IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1881

MARBEL MENDOZA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

MARGARITA I. CIMADEVILLA
Assistant Attorney General
Florida Bar No. 0616990
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF CASE AND FACTS

On March 31, 1992, Defendant was charged with the first degree murder of Conrado Calderon. (DAR. 1-4)[1] Defendant was also charged with conspiracy to commit robbery, attempted armed robbery, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. *Id.* The crimes were alleged to have been committed on March 17, 1992. *Id.*

Defendant was tried and convicted of all charges. (DAT. 1408-1409) At the conclusion of the penalty phase proceedings the jury recommended the imposition of the death penalty by a vote of 7 to 5. (DAR. 647; DAT. 1694) A sentencing hearing was held on June 22, 1994, and August 2, 1994. (S-DAR. 18-87; DAT. 1721-54) On August 2, 1994, Defendant was sentenced to death for the murder of Conrado Calderon. (DAR. 926-42; DAT. 1736-37) Defendant was also sentenced to fifteen years in prison for counts 3 and 4 of the indictment and to life in prison for count 2 of the indictment with all sentences to run concurrent to each other and concurrent to the death penalty. (DAR. 926-30; DAT. 1736) In a written sentencing order, the trial court found the "prior violent felony", the "during the course of a robbery" and

[1] The symbols "DAR.", "S-DAR." and "DAT." will refer to the record on appeal, supplemental record on appeal and transcript of proceedings, respectively, in Defendant's direct appeal FSC Case No. 84,370.

the "pecuniary gain" aggravating circumstances. (DAR. 931-42) The trial court recognized that the second and third aggravators merged and considered them as one. (DAR. 932) The trial court considered all statutory mitigating factors and found them to be inapplicable or otherwise unsupported by the record. (DAR. 933-37) The trial court rejected or gave minimal weight to all non-statutory mitigating factors argued by Defendant. (DAR. 938-41)

On direct appeal, this Court found the following historical facts:

> [Defendant] asked Humberto Cuellar to participate in robbing Conrado Calderon, who owned a mini-market. Humberto asked his brother, Lazaro Cuellar, to act as the getaway driver. The three men observed Calderon's morning routine at his house in Hialeah. Then, before dawn on the morning of March 17, 1992, the three drove to Calderon's house where they stopped and waited. When Calderon appeared at his front door at 5:40 a.m., Humberto and [Defendant] hid behind a hedge. [Defendant] carried a .38 caliber revolver, and Humberto carried a 9 mm automatic pistol. As Calderon left his house and approached his Ford Bronco, Humberto and [Defendant] approached Calderon from the rear and held him in Calderon's driveway between his Ford and Cadillac automobiles. During the ensuing struggle, Humberto used his gun to hit Calderon on the head. Calderon took out a .38 special revolver and shot Humberto in the chest. The injured Humberto ran to Lazaro's car. As he ran, Humberto heard other shots. Less than a minute later, [Defendant] arrived at Lazaro's car and told Humberto that [Defendant] had shot Calderon. No money was taken. The three drove to a hospital in Hialeah. On the way, [Defendant] told Humberto to say that Humberto had been shot by someone who had robbed him.
>
> At the hospital, police recovered Lazaro's car containing Humberto's 9 mm automatic pistol. The

> pistol was still fully loaded and had hair embedded in the slide, which was consistent with the gun having been used to hit someone on the head. The same day, Humberto was taken to the Hialeah Police Station, where he gave a sworn statement that matched his later testimony for the State. When [Defendant] was arrested on March 24, 1992, he had shaved his head and moved out of his normal residence. Items recovered from the scene included a bank bag, which was under the victim and contained $2,089, and other cash which was in Calderon's pockets and wallet. [Defendant]'s fingerprints were found on Calderon's Cadillac, adjacent to where Calderon's body was found. Calderon's gun was found under his body. Casings and bullets were recovered from the scene and from the victim's body. An x-ray of Humberto showed that the bullet lodged near his spine was consistent with Calderon's .38 special. Three of the four .38 caliber shots that hit Calderon were fired from point-blank range, and the last was fired from less than six inches away.

Mendoza v. State, 700 So. 2d 670, 672 (Fla. 1997).

On appeal, Defendant raised the following issues:

I.

THE EVIDENCE PRESENTED WAS INSUFFICIENT BEYOND A REASONABLE DOUBT, TO CONVICT THIS DEFENDANT FOR BURGLARY, REQUIRING THE VACATION OF BOTH HIS BURGLARY AND FELONY MURDER CONVICTIONS.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS SUBSTANTIVE EVIDENCE, THE PRIOR SWORN STATEMENT OF HUMBERTO CUELLAR.

III.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT=S MOTION FOR MISTRIAL FOLLOWING ITS OUT OF COURT COMMUNICATIONS WITH THE JURY.

IV.

THE TRIAL COURT ERRED IN DENYING CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS PREDISPOSED TO IMPOSE THE DEATH PENALTY.

V.

THE TRIAL COURT ERRED IN EXCLUDING MITIGATION EVIDENCE DURING THE PENALTY PHASE.

VI.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN DEFENDANT=S OBJECTIONS AND GRANT A MISTRIAL WHERE THE STATE BOTH ELICITED THAT [DEFENDANT] HAD PENDING ROBBERY CHARGES AND ALSO COMMENTED ON PENDING CHARGES DURING CLOSING ARGUMENT.

VII.

THE TRIAL COURT ERRED IN FINDING THAT THE INSTANT MURDER WAS COMMITTED FOR PECUNIARY GAIN.

VIII.

THE TRIAL COURT ERRED IN ENTERING ITS SENTENCING ORDER.

IX.

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Initial Brief of Appellant, FSC Case No. 84,370.

This Court upheld Defendant's conviction and sentence specifically ruling that because the elements of attempted armed robbery were proven beyond a reasonable doubt, it need not reach the issue of whether the State had proved the underlying felony of burglary and rejecting Defendant=s claims of error with respect to the admission of Humberto Cuellar=s prior sworn statement, allegedly improper communications with the jury, the denial of certain cause challenges, and the exclusion at the penalty phase of a copy of Defendant's asylum request. *Mendoza*, 700 So. 2d at 673-75. This court further found that the defense

expert was properly cross-examined concerning his knowledge of Defendant=s involvement in other criminal acts. *Id*. at 677. Although it was error to allow the State to mention criminal charges arising from specific bad acts, this Court found that the error was harmless beyond a reasonable doubt. *Id.* at 678. Finally, this Court found Defendant=s sentencing claims to be without merit. *Id*. at 678-79. Defendant's Petition for Certiorari in the United States Supreme Court was denied on October 5, 1998. *Mendoza v. Florida*, 525 U.S. 839 (1998).

On September 9, 1999, Defendant filed a shell motion for post-conviction relief.[2] Despite being permitted time to amend the facially insufficient motion[3] Defendant attempted to appeal the dismissal of the initial motion. This Court dismissed the appeal and ordered that Defendant Atimely comply with the order of the circuit court in respect to amending the motion for post-conviction relief so that this case is not further delayed.@ *Mendoza v. State*, 751 So. 2d 51 (Fla. 2000).

---

[2] Defendant claimed that a complete motion could not be filed because no records had been sent to the repository and reserved the right to amend following receipt of documents requested. After a hearing on the motion, at which the State presented documentation showing that records had been submitted, Judge Postman found that Appellant=s failure to file timely a completed motion was due to his own lack of diligence.

[3] Judge Postman had originally denied the motion without prejudice to refiling and granted sixty (60) days to amend. However, when Appellant complained that the dismissal would adversely affect his ability to seek federal habeas corpus relief, the judge vacated the dismissal.

Defendant finally filed his amended motion for post conviction relief on September 5, 2000, raising 28 claims:

> I.
>
> [DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNTIED [sic] STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT=S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATIONS OF CHAPTER 119, FLA.STAT., AND FLA.R.CRIM.P. 3.852. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAD RECEIVED PUBLIC RECORDS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.
>
> II.
>
> [DEFENDANT=S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF [DEFENDANT=S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> III.
>
> [DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL=S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.
>
> IV.
>
> [DEFENDANT=S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL=S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE AND COURT ACTION.

V.

[DEFENDANT] WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR=S ARGUMENTS AND THE TRIAL COURT=S STATEMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPRESSIBLE CONSIDERATIONS TO THE JURY, MISSSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL=S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED [DEFENDANT] EFFECTIVE ASSISTANCE OF COUNSEL.

VI.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF [DEFENDANT=S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

VII.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT=S AND STATE=S ACTIONS. TRIAL COUNSEL FAILED ADEQUATELY TO INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO RETAIN MENTAL HEALTH EXPERTS OR OTHER EXPERTS AND FAILED TO PROVIDE THEM WITH THIS MITIGATION, AND FAILED ADEQUATELY TO CHALLENGE THE STATE=S CASE. COUNSEL FAILED ADEQUATELY TO OBJECT TO EIGHTH AMENDMENT ERROR. [DEFENDANT=S] DUE PROCESS RIGHTS WERE VIOLATED, NO ADVERSARIAL TESTING OCCURRED, COUNSEL=S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT=S] DEATH SENTENCE IS UNRELIABLE.

VIII.

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING.

IX.

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY. [DEFENDANT] WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

X.

[DEFENDANT:S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT]. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

XI.

[DEFENDANT:S] GUILTY VERDICT AND JURY RECOMMENDED DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED [DEFENDANT:S] JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITH THE PROVINCE OF THE COURT.

XII.

[DEFENDANT:S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED. FLORIDA:S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XIII.

[DEFENDANT:S] DEATH SENTENCE IS FUNDAMENTALLY UNFAIR, ARBITRARY, CAPRICIOUS, AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE:S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE:S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL:S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

XIV.

[DEFENDANT:S] SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY:S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

XV.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSING HIS POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT:S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

XVI.

[DEFENDANT] WAS DENIED HIS RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN TRIAL COUNSEL FAILED TO OBJECT WHEN THE STATE ATTORNEY OVERBROADLY AND VAGUELY ARGUED AGGRAVATING CIRCUMSTANCES IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER.

XVII.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND RECOGNIZED APPLICABLE PRECEPTS OF INTERNATIONAL LAW, BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND/OR UNUSUAL AND INHUMAN AND DEGRADING TREATMENT AND/OR PUNISHMENT.

XVIII.

FLORIDA:S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY PRESERVED, [DEFENDANT] RECEIVED INEFFECTIVE ASSISTANCE OF

COUNSEL.

XIX.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY PREJUDICIAL PRETRIAL PUBLICITY AND BY THE LACK OF A CHANGE OR VENUE. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD AND/OR THE TRIAL COURT ERRED.

XX.

THE EIGHTH AMENDMENT AND [DEFENDANT=S] DUE PROCESS RIGHTS WERE VIOLATED BY THE SENTENCING COURT=S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

XXI.

THE TRIAL COURT=S SENTENCING ORDER DOES NOT REFLECT AN INDEPENDENT WEIGHING OR REASONED JUDGMENT, CONTRARY TO FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

XXII.

[DEFENDANT] WAS DENIED A PROPER DIRECT APPEAL OF HIS CONVICTION AND DEATH SENTENCE, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO OMISSIONS IN THE RECORD. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

XXIII.

THE JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING [DEFENDANT] TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. C.T. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

XXIV.

[DEFENDANT=S] DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

XXV.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, BY THE IMPROPER CONDUCT OF THE TRIAL COURT WHICH CREATED A BIAS IN FAVOR OF THE STATE. COUNSEL WAS INEFFECTIVE

FOR NOT OBJECTING.

XXVI.
[DEFENDANT] IS INSANE TO BE EXECUTED.

XXVII.
[DEFENDANT=S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED WHEN THE JURY VENIRE WAS NOT SWORN PRIOR TO VOIR DIRE; TRIAL COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE.

XXVIII.
[DEFENDANT=S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERROR WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR. 231-390).[4] A *Huff* hearing was held on the motion on January 26, 2001, after which the court orally denied all claims and subsequently entered a written order on March 5, 2001. The post conviction court found all of the claims facially insufficient, conclusively refuted by the record, procedurally barred and/or not ripe for adjudication and, thus, summarily denied the motion. (PCR. 665-73)

Defendant appealed the summary denial of his motion for post conviction relief to this Court, raising 20 issues.[5] On

[4] The symbol “PCR.” and “S-PCR.” will refer to the record on appeal and supplemental record of Defendant’s appeal from the denial of his post conviction motion FSC case No. SC01-735.

[5] (i) the trial court erred by summarily denying Defendant’s ineffective assistance of counsel claims and he is entitled to an evidentiary hearing; (ii) error to deny motion to disqualify; (iii) Defendant was improperly denied access to public records;

April 3, 2002, this Court remanded the matter for an evidentiary hearing on the claims of ineffective assistance of counsel raised in Defendant=s September 9, 2000 motion for post conviction relief. At that time, this Court dismissed without prejudice Defendant's petition for writ of habeas corpus, which raised ten allegations of ineffective assistance of appellate counsel and which had been filed concurrently.

On August 27, 2002, Defendant filed a supplement to his motion for post conviction relief, claiming that his sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).[6] The

---

(iv) trial counsel was ineffective during voir dire; (v) jury venire was not sworn prior to voir dire; (vi) statements by the prosecutor and trial court were prejudicial, inflammatory and improper; (vii) penalty phase jury instructions were incorrect and improperly shifted the burden to Defendant to prove that death was inappropriate; (viii) trial court gave erroneous instruction to jury on the standard for judging expert testimony; (ix) jury received inadequate guidance concerning the aggravating circumstances to be considered; (x) the State relied on non-statutory aggravating factors; (xi) the *Caldwell* claim; (xii) the rules prohibiting juror interviews are unconstitutional; (xiii) the State overbroadly and vaguely argued aggravating circumstances and trial counsel conceded aggravating circumstances without Defendant's consent; (xiv) execution by electrocution and/or lethal injection is cruel and/or unusual and inhuman and degrading treatment and/or punishment; (xv) Florida's capital sentencing statute is unconstitutional; (xvi) absence of change of venue denied Defendant a fair and impartial jury; (xvii) unconstitutional automatic aggravating circumstances; (xviii) improper conduct of the trial court created a bias in favor of the State; (xix)Defendant is insane to be executed; and (xx) cumulative error. Initial Brief of Appellant, FSC Case No. SC01-735.

[6] On remand, Defendant had filed a motion for reconsideration of the claims not involving ineffective

State responded to this supplement on November 22, 2002. After listening to argument, the lower court denied this claim.

The matter then proceeded to an evidentiary hearing on April 22, 2003. Defendant presented the testimony of Dr. Vincent Dimaio, Chief Medical Examiner for Bexar County, Texas. (T. 3)[7] Dr. Dimaio reviewed the deposition, trial testimony and report of gunshot residue expert Gopinath Rao, a police officer's report, the medical examiner=s report, the crime scene report and diagram, the trial testimony of Thomas Quirk, Ray Freeman, and R. Gallagher, and Humberto Cuellar=s statement and trial testimony. (T. 5) Dr. Dimaio stated that Mr. Rao did a standard method of gunshot residue analysis in this case. (T. 8-9)

Dr. Dimaio stated that Mr. Rao=s analysis showed that Humberto Cuellar had high levels of gunshot residue on the back of his left hand, less on his left palm and significantly less

---

assistance of counsel in his amended motion for post conviction relief and of the denial of his claim for public records against the City of Miami Police Department. After a hearing on this motion, the lower court refused to reconsider the additional claims in the amended motion for post conviction relief. However, the court permitted Defendant to file a new demand for additional public records, limited to the matters relevant to this case. On June 28, 2002, the City of Miami Police Department delivered additional police reports regarding Defendant=s prior convictions. The lower court had given Defendant until August 27, 2002, to file an amendment to his motion for post conviction relief based on any new claims arising from the new records.

[7] The symbol AT.@ will refer to the transcripts of the evidentiary hearing.

on his right hand. (T. 10-11) He opined that this distribution indicated that Humberto had fired a gun. (T. 11-12) Dr. Dimaio stated that he based his conclusion on a study he had done, which had been presented in Argentina but never published. (T. 12-13)

Dr. Dimaio also reviewed the results of the gunshot residue test on Lazaro Cuellar=s hands. (T. 13-14) He found one particle on the back of Lazaro Cuellar=s right hand, three on the back of his left hand and none on either palm. (T. 14) Dr. Dimaio opined that this distribution indicated that Lazaro Cuellar had been near a gun when it was fired but not that he had handled a recently fired gun. *Id.* He stated that the gunshot residue on Lazaro=s hands was inconsistent with him having remained in the car during the shooting. (T. 17)

Dr. Dimaio admitted that experts in gunshot residue generally testify only that a person could have gotten the residue on their hands by firing a gun, being near a gun that had been fired or handling a recently fired gun. (T. 15) However, Dr. Dimaio based his opinion on his own unpublished study, that involved 30 test firings and resulted in positive results for gunshot residue in only 10 trials. (T. 15-16, 34)

Dr. Dimaio stated that the timing of the taking of the swabs was relevant because gunshot residue particles are easily

lost from the hands. (T. 17-19) However, he stated that so long as the residue was present and distributed on the hands in the manner he saw, the fact that the swabs were taken several hours after the crime would not affect his opinion. (T. 19-20)

Dr. Dimaio stated he could give degrees of probability that the gunshot residue got on the Cuellars' hands in the manner he had suggested but refused to assign it a percentage. (T. 24-26) He stated that the analysis would depend on a number of circumstances, including the weapon used, the relative locations of the gun and the hands, and the passage of time. (T. 25-26)

Dr. Dimaio admitted that the same gunshot residue results could have been obtained if Humberto Cuellar had extended his hands toward Mr. Calderon's gun simultaneous with Mr. Calderon firing at Humberto. (T. 26-27, 28-30) However, Dr. Dimaio did not believe that Humberto's hands could have been extended in such a manner as to have caused the observed results based on Humberto's statement that he had a gun in his hand, had just struck the victim, was two to three feet away and did not point a gun at Mr. Calderon. (T. 31-32, 38)

Dr. Dimaio could not scientifically opine whether gunshot residue would transfer from clothing or what effect blood would have on gunshot residue tests. (T. 27-28) However, he did believe, based on common sense, that residue would transfer and

blood would affect the results. *Id.*

Dr. Dimaio stated that his normal hourly rate was $250 per hour but that he was charging a flat rate of $2,000 for traveling to Florida and testifying at the evidentiary hearing. (T. 20) Dr. Dimaio admitted that he would not have done this work for the county rate of $125 an hour. (T. 21-23)

Defendant next called Minaelia Mendoza, Defendant=s paternal aunt. (T. 59-60) She stated that she lived near Defendant=s family when he was born. (T. 61) Defendant=s family was a poor, working class family who lived in a boarding house. (T. 61-62) She stated that Defendant was playful, fought with other children and was not peaceful as a child. (T. 62-64) She stated Defendant was not taken to the doctor as a result of his behavior. (T. 63) She stated that Defendant was sickly and would faint without any apparent cause. (T. 64-66) Defendant was taken to the doctor, and no physical cause was found. (T. 66) Defendant was then taken to a *Santero* and Ascratched with *Palo*.@ (T. 68-69) This is akin to making a pact with the devil and involves bathing the person with roots and grass and sacrificing animals, as well as making a mark on the person=s skin. (T. 69) This ritual was done because Defendant was nervous and did things that were not right. (T. 70) Defendant also claimed to have nightmares about monsters. (T. 71)

Ms. Mendoza stated that Defendant=s mother would punish Defendant=s misbehavior by hitting him, and Defendant would throw things at his mother in response. (T. 71-72) His mother would also tell Defendant that she wished him dead and that he was a bad boy and would ask him why he did this to her. (T. 75) Ms. Mendoza stated that she and Defendant=s father tried to convince Defendant=s mother not to do these things. (T. 75-76)

Ms. Mendoza left Cuba before Defendant's family and later had contact with them by mail and phone when they were in Peru. (T. 76) She stated that when Defendant arrived in Miami he appeared nervous and restless. (T. 77) Defendant was not given psychiatric help but did continue to see the *Santero*. (T. 77-78) Defendant and his mother argued because he was not peaceful and because Defendant was skipping classes. (T. 78-79) Ms. Mendoza thought Defendant was using drugs because he would not return home when he had promised. (T. 79)

Ms. Mendoza believed that there was a history of mental illness in her family. (T. 80) Her father slept on a bed full of stones to defend himself against some imagined threat, hit her brother with a bat, a bottle and pans, abandoned them when they were young and frequently talked to himself. (T. 80-81) She also believed that a sister who lived in New York was mentally ill because she abused alcohol and drugs, was violent, did things

that were not right and got in trouble with the law. (T. 81-82) She was treated by psychiatrists and had a son who slashed his wrists and Abecame crazy for a while.@ (T. 82)

Ms. Mendoza believed that there was a family history of alcoholism because all but two of her twelve brothers drank. *Id.* She stated that she was an alcoholic before she found God. *Id.* She believed that Defendant=s father was an alcoholic because he drank on a regular basis and got drunk. (T. 82-83)

At the time Defendant was arrested, Ms. Mendoza was not on speaking terms with Defendant=s family. (T. 83) She had stopped speaking to them between three and five years after they arrived from Peru and did not speak to them for close to nine years. (T. 83-85) Ms. Mendoza knew from the media coverage that Defendant had been arrested and was being tried, but did not attempt to contact Defendant or his family. (T. 85-86) She did claim to have offered assistance to other family members and was told that her help was not wanted. (T. 86)

Ms. Mendoza did not live with Defendant and his family and did not accompany them to the doctor or *Santero*. (T. 89) She originally stated that Defendant=s parents discussed everything about Defendant with her but later admitted that they did not. *Id.* In fact, she was unaware that Defendant=s parents had taken him for psychiatric treatment from the time he was two until he

was thirteen. (T. 89-92) She did not know that Defendant was treated with psychotherapy, family therapy and a special school therapist in Cuba. (T. 94)

Ms. Mendoza admitted that she never saw any bruises or cuts on Defendant caused by his mother's corporal punishment. (T. 95-97) She admitted that Defendant fought back when his mother disciplined him. (T. 97) She admitted that no one could control Defendant and that he refused to follow rules. (T. 101-02)

Defendant next called Elisa Contreras, one of Defendant's high school teachers. (T. 106) She taught Defendant one year, spoke to him on the phone the following year and saw him at the beginning of the year after that. (T. 107) This was around December 1981, and she had not been in contact with Defendant since. *Id.* She remembered Defendant because she constantly had to tell him to be quiet. *Id.* Defendant would answer back, apologize and then do it again. *Id.* She stated that Defendant could not sit still and was always making up excuses to leave the room. (T. 109) She stated that Defendant did not study much but did well when he did study. *Id.* She only saw Defendant one hour a day in class but thought he got along well with other students, did not get into fights, did not have a lot of friends and was a follower. (T. 109-10)

She stated that she could have sent Defendant to the school

psychologist if she thought he needed it. (T. 111) If he were a student now, she would send him to counseling because he would not sit still. (T. 111-12) She believed that she met with Defendant=s mother once but did not recall why. (T. 113) Defendant did not want his mother to know that he was misbehaving. *Id.*

Damien Fernandez, an associate professor of international relations at FIU testified next regarding his field work in a Cuban refugee camp in Peru in 1980. (T. 118-19) He visited the camp twice. *Id.* He published an article about this work in 1984. (T. 128) The court declared him an expert in the Asocio-economic conditions in Latin American countries@ even though Defendant never asked that he be so qualified. (T. 123-26)

The camp he visited was run by the Red Cross and housed between 750 and 800 Cubans in tents and barracks. (T. 120) There were two groups of people in the camp, families and young single men who appeared prone to violence. (T. 121) The living conditions were poor as basic facilities were lacking, the food supply was uncertain, there was minimal security around the camp and it was difficult to maintain public order in the camp. *Id.*

Mr. Fernandez met Defendant once and from that conversation determined Defendant was in the same camp that he had visited. (T. 122) Mr. Fernandez stated that, hypothetically, being around

this type of environment would cause a person similarly situated to Defendant to feel fear, despair and hopelessness. (T. 126-27)

On cross, Mr. Fernandez admitted that he did not know the names of any of the people he interviewed in the camp or what became of them or anyone else from the camp. (T. 128-30) He had no idea how the experience in the camp affected anyone. (T. 129)

Defendant next called Claudia Baker, a licensed clinical social worker. (T. 141) Ms. Baker had specialized in the assessment and treatment of post traumatic stress disorder (PTSD) for approximately five years. (T. 141-42) She had never been qualified as an expert or testified in any court regarding a diagnosis of PTSD. (T. 143-44) Because she was not a psychologist or psychiatrist, Ms. Baker could provide psychotherapy but not medical attention. (T. 144-45) Ms. Baker=s only work with the criminal justice system had been as a mitigation specialist. (T. 145)

During a discussion of Ms. Baker=s qualifications, Defendant asserted that he hired her particularly to diagnose PTSD. (T. 151) It was also revealed that Ms. Baker had not received her masters in Social Welfare until 1993, and had just started doing forensic work. (T. 151-52)

In performing her assessment, Ms. Baker interviewed Defendant and spoke to Dr. Weinstein, Odalys Rojas, Defendant=s

parents, Alex Suarez and one of Defendant=s paternal aunts. (T. 153-55) She also reviewed Defendant=s medical records, his social security records, Dr. Haber=s deposition, the reports of Drs. Haber, Castillo, Toomer, Aguila Puentes and Eisenstein, and reports of Defendant=s crimes. (T. 154-55) Ms. Baker stated that she found Defendant hesitant to discuss his experiences in Peru because he said they had nothing to do with his criminal history, which he attributed to drug use. (T. 156-57) He glossed over the experience describing it as just having seen some fights. (T. 157) She believed this hesitation indicated that Defendant suffered from PTSD caused by those experiences. *Id.*

Ms. Baker stated that Defendant also reported having intrusive thoughts, nightmares, flashbacks and responses based on his experience in Peru as well as having been shot. (T. 159) She found these to be symptoms of PTSD. *Id.* She also found Defendant=s decreased interest in participating in activities and feelings of estrangement from others to be symptoms of the disorder. (T. 159-60) Ms. Baker found Defendant=s reports of difficulty sleeping, irritability, difficulty concentrating and distrust of others to also be symptomatic. (T. 162)

Ms. Baker testified that Defendant said he had started using marijuana upon his arrival in Miami and that up until about 1989 he continued using marijuana, alcohol and

occasionally cocaine, but did not use them to excess. (T. 163) However, Defendant reported that his usage increased markedly in 1990 or 1992 but he did not have a reason for this increase. (T. 163-64) Ms. Baker believed, however, that it was associated with Defendant being shot in 1989 and was, therefore, symptomatic of PTSD. (T. 164) She stated that people with PTSD often get worse when they are ill and that when she suggested this to Defendant as a cause of his increased drug use, he agreed. (T. 165) Ms. Baker admitted that Defendant knew she was there at the request of his attorneys and the purpose of her visit. (T. 161)

Over the State=s hearsay objection, Ms. Baker related her conversation with Defendant=s mother about their experience in Peru, her difficulty with Defendant=s misbehavior and its increase after coming to Miami, and her observations of Defendant after he was shot. (T. 184-88) She also reviewed several documents. (T. 188-89) Ms. Baker stated that Defendant=s decline in reported income after he was shot was significant to her. (T. 189) She also reviewed other records including reports of other experts. (T. 189-91) Based on this information, Ms. Baker opined that Defendant suffered from PTSD as a result of his experiences in Peru, that Defendant had begun to recover before he was shot and that being shot caused him to become worse than he originally was. (T. 191-92)

On cross, Ms. Baker acknowledged that Defendant was shot while buying drugs. (T. 193) She admitted that Defendant had told her the bullet had lodged near his spine and affected his ability to walk. (T. 193-94) In fact, the medical records showed that the bullet had entered his buttocks and lodged in his leg. (T. 194) However, Ms. Baker did not believe that it was significant that Defendant had been incorrect. (T. 194-95)

Ms. Baker admitted that Defendant had been seen by five mental health professionals none of whom found any indication that Defendant suffered from PTSD. (T. 196-97) She admitted that Defendant had told the trial experts that he had begun using alcohol before he left Cuba and progressed to marijuana immediately upon arrival in Miami. (T. 197-98) Defendant had also told these experts that he had progressed to cocaine, LSD, Quaaludes and black bow ties before he was shot. (T. 199-200) Ms. Baker also acknowledged that Defendant had been described as an unreliable informant regarding his life. (T. 200-01)

Ms. Baker admitted that her experience with PTSD was exclusively with combat veterans and disaster victims. (T. 201-02) Ms. Baker insisted that the fact that Defendant had himself caused the stressor of being shot by engaging in criminal activity did not affect her diagnosis. (T. 202-03)

Ms. Baker acknowledged that her finding of one of the

requirements for a PTSD diagnosis, hyper vigilance, was based on Defendant=s statement that he did not feel safe and was always checking behind him. (T. 204) She admitted it was difficult to determine if a criminal was hyper vigilant due to fear of arrest or because of PTSD. *Id.* However, she discounted this possibility because she believed that Defendant had not started committing crimes until 1991. (T. 205) She was unaware that Defendant had a juvenile record beginning almost at his arrival in Miami. *Id.*

Ms. Baker stated that because Defendant had not endorsed certain symptoms of PTSD, namely having difficulty recalling his experiences in Peru or having a sense of a shortened future, she believed he was being truthful when he claimed other symptoms. (T. 206) She stated that Defendant=s failure to believe that he had a shortened future while on death row was a sign of avoidance and not a lack of truthfulness. (T. 206-07)

Ms. Baker stated that another symptom of PTSD displayed by Defendant was his reported avoidance of certain activities that were similar to his experience in Peru. (T. 207) Ms. Baker stated that the traumatic part of being in Peru was witnessing violent acts and acknowledged that Defendant had continuously committed violent acts. *Id.* Ms. Baker insisted that this was consistent with avoidance, as Defendant avoided information about hunger and places with tents. (T. 207-08)

Ms. Baker stated that being in a new country and unable to speak English contributed to Defendant developing PTSD. (T. 208) However, she acknowledged that Defendant lived with Spanish speakers, attended classes in Spanish with mostly Spanish speakers and lived in an area of Miami, Little Havana, where Spanish was more commonly spoken than English. (T. 208-09)

Ms. Baker stated that she was able to diagnose other mental conditions, such as antisocial personality disorder. (T. 209) However, she never attempted to evaluate Defendant for anything but PTSD because that was all the defense asked her to do. *Id.*

Ms. Baker stated that she did not believe that Defendant=s experiences in Peru were insignificant despite the fact that he said they were because when Defendant agreed to speak more about the experiences he started to see a link between PTSD and his criminal activity. (T. 211-12) According to Ms. Baker, Defendant saw the link after she told him that people with PTSD use drugs to cope with the PTSD. (T. 212-13)

Ms. Baker did not determine whether Defendant=s parents suffered from PTSD despite having spoken to them about their experiences in Peru because she was not hired to render such an opinion. (T. 216) Ms. Baker did not know whether Defendant witnessed the acts of violence described by his mother because she only spoke to him in general terms. (T. 216-17) She stated

that she limited her questioning to the minimum necessary to find that Defendant met the DSM-IV criteria for PTSD. (T. 217) Ms. Baker did not know the prevalence of PTSD in people who had been in refugee camps because Defendant was the only such person whom she had ever evaluated for PTSD. (T. 217-18)

Ms. Baker relied in part on Defendant=s mother=s description of a change in behavior after the shooting even though he was not living with her at the time because she assumed they were still in contact. (T. 218-19) She did not speak to anyone with whom Defendant was living at that time, nor did she read Defendant=s wife=s deposition. (T. 219) Ms. Baker admitted that she placed considerable significance on the decrease in Defendant's reported income after the shooting. (T. 219-20) However, she admitted that proceeds of criminal activity would not be reported to the Social Security Administration. (T. 220) She discounted the possibility that the decline in reported income was due to an increase in criminal activity because she was only aware of criminal activity after August 1991. *Id.* However, she knew that there was evidence that Defendant was committing crimes from 1988 forward. (T. 223-24)

Odalys Rojas testified that she was an investigator, previously employed at CCRC-South, who had begun investigating Defendant=s case in 2001. (T. 243-44) Ms. Rojas reviewed

Defendant's trial counsel's file, the record on appeal and other boxes of information concerning the case in the possession of CCRC. (T. 244-46) Ms. Rojas did not see evidence that there had been an investigator on the case at the time of trial. (T. 246)

Ms. Rojas first contacted Defendant's mother. (T. 247) For six months, she visited Defendant's mother regularly and spoke to her on the phone at least twice a week. *Id.* During this time, Ms. Rojas discussed Defendant's family and medical histories, his schooling and his behavior. (T. 247-48) Based on these conversations, she then contacted Defendant's friends, paternal aunts, teachers, work supervisors, ex-wife and Humberto Cuellar. (T. 250-51)

Over the State's hearsay objection Ms. Rojas then testified in detail regarding the substance of her conversations with Defendant's since deceased mother. Ms. Rojas testified that she learned that Defendant was born in Cuba, that he was a difficult baby who cried all the time and that Defendant's mother sent him to live with his paternal grandmother because she had difficulty coping with him and needed to work. (T. 262-63) Defendant remained with his grandmother for about a year until Defendant fainted three times and was returned to his parents so they could seek medical attention. (T. 263) Defendant was taken to the hospital, tests were run and no medical problems were found.

(T. 263-64) Defendant did not continue to have fainting spells but was afraid of the dark, did not want to sleep and claimed to see a woman coming to get him. (T. 264) Defendant was again taken to the hospital but was not found to have any medical problems. *Id.* Defendant=s mother then decided to seek assistance from a *Santeria* priest. (T. 265) Rituals were done in an attempt to cleanse Defendant of bad spirits and keep him safe. (T. 265-66) Ms. Rojas stated that Defendant=s mother was upset and believed she had wasted money on these cleansings after Defendant was sent to prison. (T. 266) Defendant=s mother had also reported to Ms. Rojas taking Defendant to the doctor again when he was 10 or 11 because his teacher at a summer camp had called and suggested Defendant be taken to a doctor as he fought with other children and could not be controlled. (T. 266-67)

In 1980, Defendant=s family decided to leave Cuba. (T. 267) They went to the Peruvian Embassy, entered the compound and remained there, living on the grounds, for ten days. *Id.* According to Ms. Rojas, Defendant=s mother stated that about 10,000 people were crowded in the compound and the only food available was that which the Cuban Government threw over the fence. *Id.* After the ten days, the family was sent home to await a flight to Peru. (T. 268) As they exited the compound, a mob pelted the family with food. *Id.* When they were informed that a

flight was available, the family again had to travel through a food-throwing mob that was also punching Defendant=s father. *Id.* When they arrived in Peru, they were assigned to a large tent, which they shared with 180 people. *Id.* There was crime, gambling, violence and people openly expressing their homosexuality in the camps. (T. 269) People fought for the little food that was available. (T. 269-70) According to Ms. Rojas, Defendant=s mother stated that her husband had a nervous breakdown in Peru. (T. 270) Defendant=s mother stated that Defendant saw his father crying, throwing himself on the ground and making animal noises. (T. 270-71) Defendant=s mother also stated that Defendant saw violence in Peru. (T. 271) Defendant would wake up crying and saying he had been dreaming about the fights. *Id.* Ms. Rojas also claimed that Defendant=s mother told her that Defendant contracted typhoid fever in Peru. *Id.* He received treatment but the treatment was poor. *Id.*

In August 1982, the family arrived in Miami, and Defendant was enrolled at Miami Senior High School. (T. 272) Shortly thereafter, Defendant=s mother started getting calls from the school indicating that Defendant was skipping classes and getting into trouble. *Id.* Defendant was also acting out at home. and not obeying his curfew, so his mother would lock him out of the house. (T. 272-73) According to Ms. Rojas, Defendant=s mother

told her that she would punish Defendant's misbehavior, which she viewed as rebelliousness, by pulling Defendant's ears and hitting him with whatever was at hand. (T. 275)

Lionel Perez testified that he met Defendant in 1981 or 1982 outside Miami Senior High. (T. 293) He and Defendant would play basketball and soccer after school. *Id.* Mr. Perez stated that Defendant was working in construction and cleaning machines at a Burger King at that time. *Id.* He stated that he believed that Defendant was a nice, quiet guy who worked two jobs to help his family. (T. 294) On cross, Mr. Perez stated that he befriended Defendant shortly after Defendant arrived from Peru and admitted that he and Defendant had a group of friends. (T. 302-03) He admitted he did not know whether Defendant completed school. (T. 303) Mr. Perez stated that Defendant may have quit school before he started working two jobs. (T. 305)

Mr. Perez stated that Defendant's mother was bossy and controlling and that Defendant's father was quiet. *Id.* He stated that Defendant's mother would scream at Defendant and that Defendant would do what his mother told him. *Id.* On cross, Mr. Perez stated that he went to Defendant's home on a daily basis until Defendant got married. (T. 306) He did not like Defendant's mother because she yelled at Defendant. (T. 307) However, Mr. Perez never saw Defendant's mother hit Defendant; she just yell

at Defendant to do things. *Id.* Mr. Perez believed that Defendant was obedient and was always home on time. (T. 308) Mr. Perez believed that Defendant's father had a drinking problem because he drank a beer every night after work. (T. 310-12)

Mr. Perez stated that every time he saw Defendant, he was drinking. (T. 295) Mr. Perez stated that he and Defendant would use marijuana together two or three times a week. *Id.* However, Defendant then began to use marijuana every day. *Id.*

After Defendant got married, which Mr. Perez believed happened between 1984 and 1986, Defendant and Mr. Perez only saw each other every two or three months. (T. 296) After Mr. Perez got married, he did not see Defendant for a long time. *Id.* One of the reasons that he stopped seeing Defendant at that time was that his wife did not like Defendant. (T. 313-14) When Mr. Perez did see Defendant again, Defendant was dirty, he had not shaved and he was hanging around with the wrong crowd. *Id.* Later, on cross, he stated that by the time Mr. Perez got married in 1989 or 1990, Defendant was always dirty. (T. 314) On these occasions, Defendant was at a supermarket in the area of 14th Avenue and Northwest Third Street, which was known as an area where drugs, guns and stolen cars were sold. (T. 297) To Mr. Perez, Defendant's physical appearance indicated he was using crack. (T. 298) Mr. Perez admitted that he never saw Defendant

use any drugs other than marijuana. (T. 321-22) Mr. Perez merely assumed that Defendant was using crack or cocaine from his appearance. (T. 322) Mr. Perez only saw Defendant drink socially. (T. 322-23)

Around 1990, Defendant started using Mr. Perez's name when he was arrested. (T. 315) Mr. Perez was aware Defendant had done so on a number of occasions. *Id.* Mr. Perez confronted Defendant about the use of his name, and Defendant initially denied it. (T. 316-317) Defendant later admitted that he had done it and apologized. *Id.* Mr. Perez hit Defendant for using his name. (T. 317)

The last time Mr. Perez saw Defendant was two or three days before his arrest. (T. 298-99) Defendant had shaved his head. (T. 299) Mr. Perez stated that Defendant told him he was in trouble because Defendant had been with two friends who were brothers when they shot someone. (T. 299-300) Mr. Perez admitted that when he saw Defendant after the crime, Defendant stated that he was in trouble and that the police were looking for him. (T. 317-18) However, Mr. Perez still chose to believe that Defendant was saying that his friends had done the shooting when he used the word *they* in connection with himself and his friends having been together when the crime was committed. (T. 318) Mr. Perez admitted that he told Defendant to leave town. *Id.*

Defendant next presented the testimony of Dr. John Eustace, a physician specializing in addiction medicine. (T. 328-29) Dr. Eustace became interested in this field because he is an addict. (T. 331) Dr. Eustace reviewed records about Defendant, reports of other experts from the time of trial and post conviction proceedings and depositions from the case, and interviewed Defendant and his ex-wife. (T. 332, 349, 352-53) Based on this information, Dr. Eustace diagnosed Defendant as suffering from marijuana dependency, in sustained remission, alcohol abuse and cocaine abuse. (T. 333-34)

Dr. Eustace stated that his interview with Defendant=s ex-wife was very important in reaching his diagnosis because she was living with him and knew the most about his history. (T. 334) Over the State's hearsay objection and based on Defendant's representation that he would be calling his ex-wife to testify, the court permitted testimony regarding the substance of that interview. (T. 334-39)[8] Dr. Eustace testified that Defendant=s ex-wife considered Defendant to be a loving, hard-working person before their marriage in 1987. (T. 339) Defendant occasionally smoked marijuana and drank only socially. (T. 340) Within a month of the marriage, Defendant had a fight with his sister-in-

[8] Defendant later rested without calling Defendant=s ex-wife. (T. 579) The court refused to rule on the State's motion to strike Dr. Eustace=s testimony. (T. 338, 580)

law while drunk that alienated her. *Id.* When his wife first became pregnant in 1989, Defendant physically abused her while drunk. *Id.* When his wife was taken to deliver the baby, Defendant could not be found and subsequently arrived at the hospital so drunk that he was removed from the delivery room. (T. 340-41) After the baby was born, Defendant was not supporting the family and was behaving irresponsibly, which lead to problems in the marriage. (T. 342) On one occasion, Defendant went out with the baby and returned drunk. *Id.* When his wife confronted him, Defendant reacted violently, the police were called and Defendant was arrested for domestic violence. *Id.*

Dr. Eustace also related that Defendant=s ex-wife stated Defendant had told her he had been in a camp in Peru. Defendant also told her he had been disciplined in a verbally abusive manner as a child and by being forced to kneel on corn kernels and to sleep outside the house. (T. 346)

Dr. Eustace considered Defendant a reliable source of information because much of the reported history was the same as what Defendant had reported to other experts. (T. 352) These other experts included Drs. Haber and Toomer. (T. 355)

Defendant next called Barry Wax, one of his trial attorneys. (T. 362-63) Mr. Wax did not believe that Defendant=s crime warranted the death penalty and pursued a strategy of

showing that one of the codefendants was the shooter so that Defendant would not be sentenced to death. (T. 365-66) He remembered calling Humberto Cuellar at the penalty phase. (T. 375)

During opening statement, the jury was told that Mr. Calderon was a *bolitero* but no one was sent to find witnesses to support that assertion. (T. 367) Mr. Wax did not recall the issue of Mr. Calderon being a *bolitero* being litigated. (T. 402) However, he stated that if the trial court had precluded such evidence, he would not have attempted to present it in contravention of the court=s order. *Id.*

The jury was also told that Defendant and the codefendants were trying to collect a debt rather than robbing the victim and that they would hear testimony from the codefendant. (T. 367-68) He did not recall if he attempted to investigate this claim. (T. 402) Mr. Wax did not call Lazaro who had stated in a deposition that he had no knowledge of a robbery plan. (T. 368-70) Lazaro had also stated that he did not see Defendant with a gun. (T. 370) Mr. Wax recalled that Humberto testified that it was a robbery and Defendant was the shooter. (T. 374) Mr. Wax admitted that sometimes it was necessary to change one=s strategy based on events at trial. (T. 412) Mr. Wax admitted that the trial record reflected that he had made a strategic decision not to call

Lazaro based on events at trial. (T. 413-14) However, he did not recall why that strategic decision was made. (T. 414)

Mr. Wax recalled having Drs. Toomer and Eisenstein appointed as mental health experts to evaluate Defendant. (T. 397) He did not recall having Dr. Leonard Haber appointed but admitted that Dr. Haber=s report showed that he was a defense expert. (T. 398) Mr. Wax did not believe that the trial court would have appointed multiple experts to evaluate the same areas at the time of Defendant=s trial. (T. 397, 399)

Mr. Wax did not recall whether he gave Defendant=s school records to Dr. Toomer. (T. 371) Mr. Wax would have given Dr. Toomer contact information for Defendant=s family and asked Dr. Toomer to contact them himself to prepare a psychosocial history. (T. 372) Mr. Wax did not believe that he gave Dr. Toomer contact information for Defendant=s friends. *Id.* Mr. Wax could not locate any of Defendant=s school teachers. *Id.* He relied upon Defendant=s mother to provide information, but her information was limited. (T. 373) Mr. Wax did not get employment and medical records about Defendant other than the records from Cuba provided by Defendant=s mother. (T. 373-74)

Mr. Wax admitted that he told Dr. Eisenstein that Defendant had been shot previously. (T. 414) He stated that he relied upon the experts to tell him what was wrong with Defendant. *Id.* Had

any of the three experts he hired indicated that additional expertise was needed, he would have sought such additional assistance. (T. 414-15)

Mr. Wax stated that Mr. Suri established a very good relationship with Defendant=s mother. (T. 376) Mr. Suri would have been the primary contact with her. *Id.* Mr. Wax stated that he saw Defendant more times than were reflected on his bill. (T. 378-79) He stated that the file Defendant=s present attorneys showed him was incomplete because the Aclient contact@ file that he kept in every file was missing. (T. 379-80) Mr. Wax recalled speaking to Defendant=s mother on more than one occasion even though he only had notes from one meeting. (T. 381-82) He described getting background information from Ms. Mendoza as "like pulling teeth." (T. 382) He did learn that Defendant had fainting spells and Dr. Eisenstein=s evaluation was intended to explore psychological deficits. (T. 383) His notes reflected discussions regarding Defendant being disciplined by having his ears twisted and being hit. *Id.* Mr. Wax did not speak to Defendant's aunt, whose name was reflected on his notes. (T. 383-84)

On cross, Mr. Wax stated he thought he had adequately protected the Defendant's rights at trial but that, based on his experience now, he might have done some things differently in

terms of presenting mitigation. (T. 390-91) Mr. Wax was aware that Defendant had an extensive criminal history and a number of pending cases at the time this matter was tried. (T. 399) This affected his handling of the case. (T. 399-400) He would not have called Alexander Suarez to testify about Defendant=s drug use if Mr. Suarez had told the police that Defendant had confessed to this murder. (T. 400-01) He stated that he probably would not have called Defendant=s wife to testify if there was a history of domestic violence. (T. 393) He also probably would not have called Defendant=s friend to testify about drug use if it would have revealed that Defendant had used his friend=s name when Defendant was arrested previously. (T. 393-94)

Mr. Wax admitted that Defendant was a difficult client. (T. 402-03) He stated that Defendant=s mother was also not forthcoming in her willingness to provide information. (T. 406) However, Mr. Wax=s notes indicated that he asked Defendant=s mother about everything in Defendant=s life, beginning with Ms. Mendoza=s pregnancy with Defendant. *Id.* Mr. Wax stated he also explained to Defendant=s mother the importance of providing even negative information about Defendant. *Id.* Mr. Wax=s notes indicated that Ms. Mendoza provide detailed information about her pregnancy, the fact that she had two abortions, Defendant=s medical condition at birth, and Defendant’s detailed medical

history. (T. 406-08) She also informed Mr. Wax that Defendant was a domineering child who was always in trouble at school and fighting. (T. 408) Mr. Wax attempted to determine if Defendant was abused as a child and was told that the only punishment Defendant received was spanking and ear twisting. (T. 408-09) Mr. Wax stated that Defendant reported having a very good, loving and protective relationship with his mother. (T. 409) If Mr. Wax had believed that Defendant had been abused, he would have attempted to develop and present evidence of such abuse. *Id.* Ms. Mendoza also spoke of Defendant's elementary school performance, and she recounted details of the family's emigration from Cuba through Peru. (T. 410) Ms. Mendoza also informed Mr. Wax about Defendant=s wife and children, and Mr. Wax arranged for Defendant=s sick child to be in court so the jury could see her. (T. 410-11) She also told Mr. Wax about Defendant=s schooling and behavior, including criminal behavior, in this country. (T. 411-12)

Arnold Suri, Defendant's other trial attorney, testified that he had attended a seminar in capital litigation before he tried this case. (T. 433) Mr. Suri did not believe the death penalty was warranted in this case because Mr. Calderon had fired first and because, in his opinion, the evidence did not establish that Defendant was the shooter. (T. 434-35)

Mr. Suri believed he stated in opening that the victim was a *bolitero* but did not recall telling the jury that Humberto Cuellar was the shooter. (T. 438-40) Mr. Suri knew he made a strategic decision, after intensive discussion and consideration of options, not to call Lazaro Cuellar. (T. 440-41, 460) However, he did not recall why the decision was made. (T. 441)

Mr. Suri stated that he called Gopinath Rao to show that the amount of gunshot residue on the Cuellars' hands indicated that they had fired a gun. *Id.* Mr. Suri stated that the time difference in Mr. Rao's testimony was not important to him because the point he was making with Mr. Rao could be made based on the State's shorter time line. (T. 442-45)

Mr. Suri did not recall why he decided to call Humberto Cuellar at the penalty phase. (T. 446) However, he thought it may have been to show there was no intention to kill the victim and that the murder occurred in reaction to the victim shooting first. (T. 447-48)

On cross, Mr. Suri stated that he got along well with Defendant and visited him more than most of his clients. (T. 452) He probably spoke to Defendant about any witnesses or information that could help the defense case. (T. 453) They also discussed Defendant's life extensively, including his growing up, his experiences in Peru, his parents and being shot. (T. 453-54)

Mr. Suri admitted that he would have tried to follow up on what Defendant told him. (T. 454) He admitted that during these extensive discussions there was never any indication that Defendant had been abused as a child. (T. 462) In fact, Defendant gave Mr. Suri the impression that he had a very loving and supportive relationship with his parents. (T. 463-64)

Mr. Suri admitted that he presented evidence about Defendant=s life, his emigration through Peru, and his experience of being shot. (T. 454) He also presented evidence that Defendant had a drug problem. (T. 458) However, he had no evidence that Defendant was under the influence of drugs at the time of the crime. *Id.*

Over the State's *Frye* objection, and after hearing arguments before and after voir dire, and without a specific ruling by the court on the admissibility of the evidence, Defendant then presented the testimony of Dr. Robert Thatcher, a specialist in biopsychology. (T. 480-89, 521-24) He stated that an electroencephalogram (EEG) was a measure of the electrical activity of the brain. (T. 489-90) He stated that a QEEG was a computerized manipulation of the data from an EEG and was first reported being done in the late 1950's. (T. 491) Dr. Thatcher admitted that Dr. Mark Neuer had published an opinion paper from the American Academy of Neurology in 1997 that stated that QEEG

should not be admissible in court proceedings. (T. 499-501) Dr. Thatcher admitted that he and others had published opposing opinion papers. (T. 501-506) He stated he had testified as an expert in QEEG in Florida and other states. (T. 506-07)

On voir dire, Dr. Thatcher admitted that QEEG was his major interest in practice and the focus of most of his life's work. (T. 508) He stated that his testimony about QEEG had been subjected to *Daubert* and *Frye* challenges in 1997 in Colorado and Texas. (T. 510) Dr. Thatcher admitted that the only paper he had seen expressing an opinion on the admissibility of QEEG on behalf of the American Association of Neurology was Dr. Neuer:s paper. (T. 515-16) He did not know if the American Board of Psychiatry or American Board of Psychology endorsed the use of QEEG testimony in court. (T. 516)

Dr. Thatcher opined that the Wisconsin Card Sort test was a poor test of left hemisphere frontal lobe dysfunction and that no adequate test existed for right hemisphere frontal lobe dysfunction. (T. 545-47) He stated that a QEEG would detect such dysfunction even when it did not appear in neuropsychological testing. (T. 547-48) Later, on cross, Dr. Thatcher stated that QEEG was not the only way of finding the dysfunction he claimed to be able to see and that functional MRI or PET scans might also show such alleged dysfunction. (T. 549) He stated that the

reported accuracy of QEEG detecting disorders varied from 29% to 99%. (T. 558) Despite stating on direct that neuropsychological testing did a poor job of finding frontal lobe dysfunction, Dr. Thatcher claimed that QEEG was reliable because it was highly correlated to neuropsychological testing. (T. 560) Dr. Thatcher admitted that QEEG involved more than simply digitizing EEG data. (T. 569-70) Instead, the data is digitized, run through a mathematical transformation and then compared to a database. *Id.*

Dr. Thatcher testified that he attempted to perform a QEEG on Defendant but Defendant refused to submit to the test. (T. 524-27) Dr. Thatcher then reviewed a report prepared by Dr. Weinstein in 2002. (T. 527) He believed that Dr. Weinstein had performed an acceptable QEEG because Dr. Weinstein had a good reputation and because he used a machine that is considered reliable. (T. 528-29) He also based that opinion on the fact that the results appeared typical of the data he generally receives. (T. 529-30) Dr. Thatcher did not think the equipment used needed to be calibrated because the machine had internal calibration. (T. 530-31) He believed that if the machine was not functioning properly, one would get no data or an obvious spike. (T. 531) Dr. Thatcher opined that even if the machine was out of calibration, it would not matter. (T. 531-32) He testified that, although he uses a different normal database than Dr. Weinstein

to evaluate deviations, because he was using Dr. Weinstein's data, he also used Dr. Weinstein's database. (T. 567-68)

Dr. Thatcher believed that Defendant's tests showed a deviation in Defendant's frontal lobes and left posterior temporal and parietal lobes. (T. 532) He saw an excess of alpha activity in this region and a reduction of communication with the rest of the brain. *Id.* In response to the Court's questions, Dr. Thatcher admitted that the data required a lot of interpretation by the evaluator. (T. 534-36) He believed that Defendant's test results were valid because the remainder of the brain had normal results, he did not believe that the test would malfunction in only one area and the frontal lobes are the easiest to damage. (T. 536-37) Dr. Thatcher also stated that the observed QEEG results could not have been affected by medication or the state of alertness of the patient. (T. 565-66) Dr. Thatcher stated that the right frontal lobe controlled social context and allowed one to express emotion while the parietal and temporal lobes controlled receptive language. (T. 537-39)

Dr. Thatcher stated that he did not know Defendant's history because Defendant refused to be examined. (T. 539) He opined that people with frontal lobe dysfunction frequently have problems in judgment and impulse control. (T. 539-41) He admitted that some people with frontal lobe deviations do learn

to control themselves and that treatment was possible. (T. 541-43) Dr. Thatcher opined that use of cocaine would exacerbate any dysfunction from a problem with one=s frontal lobes. (T. 543-44) He believed that Defendant=s refusal to be examined was an exercise of poor judgment. (T. 544-45)

Dr. Thatcher admitted that he relied on Dr. Weinstein=s report in reaching his conclusions. (T. 550-51) However, he did not know if Dr. Weinstein had taken Defendant=s history. (T. 551) He had not read Dr. Weinstein=s deposition carefully because he focused exclusively on the QEEG. *Id.* Dr. Thatcher admitted that he did not know whether Dr. Weinstein had experience as a neuropsychologist and stated that he did not have such expertise. (T. 553) He admitted that he only looked at the QEEG data from Dr. Weinstein and did not look at the other tests or their results. (T. 555) Dr. Thatcher stated that he believed it was appropriate for an expert to offer an opinion without reviewing any corroborative data. (T. 556-57)

Dr. Thatcher admitted that he did not find Defendant=s refusal to be evaluated significant in formulating his opinion. (T. 562-63) He had no idea whether the test results he saw would have existed had Defendant been tested in 1992 or 1994, as it was possible that the deviations he saw were the result of events that occurred after trial. (T. 564)

Defendant then recalled Dr. Eustace to state that the frontal lobes controlled judgment and that cocaine impaired frontal lobe function. (T. 571-73) Dr. Eustace also opined that addicts are not responsible for their behavior. (T. 573-74)

The State then called Alan Klein, an expert in gunshot residue analysis. (T. 581-82) Mr. Klein stated that he had been trained by Mr. Rao, an established expert in the field. (T. 583) Mr. Klein stated that it was not possible to tell with certainty how gunshot residue came to be present on an object. (T. 585) Accordingly, it was impossible to state how the gunshot residue arrived on the Cuellars' hands as the results were consistent with a number of scenarios. (T. 587-88) He stated that gunshot residue could result from being near a gun when it was fired or touching an object with gunshot residue on it. (T. 588)

On cross, Mr. Klein stated that the data about the number of particles of gunshot residue allegedly found in this case did not come from his files. (T. 592-94) Mr. Klein stated that the number of particles found did not affect the analysis of a gunshot residue test since the number and location of the particles on a hand did not limit the scenarios under which the residue was deposited. (T. 594-96) He stated he did not read the codefendant's trial testimony. (T. 598) He could only state whether a specific scenario was consistent with the observed

results. (T. 599) The possible scenarios from a specific result are often countless because of the numerous possible intervening activities before swabbing and because GSR transfers. (T. 600)

Dr. Gisela Aguila-Puentes, a neuropsychologist, testified that she evaluated Defendant at the time of trial and again at the time of the evidentiary hearing. (T. 611-14) She also read the reports of other experts. (T. 614-15) She stated that QEEG was not a routine test conducted for the evaluation of patients. (T. 616-17) Instead, the routine tests are batteries of neuropsychological tests that are well recognized by neurologists, psychiatrists and psychologists. (T. 617-18) She stated that QEEG is mainly used by neurologists and radiologists in doing research and that her work at Jackson Memorial Hospital is mainly clinical. (T. 618-620) She stated that she does not use QEEG because the work on it was still tentative and there is a great deal of disagreement in the field regarding the test's accuracy. (T. 620) She stated that it was not generally recognized in the scientific community while neuropsychological testing is both accepted and standardized. (T. 621)

She stated that her evaluation of Defendant revealed no frontal lobe dysfunction. *Id.* She stated that when she evaluated Defendant during the post conviction proceedings, Defendant was more cooperative. (T. 622) She stated that Dr. Eisenstein's

testing at the time of trial did not yield valid results on all of the tests because Dr. Eisenstein administered the tests in English and Defendant spoke primarily Spanish. (T. 622-23)

On cross, Dr. Aguila-Puentes stated that knowing if a patient had lost consciousness in connection with a head injury would be important to her. (T. 625-26) She stated that loss of consciousness unconnected with a head injury would be less important because in some cultures people faint intentionally when they are upset. (T. 626)

The trial court denied all of Defendant's claims on which the evidentiary hearing was held. This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's claims of ineffective assistance of counsel at trial. Defendant failed to prove that counsel's performance at the guilt phase was deficient or that any prejudice resulted. Defendant also failed to establish at the evidentiary hearing that his trial counsel were ineffective in their investigation and presentation of mitigation. Defendant's claim that his counsel was ineffective for opening the door to evidence regarding pending charges was not properly pled below. Therefore, the trial court properly denied Defendant's claims of ineffective assistance at the guilt and penalty phases.

ARGUMENT

I. INEFFECTIVE ASSITANCE OF COUNSEL AT THE GUILT PHASE

A. INTRODUCTION

It is well established that in order to allege a claim of ineffective assistance of counsel sufficiently, Defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984). Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 694-695.

Despite Strickland's clear mandate that an attorney's performance be evaluated from the perspective of counsel at the

time of trial, and despite the fact that they were adopted nine years after Defendant's trial, Defendant asserts that his trial counsel's performance must be judge against the 2003 American Bar Association Standards, as they allegedly embody the prevailing professional norms. Defendant's reliance on ***Rompilla v. Beard***, 125 S. Ct. 2456 (2005), in support of the proposition that the U.S. Supreme Court has applied the 1989, as well as the 2003, versions of the ABA Standards, to cases preceding their adoption is misplaced. The Court in ***Rompilla*** specifically cites the American Bar Association Standard in place in 1982, in finding ineffectiveness when counsel failed to review a readily available case file of defendant's prior rape conviction. In a footnote, the Court makes reference to the 1989 Guidelines, specifically stating that "[t]hose Guidelines applied the clear requirements for investigation set forth in the ***earlier*** Standards to death penalty cases and imposed similarly forceful directive[.]" ***Id.*** at 2466, n.7 (emphasis added). The discussion of the newer version of the Guidelines was only relevant because the United States had cited to it in its brief. ***Id.***

Defendant also relies on ***Rompilla***'s supposed retroactive application of the 1989 Standard, to establish that counsel's failure to retain an investigator constituted ineffective assistance of counsel, as well as in support of other alleged

instances of ineffectiveness throughout his brief. Defendant wants this Court to find that, because the later versions of the guidelines merely expand on the obligations that were previously stated more vaguely but that, nonetheless, already existed, any specific guideline stated in a later version creates the specific obligation retroactively. This premise not only ignores that the guidelines are merely intended to guide as to what is reasonable and any violation of them do not establish a claim, but it seeks to gloss over Defendant's failure to establish, after a full opportunity at an evidentiary hearing, that the prevailing 1994 professional norms required specific actions contrary to counsel's performance.

Moreover, without a more specific allegation of error, the mere fact that no investigator was allegedly obtained is not dispositive in determining ineffectiveness. *Davis v. State*, 915 So. 2d 95, 124 (Fla. 2005)(Trial counsel is not absolutely required to hire an investigator under all circumstances). Neither are counsel's alleged inexperience or heavy caseload. *Gamble v. State*, 877 So. 2d 706, 716 (Fla. 2004)(Ineffectiveness under *Strickland* requires more than just a showing that trial counsel was inexperienced or overworked). After a full evidentiary hearing Defendant failed to show how the alleged lack of investigator, or inexperience or caseload led to any

error which were unreasonable in 1994.

Even if a criminal defendant shows that particular errors by defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. *Strickland*. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different, or, alternatively stated in the case at hand, whether there is a reasonable probability that, absent the errors, the fact finder would not have found Defendant guilty. *Id.* at 694.

When evaluating an ineffectiveness claim following an evidentiary hearing, this Court has held that:

> The performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but . . . the trial court's factual findings are to be given deference. *See Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. *Id.* We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Porter v. State, 788 So. 2d 917, 923 (Fla. 2001).

B. INCONSISTENT THEORIES REGARDING THE IDENTITY OF THE SHOOTER

Defendant first alleges that the trial court erred in

denying his claim of ineffective assistance of counsel predicated on his trial counsel's presentation of allegedly inconsistent theories. Defendant argues that because in opening statements trial counsel stated that Humberto Cuellar had been the shooter, and then in summation he stated that it was his brother, Lazaro Cuellar, who the evidence supported had actually shot the victim, the jury discredited any arguments whatsoever from the defense and, therefore, convicted him. After a full opportunity to develop this claim at an evidentiary hearing, Defendant failed to establish either deficient performance or prejudice with respect to this claim. The claim was, therefore, properly denied.

A reading of the defense opening argument in its entirety clearly shows that the thrust of the defense's opening statement was to attack the credibility of the State's main witness. (DAT. 607-613) Counsel was particularly vague in his opening statements in light of the fact that shortly before opening statements the State had refused to commit to which of the Cuellar brothers it would be calling. (DAT. 471-72, 593-94) Moreover, as is true of most opening statements, instead of unnecessarily presenting a specific version of the events, trial counsel's opening focused on the facts which counsel knew would necessarily be coming into evidence and pounded again and again

that the State's case rested on the credibility of the main witness, and that the physical evidence would disprove the State's version of the events. He also attacked the credibility of the State's main witness by highlighting that Humberto Cuellar had made a deal with the State in exchange for his testimony. Counsel also mentioned Lazaro's deal with the government.[9] Moreover, he continually treated Humberto and Lazaro as one by repeatedly (three times in six pages of transcript) making reference to the "Cuellar brothers." (DAT. 610, 611, 612)

Although counsel did say "he's the one who did the shooting" immediately after making reference to Humberto, this was not the central focus of his opening statement. Rather, counsel's theme throughout the opening was to highlight how the physical evidence pointed to one of the "Cuellar brothers" having shot the victim. The fact that Humberto was shot by the victim, which was the point counsel was making immediately prior to the statement upon which Defendant bases this claim, lent support to this theory. Further support founded in the physical evidence was the fact that both the "Cuellar brothers" had gun shot residue on their hands. (DAT. 608) Further focusing on the physical evidence counsel highlighted how the cash and watch

[9] This reference was only allowed based on counsel's representation to the court that he intended to call Lazaro, as the State had challenged this reference as irrelevant unless Lazaro testified.

left on the scene further disproved the robbery theory that Humberto's testimony would allegedly establish. (DAT. 610-11) At the evidentiary hearing, one of Defendant's trial counsel, Barry Wax, testified that "we were trying to show the side of reasonable doubt in the guilt phase with respect to who was the actual shooter in this case, and we were trying to establish that Marbel was not the shooter, that one of the Cuellars [was]. (T. 365) The clear thrust of the opening was that it was more likely that one of the Cuellar brothers, not Defendant, was the shooter.

After all the evidence was heard and counsel made the strategic decision not to call Lazaro Cuellar, counsel pointed the finger at the Cuellar brother the jury had not heard from. Despite Defendant's assertions that the change was inexplicable, counsel clearly attempted to explain it to the jury when he started his summation by explaining that trials are "living things." (DAT. 1319-20) He then moved on to the thrust of his argument which was, as it had been in opening statement, that Humberto Cuellar was not credible.

Counsel outlined each part of the evidence that contradicted, or at least undermined, Humberto's testimony. The medical examiner's testimony that the shooter was right handed, the firearms expert's testimony about the casings and the

location of Defendant's prints at the scene all contradicted Humberto Cuellar's testimony. (DAT. 1320-24) He argued that Humberto was not credible because the gunshot residue evidence contradicted the testimony that Lazaro had been in the car. (DAT. 1324-28) He claimed that Humberto was lying about Lazaro being in the car to cover Lazaro's involvement in the shooting. (DAT. 1328-29) He argued that there was no evidence of a robbery other than Humberto's testimony and that it was inconsistent with valuables being left at the scene. (DAT. 1329-31) He then argued reasonable doubt existed because the plea deals and inconsistent statements rendered Humberto Cuellar's testimony incredible. (DAT. 1331-36) During this argument, counsel briefly stated that Lazaro shot Mr. Calderon. (DAT. 1332-33) The theme was the same as in opening, that one of the Cuellar brothers shot the victim and they both turned state's evidence to blame Defendant, but the physical evidence showed Defendant was not the shooter and this was not a robbery. As the arguments were not truly inconsistent and the change in theory of which Cuellar brother was the shooter was caused by trial developments, Defendant did not establish deficient performance.

Moreover, there is no prejudice. The jury did not need to rely solely on Humberto's testimony to find that there was a robbery or that Defendant was the shooter. There was no dispute

that at least two guns had been brought to the scene of the alleged "debt collection." Three men came to collect this debt from one individual in his driveway at approximately 5:40 in the morning, at a time when he was carrying a bank bag with a large sum of money. The position and direction of Defendant's print on the victim's car established that he was leaning over the victim's body, who was shot at close range. Ample evidence that did not turn on any credibility determination supported that the three men were there to commit a robbery and that Defendant was the shooter.

Furthermore, in order to accept Defendant's theory on prejudice, one has to accept that the jury ignored the instructions on burden of proof and with respect to arguments not being evidence. Defendant makes a few leaps, guesses and assumptions that the jury discredited counsel's reasonable doubt arguments because the defense was not credible regarding its theory on the identity of the shooter, essentially shifting the burden. Under *Strickland*'s analysis one must presume the decisionmaker is following the law. 466 U.S. at 694-95. The defense's allegedly conflicting arguments regarding the identity of the shooter should not have affected the jury's determination of whether the State had proven beyond a reasonable doubt that a robbery plan existed.

In arguing prejudice Defendant highlights the alleged weakness of the State's case in an attempt to show that the most minute of errors on counsel's part would have led to a different result. It is precisely for the reasons outlined by Defendant that no prejudice exists. The jury heard extensive challenges to the credibility of the State's main witness. Knowing that Humberto had all the reason in the world to lie to protect his brother and to save his own skin and that he had made inconsistent statements, the jury found Defendant guilty. There is no reasonable probability of a different result had counsel argued from the beginning the Lazaro was the shooter.

Defendant=s reliance on *Bland v. California Dep=t of Corrections*, 20 F.3d 1469 (9th Cir. 1994), *overruled by Shell v. Witek*, 218 F.3d 1017 (9th Cir. 2000), is misplaced. In *Bland*, the court was not confronted with a claim of ineffective assistance of counsel for changing a theory of defense in the middle of trial. Instead, the issue was whether the defendant was entitled to federal habeas relief because the trial court had refused to allow the defendant to substitute counsel without conducting an inquiry regarding the defendant=s complaint about his counsel. *Id.* at 1475-79. In determining that the defendant was prejudiced by refusal to allow a substitution, the court noted that his counsel pursued a defense that was inconsistent

with the defendant=s own prior statements and trial testimony. *Id.* at 1479. Here, the issue is not substitution of counsel; it is ineffective assistance of counsel. Moreover, here, the difference between opening and closing did not contradict Defendant=s own statements about what happened.

Counsel made a slight change in his argument that still fit in the main thrust of their strategy to point to the Cuellar brothers and establish reasonable doubt. It was the thrust of the defense to challenge Humberto Cuellar's credibility and counsel did so with a wealth of impeachment evidence. Having heard about the plea agreement, the inherent motive to protect his own flesh and blood and the prior inconsistent statements, the jury convicted the Defendant. As no deficiency or prejudice exists, this claim was properly denied by the lower court.

C. NOT CALLING LAZARO CUELLAR

Defendant next contends that the trial court erred in denying his claim that counsel was ineffective for failing to call Lazaro Cuellar as a defense witness at trial. However, Defendant utterly failed to prove either deficiency or prejudice at the evidentiary hearing. Thus, the claim was properly denied.

It should first be noted that at least part of this claim rests on an alleged promise to the jury supposedly made by counsel in opening statement to call Lazaro Cuellar to testify.

The record does not support that any such "promise" was made. Despite assertions to the court outside the presence of the jury that they would be calling Lazaro Cuellar, it is clear from the statement to the jury that the defense was, like the State, not committing to calling Lazaro. This is best evidenced by counsel statement that "the Cuellar brothers now are going to come to court, **or at least one of them** is going to come to court and he is going to [testify]." (DAR. 610)(emphasis added) This can hardly be characterized as a promise to the jury to present the testimony of Lazaro Cuellar, as Defendant alleges counsel did. Rather than stating what Lazaro would be testifying to, what counsel in fact did was tell the jury what Lazaro had already stated in a deposition. (DAT. 611) Furthermore, counsel's statement that "the evidence is going to come in the form of Mr. Cuellar," which Defendant also claims constitutes such a promise, cannot be characterized as such given that both Humberto and Lazaro are "Mr. Cuellar."

Even if Defendant had established that such a "promise" had been made, Defendant would still not prevail. At the evidentiary hearing, both Mr. Suri and Mr. Wax testified that they made a strategic decision not to call Lazaro Cuellar. (T. 413-14, 440-41, 460) The basis of this decision was also expressed by counsel at the time of trial. (DAT. 1213) Defendant presented no

evidence that counsel did not thoroughly investigate calling Lazaro before deciding not to do so. As counsel made a strategic decision after a thorough investigation of the facts, it does not form the basis of a claim of ineffective assistance of counsel. *Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))); *see also Strickland*, 466 U.S. at 690-91 (AStrategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.@); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Thus, the lower court properly denied this claim.

Defendant seems to suggest that since counsel did not remember why they made the strategic decision, it must be disregarded. However, this argument ignores that decisions of counsel are presumed to be valid strategic decisions and the burden is on Defendant to rebut this presumption. *Strickland*, 466 U.S. at 694-695; *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). As such, the fact that Defendant's counsel could not remember why they chose not to call Lazaro Cuellar does not support his claim. *Happ v. State*, 30 Fla. L. Weekly S839 (Fla. 2005) (no basis to find ineffectiveness where counsel stated there was a reason for the decision not to call a witness but

could not recall the reason).

Defendant asserts that the decision was an unreasonable one because, once the State abandoned the premeditation theory upon resting its case, the critical issue was whether there had been a robbery, not the identity of the shooter. Therefore, Lazaro's testimony, which Defendant argues supports the "debt collection and absence of robbery intent" theory, had to be elicited despite its damaging nature with respect to the identity of the shooter. Strategic decisions made after a thorough investigation may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton*, 691 So. 2d at 471. Here, it cannot be said that no competent attorney would have failed to call Lazaro Cuellar. Defendant asserted that the Cuellar brothers were lying about their involvement in the crime. Lazaro Cuellar stated in a deposition that Defendant orchestrated this crime. Defendant sat in the front seat and told Lazaro where to drive, where to park his car, and what story to tell the police to cover up the shooting. (S-PCR. 195-96, 198, 205) His testimony was also damaging as he stated that Defendant entered the car after the shooting stating he had killed the victim. (PCR. 204) Additionally, the trial court had limited its pretrial ruling regarding the victim's *bolito* involvement to evidence stemming from personal knowledge

of it. (DAT. 455-69, 737-52) Moreover, Lazaro's statement also furthered the robbery theory in that Lazaro stated he was holding a gun in his hand, which was visible to Defendant, when Lazaro first got into his car. (PCR. 192)

Despite Defendant's assertion that Lazaro's deposition statement was highly credible because it jeopardized his plea deal, many of the statements are incredible on their face. After being woken up without any prior warning, he did not ask his brother where they were going at 5:00 a.m. on a work day, and he did not see who took his gun which was in a holster immediately next to him. (PCR. 185-86, 188, 202) Moreover, Lazaro had previously made a statement that was inconsistent with his deposition testimony and would have been impeached. (DAR. 830) He would also have been cross examined about the victim's wife having seen a car of similar description as Lazaro's casing their home days before the murder. As such, it cannot be said that no competent attorney would have decided not to call Lazaro as the cost far outweighed the benefit of his testimony.

Several courts have rejected claims that counsel was ineffective for failing to call witnesses that counsel had informed the jury it would call. In *Kenon v. State*, 855 So. 2d 654 (1st DCA 2003), the First District rejected a claim of ineffective assistance of counsel, where trial counsel, not only

had named a witness in opening statement but, as in the case at bar, had recited the substance of exculpatory statements given by the witness in a deposition, but later decided not to call the witness. The court upheld the lower court's finding that a strategic decision was made, which was based on trial counsel's evidentiary hearing testimony that he had made such a decision and that he was aware that the witness had made inconsistent statements to police and in the deposition, thereby opening her up to cross-examination.[10] The court also found no prejudice had been established and distinguished *Dames v. State*, 807 So. 2d 756 (2nd DCA 2002), where counsel had failed to call any witnesses after asserting a self-defense theory in opening, stating that the prejudice in that case was counsel's error in not providing a predicate for the crucial jury instruction and not from the failure to fulfill the promise itself.

In *Howard v. Davis*, 815 F.2d 1429, 1432-33 (11th Cir. 1987), counsel asserted an insanity defense in opening statement but then dropped that defense during trial. The Court held that counsel was not ineffective because counsel did so to prevent the State from rebutting the defense. In *Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003), counsel had promised to call two witnesses in opening statement that he later made a strategic

[10] But unlike the case at bar, in *Kenon*, the defendant called the witness at the evidentiary hearing.

decision not to call. The Court held that this did not constitute ineffective assistance of counsel. *See also Schlager v. Washington*, 113 F.3d 763 (7th Cir. 1997); *United States v. McGill*, 11 F.3d 223, 227-28 (1st Cir. 1993).

Moreover, Defendant completely failed to prove that he was prejudiced by his counsel=s failure to call Lazaro Cuellar. Defendant did not call Lazaro at the evidentiary hearing. Instead, he relied exclusively on Lazaro=s pretrial deposition to assert what Lazaro's testimony would have been. However, it is well settled in Florida law that depositions are not admissible. *See State v. Clark*, 614 So. 2d 453 (Fla. 1992); *State v. Basiliere*, 353 So. 2d 820 (Fla. 1977). In light of the credibility issues outlined above, it was particularly important that Defendant have called Lazaro Cuellar in order for the lower court to evaluate prejudice properly. Since Defendant did not call Lazaro Cuellar, the post conviction court was deprived of the ability to judge Lazaro's credibility. Moreover, the State was deprived of its right to cross examine Lazaro. As such, Defendant presented no admissible evidence that he was prejudiced by the failure to call Lazaro Cuellar. His failure to call Lazaro resulted in a failure of proof on this claim. *Oisorio v. State*, 676 So. 2d 1363 (Fla. 1996); *Smith v. State*, 445 So. 2d at 325.

Even if Lazaro=s deposition testimony had been admissible or if Defendant had established that his trial testimony would have been the same, Defendant would still not have proven that he was prejudiced. Defendant=s claim is that Lazaro=s testimony would have presented a defense to the crime of robbery based on Defendant=s statement to Lazaro that Defendant was collecting a debt. However, Defendant does not explain how such testimony would have been admissible. Defendant=s statement to Lazaro was hearsay even if Lazaro had been called. *See Lott v. State*, 695 So. 2d 1239, 1242-43 (Fla. 1997)(defendant cannot admit his own statement to a witness through that witness because it is hearsay). As such, counsel cannot be deemed ineffective for failing to attempt to introduce inadmissible evidence. *Kokal v. Dugger*, 718 So. 2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Even if the testimony had been admissible, Defendant would still be entitled to no relief. According to Defendant, Lazaro=s testimony that they were collecting a debt would have negated that there was a robbery. However, a claim that Defendant is attempting to collect a debt by force is not a defense to

robbery. *Thomas v. State*, 584 So. 2d 1022 (Fla. 1st DCA 1991).[11] As Lazaro's testimony would not have presented a defense to the crime of robbery, counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *Kokal*; *Groover*; *Hildwin*; *Breedlove*.

Moreover, even if admissible and credible, Lazaro's testimony would have only established that he was not told there was a robbery. Since his lack of knowledge about a robbery plan does not necessarily negate that one existed, this testimony would have only further impeached Humberto's testimony to the contrary. As outlined above, Humberto's credibility was extensively impeached. Similarly Lazaro's testimony that he did not see a gun in Defendant's hand when he exited the vehicle would not have established that Defendant did not in fact have a gun. The evidence established Mr. Calderon was killed with a gun other than Lazaro's or his own gun. In his deposition Lazaro stated he brought his gun to the scene and he observed his

[11] This is also true of the law of numerous other states. *Whitescarver v. State*, 962 P.2d 192, 195 (Alaska Ct. App. 1998); State v. Schaefer, 790 P.2d 281, 284 (Ariz. Ct. App. 1990); *Westmoreland v. State*, 538 S.E.2d 119, 121 (Ga. Ct. App. 2000); *State v. Brighter*, 608 P.2d 855, 859 (Haw. 1980); *State v. Miller*, 622 N.W.2d 782, 785 (Iowa Ct. App. 2000); *Cates v. State*, 320 A.2d 75, 82 (Md. Ct. Spec. App. 1974); *State v. Ortiz*, 305 A.2d 800 (N.J. Super. Ct. App. Div. 1973), *People v. Reid*, 508 N.E.2d 661, 665 (N.Y. 1987); *Commonwealth v. Sleighter*, 433 A.2d 469, 471 (Pa. 1981); *State v. Hobbs*, 64 P.3d 1218, 1222-23 (Utah Ct. App. 2003); *State v. Self*, 713 P.2d 142, 144 (Wash. Ct. App. 1986).

brother holding that gun when Humberto returned to the car. Thus, Lazaro's testimony, in fact, supports that Defendant had the third gun. In light of the credibility problems with Lazaro's testimony, the negative facts revealed by the same testimony and the other evidence presented at trial, one more piece of impeachment, in the form of a self-serving exculpatory statement from a co-defendant, does not create a reasonable probability of a different result.

The cases relied upon by Defendant are inapplicable. In *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990), the Court found that the defendant had shown that his counsel was ineffective for failing to investigate and call witnesses in support of a defense theory. However, there, counsel had not interviewed the witnesses in questions, the witnesses were independent witnesses and they had been consistent in their accounts that they had seen another person running from the scene of the crime. Here, Defendant did depose Lazaro Cuellar, who was a former codefendant and who had not been consistent in his account of the crime. In *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), the court found counsel ineffective for stating in opening statement that he was going to call experts and then not calling them. However, the court relied heavily on the fact that the promise was powerful, the testimony was painted as significant,

the promise was made only one day before the defense rested without calling the experts and the change in decision was not based on a change in defense. Here, there was no such powerful promise, the testimony of an incredible codefendant cannot be said to be as significant as that of a doctor and there was a change. In *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989), counsel failed to investigate and interview the witnesses in question despite knowing about them, and the witnesses supported a viable defense. Here, counsel deposed Lazaro and his testimony did not support a viable defense. As such, none of these cases show that counsel was ineffective.

Defendant argues that without calling Lazaro, counsel's only argument challenging the robbery theory was to point to the victim's property left at the scene. However, this is not true. Counsel argued that there was reasonable doubt about the robbery because Humberto was the only direct evidence of such a plan and he was proven to be a liar with a lot to lose. This was the only reasonable strategy in light of the facts of the case. Although the argument did not persuade the jury, counsel could not dispute the rest of the evidence tending to support the robbery: that two guns had been brought to the scene of a confrontation with the victim in his driveway at 5:40 a.m. when he was carrying a bank bag with a large amount of money. Lazaro's

testimony does not establish a reasonable probability of a different result. Thus, the claim was properly denied.

D. GUNSHOT RESIDUE EXPERT EVIDENCE

Defendant next claims that his trial counsel was ineffective in failing to prepare and investigate evidence surrounding the swabbing that revealed gunshot residue particles present on both of the Cuellar brothers' hands. Defendant appears to assert that counsel should have ensured that Mr. Rao, the expert he called to testify at trial, knew the correct time when the tests were conducted. This claim was properly denied by the lower court as it is without merit and was not proven.

It should first be noted that in making this claim Defendant assumes that the jury believed the time testified to in rebuttal by crime scene technician Gallagher was in fact the time when the swabbing was done. At trial, Mr. Rao testified that the time he used in formulating his opinion came from paperwork included in the swab kits. (1172-1176) Given the conflicting evidence presented, the jury could have reasonably found that neither time was accurate. Moreover, contrary to Defendant's assertion, the timing of the swabs was not crucial to Rao's opinion as illustrated by the fact that he rendered an opinion as to Humberto when no time at all was indicated. (DAT. 1185, 1190) In fact, Mr. Rao stated at trial that his opinion

about the manners in which Humberto Cuellar could have obtained the gunshot residue results he obtained were the same if the swabs were taken at 9:00 a.m. or 8:00 a.m. (DAT. 1184)

Moreover, Rao not only opined that it was more likely than not that Lazaro had fired a gun, he also opined that it was also more likely than not that Humberto fired a gun (DAT. 1185, 1191-92). As it is clear from the rest of the evidence that only one of the two fired, his testimony was calculated to raise reasonable doubt. Furthermore, even with Defendant=s expanded time frame, Mr. Rao could not say that Lazaro Cuellar fired a gun. (DAT. 1198-99) He stated that there were many possible sources of the gunshot residue. (DAT. 1181) At the evidentiary hearing, Mr. Suri testified the time period regarding the gunshot residue was unimportant to him. (T. 442-45) He believed that under either time line, the point was made. *Id.* Irrespective of the time frame, Rao's testimony still furthered counsel's stated strategy of establishing reasonable doubt. Thus counsel was not ineffective for failing to provide accurate information in this respect.

For this same reason, none of the testimony elicited at the evidentiary hearing, either from Defendant's expert or the State's, furthers Defendant's claim that providing Rao with the correct time would have strengthened his testimony. As Defendant

points out his post-conviction expert's opinion differed from Mr. Rao's. DiMaio's opinion, which was based on his own study which had never been published, that Lazaro was near a gun when it was fired and that Humberto had fired a weapon do not establish that Rao's opinion would have been different. To prove prejudice for failing to provide information to an expert, Defendant must show that, had counsel provided the information in question, it would have changed the expert's opinion. *Sochor v. State*, 883 So. 2d 766 (Fla. 2004); *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997); *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). Here, Defendant did not call Mr. Rao at the evidentiary hearing. As such, he did not establish whether or how Mr. Rao's opinion would have changed had he been provided with the correct time at which Lazaro's hands were swabbed.

Moreover, Rao's testimony was challenged on other grounds. On cross examination, the State made it clear that Rao's opinion was predicated on information provided to him about the facts of the case such as the number of shots fired, which included shots fired by the victim. The state also elicited that the findings were also consistent with the testimony of Humberto Cuellar irrespective of the time frame. (DAT. 1192-93) As Defendant failed to establish either deficiency or prejudice with respect to this claim, it was properly denied.

D. FAILURE TO INVESTIGATE AND PRESENT *BOLITO* EVIDENCE

Lastly Defendant asserts counsel failed to investigate exculpatory evidence that the victim was involved in an illegal gambling operation called *bolito*. At the evidentiary hearing Defendant did not present any admissible evidence not known to counsel at the time of trial. The victim's prior arrest was known and excluded by the trial court. The victim's wife was asked and stated she had no personal knowledge of it aside from the arrest, which had been deemed too remote to be relevant. After a full opportunity to develop this claim, Defendant failed to present any evidence whatsoever in support of the claim. Thus, it was properly denied. *Oisorio; Smith.*

II. INEFFECTIVE ASSITANCE OF COUNSEL AT THE PENALTY PHASE

A. FAILURE TO PRESENT AVAILABLE MITIGATION

Defendant contends that his trial counsel was ineffective in failing to present available mitigation evidence. Specifically Defendant alleges that counsel should have: (i) ensured Dr. Toomer sought out or was provided with sources of information other than Defendant with respect to his drug abuse; (ii) sought and presented evidence other than that provided by Defendant's mother regarding Defendant's upbringing; (iii) sought and presented expert testimony to the effect that Defendant suffered from post traumatic stress disorder as a

result of his stay in refugee camps in Peru following his exile from Cuba and/or from a subsequent shooting; and (iv) investigated and presented evidence that a QEEG test indicated Defendant had frontal lobe dysfunction. Defendant failed to establish either deficiency or prejudice as to any of these claims. Thus, the lower court properly denied them.

Defendant begins his argument by stating that it is significant for the purpose of evaluating his claim that counsel failed to convince the trial court to find **any** mitigating circumstance. Counsel's failure to persuade does not establish deficient performance. *See Brown v. State*, 846 So. 2d 1114, 1126 (Fla. 2003); *Haliburton*, 691 So. 2d at 472; *Sims v. Singletary*, 622 So. 2d 980, 981 (Fla. 1993); *Douglas v. State*, 373 So. 2d 895, 896 (Fla. 1979). As stated in the above discussion with respect to the guilt phase claims, neither do counsel's alleged inexperience in capital litigation nor the alleged failure to retain an investigator. *Gamble; Davis*. Instead, Defendant must show with specificity that counsel was deficient for failing to investigate and present mitigation and that such a deficiency prejudiced Defendant. *Strickland*.

With respect to the presentation of mitigation at the penalty phase of a capital trial, counsel has a duty to conduct a reasonable investigation into a defendant's background or to

make a reasonable decision that such investigation is not necessary. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) In evaluating an ineffective assistance of counsel claim specifically pertaining to an alleged failure to fulfill that duty the United States Supreme Court has held that:

> Our principal concern in deciding whether [counsel] exercised "reasonable professional judgment" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Id. at 522-23 (citations omitted).

The burden of proving both *Strickland* elements is upon Defendant. *See Smith*, 445 So. 2d at 325. Furthermore, when evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000)(quoting *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998)).

Defendant alleges that because counsel did not believe the facts of the case warranted the death penalty, they did not

conduct sufficient investigation into mitigation. Counsel's subjective assessment is irrelevant, absent a showing that a reasonable investigation was not conducted. The record clearly reflects that it was. Counsel not only investigated, but also presented, evidence of Defendant=s mental state, his alleged drug abuse and his experiences in Cuba. Counsel had Defendant evaluated by three defense mental health experts: Dr. Leonard Haber, Dr. Jethro Toomer and Dr. Hyman Eisenstein. (T. 397-98) Dr. Eisenstein was specifically contacted to evaluate whether Defendant was brain damaged because Mr. Wax had information that Defendant had suffered from fainting spells as a child. (T. 383) Defendant called Dr. Toomer to testify at the penalty phase. Defendant submitted Dr. Eisenstein=s report for the Court=s consideration. Counsel also obtained Defendant=s medical records from his treatment in Cuba and presented them to the jury, as well as the medical records of Defendant=s treatment while in jail. (DAT. 1537-44, 1546-47, 1532-33) Counsel stated that none of these experts indicated that additional expertise was necessary. (T. 414-15) Mr. Wax interviewed Defendant=s mother, and while Mr. Wax stated that he felt it was difficult to obtain information from her, his notes revealed that he did obtain a plethora of information from her. (T. 406-12) Mr. Suri also indicated that he discussed Defendant=s life with him

extensively, that they would have discussed mitigation witnesses, that he knew about his background, that he knew of Defendant=s drug use and that there was no indication that Defendant was abused as a child. (T. 453-64) Moreover, it is clear that counsel knew of Defendant=s ex-wife and her potential testimony, as she was listed as a witness and deposed.

Having conducted this investigation, counsel stated that their strategy for the penalty phase was to show that the facts of the case did not warrant the death penalty. (T. 365-66, 434-35) Moreover, counsel stated that the manner in which they pursued mitigation was influenced by their desire to avoid presentation of Defendant=s criminal history. (T. 399-400) As the State would be able to cross examine any expert about the information that he was provided to formulate his opinion, *see* 90.705, Fla. Stat.; ***Parker v. State***, 476 So. 2d 134, 139 (Fla. 1985); ***see also Carroll v. State***, 636 So. 2d 1316, 1318-19 (Fla. 1994), limiting the information provided to Dr. Toomer was in accordance with the desire to limit the jury=s exposure to Defendant=s criminal history.

Since trial counsel did have Defendant evaluated by three mental health experts and they did present the testimony of Dr. Jethro Toomer, the allegation of deficient performance Defendant seems to be making is that trial counsel should have uncovered

and presented additional evidence of what Dr. Toomer testified to, such that his testimony would have been corroborated by external sources, rather than giving opinions based solely on Defendant's self reporting and his own evaluation. Defendant asserts counsel was ineffective for failing to provide Dr. Toomer with Defendant's employment and medical records or names of friends or teachers, all of which would have allegedly corroborated Dr. Toomer's testimony regarding Defendant's account of his drug use and mental health problems.

In analyzing claims of ineffective assistance at the penalty phase for failing to present mitigation it is important to compare what was presented at trial and what is presented at the evidentiary hearing. *Asay; Davis*. At the penalty phase, Dr. Toomer testified that Defendant=s performance on both the Bender-Gestalt and the Carlson Personality Inventory showed signs of organic brain damage that impaired his ability to control his impulses. (DAT. 1565-75) He testified that Defendant reported a long history of substance abuse and that his performance on the Carlson Personality Inventory also indicated such substance abuse. (DAT. 1562-63, 1575-76) Dr. Toomer believed that Defendant=s substance abuse was a form of self-medication for his underlying mental health problems. (DAT. 1563-64) He also stated that Defendant claimed to experience auditory and visual

hallucinations and scored high for thought disorders on the Carlson. (DAT. 1577) Dr. Toomer stated that he believed that Defendant=s overall functioning was deteriorating while he was incarcerated, that he recommended that Defendant be treated for this deterioration and that as a result, Defendant was given psychotropic medication. (DAT. 1581-82) Dr. Toomer opined that Defendant had significant deficits in reality testing, cognitive impairments, emotional disturbances, brain damage and abused substances. (DAT. 1583)

Defendant also presented his mother=s testimony about his family background, including the family=s experiences in Peru. (DAT. 1504-14) Counsel also introduced Defendant's medical records from Cuba, which established Defendant had a history of psychiatric problems. Defendant also presented Dr. Eisenstein=s report to the Court. (S-DAR. 24-25) This report indicated that Defendant had mild brain damage. *Id*. Finally, The State rebutted this evidence with the fact that Dr. Toomer relied on self-reporting, Dr. Castiello=s testimony that Defendant was an unreliable informant and was malingering, and the fact that Defendant had denied drug and alcohol abuse when he was arrested. (DAT. 1641, DAR-SR. 4-10) The State rebutted Dr. Eisenstein=s testimony about brain damage with Dr. Aguila-Puentes= testimony that no such brain damage existed. (DAR-SR. 27-56)

Comparing what was presented at the evidentiary hearing it is clear that there is no "new" mitigation evidence that would have strengthened the expert or lay testimony presented at the trial. Defendant claims that testimony from a friend, Defendant's aunt, a high school teacher, and an expert on Peruvian refugee camps provide crucial corroboration to the testimony presented. A close look at each of these witnesses' testimony reveals that none presents admissible evidence that would have been available at the time of trial.

It should be noted that, although he suggests counsel was ineffective for failing to provide his expert with this background information by stating as to each witness that Dr. Toomer did not speak to them, Defendant does not expressly claim any of the "new" mitigation would have changed Dr. Toomer's opinion. A defendant proves that counsel was ineffective for failing to provide additional background data to an expert by showing that the provision of this material would have changed the expert's opinion. *See Sochor*; *Breedlove*; *Oats*. Defendant never proved that Dr. Toomer's opinion would have changed had he spoken to these individuals. He did not call Dr. Toomer at the evidentiary hearing to establish this fact. He merely claims the "additional" sources would have strengthened the expert testimony.

The testimony of Aunt Minaelia is virtually identical to that of Defendant's mother. In fact, most of her knowledge came from speaking with Defendant's mother. Moreover, the alleged corroboration from this witness with regard to Defendant's drug use was to state that she herself had been an alcoholic and she believed her brother, Defendant's father, was an alcoholic because she saw him drink regularly and get drunk. This is a far cry from corroborating Defendant's drug use.

Ms. Contreras, Defendant=s high school teacher, stated that Defendant was never quiet in class, would answer back when he was reprimanded for this behavior, did not do well in school because he did not study, did not sit still and she would now send a student like Defendant for counseling. (T. 106-113) However, the records of Defendant=s mental health treatment from Cuba stated that Defendant did not do well in school, was a discipline problem, answered back to teachers when reprimanded about his behavior, and was sent for mental health treatment as a result of this behavior. (DAT. 1539-40) This information was read to the jury. (DAT. 1547) Defendant=s mother also testified at the penalty phase to this same information concerning Defendant=s performance in school and the resulting treatment. (DAT. 1496) As such, Ms. Contreras=s testimony was cumulative to the evidence presented at the penalty phase, and counsel cannot

be deemed ineffective for failing to present it. *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000); *see also Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990).

Mr. Damien Fernandez's testimony regarding the conditions of refugee camps in Peru, likewise, is not evidence that would have corroborated Dr. Toomer's testimony. Most critically, this evidence would not have been admissible or relevant as he could only provide general information regarding the camps, not what Defendant experienced personally. Moreover, his testimony, if relevant, would only be so based on Defendant's reporting of his experience in the camps and, thus not corroborating at all.

Lionel, the friend who supposedly establishes Defendant's drug use, never saw Defendant use any drug other than marijuana, and that was years before trial. (T. 322, 295) He claimed to be able to know Defendant was using crack from his physical appearance. (T. 298, 322) Mr. Perez's supposition that Defendant had been using cocaine, without any personal knowledge, is precisely the kind of speculative testimony about drug use that was presented at trial from Defendant=s mother. (DAT. 1515, 1523)

Similarly, Dr. Eustace's testimony would not have prevented the State from rebutting Defendant=s claim of drug abuse. Aside from his discussion with Defendant's ex-wife in which she only

reported Defendant abused alcohol and socially smoked marijuana, Dr. Eustace relied entirely upon the same self-reporting evidence that Dr. Toomer had at trial. (T. 339-42, 355) As such, it cannot be said that Dr. Eustace=s testimony was not subject to the same attacks as Dr. Toomer=s testimony. Counsel cannot be deemed ineffective for failing to present this cumulative testimony. *Riechmann*; *Valle*; *Provenzano.*

Defendant also elicited the testimony of his post conviction investigator to support the claim that the long hours spent on the case established that counsel's investigation was inadequate.[12] Quite to the contrary, the fact that she logged in excess of 700 hours and uncovered virtually the same information that was known to trial counsel at the time of Defendant's trial supports the proposition that their performance was not deficient. Evidence of how long she spent on investigation or how many witnesses she interviewed is not dispositive. *Davis* (11

[12] It should be noted that, although questions were posed to Ms. Rojas at the evidentiary hearing to suggest that Defendant was abused as a child, this claim was never raised in his motion for post conviction relief. Under *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002), this claim was, therefore, not properly before the post conviction court. Moreover, as Defendant=s mother denied abusing him at the time of trial, counsel could not be deemed ineffective for failing to present this evidence even if the claim had been properly raised. *Correll v. Dugger*, 588 So. 2d 422, 426 n.3 (Fla. 1990)(where mother denied abuse at trial, counsel not ineffective for failing to present evidence of abuse).

hours spent on investigation not dispositive of ineffectiveness). The question is not how the investigation was conducted but whether the investigation was conducted. *See Bryan v. State*, 753 So. 2d 1244 (Fla. 2000). As outlined above, counsel conducted a reasonable investigation that revealed Defendant's drug use, his tenure in the camps in Peru, and his childhood medical and psychiatric problems. Counsel presented this evidence in a manner that, unlike Ms. Rojas' testimony, was actually admissible. *See Randolph v. State,* 853 So. 2d 1051, 1062 (Fla. 2003); *Rodriguez v. State*, 753 So. 2d 29, 44-45 (Fla. 2000); *Blackwood v. State*, 777 So. 2d 399, 411-12 (Fla. 2000). Defendant has not established deficient performance.

Moreover, no prejudice has been established as to any of these witnesses. As outlined above, the testimony of the aunt did not add anything new. None of the witnesses presented were any less biased than Defendant or his mother and, thus, no more credible and, thus, not corroborating.

Defendant next faults trial counsel for failing to hire additional experts regarding his mental state. Specifically Defendant claims counsel should have hired an expert in PTSD and QEEG. At the evidentiary hearing Defendant presented the

testimony of Dr. Eustace, Ms. Baker and Dr. Thatcher.[13] A defendant does not prove that his counsel is ineffective merely by showing that he has located new experts who would give more favorable opinions. *See Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992); *Provenzano v. Dugger*, 561 So. 2d at 546. Counsel does not have a duty to shop for a particular expert to give a particular opinion. *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990)(quoting *Elledge*, 823 F.2d 1439, 1447 n. 17)(11th Cir. 1987))(A>counsel is not required to ›shop= for [an expert] who will testify in a particular way.=@). As such, the presentation of these experts does not show that counsel was deficient.

Even if Defendant could show that counsel was deficient for failing to investigate and present the new experts, he would still not be entitled to relief. Defendant did not prove that the evidence he claims should have been presented was available at the time of trial, and it was cumulative to the evidence that was presented at trial. Moreover, presentation of this evidence would have opened the door to harmful information.

Dr. Eustace=s testimony about drug abuse, Dr. Thatcher=s testimony about brain damage, and Dr. Fernandez=s testimony about the conditions in the camps was cumulative to the evidence

[13] Although qualified an expert by the post conviction court, Mr. Fernandez did not offer any expert opinion. He merely described the conditions of the camps in Peru. (T. 122-29)

presented by Dr. Toomer, Dr. Eisenstein and Defendant=s mother at trial. As such, counsel cannot be deemed ineffective for failing to present this testimony. *Riechmann; Valle*; *Provenzano*.

Moreover, presentation of this evidence would have resulted in the jury hearing more negative evidence about Defendant. Dr. Eustace=s interview with Defendant=s wife revealed that Defendant abused her. (T. 339-42) The State would have been able to have placed this information before the jury had Dr. Eustace testified. *Parker v. State*, 476 So. 2d 134, 139 (Fla. 1985); *see also Carroll v. State*, 636 So. 2d 1316, 1318-19 (Fla. 1994). Mr. Perez=s testimony would have allowed the State to have elicited Defendant=s use of Mr. Perez=s name during his criminal activity and lying about doing so. (T. 315-17) Additionally, Mr. Perez would have revealed an inculpatory statement Defendant made to him about this crime and evidence of Defendant=s consciousness of guilt. (T. 298-99, 317-18) Moreover, counsel stated that he would not have wanted to reveal this information to the jury. (T. 393-95) Given the negative information that this testimony would have presented and counsel=s desire that this negative evidence not be presented, it cannot be said that Defendant proved that he was prejudiced by counsel=s alleged failure to investigate and present this evidence. *Cummings-el v. State*, 863 So. 2d 246 (Fla. 2003); *Breedlove v. State*, 692 So.

2d at 877 (no prejudice found where cross-examination and rebuttal countered any value of additional mitigation).

Defendant also asserts that counsel was ineffective for failing to present evidence that Defendant suffered from post traumatic stress disorder. However, Defendant did not prove that this evidence would have been available at the time of trial. Ms. Claudia Baker had only started working in this area in the five years preceding the evidentiary hearing, since approximately 1998. (T. 141-42) She only received her masters in social work in 1993 and had only recently started doing forensic work at the time of the evidentiary hearing. (T. 151-52) Defendant committed this crime in 1992, and trial occurred in 1994. As Ms. Baker was not doing this work at that time, it cannot be said that she would have been available to testify at the time of trial. Counsel cannot be deemed ineffective for failing to present evidence that would not have been available at the time of trial. *State v. Riechmann*, 777 So. 2d at 354-55 (claim of ineffective assistance properly denied where evidence did not definitely show that evidence was available at time of trial); *see also Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987). To the extent that Defendant may claim some other expert may have been available at that time, Defendant did not call any such expert. As such, any assertion that another expert

could have issued another opinion that could have been the same is speculation. However, A[p]ostconviction relief cannot be based on speculation or possibility.@ *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Accordingly, this claim was properly denied.

Moreover, Ms. Baker=s opinion was not credible. Ms. Baker relied extensively on Defendant=s self-reporting regarding the symptoms he experienced. However, she had to admit that Defendant lied to her about where he was shot. She believed that Defendant=s alleged PTSD caused him to use drugs and that being shot increased his PTSD. However, she ignored the fact that Defendant was shot buying drugs and that Defendant had stated that his drug use began before he was ever in Peru. Although she admitted that witnessing violence was what had allegedly traumatized Defendant in Peru, and she knew Defendant's criminal history reflected his commission of acts of violence, she relied on avoidance of traumatic experiences as evidence of PTSD. She also considered Defendant's arrival in a new country and inability to speak the language as traumas but did not consider that Defendant was living in Little Havana, where Spanish is dominant. She relied on evidence of hyper vigilance but admitted that criminals were hyper vigilant for reasons other than PTSD. She relied on evidence that Defendant=s reported income declined after he was shot but did not consider that was caused by an

increase in Defendant=s illegal activities, which would not have generated reported income. She was unaware that Defendant had a juvenile record. She acknowledged that the only illness that she sought to evaluate Defendant for was PTSD. Given this single minded focus, it is not surprising that she found it. Moreover, five other experts saw Defendant and did not diagnose PTSD. Given all of this evidence, it cannot be said that Ms. Baker=s diagnosis was credible. Since the evidence was not credible, counsel cannot be deemed ineffective for failing to present it. *Griffin v. State*, 866 So. 2d 1 (Fla. 2003).

Defendant also alleges that his counsel was ineffective for failing to present evidence that a QEEG indicated he had brain dysfunction. Most critically Defendant failed to establish this testimony would have been admissible at the penalty phase. Below Defendant asserted that the QEEG testimony he presented passed *Frye*. Defendant asserted that since EEG results are admissible, QEEG results should be as well. In making this leap, Defendant argued that a QEEG is simply a digitalization of the results of a regular EEG. Defendant contended that since QEEG is an application of EEG testing, it is not subject to *Frye* testing. Defendant also asserted that the State=s objection to the general acceptance and reliability of QEEG testing went to the weight and not to the admissibility of the testing. However, Defendant

is incorrect both legally and factually.

Under Florida law, novel scientific evidence is not admissible unless it is shown that the evidence is generally accepted in the scientific community and is reliable. *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001)(hereinafter A*Ramirez III*@); *Nelson v. State*, 748 So. 2d 237, 240-41 (Fla. 1999); *Murray v. State*, 692 So. 2d 157 (Fla. 1997); *Hadden v. State*, 690 So. 2d 573, 577-78 (Fla. 1997); *Hayes v. State*, 660 So. 2d 257 (Fla. 1995); *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995)(hereinafter A*Ramirez II*@); *Stokes v. State*, 548 So. 2d 188 (Fla. 1989); *Ramirez v. State*, 542 So. 2d 352 (Fla. 1989)(hereinafter A*Ramirez I*@). Evidence is considered novel scientific evidence even if it is based on an application of established scientific principals to a new area. *Ramirez III* at 844, 845-46 (barring evidence of knife mark identification in human tissue, even after stating that knife mark identification generally is admissible and is an application of tool mark identification, which is admissible); *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997)(rejecting argument that calculation of population frequencies for DNA evidence are not new and novel because they are based on accepted principals of statistics and population genetics); *Nelson*, 748 So. 2d at 240-41 (holding that trial court should have held a *Frye* hearing on single population frequency used in

DNA calculation); *Murray*, 692 So. 2d at 160-64 (requiring *Frye* hearing for PCR DNA testing even though DNA testing previously held admissible). Therefore, Defendant's assertion below that he was not required to show that the QEEG meets *Frye* because QEEG is not new and novel is contrary to Florida law.

Moreover, it is predicated on a false premise. Defendant claimed below that since EEG evidence is admissible, QEEG evidence is admissible because it merely represents a digital representation of the EEG data that is analyzed using accepted mathematical and statistical techniques. Dr. Thatcher, Defendant:s expert, himself admitted that once the data is digitized, it is mathematically manipulated by performing a transform on the data. The selection of the particular transformation to perform involves certain assumptions about the underlying data and its source. *See* CHI-TSONG CHEN, ONE-DIMENSIONAL DIGITAL SIGNAL PROCESSING 18-86 (1979). As was true with DNA evidence, the acceptability of making these assumptions and selection the mathematical method of analysis are subject to *Frye* testing. ***Brim v. State***, 695 So. 2d at 271. Moreover, since Defendant did not show what method was used,[14] much less that the

[14] At the evidentiary hearing Defendant's espert, Dr. Robert Thatcher rendered an opinion, not based on his personal testing of Defendant, as Defendant refused to be tested, but rather on Dr. Weinstein's records of his QEEG test.

use of that method was acceptable, Defendant did not show that QEEG evidence meets *Frye*.

Furthermore, this Court has held that to satisfy *Frye*, it is necessary to present more than the testimony of a single expert who conducted the test. Although *Ramirez III* was decided after the trial in this case, the requirement that more than the testimony of the expert proponent of the testimony be presented before *Frye* is satisfied existed long before *Ramirez III*. In *Ramirez I*, this Court held that the testimony of the expert who performed the test that it was reliable was insufficient to satisfy *Frye*. This Court stated that it was necessary to present independent evidence of the reliability and acceptance of the evidence before the evidence is admissible. *Id.* at 354-55. This Court also cited to *Ramos v. State*, 496 So. 2d 121 (Fla. 1986), for the same proposition. *See also Hadden*, 690 So. 2d at 578. As such, Florida has required more than the testimony of the expert performing the test to show that the test passes *Frye* since at least 1986.

Moreover, testimony regarding QEEG test results and opinions based on such results has been routinely excluded from court proceedings because QEEG testing is not generally accepted in the scientific community and is considered unreliable. *E.g.*, *Nadell v. Las Vegas Metro. Police Dep:t.*, 268 F.3d 924, 927-28

(9th Cir. 2001); *Craig v. Orkin Exterminating Co.*, 2000 U.S. Dist. Lexis 19240, *8-*10 (S.D. Fla. 2000); *In re Breast Implant Litigation*, 11 F. Supp. 1217, 1238-39 (D. Colo. 1998); *Browell v. Bulldog Trucking Co.*, 1993 U.S. Dist. Lexis 21115 (E.D. Tenn. 1993); *State v. Zimmerman*, 802 P.2d 1024, 1026-02 (Ariz. 1990); *Tran v. Hilburn*, 948 P.2d 52, 55-56 (Colo. Ct. App. 1997); *Ross v. Schrantz*, 1995 Minn. App. Lexis 586 (Minn. Ct. App. 1995). As such, Defendant did not prove that QEEG testimony was admissible either now or at the time of trial.

Since Defendant did not show that the QEEG evidence passed *Frye*, he did not prove that counsel was ineffective for failing to call Dr. Thatcher. Since the QEEG testimony is inadmissible, it cannot be said that it creates a reasonable probability that Defendant would not have been sentenced to death. *See Wood v. Bartholomew*, 516 U.S. 1 (1995)(inadmissible evidence does not meet materiality element of *Brady* claim); *Strickland*, 466 U.S. at 694 (prejudice prong of ineffectiveness claim same as materiality prong of *Brady* claim).

Moreover, none of the mitigation evidence presented at the evidentiary hearing outweighed that Mr. Calderon was shot to death in the driveway of his home when Defendant and Humberto Cuellar were attempting to steal his money. The jury heard that Defendant had previously been convicted of a similar robbery

where he resorted to violence. This resulted in the finding of the aggravating circumstances that Defendant had prior violent felony convictions, committed this murder during the course of a robbery and committed this murder for pecuniary gain. Despite hearing similar evidence concerning drug use, mental illness, brain damage and family background, Defendant was sentenced to death. The additional mitigation that Defendant claims should have been presented would have revealed that Defendant had beaten his wife and was not the loving family man he was portrayed to be and had always been the kind of person who did not obey the rules of society. Given this evidence, it cannot be said that but for counsels' allegedly deficient conduct, there is a reasonable probability that Defendant would not have been sentenced to death. *Strickland*. The claim was properly denied.

B. OPENING THE DOOR TO PENDING CHARGE

Defendant next contends that counsel was ineffective for opening the door to evidence of Defendant's participation in other robberies. However, this claim was not properly before the lower court and was, thus, properly denied.

Defendant did not claim in his post conviction motion that his trial counsel was ineffective for opening the door to evidence of Defendant's other criminal activity by posing a question regarding Defendant's rehabilitation potential. Rather,

Defendant asserted that the State=s comments about the pending charges stemming from said activity were improper and that they amounted to nonstatutory aggravation. (PCR. 287-88, 338-39, 354-55) This Court has held that defendants are not entitled to add assertions to a claim of ineffective assistance of counsel after the *Huff* hearing, where the added assertions do not meet the standards for successive motions for post conviction relief, even if an evidentiary hearing has been granted on a different ground of ineffective assistance at the penalty phase. *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002). Here, this claim does not meet the standard for filing a successive motion as the fact that counsel asked about the potential for rehabilitation and its effect was not unknown and unknowable at the time the motion for post conviction relief was filed. *Id.* Thus, the claim was not properly before the lower court and was properly denied.

Even if properly pled, Defendant would still not be entitled to relief as the claim is without merit. Information regarding potential for rehabilitation is generally considered important mitigation. *See Skipper v. South Carolina*, 476 U.S. 1 (1986); *see also Valle v. State*, 502 So. 2d 1225 (Fla. 1987). The State acknowledged this during the penalty phase closing argument. (DAT. 1661) Thus, counsel had a valid strategic basis for asking this question when he did and cannot be deemed

ineffective for doing so. *Haliburton*; *see also Strickland*, 466 U.S. at 690-91 (AStrategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.@); *Wiggins*, 539 U.S. at 521.

Defendant reliance on Mr. Suri=s testimony that he now believes that asking the question was a bad idea ignores that the standard for judging claims of ineffective assistance of counsel requires that the court ignore such hindsight. *Strickland*, 466 U.S. at 694-695; *see also Brown*, 846 So. 2d at 1121-22 (Fla. 2003). Accordingly, the testimony about Mr. Suri's present perception of the wisdom of having posed the question is irrelevant to a determination of deficiency.

Even if counsel could be considered deficient for asking the question about rehabilitation, the claim is still without merit as Defendant was not prejudiced. Dr. Toomer testified that part of his assessment was based on a psychosocial history. (DAT. 1557-58) He stated that he relied on this history in formulating his opinions about Defendant that were unrelated to Defendant=s potential for rehabilitation. (DAT. 1559-60, 1583) When an expert relies on information, the opposing party is entitled to cross examine the expert regarding his knowledge of the person=s complete history, even if it results in disclosure of criminal activity for which there had not been a conviction.

Parker, 476 So. 2d at 139; *see also Carroll*, 636 So. 2d at 1318-19. Since Dr. Toomer relied on Defendant=s psychosocial history in formulating his other opinions, the State was entitled to question Dr. Toomer regarding his knowledge of that history. Thus, not asking about the potential for rehabilitation would not have prevented the State=s questioning. Since the information would have come in anyway, it cannot be said that, but for counsel=s asking this question, there is a reasonable probability that Defendant would not have been sentenced to death. *Strickland*. The claim was properly denied.

C. CALLING HUMBERTO CUELLAR AT THE PENALTY PHASE

Defendant also contends that his counsel was ineffective for calling Humberto Cuellar to testify at the penalty phase. This claim was properly denied.

At the evidentiary hearing, Mr. Suri stated that he believed that he presented this evidence to show that there was no intent to kill as mitigation. (T. 447) While in his brief Defendant admits “this reasonable may have been a good bit of information to convey to the jury” he questions the “method of presenting this evidence.” Defendant alleges that by eliciting this information in the guilt phase during Humberto’s cross examination, counsel would have avoided reinforcing his version of the events. However, when asked why he did not do that, Mr.

Suri stated that he believed it was important to have Humberto say it in the penalty phase since the jury had already determined it was a robbery. (T. 447-48) As such, this was a strategic decision that Defendant failed to establish was unreasonable. *Strickland.*

Moreover, counsel is not ineffective simply because the same evidence could have been presented in a different manner with the benefit of hindsight. *Strickland*, 466 U.S. at 694-695; *see also Brown*, 846 So. 2d at 1121-22. In fact, the alternative method of presenting this evidence suggested by Defendant would have been inconsistent with the defense strategy. Throughout the guilt phase of the trial, counsel's case rested largely on challenging Humberto's credibility. To ask a question at that point to establish exculpatory evidence from this witness whom he was claiming was incredible would have been clearly confusing to the jury, who was still determining guilt. Once the jury had already found that a robbery had been intended, there was no harm in presenting Humberto as credible.

Moreover, Defendant was not prejudiced by Humberto=s testimony. His entire testimony at the penalty phase was that the purpose of going to Mr. Calderon=s home was to rob him, that there was no intention or discussion of killing him, that he did not know Mr. Calderon would be armed and that Mr. Calderon fired

first. (DAT. 1548-49) The State=s cross consisted merely of the fact that Defendant and Humberto were armed when they went to the house. (DAT. 1549) The jury had already determined that Defendant went to Mr. Calderon=s house to rob him. Thus, Humberto=s testimony on this point was, at worst, cumulative of the existing jury finding. Moreover, Defendant gained having Humberto, whose testimony had already been accepted, tell the jury that there was never any intent to kill Mr. Calderon. As such, it cannot be said that but for counsel=s presentation of this brief testimony, there is a reasonable probability that Defendant would not have been sentenced to death. *Strickland*.

CONCLUSION

For the foregoing reasons, the order denying post conviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

_____
MARGARITA I. CIMADEVILLA
Assistant Attorney General
Florida Bar No. 0616990
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Rachel L. Day**, Assistant CCRC, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this 13th day of March, 2006.

_____
MARGARITA I. CIMADEVILLA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

_____
MARGARITA I. CIMADEVILLA
Assistant Attorney General