly on the law governing the availability of the defense being asserted.

Here, two defenses were asserted on Mr. Suarez's behalf. One was that the killing occurred in self-defense when Mr. Suarez believed that the police were attacking him. The second defense was that the perceived attack rendered Mr. Suarez insane or at least incapable of reflective thought.

On the second theory defense, counsel was dependent upon the testimony of Dr. Lombillo. However, counsel failed to subpoena Dr. Lombillo and as a result could not present his testimony.

> Q The fact that he [Dr. Lombillo], in fact, did not testify certainly would indicate that somebody abandoned it?
>
> A Except that he wasn't here.
>
> Q Was that possibly the reason why he didn't testify?

A Possibly, yes. The fact that we couldn't get him here.

Q When does that indicate that the subpoena for Dr. Lombillo was issued?

A I attempted to serve it on 19 March.

Q If I were to tell you that the voir dire part of the trial had started on the 14th of March, --

A Uh-huh.

Q -- does that sound about reasonable?

A Could be. I would just have to rely on the record there.

Q If, in fact, the trial had began, the voir dire had began on March 14, --

A Uh-huh.

Q -- Would that, then, that subpoena have been issued during the course of the trial?

A Yes.

Q Should you have issued the subpoena before the trial started?

A Absolutely. Just like a lot of us have trouble doing that.

Q If you had issued the subpoena before Dr. Lombillo left town?

A He would have been here and in trouble.

(T. 695-69). See Defense Exhibit 3. This was unreasonable performance on the part of counsel which cost Mr. Suarez the

right to have the jury hear from an expert whose opinion was that Mr. Suarez at the time of the shooting was incapable of premeditation. The duty to timely subpoena witnesses for trial is a basic obligation to which counsel should be held. This failure was especially significant in the present case since the jury convicted Mr. Suarez of premeditated murder. Counsel further failed to ask for any jury instructions on the issue.

Counsels' failures to undertake minimal research and discover the state of the law in Florida as to the right to use force in self-defense against a police officer was a failure "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. at 688. Here, counsel at the evidentiary hearing acknowledged his deficient performance: "I guess I should have asked for an Ivester type of instruction." (T. 708-09). The circuit court's conclusion the jury's verdict of premeditated murder and robbery precludes error here is ludicrous. The jury was not allowed to consider accessory after the fact as regards the robbery conviction nor as regards self-defense. The instructions as given denied the right to trial by jury. Counsel did not ask for accessory after the fact but he also needed to ask for an Ivester instruction. See, Ivester v. State, 398 So. 2d 926 (Fla. App. 1981). The instruction was the very heart of the defense. Counsel performance rendered the trial an

unreliable testing.

But for counsel's failures to promote Mr. Suarez's defenses there is a likelihood of a different outcome of the proceedings.

F. FAILURE TO IMPEACH

Counsel also failed in his duty to thoroughly test the State's case through impeachment. An example of this is the fact that the prosecution asserted that Mr. Suarez's description of the events leading up to the homicide did not match the police officers' testimony and thus according to the prosecution, Mr. Suarez was not credible. However, an examination of Deputy McDaniel's March 29, 1983 sworn testimony shows changes in Deputy McDaniel's version of events (App. 19). At the time of the statement, Deputy McDaniel's story very closely matched Mr. Suarez's version. In the statement, Mr. Suarez's vehicle began speeding away early in the chase so related by Mr. Suarez. This was long before Sgt. Walker in his marked car attempted to pull the vehicle over. Contrary to Deputy McDaniel's trial testimony there is nothing in the statements about Mr. Suarez's vehicle almost hitting civilian cars. There is mention made of the vehicle almost wrecking when it ran the road block. Further in the statement, Deputy McDaniel sees the victim's patrol car and Deputy Kulh's patrol car arrive and park before Deputy McDaniel hears any gunfire. Again this is at variance with Deputy

McDaniel's trial testimony, on a very crucial point. According to Deputy McDaniel's statement, the victim was there, before the shooting started and thus could conceivably have started it.

During the evidentiary hearing, trial counsel admitted that they never went to the scene of the crime (R-317, 382, 624). They admitted they never examined the victim's gun and quick-load belt to determine the bullets were different (R. 328, 380, 720). Harold Smith gave an opinion this would have been important (R. 385). All three trial counsel cited a lack of time to prepare (R. 285, 434, 627), and Paul Erickson testified that Mr. Smith and Mr. Martin had scheduling conflicts (R. 317). Mr. Smith admitted he had a full civil caseload during the trial (R. 411).

According to Mr. Martin he didn't attend the whole trial because there was a division of labor (R. 666). However, Mr. Erickson and Mr. Smith testified that there was no set division of labor (R. 286, 4000). Mr. Smith thought he would only be doing pretrial preparation (R. 378).

The prejudice resulting from defense counsel's failure to investigate, effectively prepare for, or conduct the trial becomes very apparent in the failure to attack the State's theory of how the shooting occurred. It was the State's theory that Ernesto Suarez immediately got out of his car and moved toward the officers while firing his weapon.

Had defense counsel properly prepared their case they would have realized that the evidence actually indicated that Ernesto Suarez had left his car before the shooting started, that his shots were not the first shots fired, that co-defendant Sory had already emptied his pistol before Ernesto started firing, and that Ernesto was actually moving away from the officers while firing.

Trial attorney Harold Smith admitted at the evidentiary hearing that it would have been relevant to show that Deputy McDaniel had made a pretrial statement that even though he arrived near the same time, or shortly after, as the victim and a substantial amount of time passed before any shots were fired which allowed him enough time to exit his vehicle and draw his gun (R. 442).

Other pretrial testimony, as well as the Reyes/Sory trial testimony showed that Ernesto fired only after other shots were fired and, while firing, was retreating away from the officers. Deputy Kuhl testified that there were five or six shots, then the firecracker shots. He testified that the first set of shots sounded like the emptying of a revolver and not a rifle. It was his opinion that 20-25 shots were fired (Ernesto's gun only fired 15 shots) and there were 2 or 3 guns firing at one time (Deposition at p. 10, 20-21).

This testimony was corroborated by co-defendant Montoya who stated that Ernesto got out of the car and went towards the police. He didn't know Ernesto had a gun at this time. It was after he had exited the car and moved toward the police that shots were heard. At this time Ernesto ran towards the bus which was away from the police (Deposition p. 26).

Had the defense counsel argued this alternative theory of the events of the shooting, it would have resulted in a lesser offense or a life sentence. The State's entire argument for premeditation and purposeful killing rested on their theory that Mr. Suarez ran toward the police while firing. Had the defense argued that he was in fact retreating it would have corroborated his testimony.

G. DUTY TO OBJECT

Throughout the proceedings, counsel displayed a shocking willingness to permit the judge and the prosecutor to ignore well-established constitutional principles and criminal procedure rules. When an attempt was made to object to improper evidence, counsel's feeble arguments demonstrated gross ignorance of basic sixth amendment law.

The State violated Mr. Suarez's sixth amendment right to counsel when statements were obtained from after the formal initial of the criminal process and without a knowing and

intelligent waiver. Mr. Suarez's counsel argued that the statements were inadmissible under the Canons of Ethics. Counsel apparently believed that the Canons inured to the benefit of the accused, as opposed to simply being sanctionable rules of conduct governing members of the bar. In passing, defense counsel noted that there was a voluntariness issue that he would not waive. However, he made no effort to advance Mr. Suarez's position. He cited no case law and made absolutely no argument. Counsel's performance could only have reflected ignorance of black letter constitutional law. What can be more basic to criminal law than the sixth amendment guarantee to all accused of the right to the assistance of counsel. And what concept has been clearer in criminal law during the past fifty years than the concept expressed in Johnson v. Zerbst, 304 U.S. 458 (1938) than a waiver of the right to counsel must be knowing and intelligent to be valid.

To the extent that the trial court failed to make the correct ruling on the issue because of counsel's lack of zealous advocacy, Mr. Suarez was more certainly and obviously prejudiced. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Certainly Mr. Suarez was entitled to present evidence as to this claim at the hearing below. The circuit court's ruling precluding such evidence was clearly error, particularly in light of the fact that the court made findings of facts without allowing presentation of

evidence.

Prior to trial, Mr. Martin also feebly argued the need for a severance of Mr. Suarez's trial from his co-defendant's trial. However, as the trial court later noted, he failed to adequately explain the reason for the requested severance. Mr. Suarez's former counsel, Mr. Monaco, who had had privileged communications with Mr. Suarez was representing the co-defendants. An actual conflict of interest existed which Mr. Suarez's attorneys were obligated to bring to the court's attention. Then finally, after voir dire in which the co-defendants had participated along with their counsel, Mr. Monaco, and in which the co-defendants, along with their counsel had molded and shaped the jury through the exercise of preemptory challenges, Mr. Martin, managed to convey to the court the presence of an actual conflict and the need for a severance. But then he failed Mr. Suarez again. Mr. Martin who had not been present for voir dire failed to explain the prejudice of forcing Mr. Suarez to trial with a jury picked by the State and his co-defendants. Counsel failed to ask for a mistrial; he failed even to ask that, since one of the trials had to be continued, it should be Mr. Suarez.

Mr. Martin's actions or non-action as the case may again have reflected his lack of commitment to his client.

During the trial, Mr. Suarez's attorneys took the previously unheard of tag-team approach to criminal defense. Either as a

result of the constant reshuffling or as a result of ignorance, the State was permitted to make impermissible comments and to introduce wholly inadmissible evidence. In his opening statement, the prosecutor observed that the victim was a 33 year old father with ten years of service in the sheriff's office (R. 501). The State was allowed to introduce a photograph depicting the victim in life wearing his uniform. States Exhibit 4. R. 797-98. Testimony was presented from a fellow officer that the witness had known the victim for four or five years and that the victim was a road corporal (R. 801). No objection was registered to the State's obvious attempt to humanize the victim and arouse the jury's anger that such a good man had died. As the United States Supreme Court recently explained, the decision to impose the death penalty should not turn upon "the perception that the victim was a sterling member of the community rather than someone of questionable character." Booth v. Maryland, 107 S. Ct. 2529, 2534 (1987).

Throughout the trial, Mr. Suarez's attorneys failed to enforce the Florida Evidence Code on behalf of Mr. Suarez as it relates to opinion testimony. The medical examiner was allowed to speculate based on the body position of the victim as to the victim's activity at the moment he was shot. No foundation was required by the defense that the medical examiner needed expertise in physics to discuss the laws of kinetics in

determining the direction and manner the victim would have fallen after being shot. Further, the medical examiner's opinion was based on obvious speculation that the victim had not gotten out of his car and then gotten back in when the shooting started. The doctor's testimony was unadulterated speculation and outside the scope of the medical examiner's field of expertise (R. 785).

Deputy Connie Beaird was called by the State and was permitted to opine regarding bullet holes in palm fronds, bullet paths and trajectories, and the location of the gunman when the fatal bullet was fired (R. 904-11). On cross-examination, Deputy Beaird admitted he was not a ballistics expert. He had no training in ballistics nor in physics (R. 922, 928). He was not asked about botany and his ability to recognize fresh bullet holes in palm fronds as well as the direction; the bullet passed through the prosecution never laid a foundation for the opinion testimony. Nevertheless, defense counsel did not at any time object to the deputy's musings in these fields calling for expertise. See sec. 90.701 of the Florida Evidence Code.

The defense also failed to object to the State's repeated playing of the police tape which contained all of the transmissions on police radio during the time leading up to the shooting. The tape was played once when it was admitted. It was replayed so that the voices of all of the officers including the victim could be identified. And finally, pieces of it were

replayed to allow a witness to describe the events that were occurring contemporaneous with the radio transmission (R. 576-617). No objection was registered that this was cumulative and that it placed undue emphasis on one piece of evidence. When questioned about the tape at the evidentiary hearing, Harold Smith testified:

> Q In this case, do you recall having any concern about the jury listening to the voice of the victim on the tape?
>
> A Well, I -- Gosh, was he on there? If he had been, you know, I can't say that I was concerned but I can imagine that I would be. I wouldn't want to have any -- you know, I was concerned about the fact that the Corporal's family was in the courtroom. You know, I mean that's -- anything, you don't, you don't like anything that gives sympathy to the victim in an adversary situation like that.

(T. 452).

The State was allowed to introduce evidence -- a handwriting sample -- obtained from Mr. Suarez by trick. This evidence was seized from Mr. Suarez without a warrant after he was tricked into preparing it without a valid waiver of his fifth or sixth amendment rights.

Counsel failed to object to the trial court's improper admonitions to the jury that the jurors would only incur his wrath if he found out that they improperly communicated to anyone about the case. There was no objection when the court indicated what the jurors did in their own homes, he would probably never

know about. There was no complaint when the court told the jurors that "technically" they could not talk to each other about the case until it was submitted to them, implying that it again was expected behavior which they just should not tell anyone about. These failures to object again reflect the absence of a zealous advocate on Mr. Suarez's behalf.

There was no objection to the prosecution's introduction of the fact that Mr. Suarez's rifle was made in Russia and used by other Communist countries. This was irrelevant and an obvious attempt to label Mr. Suarez as a Communist and to focus the jurors' attention on the fact he was from Cuba (R. 973-74).

When Alberto Montoya, one of Mr. Suarez's co-defendants, was called to testify, the State attempted to introduce evidence of a conversation Mr. Montoya had with Mr. Suarez the night before. A proffer of the testimony was made out of the jury's presence. During the course of the testimony which was translated by the interpreter who normally translated for Mr. Suarez, Mr. Montoya said that the Cuban next to Mr. Suarez threatened Mr. Montoya and that Mr. Suarez threatened the other co-defendant who had already testified. Defense counsel declined an opportunity to voir dire and discover exactly what Mr. Montoya was trying to say. Counsel simply registered an objection to the hearsay from the Cuban. The court agreed and tried to have the interpreter instruct the witness not to relate hearsay. However, the interpreter

apparently had difficulty conveying the idea to Mr. Montoya and was ultimately instructed by the court to not repeat anything attributed to the Cuban (R. 1099-1102). When the testimony was repeated in the jury's presence, the jury was told by the interpreter that Mr. Suarez made Mr. Montoya "understand that if I was going to testify because George [the other co-defendant who had already testified] had already done it, but I didn't answer him, and then he told George when we came back from church that he was going to kill him because with him you don't play." (R. 1103).

As a result it was never clear what the unidentified Cuban had said and what George had told Mr. Montoya. Nor did counsel ever determine whether the State had intentionally arranged a meeting in the jail between Mr. Montoya and Mr. Suarez, the man he was about to testify against. Further undermining aggravating counsel's effectiveness was his inability to communicate with Mr. Suarez during the proffer of Mr. Montoya since his interpreter was busy interpreting Mr. Montoya's testimony for the jury. Again, Mr. Suarez did receive the effective assistance the zealous advocacy to which he was entitled.

These many failures to object while Mr. Suarez's rights were being abrogated, each individually constituted ineffective assistance. Together they reflect a complete and total failure of the adversarial process which certainly undermines confidence

in the outcome of the proceedings. These errors, were ignored (i.e., because of counsels' ignorance of the law), and went unlitigated because of counsels' ineffective assistance. See Kimmelman v. Morrison, supra. Mr. Suarez is entitled to a full and fair Rule 3.850 hearing as to all of his claims, and, thereafter, Rule 3.850 relief.

ISSUE XXX

THE STATE'S WITHHOLDING OF MATERIAL, EXCULPATORY EVIDENCE VIOLATED MR. SUAREZ'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Suarez was arrested, indicted, convicted and sentenced to death for killing a police officer. Mr. Suarez maintained that he only fired after he had been fired upon by the police. The State adamantly maintained that neither the victim nor any other police officer fired any guns at the time of the homicide. The State went to considerable lengths to establish that the victim's gun had not been fired.

However, testimony by Jack Gant, a crime scene investigator for the Collier County Sheriff's Department, at the trial of Mr. Reyes and Mr. Sory on April 5, 1984, disclosed that two spent casings were removed from "the front seat of Deputy Howell's patrol car." (Reyes' R. 1160).

The presence of two spent casings inside the victim's car was never revealed to Mr. Suarez's counsel in this case. The existence of this casing was clearly exculpatory in that it was evidence that would have supported Mr. Suarez's claim the police fired first.

There can be no doubt of the materiality of the evidence discussed above. Had this evidence been disclosed, and had the State not presented the misleading testimony that indicated that nothing was found in the victim's car to indicate he had fired his gun, there is a substantial likelihood that the outcome of Suarez's trial would have been different. Mr. Suarez's rights under the fifth, sixth, eighth and fourteenth amendments, and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny were abrogated.

Exculpatory evidence also includes impeachment evidence. At Mr. Suarez's trial, the prosecutor through the testimony of law enforcement personnel maintained a complete and thorough investigation had established that no shots other than those from Mr. Suarez's rifle had been fired. There was also testimony that fourteen spent casings were retrieved from Mr. Suarez's vehicle a week or so later.

At the trial of Reyes and Sory in April of 1984, the prosecution maintained that Sory had emptied his revolver, firing shots into the air. The State's witnesses conceded that no spent

casings from Mr. Suarez's gun had been retrieved, but maintained that the search for casings had not been all that thorough.

The State also presented testimony previously undisclosed that the fifteenth casing found in Mr. Suarez's car was found eleven months after the homicide.

The circuit court alleged in the order denying the motion to vacate that the Brady evidence was properly explained. In fact, it was not properly explained. Officer Gant's explanation of his testimony at the Sory/Reyes trial that there were two empty shell casings in the front seat of the victim's car was that the court reporter must have been wrong:

> A Right.
>
> "Question: After receiving that particular exhibit from Officer Howell's patrol car, did you have occasion to examine it?
>
> Answer: yes.
>
> Question: What condition did you find the gun and the gun belt?
>
> Answer: The gun had six bullets in it. Nothing had been fired. There appeared to be two empty casings in the front seat of Deputy Howell's patrol car and no empty casings on the front around it.
>
> And it appeared that it had not been fired."
>
> CONTINUED DIRECT EXAMINATION
>
> BY MR. McCLAIN:
>
> Q What do you want to say about that?

A I disagree in that statement, I think there were errors in the transcription of my testimony in that particular area.

If I could have the document, I'll tell you how I believe that it went down. I know there were no cartridges or casings or bullets in the front seat of that deputy's patrol car.

To the best of my memory, I believe that the gun had six bullets in it, nothing had been fired. I do not like the wording here that they have, "there appeared to be two empty casings in the front seat of the deputy's patrol car --"

I feel like I didn't say that, and I don't know how it got in there. Typing errors or transcript errors, I didn't say that.

There were no bullets in that car. I indicated that the gun had six bullets in it. It appeared that nothing had been fired, and Mr. Monaco jumped up and objected to what it appeared to be and he didn't like my talking about it. It appeared that it had not been fired.

And if you go on further, you'll see that Mr. Brock attempted to explain what I'm talking about. And when I said that it appeared that nothing had been fired, he speaks of the bullets and the gun, were they all in contact and they -- you know, they were all there. He himself never speaks again of the two empty casings in the car. And I know that Mr. Brock would have definitely brought this up if I had spoken of bullets in the front of the patrol car. And I never, I never mentioned anywhere in the deposition and anywhere in the previous trial, there was no evidence in my paperwork that there were two bullets that ever existed in that deputy's patrol car. They do not exist, this is error.

Q Okay, so it's your position that that was not your testimony, what that indicated?

A No, this is wrong. The words may have come from somewhere in the context of the testimony during that day, but it doesn't belong there.

Q And to the best of your recollection there were not two empty casings?

A No, not in that car.

Q Would that have been significant if there were two empty casings in that car?

MR. ANDERSON: Your Honor, objection. It calls for a conclusion.

MR. McCLAIN: I think, Your Honor, that he indicated that it didn't appear in any report or any prior deposition and I'm asking him if it was the type of information that if he had had it, he would have brought it or put it in his prior deposition and prior statements, for that reason.

MR. BROCK: That wasn't the way that the question was phrased.

MR. McCLAIN: The question was, was it important whether two empty casings was important, that was th question.

THE COURT: You can go ahead and answer.

A If there had been two empty casings not fired, it would have been important.

I would have documented it and I -- it would be here to look at.

(R. 574-577)(emphasis added). The testimony is clear and unequivocal. This hardly appears to be a logical explanation of

the discrepancy in the testimony.

Investigator Connie Beaird's testimony actually corroborated the theory of a "throw down" gun. He testified that the bullets in the gun purported to be the victim's gun were different from the bullets the victim had in his quick-load bullet pack that he carried on his belt. Clearly this evidence corroborates the theory that the victim did in fact fire his gun and it was replaced with another gun.

Attorney Richard Sparkman testified that he represented Mr. Suarez in his clemency proceeding. He also testified he examined the exhibits in evidence and that the bullets in the victim's gun were different from those in the victim's belt (R. 825). Furthermore, he had questioned each trial counsel and none of them were aware of this important fact (R. 829).

The business record documentation referred to by the trial court consists of a record that Med Howell had used the weapon in his car to qualify on the shooting range three months earlier. It appears to be more significant that of the many times Deputy Howell had to qualify at the shooting range, only one record was produced of his having used that particular weapon.

The State suppressed material evidence which Mr. Suarez could have used to support his theory of self defense thus violating his rights under the fifth, sixth, eighth and fourteenth amendments.

CONCLUSION

Based on the foregoing discussion, Mr. Suarez urges that the Court enter an order staying his execution, reverse the proceedings below and order new proceedings before another duly assigned judge, grant the post-conviction relief sought herein, and grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by (U.S. Mail)(Hand Delivery) to Robert Krauss, Assistant Attorney General, Department of the Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, Florida 33602, this 13th day of June, 1988.

Attorney