IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1881

MARBEL MENDOZA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Mendoza's motion for post-conviction relief following a remand by this Court for an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"TRT" -- transcript of trial proceedings contained in record on direct appeal to this Court;

"PCR" -- record on initial 3.850 appeal to this Court;

"Supp. PCR" -- supplemental record on instant 3.850 appeal to this Court;

“PCR2 – record on instant appeal following remand to the circuit court for evidentiary hearing.

“EH - transcript of evidentiary hearing following remand to circuit court. All other citations and references will be self explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Mendoza has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Mendoza, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE CASE

A grand jury indicted Mr. Mendoza and two co-defendants, Lazaro Cuellar ("Lazaro") and Humberto Cuellar ("Humberto"), for first-degree murder, conspiracy to commit robbery, attempted armed robbery, armed burglary with an assault, and possession of firearm during the commission of a felony (R. 1-4). Lazaro and Humberto are brothers.

The grand jury predicated the first-degree murder charge both on the theory of premeditation and the theory of felony-murder (R. 1). However, after the State rested its case-in-chief, the State abandoned the premeditation theory and conceded that it had failed to establish a prima facie case of premeditation (TRT 1157). Consequently, and significantly for purposes Mr. Mendoza's ineffective assistance of counsel claims, before the defense presented its case, counsel for Mr. Mendoza knew that, in order to return a guilty verdict for first degree murder, the jury necessarily would have to find beyond a reasonable doubt that Mr. Mendoza committed the charged felonies underlying the basis for the first degree felony-murder charge. The felony-murder charge was based on the theory that the victim, Mr. Calderon, was killed while the defendants were engaged in committing or attempting to commit a robbery or burglary (R. 1).

On May 20, 1993, months before Mr. Mendoza's trial, Lazaro entered into a plea agreement in which he agreed to plead guilty to the lesser offense of

manslaughter and plead guilty as charged to the offenses of conspiracy to commit robbery and attempted armed robbery (TRT 196-205). The Court agreed with the State's offer to sentence him to three concurrent terms of ten (10) years in prison (TRT 202). The plea agreement specifically set forth the condition that if Lazaro failed to perform any of the required conditions, he would be re-sentenced to twenty-seven (27) years in prison (TRT 199-200, 202). One of the required conditions was that Lazaro testify truthfully in depositions, trial and all court hearings in the State's case against Mr. Mendoza (TRT 200). This provision of Lazaro's plea agreement is significant because, as discussed below, after Mr. Mendoza's trial, the State formally attempted to vacate Lazaro's sentence for alleged non-compliance with the terms of his plea agreement on the grounds that he was not "truthful" in his pretrial deposition in violation of his plea agreement (R. 829-31; TRT 1444-5). Specifically, **after** Lazaro entered his plea and was sentenced, he swore under oath in his deposition that he, Humberto, and Mr. Mendoza went to Mr. Calderon's house to collect a debt from Mr. Calderon, **not** to commit a robbery. Significantly, this was Mr. Mendoza's defense to first-degree felony murder at his subsequent trial, i.e., that they did not plan or attempt to rob Mr. Calderon but went there merely to collect some money he owed.

The plea agreement further required Lazaro to testify against Mr. Mendoza but specifically provided that he **not** have to testify against his brother, Humberto

(TRT 196-205).

As noted, in October, 1993, some four (4) months after Lazaro entered the plea and was sentenced, and four (4) months before Mr. Mendoza's trial, Lazaro testified under oath in a deposition taken by Mr. Mendoza's trial counsel. Lazaro swore under oath that they went to Mr. Calderon's house in order to collect a debt and that there was no plan to commit robbery. Lazaro also swore in his deposition that, both before and after the shooting, he **never saw Mr. Mendoza with a gun**. He also indicated that Mr. Calderon ran a bolito operation.

On January 18, 1994, approximately two weeks before the start of Mr. Mendoza's trial, Humberto entered into a plea agreement in which he pleaded guilty to second-degree murder and was sentenced to twenty (20) years in prison (TRT 237). He also pleaded guilty to the remaining charges (TRT 239-240). In exchange for being allowed to plead to the reduced charge and for the twenty-year sentence, Humberto agreed to testify against Mr. Mendoza (TRT 241, 1086). As part of the agreement, Humberto was required to testify consistent with the State's attempted robbery theory. As with Lazaro's plea agreement, if the prosecution thought that Humberto did not testify "truthfully", then the agreement called for Humberto to be re-sentenced to more than the agreed upon twenty-year sentence (TRT 1118-9).

Mr. Mendoza was represented at trial by Arnaldo Suri and Barry Wax.

During opening statements of Mr. Mendoza's trial, Mr. Mendoza's trial counsel told the jury that the evidence will show that **Humberto** was the person who shot the victim, Mr. Calderon (TRT 610). Trial counsel also told the jury that the evidence will show that Mr. Mendoza and the two co-defendants did not confront Calderon in order to rob him but, instead, did so in an attempt to collect a debt (TRT 610, 611). To support this defense, counsel made clear to the jury in his opening statement that **Lazaro Cuellar would testify** that there was no attempted robbery, just as Lazaro maintained in his deposition given after he made his deal with the State (TRT 607-08,611-12). Trial counsel told the jury that the evidence will also show that gun-shot residue was found on both Humberto's and Lazaro's hands (TRT 608-9).

The State built its entire case on the testimony of co-defendant-turned-State-witness Humberto Cuellar. Humberto testified that Mr. Mendoza approached him and asked him if he wanted to rob a person, who, according to Humberto's testimony, Mr. Mendoza said always had money on him because he was a "boletero" (TRT 1034). Humberto testified that he agreed to commit the robbery with Mr. Mendoza and at some point asked his brother, Lazaro, to be the driver (TRT 1035, 1038). According to Humberto, on several dates prior to the shooting, they drove by Mr. Calderon's house to learn his routine (TRT 1039, 1041).

As to the shooting itself, Humberto testified that after Lazaro drove them to

a location near Mr. Calderon's house, Humberto and Mr. Mendoza got out of the car when they saw Mr. Calderon exit the house (TRT 1047). When Mr. Calderon opened the door to his vehicle parked in the driveway, Humberto and Mr. Mendoza allegedly struggled with him until Humberto hit him on the head with a gun that Humberto had removed from Lazaro's car (TRT 1050). Other than Humberto's testimony, there was no evidence that Humberto was the person who hit Mr. Calderon over the head. Police had no fingerprints from the gun linking Humberto to the Taurus nine millimeter, the gun the State claimed was used to strike Mr. Calderon over the head. After the trial, the prosecutor told the Court that Lazaro "had the gun" according to all his statements (TRT 830).

According to Humberto, after getting hit over the head with a gun, Mr. Calderon pulled out his own gun and fired three times, striking Humberto once in the chest (TRT 1051). Humberto testified that once Mr. Calderon shot him, Humberto ran back to the car and that, while he was running back, he heard a few more shots (TRT 1052-53). Humberto claimed at trial that when Mr. Mendoza returned to the car shortly thereafter, Mr. Mendoza stated that he had shot the man (TRT 1055). Significantly, Humberto's testimony directly contradicted Humberto's own statement to police that he passed out when he got in the car and did not even know if Mr. Mendoza got into the car afterward (R. 326-7; TRT 1079-80).

As noted, after the State rested, the State abandoned the premeditation theory and conceded that it had failed to establish a prima facie case of premeditation (TRT 1157). Consequently, before the defense presented its case, counsel for Mr. Mendoza knew that, in order to return a guilty verdict for first degree murder, the jury necessarily would have to find beyond a reasonable doubt that Mr. Mendoza committed the charged felonies underlying the basis for the first degree felony-murder charge. The felony-murder charge was based on the theory that the victim, Mr. Calderon, was killed while the defendants were engaged in committing or attempting to commit a robbery or burglary (R. 1).

Counsel for Mr. Mendoza called as its only defense witness, Mr. Gopinath Rao, an expert in gunshot particle analysis. At the time of trial, Mr. Rao was a criminalist for the Metro-Dade Police Department (TRT 1165-66). Mr. Rao had conducted the particle analysis of hand swabs taken from Lazaro and Humberto while they were at the hospital on the morning after the shooting. Counsel for Mr. Mendoza elicited from Mr. Rao very significant exculpatory evidence in the form of Rao's expert opinion. Mr. Rao gave the opinion that, based upon his analysis of the particles found in the swab taken from Lazaro's hands, it was "more likely than not" that Lazaro Cuellar **fired** a gun as opposed to having simply "handled" a gun that had been fired (TRT 1205, 1207). Mr. Rao indicated that his opinion was specifically grounded on his assumption that Technician Gallagher swabbed

Lazaro's hand **at 9:00 a.m.** (the shooting occurred at approx. 5:40 a.m.) (TRT 1181-83, 1200, 1207). In its rebuttal case, the State established this time to be incorrect.

Mr. Rao's opinion that Lazaro more than likely fired a gun as opposed to simply handling a gun that had been fired was significant because it strongly suggested that Lazaro and not Mr. Mendoza shot Mr. Calderon. The State's theory was that particles were found on Lazaro's hands due to Lazaro's handling of the gun that was present at the scene but not fired and/or due to his contact with Humberto, who had been shot by Mr. Calderon. The State's star witness, Humberto, had testified that Lazaro - his brother - never got out of the car. Mr. Rao's opinion was exculpatory evidence that not only suggested that Mr. Mendoza did not shoot Mr. Calderon but, at the same time, discredited Humberto's trial testimony.

Knowing all along that Mr. Rao's was wrong on his assumption that Lazaro's hands were swabbed at 9:00 a.m., the State got Mr. Rao to agree on cross-examination that his opinion was "based on this time frame" (TRT 1208) and that, consequently, if he was wrong regarding the time Gallagher took the swabs, Rao's entire opinion was "invalid" (TRT 1207). Then, in rebuttal, the State called Technician Gallagher as a rebuttal witness. Technician Gallagher confirmed what the State knew all along but which trial counsel did not: That Mr. Rao's

assumption upon which his opinion was based was wrong because Gallagher swabbed Lazaro's hands at 7:45 a.m., not 9:00 a.m. (TRT 1282-83).

In closing arguments, the prosecutor attacked Mr. Rao's opinion, arguing that, because Rao incorrectly believed that Lazaro's hands were swabbed at 9:00 a.m., his opinion was invalid (TRT 1302, 1341). The prosecutor went even further and dramatically argued that Mr. Mendoza's trial counsel **knew** that Rao's was mistaken as to the time police swabbed Lazaro's hands and **deliberately presented false evidence** in a scandalous ploy to mislead and confuse the jury (TRT 1302-03, 1316,1318,1319).

The jury found Mr. Mendoza guilty of first-degree murder, conspiracy to commit robbery, attempted armed robbery, armed burglary with an assault, and possession of a firearm during the commission of a felony. See Mendoza v. State, 700 So. 2d 670 (Fla. 1997).

As noted, supra, after the trial, the State filed a motion to vacate Lazaro's sentence for non-compliance with the terms of his plea agreement on the ground that his version of events as set forth in his sworn pretrial deposition constituted a violation of his plea agreement (i.e., that, per the State Attorney Office, he was not "truthful" in his pretrial deposition) (R. 829-31; TRT 1444-5). This was the deposition that Mr. Mendoza's trial counsel pointedly referenced in his opening statement when counsel told the jury that "the evidence was going to prove" that,

as Lazaro stated in his sworn deposition, they confronted Mr. Calderon in order to collect a debt and not for the purpose of committing a robbery (R. 607-08,611-12). In support of its motion to vacate Lazaro's sentence, the State emphasized that because Humberto's trial testimony contradicted Lazaro's version of events, the State did not call Lazaro as a witness (TRT 829-30). Clearly Lazaro's version of events as set forth in his pre-trial deposition so blatantly contradicted the State's theory of the case (that this was an attempted robbery and, therefore, a first-degree felony murder) that the State felt compelled to attempt to have him re-sentenced to 27 years for violating the provision of his plea agreement that he "truthfully" testify (i.e. to testify consistent with the State's theory). In the end, however, the Court denied the State's motion on the grounds that the State waited too late to file the motion to vacate Lazaro's sentence (TRT 832).

Also significant in terms of the specifics of the actual shooting: the prosecutor admitted to the Court during the hearing to vacate Lazaro's sentence that Lazaro indicated in all his statements that he "had the gun" (TRT 830). At trial, of course, other than Humberto's testimony, there was no evidence that Humberto was the person who hit Mr. Calderon over the head. There was no evidence, such as fingerprints, linking Humberto to the Taurus nine millimeter, the gun the State claimed was used to strike Mr. Calderon over the head.

The jury voted to recommend death by the most marginal possible vote of

seven (7) to five (5). See Mendoza v. State, 700 So. 2d 670, 673 (Fla. 1997). The Court sentenced Mr. Mendoza to death based upon two aggravating circumstances: (1) prior conviction for a violent felony; and (2) committed while engaged in the commission of a robbery and for pecuniary gain (merger of aggravators) Id. Significantly for the purposes of Mr. Mendoza's claim that counsel was ineffective during the penalty phase, the trial court concluded that Mr. Mendoza failed to establish **any** mitigating factors, statutory or otherwise, based on his mental health, experiences in Peru, or drug use and addictions (TRT 1726-32, 1733, 1734; R 948-54). The trial court concluded in its sentencing order, "**The defendant has failed to establish the existence of any statutory or non-statutory mitigating factors**" (R. 956; TRT 1735)(emphasis added).

On direct appeal, this Court affirmed the conviction and sentence. See Mendoza v. State, 700 So. 2d 670 (Fla. 1997). The Court specifically relied upon the trial court's rejection of these mitigating circumstances as a basis to conclude that the death penalty was not disproportionate. See Id. at 678 (in finding that the death penalty was proportionate, the majority found it significant that "the trial court considered but found no mitigation in the form of appellant's history of drug use and mental problems").

Mr. Mendoza timely petitioned the United States Supreme Court for certiorari. This petition was denied on October 5, 1998. See Mendoza v. Florida,

119 S. Ct. 101 (1998).

Mr. Mendoza filed his final amended motion for post-conviction relief on September 5, 2000. The Court subsequently denied Mr. Mendoza's motions to compel the production of public records and motion to disqualify Judge Postman. At the Huff hearing held on January 26, 2001, the Court orally summarily denied all of Mr. Mendoza's post-conviction claims. The Court issued a written summary denial on March 5, 2001.

Mr. Mendoza appealed the Court's summary denial and on April 3, 2002, this Court remanded the case with orders for the Court to conduct an evidentiary hearing on Mr. Mendoza's claims of ineffective assistance of counsel. This Court also ordered that the case be assigned to a judge other than Judge Postman, effectively ruling that Judge Postman erred in not granting Mr. Mendoza's motion to disqualify him.

The evidentiary hearing testimony commenced in March, 2004 and took place over several days. At the evidentiary hearing Mr. Mendoza presented the testimony of trial counsel Barry Wax and Arnaldo Suri (EH 363-442); forensic pathology expert Dr. Vincent Dimaio (EH 3-35); international relations expert Dr. Damian Fernandez (EH 118-132); post traumatic stress disorder expert Dr Claudia Baker (EH 135-233); addictions expert Dr. John Eustace (EH 329-358, 571-581); expert psychologist Dr. Robert Thatcher (EH 487-495); CCRC-South investigator

Odalys Rojas (EH243-289); Mr. Mendoza's aunt Minaleia Cuesta (EH 59-106); school teacher Elisa Conteras (EH 106-118); and friend Lionel Perez (EH 292-328).

The State called criminalist Allan Klein (EH 632) and neuropsychologist Gisela Aquila Puentes (EH 612-636). Following the submission of closing memoranda by both parties on the lower court entered an order denying relief (PCR2 80-81). This appeal follows.

SUMMARY OF THE ARGUMENT

1. Mr. Mendoza was afforded constitutionally ineffective assistance of counsel during the guilt phase of his capital trial. Because of counsel's inexperience, unfamiliarity with the standards of care, and failure to retain an investigator, counsel unreasonably presented inconsistent arguments to the jury, failed to present key witnesses and failed to present exculpatory gunshot residue evidence, to Mr. Mendoza's substantial prejudice.

2. Trial counsel was ineffective during Mr. Mendoza's penalty phase for failing to investigate and present available mitigating evidence and for opening the door to allow the State to present evidence of a pending charge of which Mr. Mendoza was not yet convicted.

ARGUMENT

ARGUMENT I
MR. MENDOZA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Introduction

> **"They tried to get you to believe something different than they know to be the evidence in this case."**

(TRT 1302-03) (emphasis added) (prosecutor's closing argument in Mr. Mendoza's guilt phase).

Trial counsel's failures during the guilt phase invited the above inflammatory accusation by the prosecutor Flora Seff. Because of trial counsel's inconsistent theory of the case, failure to keep his promise to the jury made at opening statement and failure to properly present exculpatory gunshot residue evidence, he opened the door to the State's devastating allegations and left Mr. Mendoza's credibility in tatters. The jury's verdict finding Mr. Mendoza guilty of first-degree murder was predicated exclusively on the theory of felony-murder. The State agreed prior to deliberations that the State failed to present sufficient evidence of the alternative theory of premeditated murder (TRT 1157). Therefore, the trial court instructed the jury only on the theory of felony-murder. As will be established below, had Mr. Mendoza's trial counsel not rendered deficient performance, there is a reasonable probability that the jury would have concluded

that the State failed to prove the existence of the alleged underlying felonies and, therefore, would have acquitted Mr. Mendoza of first-degree felony-murder. Because there is a reasonable probability that the outcome of the trial would have been different had trial counsel not been diffident, Mr. Mendoza is entitled to a new trial.

Absent the testimony of the State's key witness, Humberto Cuellar, the State simply had no evidence to support the charge of first-degree felony-murder. The physical evidence established that the victim, Mr. Calderon, himself fired his gun first and shot Humberto before the victim was shot. In fact, the physical circumstantial evidence actually contradicted the State's robbery theory because the victim was found with the victim's bank bag containing a large amount of cash. Also, the victim was found still wearing his Rolex watch. The State presented absolutely no evidence that any property was taken from the victim. Other than Humberto's testimony, the State presented no evidence of the alleged underlying felonies. Therefore, in order to return a guilty verdict, the jury had to accept as true Humberto's trial testimony.

Conversely, given the lack of any other evidence to support the charge of first-degree felony-murder, if the jury did not believe Humberto's testimony, the jury would have necessarily acquitted Mr. Mendoza. Viewed in this light, had trial counsel not rendered sub-standard legal assistance as outlined below, there is more

than a reasonable probability that the jury would have concluded that the State failed to prove its case beyond a reasonable doubt.

The lower court did not address the specifics of Mr. Mendoza's claims of ineffective assistance of counsel at his guilt phase nor did it make any specific findings of fact. See PCR2 81. The only law that the lower court cited is Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), which the Court correctly identifies as setting forth the two prongs necessary for ineffective assistance of counsel, and Haliburton v. State, 691 So. 2d 466 (Fla. 1997) for the proposition that ".. Strategic choices made by criminal defense counsels in matters of law and facts which are relevant to plausible options may only be overturned if they are so patently unreasonable that no competent attorney would have chosen it". The lower court appears to be implying that counsel's performance was a matter of strategy and that as such strategic decisions do not amount to deficient performance. This is an error both as a matter of fact and of law. As will be demonstrated infra, the proposition that trial counsel had a strategic reason for their decision making is refuted by their own statements on the record of the evidentiary hearing. Even if trial counsel had purported to have a strategy, if it were the result of inadequate investigation, it would not pass constitutional muster. Furthermore, the lower court has grossly over simplified and misapplied the relevant law as Mr. Mendoza can show.

The Sixth Amendment guarantees that a criminal defendant will not be convicted without the effective assistance of counsel. In Strickland, the United States Supreme Court enumerated the now familiar principles governing a convicted defendant's claim that his or her counsel rendered constitutionally ineffective assistance at trial:

> An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Ibid.
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> In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. Strickland, 466 U.S., at 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052. In Strickland, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052.
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> . . . [W]e evaluate the totality of the evidence - - "both

> that adduced at trial, and the evidence adduced in the habeas proceeding[s]." Williams v. Taylor, 529 U.S., at 397-398, 146 L. Ed. 2d 389, 120 S. Ct. 1495.

Wiggins v. Smith, 539 U.S. 510, 521, 534, 536 (2003). However to the extent that any purportedly "strategic" choices are the result of an incomplete or incompetent investigation, they cannot be considered reasonable, a tenet with which the lower court was either unaware or which it disregarded.

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id., at 690-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052.

Wiggins, 539 U.S. at 522 quoting Strickland. "[T]he benchmark for judging a claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Strickland requires a reviewing Court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

> [D]espite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable.

Miller v. Francis, 269 F. 3d 609, 615-16 (6th Cir. 2001) citing Strickland, 466 U.S. at 681 (1984).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . .fell short of the standards for capital defense work articulated by the American Bar Association (ABA) - - standards to which we have long referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v. Taylor, supra at 396.

(Wiggins v. Smith, 123 S. Ct. at 2536-2537).

Wiggins is clear that the ABA Guidelines[1] supply the guide to what is reasonable in investigating a capital case. However, Wiggins refers to the version of the Guidelines that was promulgated in 1989. The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the Guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Mendoza's case. However,

[1]American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

notwithstanding the fact that Mr. Mendoza's case was tried in 1995, there is no doubt that the 2003 Guidelines are equally applicable to Mr. Mendoza's case. The United States Supreme Court has recently reaffirmed the applicability of the 2003 Guidelines to those cases tried before their promulgation. In Rompilla v. Beard, 125 S. Ct. 2456 (2005) in which case the trial took place in 1989 prior to the promulgation of both the 1989 and the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case. As the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482, (2003) "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel. The 2003 ABA Guidelines do not depart in principle or concept from Strickland [or] Wiggins." Hamblin, 354 F. 3d at 487 (2003). Thus the 2003 Guidelines are applicable to cases tried before the 2003 Guidelines were promulgated since they merely explain in more detail the concepts promulgated previously.

In Mr. Mendoza's case, the quality and scope of counsel's representation fell far short of the reasonable standards outlined by both the 1989 and the 2003 Guidelines. Trial counsel lacked any meaningful experience in trying capital cases. At the evidentiary hearing, it was established without dispute that both of Mr. Mendoza's counsel, Mr. Suri and Mr. Wax, had little to no experience trying capital cases. Prior to representing Mr. Mendoza, Mr. Suri had never tried a

capital case (EH 432). Mr. Wax's only previous capital case experience was a last minute assignment as second chair in the case of State v. Bobby Lee Robinson (see Robinson v. State, 702 So. 2d 213 (Fla. 1997)[2]. In that case, Mr. Wax did not come on until a week before trial and so did not participate in the pre-trial investigation or proceedings (EH 363-364). Mr. Wax's only other capital case experience was in a re-sentencing in the case State v. Harry Philips (EH 364). Significantly, Mr. Wax handled the re-sentencing for Mr. Philips by himself with no co-counsel and did so during the period of time between Mr. Mendoza's guilt and penalty phases (EH 364). In other words, during the time leading up to Mr. Mendoza's penalty phase proceedings, Mr. Wax was pre-occupied with representing - by himself and with no assistance - another capital case client in a penalty phase proceeding. Thus Mr. Mendoza was burdened with two inexperienced lawyers one of whom had an excessive workload which limited the amount of time available for Mr. Mendoza's representation.[3]

[2]In Robinson it was noted that Mr. Wax's co-counsel in Robinson had been disciplined by the Florida Bar and granting Robinson a new trial due to counsel's and the judge's conduct. This Court found that Mr. Wax's co-counsel, among other things, failed to adequately prepare for trial.

[3]Guideline 10.3 (2003) which sets forth counsel's obligations regarding workload states that "Counsel representing clients in death penalty cases should limit their caseloads to the level needed to ensure high quality legal representation in accordance with these Guidelines". Mr. Wax patently did not do this.

Even more egregiously, counsel failed to utilize the services of an investigator for either the guilt-innocence or penalty phase investigation even though counsel obtained approval from the trial court to use county funds to do so (EH 386). Counsel's failure to hire an investigator is unconscionable in a capital case in which the client's life literally hangs in the balance. Counsel had no reasonable explanation as to why they did not use the available funds to enlist the assistance of an investigator other than their complete lack of experience at the time. At the evidentiary hearing, Mr. Wax admitted that, while **now** he uses an investigator when he represents capital defendants, he could not explain and had "no idea" why they did not use one in Mr. Mendoza's case (EH 386).[4] Mr. Suri candidly admitted that looking back, it was "almost inconceivable" to him that they did not use an investigator and stated that he had "no idea" why they did not (EH 438). This inexplicable failure to utilize an investigator contravenes the ABA Guidelines. Guideline 10.4 which details the structure of the defense team is clear that the defense team should include "at least one mitigation specialist and one fact investigator" Guideline 10.4(C)(2)(a) (2003). Mr. Mendoza was afforded neither type of investigator. As trial counsel Suri admitted that had he tried this case today, he would "have done things differently". As will be detailed below, the

[4]Mr. Wax was also at a loss to explain why he asked for only $750 for an investigator and then did not hire one (EH 386).

errors and omissions by trial counsel during Mr. Mendoza's guilt phase pervaded and permeated every aspect of his guilt phase, to his substantial prejudice.

B. Trial counsel asserted contradictory and inconsistent arguments to the jury as to the identity of the shooter.

One of the most significant trial counsel's errors was counsel's contradictory and inconsistent arguments to the jury as to who actually shot and killed the victim. Trial counsel told the jury during opening statements that **Humberto** Cuellar was the person who shot the victim. However, in closing arguments, with no intervening justification and with not even the pretext of an explanation to the jury, counsel switched theories and argued that **Lazaro** Cuellar was the shooter. Counsel's unexplained, inexplicable, and contradictory arguments completely decimated the credibility of Mr. Mendoza's defense and virtually assured a guilty verdict. Counsel's conduct did nothing but impress upon the jury the notion that the entirety of the defense, including counsel and Mr. Mendoza, lacked credibility.

This was not a case of counsel simply arguing inconsistent defenses. Counsel asserted two mutually exclusive versions of the **fundamental factual issue of the case**: **the identity of the shooter**. By presenting entirely contradictory and mutually exclusive factual scenarios to the jury, counsel assured that the jury would give no credence to any of counsel's arguments or to the defense in general.

During opening statements, trial counsel unequivocally represented to the jury that Humberto Cuellar was the person who shot the victim:

> What is the physical evidence and who gets shot in this case?
>
> We know you are going to find out from the evidence that Mr. Calderon [the victim], in fact, did fire his gun, three shots. And who gets hit by that shot? Not Marbel Mendoza, but **Humberto Cuellar,** because **he's the one who did the shooting. That's who Mr. Calderon shot.**

(TRT 609-10) (emphasis added). Yet, in closing argument, without any explanation to the jury for the switch and without any asserted intervening reason for doing so, counsel completely flip-flopped and argued that **Lazaro** Cuellar was the person who shot the victim:

> [Gunshot residue expert Mr. Rao] came to Court and said more likely than not . . .based on the amount of residue on Lazaro Cuellar's hand it is his opinion he fired a firearm because the swabbing was two and a half hours later.
>
> * * * *
>
> You see the physical evidence - - that is the physical evidence. We can dispute whether it was two hours later or three hours later, but you know what the bottom line is. Lazaro Cuellar had gun powder residue all over his hands after 2 hours and 15 minutes later or 2 hours later. Let's say that is a fact. Now, they can dismiss it. They can say it doesn't matter. They can come in here and try to impeach and try to criticize and try to belittle Mr. Rao's testimony, but those are the facts.

* * * *

> I'll tell you how Lazaro got gunpowder residue on his hand **because he was not in the car**. That is what the physical evidence in this case tells you, compels you to conclude. You know Humberto - - what is Humberto Cuellar going to do folks. What are we dealing with here? Lazaro is his brother. **You think Humberto is going to say when he's at the hospital with a shot, a shot to the chest, is he going to say my brother, my brother after I was shot emptied his gun in Mr. Calderon**. Come on folks, what is he going to say. Who else was there? Marbel Mendoza. That is what he is going to say . . . . **Is he going to say his brother, who got manslaughter and ten, that his brother was the shooter**. It is not going to happen in a million years. **And that is really what the case is about**.

* * * *

> Remember Ms. Seff in voir dire, the three musketeers. You know when people go to a crime they are all equally guilty. The three musketeer, everybody is equally guilty. Remember that. What happened to that concept because I don't see it here? Did you see that here? Did you see equal justice here anywhere? Did you see it because I don't see it. **What I see is that Humberto Cuellar and his brother, who shot this man, the evidence tells you he shot this man**, the evidence tells you they all lied and got away with it.

(TRT 1327, 1328-29, 1332-33) (emphasis added). There is no question that trial counsel inexplicably changed theories midstream. After the State rested, and in direct contradiction to Mr. Suri's earlier opening statement to the jury that **Humberto** shot Mr. Calderon, Mr. Wax announced on the record that, now,

instead:

> **It's the defense theory of the case that Lazaro Cuellar shot and killed Conrado Calderon**. Lazaro Cuellar had an independent action not perceivable by Mr. Mendoza or planned. In addition, acts of Lazaro shooting and killing Mr. Calderon had nothing to do in furtherance of the burglary or robbery, which is charged.

(TRT 1225) (emphasis added).

Counsel's performance fell short of the ABA Guidelines, which as made clear by Wiggins and Rompilla supply a norm as to what amounts to "reasonable" standards of representation in a capital case. Guideline 10.10.1 (2003) which deals with overall trial preparation makes it clear that counsel should formulate an internally consistent theory of the case:

> As the investigations mandated by Guideline 10.7 produce information trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty and **should seek to minimize any inconsistencies.**

ABA Guideline 10.10.1 (2003) (emphasis added).[5]

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[5]The Commentary to the Guideline emphasizes that credibility will be lost if counsel takes inconsistent positions at different stages of the trial. It states that "it is critical that well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. **Counsel should then advance that theory during all phases of the trial including jury selection, witness preparation, pretrial motions, opening statements, presentation of evidence and closing argument**". Commentary to Guideline 10.10.1 (2003). Manifestly Mr. Mendoza's representation did not comport with this essential principle.

While counsel is exhorted to develop a theory of defense that is consistent between the guilt and the penalty phase, it is even more self evident that the theory should be consistent within the confines of the guilt phase. At the evidentiary hearing, trial counsel could articulate absolutely no strategic reason for this completely ruinous course of action and agreed that it was a serious error (EH 371, 441). Absent an explanation to the jury by counsel in closing argument that specific evidence unexpectedly came to light during trial justifying counsel's flip-flop, counsel's urging of inconsistent and contradictory versions of events, especially in a capital case, can be nothing but deficient under Strickland. Counsel gave no explanation to the jury for his inconsistent arguments. Both Mr. Suri and Mr. Wax admitted at the evidentiary hearing that the presentation of inconsistent theories was bad practice (EH 371).

The prejudice to Mr. Mendoza is obvious. As a consequence of counsel's contradictory arguments to the jury, the jury could have concluded nothing else but that Mr. Mendoza had no bona fide defense to the State's charges and that nothing trial counsel argued had any credibility or validity whatsoever**.**

Trial counsel asserted a reasonable doubt defense grounded on counsel's argument that this was not a robbery and that Humberto Cuellar's trial testimony as to the events in question was false. However, due directly to trial counsel's blunder, the jury found Humberto credible enough to reject the defense's

reasonable doubt argument. The jury quite reasonably treated **counsel's** contradictory version of events as proof of the complete and utter lack of credibility on the part of Mr. Mendoza's defense. Because the defense did not dispute that Mr. Mendoza was present with the other co-defendants on the night in question, the jury naturally would assume that Mr. Mendoza likely **knew** the truth of what had occurred, i.e. that he knew who shot the victim. Therefore, in the eyes of the jury, trial counsel's inexplicable and contradictory argument as to the true identity of the shooter established in the jury's mind that Mr. Mendoza's defense was grounded on nothing but deceit and trickery.

With respect to the prejudice prong of Strickland, "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," but only that there is a "reasonable probability that the result would have been different." A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland at 694. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." Id. at 687. Mr. Mendoza has established both deficient performance and prejudice of Strickland.

In Bland v. California, 20 F. 3d 1469 (9th Cir. 1994) (overruled on other grounds), the Ninth Circuit Court of Appeals held that the presentation of inconsistent theories by defense counsel meets the Strickland prejudice

requirement and undermines confidence in the outcome of the trial. In Bland, the factual dispute before the jury was whether or not the defendant was the person who, while riding in a jeep with two other men, shot into a crowd of people standing at a bus stop. Id. at 1471-72. As in Mr. Mendoza's case, counsel presented differing theories as to the identity of the shooter. See Id. at 1479. The Court concluded:

> Inconsistencies between the theories presented by the defense and prosecution are a given. **However, when those inconsistencies also arise from the defense's own camp, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."** Strickland, 466 U.S. at 694. Accordingly, because counsel's errors undermine confidence in the outcome, we conclude that Bland has established prejudice. See Id.

Bland 20 F. 3d at 1479 (emphasis added). As in Bland, where the inconsistent theories presented by "defense's own camp" involved the identity of the shooter, Mr. Mendoza was prejudiced when his own counsel presented to the jury inconsistent and contradictory versions of the facts with no intervening evidence or even an attempt by counsel to justify to the jury this remarkable, mid-trial change in the defense.

Obviously, in light of counsel's actions, counsel did not have or develop a clear, decisive theory of the case. Of course, granting that, prior to the presentation of the State's case, counsel reasonably may not have been in a position to

confidently conclude what would be the best theory to present to the jury, counsel easily could have avoided the whole problem by simply not locking himself into a specific scenario during his opening statement. Counsel could have just not named during opening statement who the defense believed the shooter was. Counsel could have made a more general opening statement without losing persuasiveness with the jury. Then, after all the evidence was presented, counsel could have argued vigorously his particular theory without having lost all semblance of credibility as occurred here. There can be no credible argument asserted that counsel's conduct did not fall below the minimum standard for competent **capital case** defense counsel. See Bland.

The State's case for first degree felony murder rested entirely upon the jury's assessment of the credibility of the trial testimony of Humberto. The trial record establishes that Humberto's credibility was questionable at best given his personal interest in testifying against Mr. Mendoza in order to get his deal from the State and given that he gave a myriad of statements to police that were inconsistent and conflicted with his trial testimony on material factual matters. Given this shaky ground upon which the State rested its case for first degree felony murder - the co-defendant Humberto's credibility - there is a reasonable probability that the outcome of the trial would have been different had counsel not been deficient.

The jury knew that Humberto was testifying against Mr. Mendoza in order

to earn himself a 20-year prison sentence for second degree murder and thereby avoid the possibility of a first degree murder conviction and either life in prison or the death penalty (TRT 1061, 1063, 1083). The jury also knew that Humberto and Lazaro Cuellar were brothers and that, as a condition of his plea, Humberto was required to testify "truthfully" against Mr. Mendoza but that the plea agreement specifically provided that he would not be required to testify against his brother, Lazaro (TRT 1031, 1086). The jury also knew that Lazaro had also been charged with first-degree murder but that he pleaded out to manslaughter with a sentence of ten years (TRT 1086, 1087). Therefore, in addition to his own interest in avoiding a first-degree murder conviction and a possible death sentence, Humberto was motivated to testify against Mr. Mendoza in order to protect his own brother, Lazaro.[6]

The jury had good reason to question Humberto's credibility because **the content** of his trial testimony was **directly tied to the very viability of his deal with the State to avoid a first-degree murder charge and a possible death sentence** or life in prison. The jury had further reason to doubt his testimony because of his interest in protecting his own brother. As explained below, the jury also knew that Humberto's trial testimony contradicted his prior sworn statements

[6] Gunshot residue expert Mr. Rao testified that it was more likely than not that Lazaro actually fired a gun. Humberto testified that Lazaro never got out of the car.

to police on very significant and material matters.

In addition to the State's generous deal given to Humberto in exchange for his testimony, the jury had other reasons to doubt his credibility. At trial, Humberto admitted that: 1) he failed to tell police in his initial statement that he hit the victim over the head with his gun (TRT 1076); 2) he lied when he told police that he never pulled out his gun (TRT 1078); 3) while he testified on direct examination that, when Mr. Mendoza returned to the car, he told Humberto that he had shot the victim, Humberto told police that he (Humberto) passed out when he (Humberto) reached the car, that the next thing he knew, he was in the hospital, and that **he did not know what Mr. Mendoza did after the shooting** (TRT 1079-80); 4) he originally told police that he was unsure what caliber gun Mr. Mendoza was allegedly carrying at the time of the shooting, yet, he now (at trial) believed that Mr. Mendoza carried a .38 Special Revolver, which was the caliber of bullets that killed the victim (TRT 1067, 1084-5); 5) while he testified on direct that he did not know how many bullets were in the Taurus nine millimeter gun (the gun Humberto allegedly used to strike the victim over the head), he had told police that the gun contained 14 or 15 rounds (TRT 1089-90); 6) that, contrary to his trial testimony that his brother, Lazaro, knew about the alleged planned robbery, he told police that Lazaro did not know about it (TRT 1091); 7) that while he testified on direct examination that Lazaro brought the Taurus nine millimeter, Humberto told

police that Lazaro was not armed (TRT 1087, 1092); 8) that, contrary to his trial testimony, Humberto told police that he and Lazaro drove by the victim's house together before the day of the shooting (TRT 1093-4); 9) that contrary to his trial testimony that it took Mr. Mendoza thirty seconds to one minute to return to the car after Humberto was shot (TRT 1054), Humberto had told police that Mr. Mendoza came back to the car in "a few seconds" (TRT 1094).

Given that the jury already had significant and substantial reasons to doubt the veracity of Humberto's testimony, there is more than a reasonable probability that the outcome of the trial would have been different had counsel not been deficient. This is so because the State's entire case depended on the highly questionable credibility of co-defendant-turned-State's-witness Humberto Cuellar. Humberto's credibility was placed into serious doubt at trial. While it must be assumed that the jury must have ultimately found him credible in order to return a guilty verdict[7], given the failures of trial counsel, it cannot be said with any degree of confidence that, had counsel not been deficient, the verdict would have been the same.

[7]As previously noted, the State's entire case rested on Humberto's testimony. Without Humberto's testimony, the State had no evidence to support the charge of first-degree felony murder.

In analyzing the prejudice to Mr. Mendoza caused by trial counsel's errors, this Court must examine and assess the cumulative effect of all counsel's errors. See State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996) (cumulative effect of numerous error by counsel may undermine confidence in the outcome of the original trial); see also Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995). This Court's analysis of the prejudice to Mr. Mendoza must include an analysis of the prejudice caused not only by counsel's contradictory arguments to the jury, as discussed above, but also the combined effect of the prejudice caused by the additional errors discussed throughout the remainder of the instant pleading.

C. Trial counsel broke his promise to the jury in opening statement and failed to present available evidence that there was no attempted robbery by failing to call Lazaro Cuellar as a witness.

In addition to trial counsel's haphazard, inexplicable, and contradictory arguments to the jury regarding the identity of the shooter (see section B, above), trial counsel was ineffective because counsel failed to call as a defense witness Lazaro Cuellar. Lazaro would have provided exculpatory evidence that the reason he, Humberto, and Mr. Mendoza made contact with the victim was **not** to attempt a robbery, but to collect some money owed by the victim. Lazaro would have testified that neither Mr. Mendoza nor Humberto ever indicated to him (Lazaro) that robbery or theft was the motive behind their confronting the victim. Also, he would have testified that he **never** saw Mr. Mendoza with a gun. This evidence

would have completely undermined the credibility of the State's star witness, Humberto, and, at the same time, provided the jury with highly credible exculpatory evidence negating the alleged underlying felonies that formed the basis for the charge of felony-murder. Had trial counsel presented this evidence to the jury, there is more than a reasonable probability that the outcome would have been different. See Montgomery v. Peterson, 846 F. 2d 407 (7th Cir. 1988) (counsel's failure to investigate and present evidence held prejudicial when evidence would have "directly contradicted the State's chief witness . . . upon whose testimony the State depended in order to secure a conviction" and, at the same time, exonerated the defendant of the crime) Id. at 415.

Not only did trial counsel not call Lazaro to testify but, in not calling him, counsel broke his promise to the jury that the jury would hear this evidence. In opening statements, trial counsel purportedly laid out for the jury a map of the defense[8], which included the defense that there was no plan or intention to rob Mr. Calderon (TRT 610-11). Counsel represented to the jury that Humberto was going to falsely testify that it was a planned robbery and that Mr. Mendoza was the shooter because Humberto had asserted this version of events in order to secure more favorable treatment from law enforcement and, ultimately, obtain his deal

with the State (TRT 611). Most critically, counsel then informed the jury that the evidence was going to show that, in direct opposition to Humberto's testimony, Lazaro would maintain that they went to Mr. Calderon's house in order to collect a debt, not to commit a robbery. Counsel very dramatically told the jury in opening statement that the jury would hear from Lazaro that, contrary to what State witness Humberto would tell them, there was no attempted robbery:

> Let me tell you now what the evidence in this case is going to prove.
>
> * * * *
>
> Lazaro made a deal a year ago with the State of Florida. I believe it was last May. I took his deposition. We took his deposition – which is a sworn statement from him – in October of last year.
>
> **You know what he says they went there for? They went there to collect a debt from Mr. Calderon [sic]. . . .**
>
> One of the things also to pay attention to is that **the evidence is going to come in in the form of Mr. Cuellar** – and I cross-examined the Cuellar brothers. You know what **Lazaro** Cuellar, after he makes a deal with them, says? He says, "We went there not to rob anybody, but to make a debt."

(TRT 607-8, 611-12) (emphasis added).

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[8] As discussed in section A, counsel subsequently and inexplicably changed the defense's theory regarding who it was that actually shot the victim, rendering the defense entirely incredible in the eyes of the jury.

Counsel unequivocally informed the jury in his opening statement that the defense would call Lazaro to testify. Consistent with his opening remarks to the jury, immediately preceding opening statements, counsel had even made known to the Court and the State his intention to call Lazaro as a defense witness (TRT 593) ("MR. SURI: For the record, I told the Court that I planned to call Lazaro Cuellar); (TRT 594) ("MR. SURI: . . . I'm telling you that **I'm putting on one of the co-defendants**, and I want to start with this in opening. THE COURT: Which of the defendants do you intend to call? MR. SURI: **Lazaro Cuellar**.") (emphasis added); see also (EH 9-24-03, p. 81) (Mr. Suri's evidentiary hearing testimony confirming that he "told the jury in opening statement this is what Lazaro Cuellar is going to say").

However, despite counsel's representation to the jury, counsel never called Lazaro as a witness, nor was **any** evidence presented by either the State or the defense that the men confronted Mr. Calderon in order to collect a debt and not for the purpose of committing robbery.[9] Counsel broke his opening statement promise to the jury that the jury would hear this evidence. Had counsel called Lazaro Cuellar as a witness, Lazaro would have contradicted State witness Humberto's testimony and provided powerful exculpatory evidence that negated the felonies

underlying the first degree felony murder charge.

In Lazaro's sworn deposition taken on October 15, 1993, given **after** he entered into and was sentenced pursuant to his plea agreement, Lazaro swore under oath:

> Q. [Trial counsel] When did your brother first approach you to discuss doing a robbery of this individual that is named Conrado Calderon in Hialeah?
>
> A. [Lazaro Cuellar] At no time did he approach me to discuss any robbery or anything.
>
> Q. Your testimony is that before . . . driving to Calderon's house, your brother had never discussed doing a robbery on Mr. Calderon?
>
> A. Right.
>
> Q. That's your testimony?
>
> A. Right.
>
> Q. Did Mr. Mendoza ever discuss with you -
>
> A. No.
>
> Q. Let me finish - - Mr. Mendoza ever discuss with you committing a robbery of Mr. Calderon?
>
> A. No, sir.

(Deposition of Lazaro Cuellar, 10-15-93, p. 10, filed in the Court file on November

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[9]Counsel could argue only that the circumstantial evidence that Mr. Calderon's money and watch were not taken suggested this was not an attempted

4, 1993). Regarding the point in time when Humberto and Mr. Mendoza came to Lazaro's residence and picked him up before going to Mr. Calderon's house,

> Q. At this point did you ask Humberto, where are we going, what are we doing?
>
> A. Yes. I asked him, where are we going. He goes, this Mendoza, Mendoza was in the car, Mendoza says, this guy owes me money. I need to get over there to get him before he goes to work so I can talk to him.
>
> Q. So Mendoza told you that the guy owed him some money?
>
> A. Yes.
>
> Q. And they were going over there to collect that money?
>
> A. (Witness nods affirmatively.)
>
> Q. Is that a yes or a no?
>
> A. Right.
>
> * * * *
>
> Q. But it was your clear understanding that they were going over because the individual owed Mendoza or your brother - - by the way - -
>
> A. Mendoza.
>
> Q. - - did he tell you how much money?
>
> A. No.

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robbery.

* * * *

> Q. To this day, as far as you know, it was Mendoza and your brother had gone to see [see] Conrado Calderon to have him repay whatever money they owed Mendoza and your brother; is that why your understanding was?
>
> A. Yes.
>
> Q. You never heard them discuss that they were going to rob Calderon?
>
> A. No.

(Deposition of Lazaro Cuellar, 10-15-93, p. 16-17, filed in the Court file on November 4, 1993).

By not calling Lazaro to testify, as counsel promised the jury, counsel failed to present exculpatory evidence to the jury that negated the alleged felonies underlying the charge of first degree murder. Not only was this evidence exculpatory, but it also would have called into serious question the credibility and veracity of Humberto, the State's star witness. Ironically, trial counsel himself correctly emphasized to the jury in his opening statement that Lazaro's version of events as set forth in his sworn testimony is highly credible due to the fact that, under the explicit terms of his previously entered plea agreement, his decision to swear under oath to facts that directly contradicted the State's theory of the case that this was an attempted robbery, placed him at serious risk of the State moving

to vacate his 10-year prison sentence and seek a 27-year sentence.[10] In fact, that is exactly what happened. **After** Mr. Mendoza was found guilty, the State filed a motion to vacate Lazaro's sentence for non-compliance with the terms of his plea agreement on the ground that his version of events as set forth in his sworn pretrial deposition constituted a violation of his plea agreement (R. 829-31; TRT 1444-5). In support of its motion to vacate Lazaro's sentence, the State emphasized that because Lazaro's sworn deposition statement contradicted Humberto's trial testimony, the State did not call Lazaro as a witness (TRT 829-30). Clearly Lazaro's version of events as set forth in his pre-trial deposition so blatantly contradicted the State's theory of the case (that this was an attempted robbery and, therefore, a first-degree felony murder) that the State felt compelled to attempt to have him re-sentenced to 27 years for violating the provision of his plea agreement that he "truthfully" testify (i.e. to testify consistent with the State's theory).

Counsel's failure to call Lazaro as a witness constituted deficient performance that prejudiced Mr. Mendoza. See Strickland. At the evidentiary hearing, counsel could articulate no reason for not calling Lazaro as a witness (EH 371). As counsel himself admitted, "We didn't have nothing [sic] to lose to put him on" (EH 441). This is a correct assessment by trial counsel. As will be

[10]Under the terms of his plea agreement, Lazaro was required to testify "truthfully" in deposition, trial and all court hearings in the instant case (TRT 200).

discussed below, counsel indeed had nothing to lose and everything to gain by calling Lazaro as a witness.

Significant to counsel's decision not to call Lazaro as a witness is the fact that, after the State rested but before the defense started its case, the State conceded that it had failed to present sufficient evidence to get to the jury on the premeditation theory of first-degree murder. Consequently, prior to making the decision whether or not to call Lazaro, counsel knew that, in order to return a verdict of guilty of first degree murder, the determinative issue for the jury was not which of the three men shot Mr. Calderon, but, instead, whether or not Mr. Calderon was killed during an attempted robbery**.** The prosecutor argued this very point to the jury in closing when she argued that, even if Mr. Mendoza did not shoot Mr. Calderon, if the jury found that an attempted robbery occurred, then they had to find Mr. Mendoza guilty of first degree murder (TRT 1337); see also (TRT 1338) (where prosecutor tells the jury in closing arguments, "It doesn't matter whether or not Mr. Mendoza's the shooter . . . . [L]et's say he's not the shooter. He's guilty of first degree felony murder."). Given the wide net cast by the law of felony murder and the law of principals that acts to ensnare the non-shooting participant, once the State's case was narrowed to only the felony murder theory, whether Mr. Mendoza or one of the other men shot Mr. Calderon became - for the purpose of defending against the charge of first degree murder - a legally non-

consequential matter. With this important point in mind, Lazaro's testimony would have gone directly to negate felony murder by negating the alleged underlying felonies. Counsel's decision not to call him as a witness was not reasonable strategy. Counsel's error was compounded and magnified because counsel had promised the jury that the defense would call Lazaro as a witness and that he would testify that there was no attempted robbery.

Because the factual dispute as to who actually shot Mr. Calderon was no longer determinative of whether or not Mr. Mendoza could be found guilty of first degree murder, any suggestion that trial counsel's failure to call Lazaro as a witness was reasonable because Lazaro indicated in his deposition that when Mr. Mendoza returned to the car, he indicated he had killed Mr. Calderon, is without merit (EH 457-460). Even if the jury had concluded that Mr. Mendoza was not the person who shot Mr. Calderon, under the law of felony murder, and as the prosecutor in fact argued to the jury in closing, the jury still could have found Mr. Mendoza guilty of first degree felony murder. Of course, trial counsel did not articulate this as a reason for not calling Lazaro and therefore cannot be relied upon as a basis to deem counsel's conduct reasonable strategy.

Even if he had articulated this as a reason, it must be deemed not a reasonable strategy. The **only way** for counsel to obtain a not guilty verdict on the charge of first degree felony murder was to persuade the jury that the State had

failed to prove beyond a reasonable doubt that this was an attempted robbery. Lazaro would have provided direct evidence of this fact. Counsel's decision not to call him was not reasonable under the specific circumstances of this case - namely, the fact that only the felony murder theory of first degree murder was presented to the jury.

The case of Harris v. Reed, 894 F. 2d 871 (7th Cir. 1990), is similar to the instant case on this issue. In Harris, the defendant was charged and ultimately convicted of murder. After the victim was shot, two witnesses reported to police that they heard a shot and saw a man flee from the scene. Id. at 872-73. Each witness identified McWhorter as the person they saw. Id. McWhorter became the police's prime suspect until a month later, when another alleged witness came forward. This new witness told police that he heard a shot and saw a person he later identified as the defendant, Harris, get into a vehicle and drive away from the scene. Id. at 873. The state charged Harris with murder and not McWhorter. During opening statements, defense counsel told the jury that the evidence would show that police had learned that McWhorter was seen running away from the scene immediately after the shooting and that he was the chief suspect until the new witness came forward. Id. at 873-74. Yet, despite defense counsel's representations to the jury, the defense rested without calling the two witnesses who identified McWhorter.

The Seventh Circuit Court of Appeals held that trial counsel was ineffective for not calling either of the witnesses who would have supported the defense that the defendant, Harris, did not shoot the victim. Id. at 878. Trial counsel's reason for not calling these witnesses was that he felt the prosecution's case was weak and that the jury would return a not guilty verdict. Id. The Seventh Circuit concluded that trial counsel's decision not to present the McWhorter theory through the testimony of the two witnesses who identified McWhorter as the person they saw fleeing the scene, **especially "after preparing the jury for the evidence thought the opening",** was unreasonable professional conduct. Id. at 879 (emphasis added). The Court held:

> [C]ounsel decided not to present these available witnesses; he chose to gamble on his perceptions about the weakness of the prosecution's case. **By resting without presenting any evidence in favor of the defense, counsel left the jury free to believe state witness' account. In fact, counsel's opening statement primed the jury to hear a different version of the incident. When counsel failed to produce the witness to support this version, the jury likely concluded that counsel could not live up to the claims made in the opening.**

Id. at 879 (emphasis added). Mr. Mendoza's trial counsel did exactly the same thing as counsel did in Harris: failed to present evidence promised to the jury in opening statement that would have contradicted the State's evidence - specifically, evidence that would have directly contradicted the State's version of events as

testified to by key witness Humberto Cuellar.

In Anderson v. Butler, 858 F. 2d 16 (1st Cir. 1988), the defendant was convicted of the first-degree murder of his estranged wife after finding her in the bedroom with another man. Electing to not contest the charge that he killed his wife, the issue at trial was for the jury to determine based on the defendant's state of mind whether he was guilty of first degree murder, second degree murder, or manslaughter. In opening statements, defense counsel told the jury that he would call as witnesses a psychiatrist and a psychologist to testify that, on the night in question, the defendant could not appreciate what was occurring. Id. at 17. However, counsel rested his case without calling the doctors. Id. The First Circuit Court of Appeals reversed the lower court's denial of the relief and held that trial counsel was ineffective for promising that the jury would hear this evidence and then not presenting it. The Court found prejudice **as a matter of law** for counsel to promise the jury it would hear such powerful evidence and then not produce it. Id. at 19.

In reversing the lower court's denial of relief, the Court in Anderson focused on both the lower court's and the state court's failure to include in their Strickland analyses the "**effect on the jury** of counsel's not putting the doctor's on the stand after he had said he would do so." Id. at 17-18. The lower courts treated as two separate issues counsel's decision not to call the doctors and counsel's failure to

comply with his promise to the jury. The First Circuit rejected this approach and made clear that, in order to properly assess the defendant's claim of ineffective assistance of counsel, the Court had to "consider **the totality** of the opening statement and the failure to follow through." (Id. at 17) (emphasis added).

As noted in Mr. Mendoza's case, not only did counsel not call Lazaro to present evidence that there was no attempted robbery, counsel, as in Anderson and Harris, broke his promise to the jury in opening statement to present this evidence.[11] The prejudice to Mr. Mendoza is obvious: the jury never learned of material evidence that supported Mr. Mendoza's version of the facts and directly contradicted the prosecution's evidence.

The prosecution capitalized on trial counsel's failure to live up to his promise that the jury would hear evidence that this was not an attempted robbery, arguing to the jury in closing argument:

> **One of the things I suspect you will remember is the opening statement when you heard this case is going to be about [sic]**. Now, you heard a lot of things

[11]The State may contend that Mr. Mendoza has not established prejudice because he did not call Lazaro at the evidentiary hearing. This argument would necessarily fail. The State below admitted that Lazaro Cuellar supported the theory presented in opening that it was not a robbery". Additionally as Wiggins makes plain, Mr. Mendoza need not present in post conviction the exact evidence that competent counsel would have presented at trial. Instead the Court held that in post conviction the defendant must establish "a reasonable probability that a competent attorney...would have introduced the evidence in an admissible form." Wiggins 535 U.S. , 535 (2003).

in terms of what this case was going to be about from the defense in this case if you all made notes, you need to listen to this evidence because I suggest to you that you heard, **there is no evidence about their theories and what they suggest in this case**.

You heard no evidence about what they defense counsel think you are going to hear or they thought may have happened in this case. The only evidence I heard about what actually happened . . . was when Humberto Cuellar took the witness stand. Because of all the witnesses that testified to you, he's the only one that was there.

* * * *

And we know that Conrado Calderon was a victim of a burglary, of attempted robbery, of a murder, and of conspiracy against him to commit a robbery on him.

There is nothing to the contrary of what Humberto Cuellar tells you. Nothing in the evidence of this case that contradicts that. In fact, everything supports it.

* * * *

I'm going to sit down now and the defense attorney is going to have an opportunity to answer some questions for you and suggest to you how Criminalist Rao's testimony, which suggested to you how Lazaro Cuellar might have, could have, would have, maybe if, fired a gun except this whole conclusion is based on the wrong time and they purposely put it on to mislead you because they knew the right time. **Let him explain to you how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you and that you shouldn't believe Humberto Cuellar.**

(TRT 1301-02, 1304, 1318-19).

Mr. Mendoza was prejudiced by trial counsel's failure to call Lazaro Cuellar because there is reasonable probability that, "if presented to a jury acting 'conscientiously . . . and impartially,' would have led the jury to have a 'reasonable doubt' respecting" the existence of the alleged felonies underlying the charge of first-degree felony murder. United States v. Tyrone, 878 F. 2d 702, 713 (3rd Cir. 1989). In Tyrone, the Court reversed the lower federal court's denial of the defendant's federal habeas corpus petition and concluded that trial counsel's failure to call a witness who would have testified to facts consistent with the defendant's defense and contrary to the testimony of government witnesses was ineffective. Id.

D. Trial counsel was ineffective in preparing and presenting exculpatory evidence of gunshot residue.

Trial counsel was ineffective for failing to prepare and investigate the evidence surrounding the gunshot residue swabs taken of Lazaro and Humberto at the hospital following the shooting and for failing to provide Mr. Mendoza with competent expert assistance in violation of Ake v. Oklahoma, 470 U.S. 68 (1985).

Trial counsel called as a defense witness, Mr. Gopinath Rao, an expert in gunshot particle analysis. Mr. Rao was a criminalist for the Metro-Dade Police Department (TRT 1165-66). Mr. Rao had conducted the particle analysis of the

hand swabs taken from Lazaro and Humberto while they at the hospital during the morning after the shooting. Counsel for Mr. Mendoza elicited from Mr. Rao very significant exculpatory evidence in the form of Rao's expert opinion. Mr. Rao gave the opinion that, based upon his analysis of the particles found in the swab taken from Lazaro's hands, it was "more likely than not" that Lazaro Cuellar **fired** a gun as opposed to having simply "handled" a gun that had been fired (TRT 1205, 1207). Critical to Mr. Mendoza's instant claim of ineffective assistance of counsel, Mr. Rao made perfectly clear to the jury that his opinion was specifically grounded on his assumption that Technician Gallagher swabbed Lazaro's hand **at 9:00 a.m.** (TRT 1181-83,1200,1207). Mr. Rao testified that he reached his opinion because, since more and more particles fall off as time passes, the number of particles found on Lazaro's hands at 9:00 a.m. was significant given that the shooting occurred almost three and one-half hours earlier at 5:40 a.m. (TRT 1181-83).

Mr. Rao's opinion that Lazaro more than likely fired a gun as opposed to having simply handled a gun that had been fired was obviously significant because it strongly suggested that Lazaro and not Mr. Mendoza shot Mr. Calderon. The State's theory was that particles were found on Lazaro's hands due to Lazaro's **handling** of the gun that was present at the scene but not fired and/or due to his post-shooting contact with Humberto, who had been shot by Mr. Calderon. The State's star witness, Humberto, had testified that Lazaro - his brother - never got

out of the car. Mr. Rao's opinion was exculpatory evidence that not only suggested that Mr. Mendoza did not shoot Mr. Calderon but, at the same time, discredited Humberto's trial testimony.

Knowing all along that Mr. Rao's was wrong on his assumption that Lazaro's hands were swabbed at 9:00 a.m., the State set him up for a mighty fall during the State's cross-examination. During cross, Mr. Rao indicated that his opinion was "based on this time frame" (TRT 1208) and that, consequently, if he was wrong regarding the time Gallagher took the swabs, Rao's entire opinion was invalid:

> Q. [Prosecutor] So if the time frame is wrong, your opinions are invalidated?
>
> A. [Mr. Rao] That's correct.
>
> Q. If . . . Lazaro was swabbed not at nine, but earlier, then you couldn't reach the same conclusion necessarily, could you?
>
> A. No.
>
> * * * *
>
> Q. The time factor is very important to your opinion?
>
> A. That's correct.

(TRT 1207). The final blow to the jury's perception of the reliability of Rao's opinion came when the State called Technician Gallagher as a rebuttal witness.

Technician Gallagher confirmed what the State knew all along but which trial counsel did not: That Mr. Rao's assumption upon which his opinion was based was wrong because Gallagher swabbed Lazaro's hands at 7:45 a.m., not 9:00 a.m. (TRT 1282-83).

The record establishes that trial counsel **failed to review their own deposition of Technician Gallagher** who, as the State pointed out during Gallagher's rebuttal testimony, unequivocally told trial counsel in his deposition that he took Lazaro's swab at 7:45 or 7:50 a.m. (TRT 1289-90). As the prosecutor strenuously and repeatedly pointed out at trial, trial counsel therefore should have known that Lazaro's swab was taken at 7:45 a.m., not 9:00 a.m. Obviously, neither counsel nor Mr. Rao knew this because Mr. Rao's predicated the entirety of his opinion - which was exculpatory to Mr. Mendoza - on the incorrect assumption that Lazaro's swab was taken at 9:00 a.m. Further illustrating counsel's mistake as to the time, during an argument on an objection made when the prosecutor asked Mr. Rao about a "hypothetical" in which Lazaro's hands were swabbed at "approximately 7:30", trial counsel Mr. Suri objected specifically because that "was not the facts of the case" (TRT 1194). Counsel clearly objected because he **incorrectly** believed that Lazaro's hands were swabbed at 9:00 a.m.

Because counsel and their expert Mr. Rao were wrong as to the time Lazaro's hands were swabbed, the State was able to easily undermine Rao's

otherwise significant and exculpatory opinion that Lazaro more likely than not fired a gun as opposed to having simply handled a gun that had been fired. In closing arguments, the prosecutor hammered home the point and argued that, because Rao assumed incorrectly that Lazaro's hands were swabbed at 9:00 a.m., his opinion was invalid (TRT 1302, 1341).

Significantly, the prosecutor did not simply argue that Mr. Rao's opinion was invalid because he had the time wrong, she went much, much further. Ms. Seff, the prosecutor, explicitly argued to the jury that Mr. Mendoza's trial counsel **deliberately presented false evidence** in a scandalous ploy to mislead and confuse the jury (TRT 1302-03, 1316,1318,1319). During closing arguments, Ms. Seff attacked the integrity of trial counsel - and, by association, the integrity of Mr. Mendoza and the whole of the defense's case - as follows:

> Now, it's also fitting that the last evidence that you heard in this case came in the form of rebuttal testimony by Technician Gallagher because I suggest to you that what happened in regards to Technician Gallagher and the attempt to have Criminalist Rao tell you that all his opinions were based on nine o'clock in the morning [sic]. That the gunshot residue tests were performed at nine o'clock in the morning on Lazaro Cuellar is what the rest of this defense is about because you all know that that is not true. Not only did you all know that the tests were not done at nine, you heard the witness and you saw it on the bag.

They knew, Mr. Wax, in June of 1992[12]. That was told to them by the technician when he took those tests and yet he proceeded to put on an expert witness who based an opinion on something that wasn't accurate. That it was nine o'clock. **He knew it wasn't nine o'clock all along.**

Back in June of 1992 he knew that that was not accurate and he put that man in front of you to try to confuse and mislead you to base an opinion on something that is not true.

The last thing - - Criminalist Rao whatever his opinions are or could have, would have, should have, might of, probably, but whatever his opinion was and whatever you found about his opinion the last thing he said on my recross when I asked him the question was and is this all based on the time element and he said yes. And you know now that the time element was wrong and they know it was wrong and **they tried to get you to believe something different than they know to be the evidence in this case.**

* * * *

I'm going to sit down now and the defense attorney is going to have an opportunity to answer some questions for you and suggest to you how Criminalist Rao's testimony, which suggested to you how Lazaro Cuellar might have, could have, would have, maybe if, fired a gun except this whole conclusion is based on the wrong time and **they purposely put it on to mislead you because they knew the right time**. Let him explain to you how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you and that you

[12]Referring to the date that trial counsel took Technician Gallagher's deposition during which Gallagher told counsel that Lazaro's hands were swabbed at 7:45 a.m.

> shouldn't believe Humberto Cuellar.
>
> * * * *
>
> Why should the State have brought Rao to the stand? **Because I knew just like they knew back in June of 1992 that the Criminalist Rao's opinions were flawed, that he had the wrong information, that his opinion was based on something that wasn't true, and that his opinion was worth nothing**. Now, you are going to get an instruction on expert witnesses. You will see you can discount his opinion. That is why the State didn't call him because his opinion isn't based on the facts of this case and, therefore, it's not a valid opinion for your consideration suggesting that Lazaro fired a gun because he had gunshot residue on both of his hands.

(TRT 1302-03, 1318-19, 1341) (emphasis added).

Even more outrageous than the prosecutor's accusations is that, as will be established below, at the evidentiary hearing, **the State's own gunshot residue expert**, Mr. Klein, reviewed the record and unequivocally concluded that Mr. Rao's opinion was **not** invalidated by the fact that Rao had the time wrong. It cannot be emphasized enough that the State (Ms. Seff herself) called Mr. Klein as her witness at the evidentiary hearing. Mr. Klein fully substantiated the validity of Mr. Rao's opinion and, in so doing, directly refutes Ms. Seff's closing argument to the jury that Rao's opinion was invalid. Because the State's own witness - the current gunshot residue expert for the Metro-Dade Police Department - now directly repudiates the truth of the State's argument to the jury (that Rao's opinion

was invalid), due process **demands** that Mr. Mendoza be granted a new trial.

As noted above and as Wiggins makes clear, the ABA Guidelines provide the reasonable professional norms for what constitutes adequate investigation in a capital case. Guideline 10.7 is clear that "Counsel at every stage have an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty" Guideline 10.7 A (2003). Furthermore, the Commentary to this Guideline states that "With the assistance of appropriate experts, counsel should then aggressively reexamine the governments forensic evidence, and conduct appropriate analyses of all other available forensic evidence". Commentary to Guideline 10.7 para. 4 (2003). Here, trial counsel neither aggressively reexamined the State's evidence surrounding the gunshot residue swabs taken of Lazaro and Humberto at the hospital following the shooting and for failing to provide Mr. Mendoza with competent expert assistance in violation of Ake v. Oklahoma. Effective counsel would have known the correct time and thereby avoided the State being able to completely discredit the entire defense. Furthermore, competent counsel and a competent expert would have established that, even with the correct time frame, it was still more likely than not that Lazaro fired a gun as opposed to just handling a gun that had been fired.

The State's own expert witness called to testify at the evidentiary hearing established that Mr. Rao's opinion at trial was in fact entirely valid - contrary to

the State's argument to the jury that it was not. At the evidentiary hearing, the State's own gunshot residue expert, Mr. Alan Klein, a criminalist for the Metro-Dade Police Department (Mr. Rao's predecessor), testified that Mr. Rao's opinion was correct and that the fact that Mr. Rao incorrectly thought that the swab was taken at 9:00 a.m. did not at all invalidate the validity of Rao's opinion:

> Q. [Post-conviction counsel]. Did you read the testimony of Mr. Rao that provided in this case?
>
> A. [Mr. Klein]. Yes.
>
> Q. Are you telling the Court that Mr .Rao's testimony was inaccurate?
>
> * * * *
>
> A. I don't think I said that, no.
>
> * * * *
>
> Q. Your answer is no but you are not saying to this Court that Mr. Rao's testimony was wrong?
>
> A. Correct.
>
> * * * *
>
> Q. (Mr. Rao) was discredited because he thought that swabs were taken at 9:00, but in actuality swabs were taken at 8:05 and 7:45, but does that make his opinion any less valid? If at 7:45 there was gunshot residue there and there was also at 8:05 gunshot residue there, is his opinion any less valid if he thought the swabs were taken at 9:00:

A. [Mr. Klein]. No, it wouldn't be less valid. It would be as valid and he was correct in saying that at the time is [sic] an important factor, but as I said, in this case because the time you are talking about might be about an hour's difference or so, it is more of activities that are the deciding factors in this rather than the time . . . .

Q. Exactly, in this particular scenario when he thought that the swabs were taken at a later time as opposed to an earlier time, it makes no difference, it still means that gunshot residue was positive?

A. Yes.

* * * *

THE COURT: [Y]ou are saying it wouldn't be fatal to his opinion?

THE WITNESS: Correct.

BY MS. PEREZ-GARCIA [Post-conviction counsel]

Q. In your opinion Mr. Rao's opinion was valid?

A. Yes.

(EH 592-610). As noted, supra, in her closing argument to the jury, the prosecutor pointedly argued that the jury should disregard Mr. Rao's opinion because he made an error as to the time Lazaro's hands were swabbed. Now, at the recent evidentiary hearing, the State's very own resident gunshot residue expert established this was not true and that **Mr. Rao's opinion is valid despite the fact that Rao had the time wrong**. In fact as common sense dictates, since the hand

swabs were taken **earlier** than Rao believed, (at 7:45 am and 8:05 am respectively rather than the time of 9:00 am which Mr. Rao believed), the positive identification was even stronger than adduced at trial.

Mr. Mendoza is entitled to a new trial because the State's own expert witness (Mr. Klein) directly contradicts the prosecutor's own closing argument to the jury that Mr. Rao's opinion that Lazaro more likely than not fired a gun was not valid.[13]

Dr. Vincent Dimaio has been the Chief Medical Examiner for Bexer County, San Antonio, Texas for twenty-two years (EH 4-22-03, p. 16). Prior to that, he was for eight years the medical examiner for Dallas, Texas (Id.). At the evidentiary hearing, the Court recognized him as an expert in pathology and gunshot residue analysis (Id. at pp. 4-5). He testified at the evidentiary hearing that, in his opinion, the gunshot residue evidence suggested that Lazaro was near a gun at the time the gun was fired (EH 4-22-03 p. 14). He also was of the opinion that the evidence was consistent with Humberto having fired a gun (Id., pp. 10-12). While his opinion differed from Mr. Rao's with respect to Lazaro, they both agreed that the residue evidence was not consistent with Lazaro having simply handled a

[13]The State in fact has a duty to concede this point and agree to a new trial in order to not violate Mr. Mendoza's right to due process and in light of the State's ethically-mandated and paramount goal to seek justice over that of simply seeking to win the case.

gun that had been fired (TRT 1205, 1207; EH 4-22-03, p. 14). In sum, based on the opinions of Mr. Rao and Dr. Dimaio, the evidence was consistent with Lazaro having either fired a gun or having been present when a gun was fired and inconsistent with him having simply handled a gun after it was fired. Whether Lazaro fired a gun or was near a gun at the time it was fired, either case directly refutes the testimony of Humberto, who told the jury that Lazaro never got out of the car.

Counsel failed to competently present the exculpatory gunshot residue evidence by failing to learn and inform his expert, Mr. Rao, of the correct time that Lazaro's hands were swabbed. The State argued to the jury in closing that Mr. Rao's opinion that Lazaro more likely than not fired a gun was invalid because he had the time wrong. However, at the evidentiary hearing, the State's own gunshot residue expert from the Metro-Dade Police Department steadfastly maintained that **Mr. Rao's opinion was valid despite the error**. Thus, the State's own evidence now directly contradicts the prosecutor's closing argument to the jury on this critical issue. In light of all these errors and their effects on the outcome of the trial, Mr. Mendoza is entitled to a new trial.

E. Trial counsel failed to investigate and present exculpatory evidence.

Mr. Mendoza's counsel failed to hire and utilize the services of an investigator even though counsel obtained approval from the trial court use county

funds to do so (EH 366,437). Counsel's failure to hire an investigator again falls short of the "reasonable professional norms" provided by the ABA Guidelines and approved by Wiggins and Rompilla. Counsel had no reasonable explanation as to why they did not use the available funds to enlist the assistance of an investigator other than their complete lack of experience at the time. At the evidentiary hearing, Mr. Wax admitted that, while **now** he uses an investigator when he represents capital defendants, he had "no idea" why they did not use one in Mr. Mendoza's case (EH 367). Mr. Suri candidly admitted that looking back, it was "almost inconceivable" to him that they did not use an investigator and suggested that it was because of their inexperience (EH 437).

Trial counsel was ineffective when counsel failed to present available evidence that, **at the time of the shooting**, Mr. Calderon was involved in racketeering activities and ran a "bolito"[14] operation. This evidence would have supported the defense that Mr. Calderon was confronted in order to collect a debt and not for the purposes of robbery. Evidence that Mr. Calderon was involved in bolito activities at the time of his death would have constituted additional evidence that Mr. Mendoza was not committing or attempting to commit a robbery but, instead, was attempting to collect money owed by Mr. Calderon. The trial court in

[14]"Bolito" is a type of illegal lottery. See Greater Loretta Improvement Association v. State, 234 So. 2d 665, 672 (Fla. 1970).

fact ruled such evidence was relevant and admissible (TRT 469-70, 747-52). However, because trial counsel failed to investigate and discover this evidence, the jury never learned of this critical exculpatory information. At trial, Mr. Suri informed the Court that he had such evidence available.

F. Conclusion

Trial counsel's many omissions and failures at the guilt phase did not comport with the reasonable professional norms of the ABA Guidelines. Contrary to the lower court's implication, it is clear from the record of the evidentiary hearing that there was no strategy for these failures to investigate and develop a theory of the case. Failure to investigate, failure to review discovery materials and failure to develop a consistent theory of the case are not acceptable strategy. As a result of these omissions the State was able to shred the credibility of Mr. Mendoza's defense and allow his conviction. As Wiggins makes plain, a strategic decision made after a less than complete investigation does not constitute a bar to a finding of deficient performance.

Furthermore, the prejudice attaching to each of counsel's errors is self evidence. For each of the failings described supra, taken individually, there is a reasonable probability that the outcome of the guilt phase would have been different. Taken together, as this Court must do, there can be no doubt that Mr. Mendoza is entitled to a new trial.

ARGUMENT II

MR. MENDOZA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY/SENTENCING PHASES OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Trial counsel failed to investigate, discover, and present mitigation evidence

a. Introduction

Trial counsel was ineffective for failing to present significant available statutory and non-statutory mitigation to both the penalty phase jury and the sentencing judge. Trial counsel's failure in this regard rendered his death sentence unreliable. The jury recommended the death penalty by a mere margin of 7 to 5. See Mendoza v. State, 700 So. 2d 670, 673 (Fla. 1997). Had a single juror who voted for death instead voted for life, Mr. Mendoza would have received a life recommendation (on a vote of 6 to 6). This would have undoubtedly led to a life sentence given that the judge would have been required to give the jury's recommendation great weight (see Tedder v. State, 322 So. 2d 908 (Fla. 1975)) and given that the judge found only two relatively weak aggravating circumstances to justify the death sentence: (1) prior conviction for a violent felony; and (2) committed while engaged in the commission of a robbery (merged with pecuniary gain). See Mendoza at 673. Significantly for the purpose of Mr. Mendoza's instant claim of ineffective assistance of counsel, the trial court, in sentencing Mr.

Mendoza to death, concluded that Mr. Mendoza **failed to establish any mitigating factors**, statutory or otherwise, based on his mental health, experiences in Peru, or drug use (TRT 1726-32, 1733, 1734; R 948-54). The trial court concluded in its sentencing order, "**The defendant has failed to establish the existence of any statutory or non-statutory mitigating factors**" (R. 956; TRT 1735) (emphasis added).

When this Court affirmed the death sentence, the Court specifically relied upon the trial court's rejection of these mitigating circumstances as a basis to conclude that the death penalty was not disproportionate. See Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997). (In finding that the death penalty was proportionate, the majority found it significant that "the trial court considered but found no mitigation in the form of appellant's history of drug use and mental problems"). Consequently, the established law of the case is that trial counsel completely failed to establish **any** mitigation, statutory or non-statutory. As was established at the evidentiary hearing, this occurred not because Mr. Mendoza does not have mitigating factors in his life history and background, but because counsel was ineffective in not investigating, discovering, and presenting this evidence to the sentencing jury and judge.

Following the evidentiary hearing, the lower court denied Mr. Mendoza's claim that his trial counsel was ineffective at the penalty phase. The lower court

did not make specific findings of fact, but as with the guilt phase of the trial, seems to be basing its ruling on an assumption that trial counsel had a strategy for not investigating Mr. Mendoza's social history and that any such strategy was reasonable. In so doing, the lower court ignored the applicable law as it relates to strategy in determining ineffective assistance of counsel.

As explained in Argument I, supra, Strickland requires Mr. Mendoza to prove both deficient performance and prejudice. As in the guilt phase, Mr. Mendoza has proven both with regard to his penalty phase.

Much of Mr. Mendoza's claim of ineffective assistance of trial counsel rests on the failure to investigate and present mitigation that was available. Florida law does not require that Mr. Mendoza establish the existence of mitigating circumstances beyond a reasonable doubt. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("When a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved"). As will be demonstrated, Mr. Mendoza is entitled to relief in the form of a new penalty phase.

b. Deficient performance

At the penalty phase, trial counsel's case consisted of the testimony of Marbel's mother, Nilia Mendoza, Dr. Toomer, a psychologist, a childhood medical record from Cuba, and the testimony of the State's star witness Humberto Cuellar.

Mrs. Mendoza testified in very general terms about Marbel's childhood health and the family's subsequent move from Cuba to Miami via the Peruvian tent city. Her description of their experience was limited. Regarding drug use, Mrs. Mendoza testified that there were no indications that Marbel had a drug problem. While she testified that she suspected that he smoked marijuana (TRT 1515-16, 1522-23) and saw him drunk on one occasion (TRT 1523-4), she also testified that she had no reason to believe that he was taking any other drugs, including cocaine (TRT 1522-23, 1527).

Clinical Psychologist Dr. Jethro Toomer evaluated Mr. Mendoza and testified at trial that, **based solely on what Marbel told him**, and Dr. Toomer's evaluation, Marbel suffered from deficits in reality testing as reflected in cognitive impairment and emotional ability (TRT 1583). He also saw evidence of brain damage but could not so conclude without further testing (TRT 1571, 1574,1583). He noted that Marbel had a history of audio and visual hallucinations and childhood psychiatric evaluations (TRT 1562-64). He also noted indications of poor impulse control, high anxiety, poor judgment, and poor self-esteem (TRT 1570, 1574, 1580). Critical to the instant claim of ineffective assistance, Dr. Toomer admittedly did not obtain any information from sources other than Mr. Mendoza himself (TRT 1560-61, 1593). While he testified that Marbel reported a history of very significant and frequent drug use (TRT 1576, 1662-3), Dr. Toomer

was not provided nor did he obtain any information corroborating this fact (TRT 1560, 1593). Dr. Toomer did not talk to any family members such as Marbel's parents or ex-wife, and did not look at any records other than jail records (TRT 1592). Furthermore, Dr. Toomer never testified regarding the effects of Marbel's substance abuse on his mental health and functioning.

Mr. Mendoza's death sentence is the direct result of trial counsel's inexperience in capital case litigation, as previously discussed. Counsel failed to utilize the services of an investigator or a mitigation specialist (EH 366). Mr. Wax had minimal capital case experience and Mr. Suri had absolutely none (EH 363,432). At the time of Mr. Mendoza's trial, Mr. Wax had never attended any seminars or educational programs for investigating and trying capital cases (EH 364). Mr. Suri had attended a single capital litigation seminar in 1992 (EH 433).

In addition to, and as a result of, counsel's clear lack of experience in investigating and trying capital cases, is the fact that counsel's basic approach to the penalty and sentencing phase investigation was fundamentally - and fatally - flawed. At the evidentiary hearing, both Mr. Wax and Mr. Suri admitted without dispute or rebuttal by the State that they did not investigate and prepare as vigorous a case for mitigation as they could have because they believed that the jury would not recommend the death penalty based upon the particular facts of the shooting. Mr. Wax put it this way:

Q. [Post-conviction counsel]. When you tried the case, did you think this was a death case?

A. [Mr. Wax]. I never felt that it was the kind of case that warranted the death penalty. The words I would use is this is not a death case.

* * * *

Q. Did the fact that you didn't get a negotiated life sentence from the State in this death penalty case affect you in the way you prepared and tried the case?

A. Yes.

Q. Tell us how.

A. Well, the fact that it - - well, **the fact that we didn't feel it was a death case affected our approach to the penalty phase in the sense that we were trying to show [sic] 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 . . ., and because of that, we were primarily relying upon the facts of the case to persuade the jury that death was not an appropriate punishment as opposed to the background of the defendant. So the emphasis was more factual than - -that's [sic] historical**.

Q. But the fact that you thought it wasn't a death case, did that affect how much work and effort you put into this mitigation case?

A. Perhaps yes, perhaps.

(EH 9-24-03, pp. 6-7). Mr. Suri similarly testified:

A. [Mr. Suri]. . . . I had never felt that this was a death

penalty case.

Q. [Post-conviction counsel]. Why is that? Tell the Court the facts of the case that made you feel that this was not a death case.

A. I mean - -first of all, the shooting, it was - - there's no question that the victim in this case began the shooting in the case. We thought that there was real issues as to who was the shooter in the case. When you have the two other potential shooters - - and there's nothing in the records, I believe, that indicates who the shooter in this case was. If you've got two co-defendants that might be the shooters, the total lack of forensics evidence, and they're getting 10 and 20 years, there's a serious proportionality argument.

The assumption was this was not a death penalty case, and I think unfortunately, that colored perhaps our efforts of mitigation, you know, and also just inexperience, quite frankly. I had never done a mitigation before. I don't know if Barry Wax had in fact - - I think he had done one case before that. We did state - -delineate our responsibilities in that way. We put on what we put on, and for example, one of the things I do now, I request a mitigation specialist, investigators, and I believe we didn't do that in Marbel's case. I believe that's unfortunate at that time experience [sic].

Q. So do you think your judgment that this was not a death case effectuated - - you prepared it?

A. Yes, and inexperience lead to - - we could have done a lot more with the mitigation case.

(EH 434-5). Counsel from the start believed that the jury's determination of the facts surrounding the actual incident would be enough to persuade the jury to make

a life recommendation. Relying on this belief, counsel only half-heartedly pursued a mitigation investigation and failed to conduct a competent investigation into Mr. Mendoza's background and mental health. As a result, the trial court found - and the Supreme Court affirmed on direct appeal - that trial counsel **failed to establish any mitigation whatsoever**.

Mr. Mendoza's counsel failed to conduct a thorough investigation that would have yielded significant mitigation evidence of which the jury and sentencing judge never learned and which would have directly corroborated the facts relied upon by Dr. Toomer to support his opinion - an opinion that the State successfully attacked for lack of corroborating factual support. There is more than a reasonable probability that, had this evidence been presented at trial, one of the seven jurors who voted for death, would have voted for life, virtually assuring that the trial court would have imposed a life sentence. See Tedder.

Mr. Wax did not recall whether he had provided his expert, Dr. Toomer, with any records of the defendant - including employment and medical records - yet admitted it would have been a good idea to do so. (EH 371-2). Mr. Wax admitted that he did not provided his expert with the names of any friends or school teachers of Mr. Mendoza, because he could not find any, explaining that he had used Mr. Mendoza's mother as his primary source of information, and the information he got from her was "sketchy at best" (EH 373). Yet, Mr. Wax admits

that he only met with Mr. Mendoza's mother for a total of six hours. Further, with regard to the information received from the mother, he admits that the mother stated she inflicted corporal punishment against Marbel, but he never followed up on that information, and that she provided him with the name of another family member, but he never followed up on that either (EH 373). Of course, Dr. Toomer himself testified at trial that he had no records to review and that he talked to no one but Marbel himself (TRT 1560-1, 1592, 1593).

Mr. Wax admitted to not retaining an addictions expert, a post traumatic disorder expert, or anyone with experience in the Peruvian camps where Mr. Mendoza had been refuged (EH 374). He also did not obtain the medical records showing that Mr. Mendoza had been shot in a previous incident (EH 374).

Mr. Suri testified that, at the time of Mr. Mendoza's trial, he did not understand the importance of mitigation and that he should have put a mitigation package together for the jury (EH 9-23-04, pp. 435-7). Mr. Suri further listed the shortcomings as to their trial preparation and presentation, which essentially reiterated the testimony of Mr. Wax with regard to the failure to prove an addiction problem.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000). See also Id. at 1515 ("trial

counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." Id. While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a Court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further

(Wiggins v. Smith, 123 S. Ct. 2527, 2538 (2003)). Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id. at 2539, citing Strickland, 466 U.S. at 690-691.

Both the record of Mr. Mendoza's penalty phase and the evidence presented at his evidentiary hearing reveal trial counsel made a "less than complete investigation" and that his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on

inadequate investigation.[15] As a result, counsel's performance was deficient, with regard to both mental health evidence and other mitigation evidence. The lower court's finding that trial counsel's performance was justified by strategy is incorrect, since the strategy was not itself the result of a reasonable investigation.

At the evidentiary hearing, Mr. Mendoza presented a wealth of evidence supporting both statutory and non statutory mitigating circumstances. This was evidence that was reasonably available to trial counsel but which, because trial counsel did not do a constitutionally adequate investigation, was never presented to Mr. Mendoza's sentencing jury. Trial counsel presented no evidence whatsoever during the penalty phase that Mr. Mendoza suffers from post-traumatic stress disorder. Post-traumatic stress disorder is a recognized mental disorder that necessarily requires the presentation of expert testimony. Cf. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision pp. 463-68. Dr. Toomer never even suggested the possibility that Mr. Mendoza suffered from post-traumatic stress disorder.

Trial counsel failed to present available evidence that not only corroborated Mr. Mendoza's substance use and abuse but that also would have established that he suffered from an addictions disorder. At the evidentiary hearing, post-

[15]Certainly, blind faith by counsel that "this was not a death case" does not meet the Wiggins criteria for what constitutes a reasonable investigation.

conviction counsel called Dr. John Eustace, M.D., an expert in addiction medicine. Dr. Eustace was the former Medical Director of the Addictions Treatment Program at Mount Sinai Medical Center (EH 9-23-03, p. 41-2). Dr. Eustace evaluated Marbel and concluded that he met the DSM IV's multiple criteria for having a Type Two addictive disorder, including addictions to alcohol, cannabis, and cocaine (Id., p. 44-5, 55). As part of his evaluation, Dr. Eustace interviewed Marbel's former wife, reviewed medical, jail and prison records, and reviewed various statements and depositions of lay and expert witnesses (Id., p. 43-5, 59, 63-7). Unlike Dr. Toomer, Dr. Eustace **corroborated his opinion with available outside sources** which, if presented to the sentencing jury, would have prevented the State from making its inflammatory and damaging argument that the entirety of the mental health testimony presented at trial was all a lie concocted by Mr. Mendoza to save himself from the death penalty. Dr. Toomer never talked to Marbel's paternal aunt, Minaelia Mendoza Cuesta, who testified at the evidentiary hearing. She provided further corroboration of Marbel's substance abuse (EH 82-85). Ms. Cuesta also testified that during Mr. Mendoza's trial, she lived in Miami and would have been available and willing to assist Mr. Mendoza in any manner, but no one from the defense team contacted her or asked her to testify at the trial in any capacity (EH 105).

Ms. Cuesta had contact with Mr. Mendoza and his parents since the time he

was born. He was not a peaceful child, but rather a nervous child who was always fighting with other children (EH 63). He was a sickly child and she had observed times when he would faint as "if he was dead" (EH 65). Such spells lasted for approximately an hour (EH 65). At that time, Mr. Mendoza was taken to the doctor, but the doctors could not find anything wrong with him (EH 66). Frustrated because the doctors could not help him, his parents took him "to a man who had to do with voodoo and things like that", a santero (EH 67).

Ms. Cuesta testified regarding Marbel and his family's exodus from Cuba to the tent city in Peru, where he lived with his family for three years (EH 76). Upon his arrival in Miami, she described Mr. Mendoza as being very restless, very nervous, and in very bad shape (EH 77). However, rather than getting him psychiatric help, his parents continued having him see the santero, to no avail (EH 77-78).

Marbel's substance abuse and mental health problems were further corroborated at the evidentiary hearing by Leonel Perez, a high school friend of Marbel's. Dr. Toomer never talked to him. Mr. Perez had met Mr. Mendoza in 1981 or 1982 (EH 292). They were friends and Leonel saw Marbel "everyday" and would go to Marbel's house "almost everyday" until around 1986 or 1987 when Marbel got married (EH 297). Leonel and Marbel grew up in a rough neighborhood. He and Marbel smoked marijuana together once in a while but,

subsequently, Marbel started smoking every day (EH 297). Leonel also noticed that Marbel was hanging around with the wrong people and began to look dirty and unkempt (EH 297). Marbel started acting crazy and told Leonel to mind his own business when Leonel asked Marbel about Marbel's drug use (EH 298). Leonel believed based upon the way Marbel looked and acted that Marbel was doing crack cocaine (2983). Leonel saw Marbel two or three days before Marbel got arrested. At that time, Marbel told Perez that he was in trouble, that he was with two brothers, and that "they" - the brothers - had shot somebody (EH 301). Mr. Perez was in Miami during the time of Marbel's trial. No one from Mr. Mendoza's defense team ever spoke with him or asked him to testify (EH 301).

Further corroboration of Mr. Mendoza's background came from Elisa Contreras, Marbel's high school teacher during the early 1980's. Dr. Toomer never talked to her. She testified at the evidentiary hearing that she had taught at Miami Senior High School for 22 years (EH 106). She was teaching there at the time Mr. Mendoza was on trial (EH 106). No one ever contacted her during the trial to ask any information about Mr. Mendoza (EH 107). Mrs. Contreras remembered Marbel because she had to constantly tell him to be quiet and to sit down. He would answer her and then right away say he was sorry, that he wouldn't do it again, and, two seconds later, would be at it again (EH 107). She further testified that during the time Mr. Mendoza was at Miami High, it was right after the Mariel

exodus from Cuba. As a result, classes were crowded and there were many difficulties caused by the Mariel students with emotional problems caused by the traumatic change in their lives (EH 108).

Mrs. Contreras described Mr. Mendoza as being very hyper. He could not sit still and would make up excuses to stand up and go to the bathroom, go to drink water many times during the period. He did not study much (EH 109). Mrs. Contreras testified that Marbel needed psychological treatment which the school was not equipped to provide at that time (EH 111). Had she taught Mr. Mendoza today, she would have referred him to a trust counselor, who are counselors for students who need more attention (EH 111). Post-conviction addictions expert Dr. Eustace testified that, in a person such as Marbel who had been diagnosed by another expert as having frontal lobe dysfunction, cocaine and other drug use would further diminish the functioning of the frontal lobes, particularly with regard to judgment and integration of consequences (EH 573). Robert W. Thatcher, Ph.D., Director of Neuro-Imaging at the Bay Pines VA Medical Center in Bay Pines, St. Petersburg, Florida, reviewed the records of a Quantitative EEG which was administered to Mr. Mendoza by Dr. Ricardo Weinstein (EH 528). Dr. Thatcher testified that the QEEG measures electrical energies to the brain by making traces on paper. In reviewing Marbel's test, he found that there were two major regions that were deviant from normal (EH 532). The most deviant being

the bilateral frontal lobes, which had excessive slowing, by having a significant reduction in energy, and deviant in their communication with other parts of the brain (EH 533-4). This type of defect is often related to poor judgment and poor impulse control (EH 536). Cocaine use would exacerbate these effects (EH 543).

As noted, trial counsel presented no evidence that even suggested that Mr. Mendoza suffered from post-traumatic stress disorder ("PTSD"). However, at the evidentiary hearing, post-conviction counsel presented unrefutted evidence that Marbel suffers from PTSD as a result of his experiences in Miami and Peru. Claudia Baker, a licensed clinical social worker who is employed by the National Center for Post Traumatic Disorder, testified as an expert in PTSD (EH 141). She evaluated Mr. Mendoza for PTSD. In order to arrive at an opinion, she interviewed Mr Mendoza, his mother and father, a friend, and a paternal aunt, and reviewed his school records, social security records, a police report and medical records from when he was the victim of a shooting. Having reviewed the criteria in the DSM IV for post-traumatic stress disorder, she concluded that he indeed suffers from PTSD as a result of his experiences in both Miami and Peru.

Ms. Baker also found that, upon arriving in Miami from Peru, he had trouble functioning but then, he then got a bit better until he was the victim of a shooting. According to Ms. Baker, after he was shot, Marbel developed even more symptoms of PTSD and, as a consequence, began using more and more substances

like alcohol and drugs to self-medicate (EH 164).

The horrible conditions at the Peruvian camp where Marbel lived were corroborated at the evidentiary hearing by Professor Damian Fernandez, who has been a Professor of International Relations at Florida International University since 1992 (EH 118). While doing field work in Peru, he visited the Peruvian tent city/refugee camps (EH 118-119). He interviewed Mr. Mendoza and confirmed that the camp he had visited was at the same camp in which Mr. Mendoza had lived (EH 122). The camp was overcrowded and unsafe due to a criminal element which lived in the camp. The living conditions in the camps were dire on both an economic and emotional level (EH 121). Trial counsel rendered deficient performance because neither the jury nor the trial court were ever informed that Mr. Mendoza not only suffered the debilitating effects of post-traumatic stress disorder but, also, failed to seek out and discover available evidence that would have directly corroborated and supported Dr. Toomer's opinions rendered at trial regarding Marbel's mental illness and severe substance disorder. Odalys Rojas was the investigator on Mr. Mendoza's case assisting current post-conviction counsel. She was responsible for reviewing all of the trial attorneys' file boxes, contacting witnesses during her own investigation, and acting as a mitigation specialist would have during the trial stage (EH 245). Ms. Rojas testified that the trial attorneys had failed to engage an investigator at the trial stage of the case (EH

246-7). Ms. Rojas testified that she contacted and interviewed various family members of Mr. Mendoza including his mother, father, former wife, and paternal aunts, as well as a former school teacher, and childhood friend (EH 250-1). In so doing, Ms. Rojas was able to learn critical facts about Mr. Mendoza's life, such as his various health problems in early childhood, the failure of physicians to help him, his mother resorting to voodoo and black magic to attempt to help him, and all of the other problems of his youth. Further, she was able to trace his passage through the Peruvian embassy to a tent city in Peru, prior to arriving in the Untied States. She traced and developed the multitude hardships he and his family suffered in the Peruvian tent city (EH 202). Ms. Rojas then traced Mr. Mendoza's early years in Miami, and his problems adjusting to life in a new land (EH 9-22-03, pp. 272-8). In total, Ms. Rojas logged in excess of 700 hours in the investigation of this case (EH 278).

Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history for the purpose of developing potential mitigation. It clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . .fell short of the standards for capital defense work articulated by the American Bar Association (ABA) - - standards to which we have long

> referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v. Taylor, supra at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1) p. 93 (1989) (emphasis added).

(Wiggins v. Smith, 123 S. Ct at 2536-2537). As the Wiggins Court further explained, the applicable ABA standards state that:

> [A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, **family and social history**, prior adult and juvenile correctional experience, and religious and cultural influences.

Id. quoting ABA Standards for Criminal Justice 4-4.1. (1989) (emphasis in original). Had trial counsel investigated Mr. Mendoza's social history, he would have discovered a wealth of information that would have both been compelling in its own right and have strengthened the testimony of his mental health expert Dr. Jethro Toomer.

As noted in Argument 1, supra, under Rompilla v. Beard, 125 S. Ct. 2456 (2005) it is clear that the 2003 Guidelines are applicable in analyzing the performance of counsel prior to 2003. Under Wiggins and its progeny, trial counsel clearly rendered deficient performance by failing to investigate Mr. Mendoza's social history. Trial counsel's performance fell short of the standard of

reasonableness articulated by the Guidelines and adopted by the Wiggins Court.

This requirement is further explained by the 2003 Guidelines:

> Because the sentencer in a capital case may consider in mitigation "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant", penalty phase investigation requires extensive and generally unparalleled investigation into the personal and family history. In the case of the client, this begins with the moment of conception. Counsel needs to explore:
>
> (1) Medical history (including hospitalizations mental and physical illness or injury, alcohol and drug use, prenatal and birth trauma, malnutrition, developmental delays and neurological damage;
>
> (2) Family and social history (including physical, sexual or emotional abuse, family history of mental illness, cognitive impairments, substance abuse, or domestic violence, poverty familial instability, neighborhood environment and peer influence), other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster, experiences of racism or other social or ethnic bias, cultural or religious influences, failures of government or social intervention (e.g. failure to intervene or provide necessary services placement in poor quality foster care or juvenile detention facilities);
>
> (3) Educational history (including achievement, performance, behavior and activities), speciaL. Ed.ucational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
>
> (4) Military service (including length and type of service, special training, combat exposure, health and mental health services);

> (5) Employment and training history (including skills and performance and barriers to employability;)
>
> (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education of training and regarding clinical services)

Commentary to ABA Guideline 10.7 (2003). Trial Counsel's purported "strategy" to concentrate on the facts of the crime itself is no substitute for a constitutionally adequate investigation.

Because Mr. Mendoza's counsel were counting on the facts of the incident itself to convince the jury to vote for a life recommendation, counsel did not pursue all avenues of investigation. As a result, counsel failed to discover a plethora of mitigation that would have made a difference in this case. Counsel's failure in this regard cannot be deemed reasonable strategy because counsel's belief that the jury would make a life recommendation based upon the facts of the shooting was not a reasonable basis to curtail their mitigation investigation. Contrary to the lower court's finding, counsel rendered constitutionally deficient performance at Mr. Mendoza's penalty phase.

c. Prejudice

In Mr. Mendoza's case, the prejudice is apparent. See Williams v. Taylor, 120 S. Ct. 1495 (2000), in which the Supreme Court granted relief based on

ineffective assistance of counsel because " . . . the graphic description of Mr. Mendoza's childhood . . . might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 120 S. Ct. 1495 at 1515.

A proper analysis of prejudice entails an evaluation of the totality of available mitigation - - both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "mitigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516.

At the closing of Mr. Mendoza's penalty phase, the prosecutor unequivocally argued to the jury at trial that **because** Marbel's self-report of mental illness and substance abuse was a fabrication concocted by Mr. Mendoza in an effort to avoid a death sentence, Dr. Toomer's opinions were not reliable and invalid. As noted, the trial court agreed with the prosecutor's argument and concluded in its sentencing order "that there was no credible evidence of the mitigating factor of Mr. Mendoza's drug use and dependency other than the self-serving statements by the defendant. . . ." (R. 939). However, had trial counsel

conducted a competent investigation and presented **at trial** the evidence presented by post-conviction counsel at the evidentiary hearing, the jury and the trial judge would have **not** rejected the validity of Dr. Toomer's opinion, and, consequently, had counsel been effective, there is more than a reasonable probability that the outcome of the penalty phase would have been different. See Strickland; Wiggins.

Trial counsel relied on Dr. Toomer's testimony in closing arguments to try and convince the jury that life in prison was the proper sentence (TRT 1669-75). However, the State vigorously attacked the reliability of the defense's penalty phase evidence, particularly, the validity of Dr. Toomer's opinions. The prosecutor took full advantage of trial counsel's failure to provide corroborating evidence to Dr. Toomer and very effectively argued that any claim by Mr. Mendoza that he was suffering from a mental or emotional disturbance or that he abused drugs and alcohol was simply **a lie concocted by Mr. Mendoza in order to avoid the death penalty**. The trial court agreed with the State's argument and concluded in its sentencing order that Mr. Mendoza failed to establish **any** mitigating factors, statutory or otherwise, based on his mental health, experiences in Peru, or drug use (TRT 1726-32, 1733, 1734). Indeed, the trial court specifically rejected as constituting non-statutory mitigation Mr. Mendoza's childhood experiences, his drug use and dependency, and the resultant effects on his functioning (TRT 1732-34). The trial court concluded in its sentencing order,

"**The defendant has failed to establish the existence of any statutory or non-statutory mitigating factors**" (RTR 1735). The State vehemently argued to the jury during penalty phase closing arguments that Mr. Mendoza fabricated his report of substance abuse and mental health problems to Dr. Toomer. The State also attacked Dr. Toomer's opinion on the basis of his admitted failure to substantiate his opinions with sources other than Mr. Mendoza's own self-reporting. The prosecutor argued:

> Another mitigating circumstance which is going to be read to you is that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Did you all hear any evidence of that?
>
> Did anybody hear that during the penalty phase or during the trial from Humberto Cuellar, who talked about what he did and the defendant did and what his brother did, that this defendant had any mental problems or emotional problems at the time he committed this crime?
>
> * * * *
>
> I suggest you heard nothing about that.
>
> * * * *
>
> . . . Did you ever hear that he went to a mental health program or any drug program or anything? Did you ever hear any doctor or of any crisis intervention at Jackson Memorial Hospital or while he was in school finishing his GED?

* * * *

. . . You heard nothing, nothing until after he had committed violent crimes against people in this community, that he wanted to say that he had mental problems and that is why or that is some excuse for what he did. He is using drugs.

* * * *

I asked Mr. Mendoza's mother if she had ever gone through Mr. Mendoza's clothes and went through the room that he was staying in her house after he as picked up by Detective Navaro to see what he had on him. He had nothing, no drugs, no marijuana. Excuse me. Cigarettes, marijuana cigarettes is what he had. No alcohol, no power cocaine, no pills, nothing.

* * * *

He volunteers to the doctors that he uses a lot of drugs. "I had a problem using drugs up until the time I was arrested," and yet nothing is found. She doesn't have to know what cocaine looks like. I asked her. "White power." I asked her if she knows about other kinds of drugs other than white power. She didn't know. She didn't find any powder, because **it doesn't exist. It's an excuse.**

"Don't find me responsible, because I have a drug problem."

* * * *

Now, I would like to speak about a couple of things about the defense's expert. That is the expert they are relying on, Dr. Toomer. Dr. Toomer's job is to go to see the defendant in jail. He is hired by the defense attorney and then he looks for something good to argue

to you, some excuse, some excuse so you won't recommend the death penalty. It boils down to that is what his job is.

I suggest he is not a professional. This is a witness who calls it like he sees it. He calls it like he sees it, as mitigating, he always calls it as a sequence to be able to argue to you, and he always sees it to please his clients, which is the defense attorney and the defendant.

* * * *

Dr. Roomer didn't talk to the defendant's mother. She testified, so she was obviously here. He didn't talk to the ex-wife, didn't talk to the cops, didn't look at the police reports. **Dr. Toomer** didn't talk to me, **didn't talk to anybody except this defendant, trying to save his life. That is who he relies on when making his judgment as to whether or not he is mentally ill, whether or not he has a drug problem, whether or not he has emotional problems. He relies on him.**

Yes, and the defendant told him that he has an extensive drug history, alcohol, marijuana, crack cocaine, and he was using up until the time he was arrested. "I don't know what I'm doing. I'm always on drugs. I'm always high."

Is this reliable? Is that something that we should consider? Is that something that you should consider as a mitigating circumstance?

I suggest not.

Then Dr. Toomer comes up and says he used drugs as a form of self-medication. Where does he come up with that? Now the defendant is treating himself, medicating himself when he has mental problems using crack cocaine or marijuana or alcohol. We should

consider that as mitigating?

I suggest to you **it's garbage.**

* * * *

> In the robbery that he was convicted on in April he got twelve years, but now the stakes are higher. "I'd better come up with something. I'd better come up with some severe drug problem. I'd better come up with some mental problems to save my life."

(TRT 1653-61) (emphasis added).

Because Dr. Toomer's opinion was based on nothing but Marbel's own self-reporting, the State convinced both the jury and the sentencing judge to completely reject Dr. Toomer's opinion as constituting any mitigation, statutory or non-statutory mitigation. Obviously, the jury and the judge concluded that the Marbel's accounts of his mental health history and substance abuse provided to Dr. Toomer were false (or, as the prosecutor argued to the jury, "**garbage**").

The prejudice to Mr. Mendoza caused by both the denial of competent mental health assistance and trial counsel's failure to present the available substantial mental health mitigation is clear: The jury recommended death by a mere 7 to 5 margin. Mr. Mendoza therefore missed a life recommendation by a single vote. Furthermore, on direct appeal this Court specifically relied upon the trial court's rejection of these mitigating circumstances – which was the direct result of trial counsel's ineffectiveness and the denial of Mr. Mendoza's right to

competent mental health assistance – as a basis to conclude that the death penalty was not disproportionate. See Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997). Given the State's argument that Mr. Mendoza's asserted mitigation evidence should not be believed (because "it's garbage") and the trial court's complete rejection of all mitigation related to Mr. Mendoza's background and drug abuse, trial counsel's failure to present the available evidence that would have supported these mitigating circumstances, as well as the resulting denial of Mr. Mendoza's constitutional right to competent mental health assistance, prejudiced Mr. Mendoza.

B. Trial counsel opened the door to allow the State to present evidence of Mr. Mendoza's pending charges for robbery with a firearm.

Trial counsel was ineffective for "opening the door" during his direct examination of defense expert Dr. Toomer to allow the State to cross-examine Dr. Toomer, and thereafter comment during closing penalty phase arguments, as to Toomer's knowledge of Mr. Mendoza's involvement in other robberies. See Mendoza v. State, 700 So. 2d 670, 675-77 (Fla. 1997) (setting forth relevant questioning of Dr. Toomer by counsel in which he opened the door and State's subsequent cross-examination and closing argument comments eliciting the fact that Mr. Mendoza was allegedly involved in other robberies using a firearm and had pending charges arising therefrom). As a result of trial counsel's conduct, the State was able to inform the jury that Mr. Mendoza had allegedly committed "other robberies . . . using a firearm" **in addition** to the single robbery for which Mr. Mendoza had been previously convicted at the time of his trial in the instant case (the "Street" robbery) and which was presented to the jury in the form of a prior conviction and testimony from the victim in that case, Mr. Street. See Id.

ABA Guideline 10.11 (G) is unequivocal that "In determining what presentation to make concerning penalty, **counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence.**" ABA Guideline 10.11 (G) (2003). Had counsel thought through and planned its presentation of Dr

Toomer, this would never have been allowed to happen. Counsel's blunder prejudiced Mr. Mendoza, especially when considered in conjunction with counsel's other instances of ineffective assistance in the penalty phase and in light of the fact that this Court held on direct appeal that the trial court erred in overruling counsel's objection to the State's questioning Toomer and comment by the prosecutor during closing argument about Dr. Toomer's knowledge of **pending trials** in the other robberies (as opposed to his knowledge of Mr. Mendoza's involvement in the robberies themselves, which the Court held was not in error). See Id.

At the evidentiary hearing, counsel acknowledge that they should never have asked the question:

> Q. [Post-conviction counsel]. Do you recall that in this particular case evidence of Mr. Mendoza's pending cases was brought before the jury in the penalty phase?
>
> A. [Mr. Suri]. Yes.
>
> Q. How did that happen?
>
> A. I think we committed - - I have no problem in saying this is something I absolutely recollect. I did not see a transcript for ten years. I've thought about it, we - in our direct examination of Dr. Toomer and I remember it was the very last question that we asked, - - we asked him about whether Marbel could be rehabilitated.
>
> Q. And what happened after that?

> A. Well, he answered that he could, and Ms. Seff obviously argued to Judge Postman that that opened the door to all his pending robberies and Postman afterward was very heated, argued. That lasted a very, very long time, allowed it in, and it's particularity galling to me because, one, I do not believe we anticipated the door with us [sic], particularly galling to me. We should have not gone there at all because in reality, the last thing . . . that the jury wanted to hear is . . . Marbel being rehabilitated about anything.
>
> The answer didn't help us in any way. If he's convicted of murder, he's going to do life. You don't need to kill him. Why did we have to ask Toomer about rehabilitation or not? The answer hurt us. Forget about opening the door which is why I believe we're here, but it killed us. It didn't - - we didn't need to ask that question. If anything, the jury hearing that, he could be rehabilitated was the last thing they needed to hear.

Counsel was without question ineffective for opening the door to such devastating and otherwise inadmissible evidence. The Supreme Court concluded on direct appeal that counsel opened the door to Mr. Mendoza's specific acts of alleged involvement in other armed robberies and grounded its opinion on the Courts prior pronouncements that had been established before Mr. Mendoza's trial. See Mendoza, 700 So. 2d at 677. Competent counsel would have known that the question posed by Dr. Toomer would open the door to this devastating evidence.

The prejudice to Mr. Mendoza is equally clear. Due to counsel's error, the jury was informed by the prosecutor no less that Mr. Mendoza was allegedly involved in and "in jail awaiting **other** robberies . . . using a firearm". Mendoza,

700 So 2d at 670. It was perfectly clear and the jury therefore understood that these "other robberies" for which Mr. Mendoza was awaiting trial were **in addition** to the "Street" robbery which was the single case relief upon by the Sate and accepted by the trial court as an aggravating prior violent felony. There can be no credible argument that the jury did not consider these "other robberies" committed "using a firearm" when deciding whether or not to recommend the death penalty. Given the very close vote in favor of death (7 to 5) and the other penalty phase errors as alleged in the instant proceedings and as determined on direct appeal[16], there is more than a reasonable probability that the outcome would have been different absent counsel's mistake.

C. Trial counsel was ineffective for calling Humberto Cuellar as a witness in the Penalty Phase.

Trial counsel was also ineffective for calling Humberto Cuellar as a witness in the penalty phase. Counsel called Humberto during the penalty phase in order to have him testify that they never intended or planned on shooting Mr. Calderon (EH 9-24-03, pp. 88-9; TRT 1668). This was a complete disaster for Mr. Mendoza as counsel's direct examination of Humberto did nothing but **needlessly** prop-up the credibility of Humberto and his version of events and make it appear to the jury

[16]While this Court held on direct appeal that the error was harmless, the effect of this error on the jury must be factored in and considered in the cumulative

that the defense, in the end, accepted Humberto's testimony as the truth of what occurred that night. Trial counsel called Humberto as a defense witness during the penalty phase and asked him:

> Q. [Mr. Wax]. In March of 1992, **when you and your brother and Marbel Mendoza went to Conrado Calderon's home, what was your intention?**
>
> A. [Humberto Cuellar]. **To rob them of money.**
>
> Q. **Excuse me?**
>
> A. **To rob the victim.**
>
> Q. **Did you have any intention other than robbing Mr. Calderon?**
>
> A. **No.**
>
> Q. Was there ever any intention of killing Mr. Calderon?
>
> A. No.
>
> Q. Was there . . . any discussion about killing Mr. Calderon?
>
> Q. No, sir.

(TRT. 1547-48) (emphasis Added). As noted, counsel's only purpose for calling Humberto was to have him tell the jury that they never intended to kill Mr. Calderon (EH 9-24-03, pp. 88-9). While this reasonably may have been a good bit

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analysis of the prejudice caused by the instant claims of ineffective assistance of counsel.

of information to convey to the jury for the purpose of attempting to secure a life recommendation from the jury, counsel's method of presenting this evidence had the complete opposite result.

First of all, as counsel admitted at the evidentiary hearing, counsel believed that the circumstances surrounding the shooting as presented in the guilt-innocence phase of the trial itself were likely to cause the jury to return with a life recommendation. The circumstances counsel sought to establish in the guilt-innocence phase were that this was not an attempted robbery and that Mr. Mendoza was not the shooter. Of course, Humberto testified during the guilt-innocence phase that this **was** a robbery and that Mr. Mendoza **was** the shooter. For Mr. Mendoza's own counsel to call Humberto as a defense witness in the penalty phase and elicit testimony from him simply in which he repeated and emphasized again his story that this was a robbery flies in the face of the entire defense.

Secondly, counsel could and should have simply asked Humberto **during cross-examination in the guilty-innocence phase** whether they intended to kill Mr. Calderon. He would have answered "no" and counsel would have avoided having Humberto reinforce his version of event as a **defense witness** during the penalty phase, which signaled to the jury that the defense was now conceding that Humberto's testimony was true.

Third, counsel failed to limit his direct examination to the evidence sought – that they did not intend to kill the victim. Instead, began his questioning with asking, "[W]hen you and your brother and Marbel Mendoza went to Conrado Calderon's home, **what was your intention**?" This opened the door for Humberto to **again** tell the jury that their purpose was **to rob the victim**, a fact in direct conflict with Mr. Mendoza's defense. Counsel needlessly allowed Humberto to bolster his credibility by eliciting this testimony as a witness called by defense counsel. Counsel's conduct in this matter was clearly ineffective for each of these reasons.

D. Conclusion

In Mr. Mendoza's case, "counsel's error[s] had a pervasive effect, altering the entire evidentiary picture at the penalty phase." Coss v. Lackwanna County District Attorney, 204 F. 3d 453, 463 (3d Cir. 2000). That the triers of fact received a wholly inaccurate portrayal of Mr. Mendoza's life is established by a comparison of the trial court's sentencing order with what is now known. When postconviction counsel is able to demonstrate through expert testimony "that it is likely that a jury would have been persuaded to recommend a penalty other than death," this Court should bear in mind that "it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive." See Coney v. State, 845 So. 2d

120, 131-132 (Fla. 2003). Had the jury in Mr. Mendoza's case "been confronted with the considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." Wiggins v. Smith, 123 S. Ct. 2527, 2543 (2003).

Mr. Mendoza was prejudiced by counsel's failures notwithstanding the existence of aggravating factors. In cases such as Mr. Mendoza's, where trial counsel failed to present available substantial mitigation, this Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, 675 So. 2d 567 (Fla. 1996) (prejudice established "[I]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented at the penalty phase").

Mr. Mendoza was ill-served by the representation of counsel during the trial. "It is not just that the defense presented on Mr. Mendoza's behalf at the sentencing phase was ineffective, rather, Mr. Mendoza's counsel did not present any meaningful mitigation evidence at the sentencing phase because he was not prepared due to his lack of knowledge and understanding of the sentencing phase of a capital case. This total lack of preparation, investigation and understanding of sentencing caused counsel's deficient performance and extreme prejudice to Mr. Mendoza. Hamblin at 24.

The evidence presented at Mr. Mendoza's hearing is identical to that which

established prejudice in these cases, and Mr. Mendoza is similarly entitled to relief under the standards set forth in Strickland and Williams and reiterated in Wiggins and Hamblin. This Court should grant Mr. Mendoza a new penalty phase.

CONCLUSION

Mr. Mendoza respectfully requests this Court to vacate his convictions and grant him a new trial. But for trial counsel's ineffective assistance during the guilt-innocence phase of his capital trial, there is a reasonable probability that the jury would have found Mr. Mendoza not guilty of first degree felony murder. Trial counsel's opening statement to the jury contradicted his closing argument on the critical fact of the identity of the shooter. Trial counsel promised the jury in opening statement that the defense would call Lazaro Cuellar and that Lazaro would testify that this was not an attempted robbery. Lazaro had prior to trial testified under oath in his deposition that there was no attempted robbery. However with no intervening reason and no explanation to the jury, counsel never called Lazaro to testify and presented no evidence that this was not a robbery. Finally, counsel failed to acquaint himself with critical facts surrounding the gunshot residue evidence, thereby allowing the State to substantially discredit the opinion of Mr. Mendoza's gunshot residue expert, Mr. Rao, who concluded that it was more likely than not that Lazaro had fired the gun. Furthermore, at the evidentiary hearing, the State's own gunshot residue expert, Mr. Klein, testified in

direct contradiction to the State's closing argument to the jury when Mr. Klein unequivocally testified that Mr. Rao's opinion was **not invalidated** by Mr. Rao's error in the timing of Lazaro's gunshot residue swab.

Additionally, Mr. Mendoza is entitled to a new penalty phase proceeding. Trial counsel was ineffective for failing to investigate, discover, and present mitigation evidence, for "opening the door" to allow the State to elicit evidence of pending armed robbery charges, and for calling the State's star witness as a defense witness during the penalty phase. But for counsel's ineffectiveness, and in light of the jury's marginal 7 to 5 vote and the trial court's conclusion that counsel failed to establish **any** mitigation whatsoever, there is a reasonable probability that the outcome of the penalty phase proceedings would have been different.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on November 28, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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