IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-831

PABLO SAN MARTIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 59

ARGUMENT 60

I. THE SUMMARY DENIAL OF CLAIMS WAS PROPER. 60

II. THE LOWER COURT PROPERLY REJECTED THE CLAIM REGARDING ABREU. 88

CONCLUSION 100

CERTIFICATE OF SERVICE 100

CERTIFICATE OF COMPLIANCE 101

TABLE OF AUTHORITIES

Cases

Adams v. Wainwright,
709 F.2d 1443 (11th Cir. 1983) 66

Allen v. State,
854 So. 2d 1255 (Fla. 2003) 90

Arizona v. Youngblood,
488 U.S. 51 (1988) 86

Asay v. State,
769 So. 2d 974 (Fla. 2000) 70

Blanco v. State,
702 So. 2d 1250 (Fla. 1997) 86

Booker v. State,
32 Fla. L. Weekly S537 (Fla. Aug. 30, 2007) 61, 64

Brady v. Maryland,
373 U.S. 83 (1963) 53, 82, 84, 89, 93

Breedlove v. State,
692 So. 2d 874 (Fla. 1992) 70

Bryant v. State,
901 So. 2d 810 (Fla. 2005) 61

Card v. Dugger,
911 F.2d 1494 (11th Cir. 1990) 70

Card v. State,
497 So. 2d 1169 (Fla. 1986) 61

Cherry v. State,
656 So. 2d 1069 (Fla. 1995) 76

Colorado v. Connelly,
479 U.S. 157 (1986) 76, 78

Connor v. State,
803 So. 2d 598 (Fla. 2001) 86

Cook v. State,
792 So. 2d 1197 (Fla. 2001) 61

Correll v. Dugger,
558 So. 2d 422 (Fla. 1990) 62, 64

Crawford v. Washington,
541 U.S. 36 (2004) 58, 59

Cuyler v. Sullivan,
446 U.S. 335 (1980) 72

Darling v. State,
32 Fla. L. Weekly S486 (Fla. Jul. 12, 2007) 61, 64

Diaz v. State,
945 So. 2d 1136 (Fla. 2006) 82

Duest v. State,
555 So. 2d 849 (Fla. 1990) 61

Durocher v. State,
569 So. 2d 997 (Fla. 1992) 92, 95

Elledge v. Dugger,
823 F.2d 1439 (11th Cir. 1987)..... 72

Fernandez v. State,
730 So. 2d 277 (Fla. 1999) 1

Francis v. Barton,
581 So. 2d 583 (Fla. 1991) 61

Franqui v. State,
32 Fla. L. Weekly S210 (Fla. May 3, 2007) 1, 78

Franqui v. State,
699 So. 2d 1332 (Fla. 1997) 1

Franqui v. State,
804 So. 2d 1185 (Fla. 2002) 1

Giglio v. United States,
405 U.S. 150 (1972) 82, 84, 88, 89

Godinez v. Moran,
509 U.S. 389 (1993) 76, 78

Gonzalez v. State,
700 So. 2d 1217 (Fla. 1997) 1

Gonzalez v. State,
786 So. 2d 559 (Fla. 2001) 1

Griffin v. State,
866 So. 2d 1 (Fla. 2003) 61, 74, 75, 83,
.....84, 85, 98, 99

Guzman v. State,
868 So. 2d 498 (Fla. 2003) 89, 90

Haliburton v. State,
691 So. 2d 466 (Fla. 1997) 66

Harvey v. Dugger,
656 So. 2d 1253 (Fla. 1995) 76

Hegwood v. State,
576 So. 2d 170 (Fla. 1991) 93

Herrera v. Collins,
506 U.S. 390 (1993) 78

Hudson v. State,
538 So. 2d 829 (Fla. 1989) 76

Johnson v. Singletary,
938 F.2d 1166 (11th Cir. 1991)..... 79

Jones v. State,
591 So. 2d 911 (Fla. 1991) 79

Jones v. State,
732 So. 2d 313 (Fla. 1999) 70

Jones v. State,
928 So. 2d 1178 (Fla. 2006) 86

Jones v. State,
949 So. 2d 1021 (Fla. 2006) 61, 64

Keen v. State,
775 So. 2d 263 (Fla. 2000) 88

Knight v. State,
746 So. 2d 423 (Fla. 1998) 92, 95

Maharaj v. State,
684 So. 2d 726 (Fla. 1996) 29

Maharaj v. State,
778 So. 2d 944 (Fla. 2000) 89, 92, 94, 97

McDonald v. State,
952 So. 2d 484 (Fla. 2006) 86

Melton v. State,
949 So. 2d 994 (Fla. 2006) 83, 84

Mendyk v. State,
592 So. 2d 1076 (Fla. 1992) 93

Oats v. Dugger,
638 So. 2d 20 (Fla. 1994) 70

Palmes v. Wainwright,
725 F.2d 1511 (11th Cir. 1984)..... 66

Patton v. State,
878 So. 2d 368 (Fla. 2004) 86

Provenzano v. Dugger,
561 So. 2d 541 (Fla. 1990) 61

Puiatti v. Dugger,
589 So. 2d 231 (Fla. 1991) 62, 64

Ragsdale v. State,
720 So. 2d 203 (Fla. 1998) 61, 70, 73, 81,
..... 83, 85, 87

Riechmann v. State,
32 Fla. L. Weekly S135 (Fla. Apr. 12, 2007) 97

Ring v. Arizona,
536 U.S. 584 (2002) 52, 53, 59

Robinson v. State,
707 So. 2d 688 (Fla. 1998) 61, 74

Rodriguez v. State,
919 So. 2d 1252 (Fla. 2005) 74, 85

Rogers v. State,
511 So. 2d 526 (Fla. 1987) 86

Rogers v. State,
782 So. 2d 373 (Fla. 2000) 90

Rose v. State,
617 So. 2d 291 (Fla. 1996) 70

Routly v. State,
590 So. 2d 397 (Fla. 1991) 89, 91

San Martin v. Florida,
525 U.S. 841 (1998) 24

San Martin v. State,
705 So. 2d 1337 (Fla. 1997) 4, 22, 23, 24,
.....75, 82, 88, 99

San Martin v. State,
717 So. 2d 462 (Fla. 1998) 1

Sanders v. State,
707 So. 2d 664 (Fla. 1998) 72

Sawyer v. Whitley,
505 U.S. 333 (1992) 79

Sawyer v. Whitley,
945 F.2d 812 (5th Cir. 1991) 79

Sochor v. State,
883 So. 2d 766 (Fla. 2004) 89, 94

State v. Gray,
654 So. 2d 552 (Fla. 1995) 38

State v. Riechmann,
777 So. 2d 342 (Fla. 2000) 72

State v. Wilson,
686 So. 2d 569 (Fla. 1996) 61

Stephens v. State,
748 So. 2d 1028 (Fla. 1999) 90

Strickland v. Washington,
466 U.S. 668 (1984) 64, 69, 70

Strickler v. Greene,
527 U.S. 263 (1999) 89

Trotter v. State,
932 So. 2d 1045 (Fla. 2006) 85

United States v. Bailey,
123 F.3d 1381 (11th Cir. 1997)..... 89

United States v. Lochmondy,
890 F.2d 817, 822 (6th Cir. 1989)..... 89

United States v. Meros,
886 F.2d 1304 (11th Cir. 1989)..... 93

United States v. Michael,
17 F.3d 1383 (11th Cir. 1994) 89

Valle v. State,
581 So. 2d 40 (Fla. 1991) 92, 95

Valle v. State,
705 So. 2d 1331 (Fla. 1997) 61

Walls v. State,
926 So. 2d 1156 (Fla. 2006) 73

Way v. State,
760 So. 2d 903 (Fla. 2000) 89, 90

Williams v. Head,
185 F.3d 1223 (11th Cir. 1999)..... 73

Zack v. State,
753 So. 2d 9 (Fla. 2000) 61

STATEMENT OF CASE AND FACTS

On February 18, 1992, Defendant, along with Leonardo Franqui and Pablo Abreu, were charged by indictment with the first degree murder of Raul Lopez, the attempted first degree murder of Danilo Cabanas, Sr., the attempted first degree murder of Danilo Cabanas, Jr., the attempted armed robbery of the Cabanases, two counts of grand theft auto and the unlawful possession of a firearm during the commission of an offense. (R.[1] 1-5) Prior to trial, Abreu entered into a plea agreement with the State.[2] (R. 2) The matter proceeded to trial on July 7, 1993. (R. 20) After considering the evidence, the jury found

[1] The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, FSC Case No. 83,611, respectively.

[2] Defendant, Franqui, Abreu, Ricardo Gonzalez and Fernando Fernandez were also charged, convicted and sentenced to death for the murder of Officer Steven Bauer. This Court affirmed all of the convictions but reversed all of the death sentences. *Fernandez v. State*, 730 So. 2d 277 (Fla. 1999); *San Martin v. State*, 717 So. 2d 462 (Fla. 1998); *Gonzalez v. State*, 700 So. 2d 1217 (Fla. 1997); *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997). This Court ordered that Fernandez and Defendant be resentenced to life. *Fernandez*, 730 So. 2d at 283; *San Martin*, 717 So. 2d at 471-72. Resentencings were ordered for Franqui and Gonzalez. *Gonzalez*, 700 So. 2d at 1219; *Franqui*, 699 So. 2d at 1336. After the resentencings, Franqui and Gonzalez were again sentenced to death, and this Court affirmed those sentences. *Franqui v. State*, 804 So. 2d 1185 (Fla. 2002); *Gonzalez v. State*, 786 So. 2d 559 (Fla. 2001). Both Franqui and Gonzalez sought and were denied post conviction relief. This Court has affirmed the denial of post conviction relief regarding Franqui. *Franqui v. State*, 32 Fla. L. Weekly S210 (Fla. May 3, 2007). Gonzalez's post conviction appeal remains pending before this Court. *Gonzalez v. State*, FSC Case No. SC04-225.

Defendant guilty as charged on all counts. (R. 634-40) The trial court adjudicated Defendant in accordance with the verdicts. (R. 641-42) The facts adduced at trial, as found by this Court, were:

> Danilo Cabanas Sr., and his son Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Senior would pick up cash from his bank for the business. After Cabanas Senior was robbed during one of his bank trips, his son and a friend, Raul Lopez, regularly accompanied him to the bank.
>
> On Friday, December 6, 1991, the trio left the bank with $25,000 in cash. The Cabanases rode together in a Chevrolet Blazer driven by the son; Lopez followed in his Ford pickup truck. As the trio drove alongside the Palmetto Expressway, their vehicles were "boxed in" at an intersection by two Chevrolet Suburbans. Two masked men exited from the front Suburban and began shooting at the Cabanases. When Cabanas Senior returned fire, the assailants returned to their vehicles and fled. Cabanas Junior also saw one masked person exit the rear Suburban.
>
> Following this exchange of gunfire, Lopez was found outside his vehicle with a bullet wound in his chest. He was transported to the hospital, but died shortly thereafter.
>
> The Suburbans driven by the masked men were found abandoned. It was subsequently determined that both vehicles had been stolen. The Suburbans suffered bullet damage, including thirteen bullet holes in one vehicle. The Cabanases' Blazer was also riddled with ten bullet holes.
>
> [Defendant's] confession and a subsequent statement, in which he told the police where he had disposed of the weapons used in the incident, were admitted at trial. [Defendant] refused to allow either statement to be recorded stenographically, but did sign a waiver of his *Miranda* rights and orally confessed to the crime. [Defendant] admitted his

involvement in the incident and recounted the details of the plan and how it was executed. He explained that Fernando Fernandez had told him and Franqui about Cabanas's check cashing business several months before this incident and that they had planned the robbery by watching Cabanas to learn his routine. He also explained how they used the stolen Suburbans to "box in" the victims at an intersection: [Defendant] and Abreu drove in front of the Cabanases' Blazer and Franqui pulled alongside the Blazer in the second Suburban so that the Cabanases could not escape. He also recounted that a brown pickup driven by Cabanas's "bodyguard" drove up behind the Blazer. [Defendant] stated that he exited the passenger side of the first Suburban armed with a 9mm semiautomatic pistol and that Abreu exited the driver side armed with a "small machine gun." [Defendant] admitted that he initiated the robbery attempt by telling the occupants of the Blazer not to move and that he shot at the Blazer when the driver fired at them. However, he denied firing at Lopez's pickup. [Defendant] also detailed Franqui's role in the planning and execution of the crime. He placed Franqui in proximity to Lopez's pickup, but could not tell if Franqui fired his gun during the incident. [Defendant] initially claimed that he had thrown the weapons used in the incident off a Miami Beach bridge, but in a subsequent statement admitted that he had thrown the weapons into a river near his home and drew a map detailing the location. Two weapons, a 9mm semiautomatic pistol and a .357 revolver, were later recovered from that location by a police diver. [Defendant] did not testify at trial, but his oral confession and subsequent statement about the guns were admitted into evidence.

Franqui's formal written confession was also admitted at trial, over [Defendant's] objection. Franqui initially denied any knowledge of the Lopez shooting, but confessed when confronted with photographs of the bank and the Suburbans. Franqui recounted the same details of the planning and execution of the crime that [Defendant] had detailed. Franqui admitted that he had a .357 or .38 revolver. He also stated that [Defendant's] 9mm semiautomatic jammed at times and that Abreu carried a Tech-9 9 mm semiautomatic which resembles a small machine gun.

> Franqui claimed that he returned fire in Lopez's direction after Lopez opened fire on him.
>
> A police firearms expert testified that the bullet recovered from Lopez's body was consistent with the .357 revolver used by Franqui during the attempted robbery. The expert also stated that a bullet recovered from the passenger mirror of one of the Suburbans and a bullet found in the hood of the Blazer were definitely fired from the same gun as the Lopez bullet. However, due to the rust on the .357 recovered from the river, the expert could not rule out the possibility that all three bullets had been fired from another .357 revolver.

San Martin v. State, 705 So. 2d 1337, 1341-42 (Fla. 1997)(footnote omitted).

The penalty phase commenced on November 2, 1993. (R. 38) At the penalty phase, the State presented the testimony of Craig Van Ness, Det. Boris Montecon, Pedro Santos, Det. Ralph Nazario and Abreu. Mr. Van Ness testified to the events that lead to Defendant's convictions for armed kidnapping and armed robbery of Mr. Van Ness. (T. 2554-73) Det. Montecon testified regarding his arrest of Defendant for the Van Ness crimes on January 14, 1992, the day the crimes were committed, and Defendant's confession regarding these crimes. (T. 2574-96) Mr. Santos testified to the events that lead to Defendant's convictions for attempted murder and attempted robbery of Mr. Santos that occurred on November 29, 1991. (T. 2600-17) Det. Nazario testified regarding Defendant's confessions to the crimes regarding Mr. Santos. (T. 2617-37)

Abreu testified regarding the planning and execution of the crimes against the Cabanases and Mr. Lopez. (T. 2710-63) During this testimony, Abreu described a meeting that occurred in the days before the crime. (T. 2713-17) The State then elicited the discussion regarding the plan regarding Mr. Lopez:

> [The State:] Mr. Abreu, did Franqui tell you that the people getting the money out of the bank had somebody that protected them or was with them?
> [Abreu:] Yes, that there was one behind them that was like a bodyguard or an escort, and the ones up front had the money.
> [The State:] And what did Franqui tell you about the bodyguard, what he would have with him?
> [Abreu:] He said not to worry about it, that the only one that could shoot there was the bodyguard, not the others.
> [The State:] And what did Franqui tell you or Pablo they were going to do to the bodyguard, if anything?
> [Abreu:] That it would be better for him to be dead first than Franqui.
> [The State:] What did Franqui tell you that they were going to do with the bodyguard during the crime?
> [Abreu:] First he was going to crash against him and throw him down the curbside, and then he would shoot at him, but he didn't do it that way.

(T. 2717-18)

Defendant presented the testimony of Abreu; Domingo Maldonado, a prison minister; Julio Calveiro, another prison minister; Juan San Martin, Defendant's brother; Javier San Martin, another brother; Daisy San Martin, Defendant's sister; Paulina Martinez, Defendant's grandmother; Francisca San Martin, Defendant's mother; Dr. Dorita Marina, a psychologist; and Dr.

Jorge Herrera, a neuropsychologist. Defendant's school records and a report of an evaluation conducted by Dr. Lourenco were also admitted by stipulation.[3] (T. 2911) There was also a stipulation that Defendant had not received any disciplinary reports while incarcerated. (T. 2913-14)

Abreu testified that he was Defendant's cousin and that Defendant came from a good family, which included four brothers and a sister. (T. 2764-65) He stated that Defendant's father drank a lot but was a hard worker who supported him family. (T. 2765-66) Defendant's parents fought and separated at times because Defendant's father drank. (T. 2766) Abreu knew that Defendant had a problem with his vision because of a childhood accident. (T. 2767) However, he did not know if Defendant had been to any mental health professionals. (T. 2767)

Maldonado testified that he had met Defendant about seven or eight months before trial and had seen him at least six or seven times thereafter. (T. 2777-78) Maldonado believed that Defendant had accepted God, repented his sins and was remorseful for his actions. (T. 2779) As such, Maldonado believed that Defendant was a changed man. (T. 2780)

Calveiro testified that he had met Defendant seven months

[3] Defendant had indicated earlier in the proceedings that he would only present Dr. Lourenco if the State objected to the admission of his report because he planned to have Dr. Herrera testify regarding the findings. (T. 2813-14)

to a year before trial and had seen him on several occasions. (T. 2788-89) He also believed that Defendant had changed, had confessed and repented his sins and was remorseful. (T. 2789-90)

Juan San Martin testified that neither he nor any of his siblings, other than Defendant, had ever been convicted of a crime, and that he and the other siblings were gainfully employed. (T. 2825-27) He and Defendant had previously worked together for a period of three years. (T. 2827-28) Juan stated that Defendant had worked throughout his life and had helped to support the family. (T. 2728-29) He stated that Defendant was very good at school. (T. 2828) However, Juan did not know his grades but was aware that Defendant skipped school and never finished high school. (T. 2828) Juan did not believed Defendant was a violent person, felt that his commissions of these crimes was out of character and found Defendant to be friendly and a good brother. (T. 2828-30)

Juan recalled little of his life in Cuba. (T. 2830) He stated that his parents were separated, that his father drank "more than a little bit," and that his father did not have much contact with the children. (T. 2830-32) Juan described Defendant as nervous, easy-going and a follower because he was not smart enough to think for himself. (T. 2832, 2837-38) Juan

stated that his parents were not abusive to any of their children but that Defendant would be hit with a belt by his father for misbehaving. (T. 2835)

Javier San Martin testified that Defendant was a good brother, who worked and helped to support the family. (T. 2843-45) He stated that his family always had food and a home and that Defendant was the only member of the family to get in trouble. (T. 2846)

Daisy San Martin testified that Defendant was a good brother, not a violent person and a follower. (T. 2850-52) Her parents were separated but Daisy did not know what caused the separation and did not consider her father to be an alcoholic. (T. 2852-53) She admitted that the family always had a home and food and that Defendant was the only member of the family to get in trouble. (T. 2855-56) She stated that Defendant was nervous. (T. 2856, 2858) She stated that Defendant was a hard worker. (T. 2857) Daisy stated that Defendant had stuck scissors in his eye when he was young and had "cracked" his head in a bicycle accident. (T. 2860)

Martinez testified that Defendant's father had been a political prisoner in Cuba before the Mariel boatlift. (T. 2861-62) She had always lived near Defendant's family and visited them frequently. (T. 2862) She considered Defendant to

be a good person and grandchild. (T. 2862-63)

Francisca San Martin testified that Defendant accidentally cut himself in the eye with a pair of scissors when he was four. (T. 2865-66) As a result, Defendant had surgery but his vision in that eye was impaired and he had to wear glasses. (T. 2867) Before this accident, Defendant enjoyed going to school but afterward, he did not like going to school because he was teased. (T. 2867) The school, however, never complained of Defendant's behavior. (T. 2867) When Defendant was 16, he fell of his bicycle, hit his head and lost consciousness. (T. 2868)

Defendant had held a job for three year but lost it when the company went bankrupt. (T. 2868) Thereafter, Defendant had difficulty obtaining employment because he lacked an education. (T. 2868)

Francisca believed that Defendant was a nonviolent person and a good son, who always helped her. (T. 2869) However, she believed that Defendant had always been nervous. (T. 2869) She stated that she and her husband had separated because her husband drank. (T. 2869) However, her husband had always supported the family, and she considered him to be a good father. (T. 2870-71) While her husband had disciplined Defendant was a belt two or three times, he was not abusive to Defendant. (T. 2871)

Dr. Marina testified that she evaluated Defendant and obtained an extensive psychosocial history from him. (T. 2914) She also reviewed his school records and Dr. Lourenco's report. (T. 2925, 2955) She administered the WAIS-R, an arithmetic achievement test, the Bender Gestalt, trail making test, Rorschach test, the MMPI and the house-tree-person test (T. 2937-38, 2945, 2946, 2947, 2951, 2953)

From this assessment, Dr. Marina learned that Defendant's eye had been injured in a childhood accident, which resulted in him being almost blind in that eye, and that Defendant had a facial tic. (T. 2921) Defendant stated this eye injury made it difficult for him to learn to read and write and that he performed badly in school. (T. 2924, 2925) It also caused him to be teased in school and to feel inferior. (T. 2924)

Defendant had come to this country when he was 13. (T. 2921) One of Defendant's brothers had been raised by his grandmother but Defendant did not know why. (T. 2922-23) Defendant asserted that his father drank, that he later started to drink with his father as a teenager and that his father had been abusive when the family lived in Cuba. (T. 2923, 2928) Defendant had used marijuana as a teenager also but stopped after having a frightening experience with it. (T. 2928)

Defendant held numerous jobs. (T. 2927) He had once quit

a job because the boss reprimanded him and he felt humiliated. (T. 2927) Defendant had broken off a romantic relationship because he was jealous that his girlfriend was talking to other men and had never engaged in sexual relations. (T. 2927-28) Defendant provided a brief outline of the facts of the case and claimed to be remorseful. (T. 2936)

On the WAIS-R, Defendant obtained a 76 verbal IQ, an 84 performance IQ and a 77 full scale IQ (T. 2939, 2943, 2945) Defendant did very poorly on the achievement test. (T. 2946) The Bender Gestalt results indicated emotional difficulty but no organicity. (T. 2946, 2947) Defendant had to take the Rorschach test three times because the result was invalid the first time and the second administration was incomplete. (T. 2948-49) The eventual results were indicative of schizophrenia, but Dr. Marina believed this was the result of Defendant's eye injury, as there were no other signs of schizophrenia in Defendant or his family. (T. 2949-50) The MMPI was invalid because of the elevated F scale, which Dr. Marina again attributed to Defendant's vision problem. (T. 2951-53)

Based on this information, Dr. Marina opined that Defendant was deprived of a normal family life, had poor judgment, had borderline intellectual functioning, had narcissistic personality disorder, had cyclothymia and had a learning

disability. (T. 2940, 2943, 2945, 2954, 2955, 2961) Dr. Marina stated that Dr. Lourenco's finding of an abnormality in left temporal area in the EEG he did was consistent with her findings. (T. 2957) Dr. Marina stated that based on these diagnoses, she believed that the extreme mental or emotional statutory mitigators applied. (T. 2961) She also believed that Defendant's intellectual functioning, learning disability, his good behavior in pretrial detention, his lack of potential for future dangerousness, his family background, his father's alcoholism, his abuse as a child and his use of alcohol were all mitigating. (T. 2961-63)

On cross, Dr. Marina stated that the fact that the other family members denied abuse and minimized the father's drinking did not affect her opinion because they were simply in denial. (T. 2983, 3022-23) She insisted that the best way to get information about a defendant's mental state was not to speak to the person or their family. (T. 3004) She stated that if one accepted that Dr. Lourenco found evidence of organicity, her diagnosis of cyclothymia would be incorrect because the symptoms of the disorder would be caused by the organicity. (T. 3011) However, she did not consider Dr. Lourenco's finding to be inconsistent with her evaluation because the symptoms would still exist. (T. 3011-12)

Dr. Herrera testified that he evaluated Defendant and obtained a history from him. (T. 3024-41) He also reviewed Defendant's school records. (T. 3045) He also administer the Dash 2 test of nonverbal intelligence, the Wisconsin Card Sort test, the Symbol Digit Modalities test, the Grip Strength test, Visual Search test, Color Naming test, the Finger Tap test, Serial Digit Learning test, the Groove Pegboard test, Trail Making test, Vigilance test, Verbal Fluency test, Rey Auditory Verbal Learning Test, Rey-Osterreith Complex Figure test, Fifteen Semantic Memory test, Figural Memory test and the interview version of the MMPI (T. 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3057, 3058, 3060, 3061)

Through the history, Dr. Herrera learned that Defendant had difficulty learning to read, a history of truancy from school and sustained an injury to his eye when he was a child. (T. 3044-45) Defendant also related having been involved in two accidents in which he suffered head trauma as a teenager, one of which involved a loss of consciousness. (T. 3046) After having been socially promoted to the eighth and ninth grades, Defendant dropped out of school when he was 16. (T. 3047) He also reported Defendant's work history. (T. 3047)

On the Dash 2, Defendant obtained an IQ of 75, in the borderline range of intellectual functioning. (T. 3049) The

results of the Wisconsin Card Sort test were not normal but there was no major deviation. (T. 3051) The Symbol Digit Modalities test yielded a normal result on the written portion and a mildly impaired result on the oral portion. (T. 3052) The Grip Strength test revealed that Defendant was weak. (T. 3052) The Visual Search, Color Naming, Serial Digit Learning, Groove Pegboard, Vigilance, Rey-Osterreith Complex Figure and Figural Memory tests yielded normal results, and the results of the Finger Tap test was insignificant. (T. 3054-55, 3057, 3060, 3061) The MMPI showed no pathology. (T. 3061-62) The result on the first half of the Trail Making test was normal, but Defendant failed the second half. (T. 3056) Defendant scored in the moderately impaired range on the Verbal Fluency test. (T. 3058) Defendant was mildly to moderately impaired on the Rey Auditory Verbal Learning test. (T. 3060) Defendant was in the moderately to severely impaired range of the Fifteen Semantic memory test. (T. 3061)

Based on the results from the Verbal Fluency test, the oral portion of the Trail Making test, the Rey Auditory Verbal Learning test and Fifteen Semantic Memory test, Dr. Herrera suspected that Defendant had a lesion in his left temporal lobe caused by head trauma. (T. 3056-57, 3058, 3060, 3061, 3063-64) He had a brain topograph or qualitative EEG performed by Dr.

Lourenco to confirm his suspicions. (T. 3064-65) Dr. Herrera stated that the reason he requested this test rather than a medical imaging test was that the lesions he believed existed did not show up in medical images. (T. 3064) This test showed an asymmetry of EEG amplitudes in the left temporal region, which confirmed Dr. Herrera's suspicions. (T. 3065-66) The test also found a pattern of immaturity in the frontal lobe. (T. 3066) He stated that the lesion caused Defendant to be impulsive. (T. 3059)

Based on this evaluation, Dr. Herrera opined that Defendant's capacity to appreciate the criminality of his conduct was substantially impair. (T. 3069-70) He based this on his belief that Defendant did not consider the results of his actions. (T. 3070) He also opined that Defendant would be a follower. (T. 3072) He also felt Defendant's learning disability, his ability to adapt to incarceration, and his lack of future dangerousness were mitigating. (T. 3073-75) He stated that he had not found the extreme mental or emotional disturbance mitigator because he had not looked for it and he had not found a mental disorder. (T. 3081-82)

On cross, Dr. Herrera opined that an inconsistency between Defendant's performance on a test he gave and his performance on the same test when Dr. Marina gave it was the result of the

nature of Defendant's brain damage. (T. 3109) He explained that the statement in Dr. Lourenco's report about a finding being of unclear clinical significance concerned Defendant's frontal lobe and not his temporal lobe. (T. 3112, 3122)

The State then called Dr. Charles Mutter, a psychiatrist, in rebuttal. (T. 3239-40) Dr. Mutter testified that he evaluated Defendant, reviewed a summary of Defendant's confession, the depositions of Defendant's experts and his family members, the raw data from Defendant's experts' testing and Dr. Lourenco's report. (T. 3243-45)

Defendant told Dr. Mutter that he did not intend to harm the victims, only fired his gun in response to the victims firing at him and fired his gun up in the air. (T. 3246) Defendant did admit to planning and attempting to rob the victims and knowing it was wrong to rob people. (T. 3246) However, Defendant stated that he was simply not thinking of the consequence of his actions when he was committing them. (T. 3246) Given this discussion, Dr. Mutter believed that Defendant appreciated the criminality of his conduct when he committed the crimes. (T. 3247)

Dr. Mutter stated that the Rorschach test did not provide information about how long a person may have suffered from any mental disorder. (T. 3251) He did not believe that Dr.

Lourenco's report indicated brain dysfunction in the left temporal lobe as the report stated the findings were of unclear clinical significance. (T. 3247) Thus, Dr. Mutter opined that the report did not clearly show a lesion and that any lesion that did exist was irrelevant because it did not affect Defendant's behavior. (T. 3247-48) He also found no psychological disturbance or mood swings in Defendant. (T. 3249) However, Defendant did have borderline intellectual functioning. (T. 3254) As such, Dr. Mutter opined that neither of the statutory mental mitigators applied. (T. 3249, 3251-53)

During cross, Defendant questioned Dr. Mutter about the fact that Dr. Lourenco's statement about unclear clinical significance only applied to one of two findings. (T. 3296-97) Dr. Mutter admitted that it did but asserted that the other finding was due to Defendant's eye injury in his opinion. (T. 3297-98) He acknowledged that the second finding could be due to a lesion caused by a head injury but stated that it would not affect his opinion even if it were true. (T. 3298-3300)

After considering this evidence, the jury recommended that Defendant be sentenced to death for the murder of Mr. Lopez by a vote of 9 to 3. (R. 1038) The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 1095-1117) In aggravation, the trial court found three aggravators: (1)

prior violent felony, based on Defendant's convictions for the armed kidnapping and armed robbery of Mr. Van Ness, the attempted murder and attempted armed robbery of Mr. Santos, and the attempted murders of the Cabanases; (2) during the course of a robbery and for pecuniary gain, merged; and (3) cold, calculated and premeditated (CCP). (R. 1096-99) In mitigation, the trial court found only that Defendant was loved by his family, as a nonstatutory mitigator. (R. 1113) It considered and rejected both of the statutory mental mitigators, the extreme duress statutory mitigator, the age statutory mitigator, Defendant's IQ score as a nonstatutory mitigator, alleged brain damage as a nonstatutory mitigator, the fact that Defendant did not fire the fatal bullet as a nonstatutory mitigator, Abreu's plea to a life sentence as a nonstatutory mitigator, the fact that Defendant confessed as a nonstatutory mitigator, Defendant's alleged remorse as a nonstatutory mitigator, mental problems not rising to the level of the statutory mitigators as a nonstatutory mitigator, and Defendant's request for mercy as a nonstatutory mitigator. (R. 1099-1115)

The trial court also sentenced Defendant to life imprisonment with a three year minimum mandatory term for each of the attempted murders, 15 years imprisonment with a three year minimum mandatory term for the attempted armed robbery, 5

years imprisonment for each of the grand theft autos, and 15 years imprisonment for the possession of the firearm. (R. 1116-17, 1121-25) The trial court ordered that all of these sentences be served consecutively to each other and consecutively to his sentences for the Van Ness and Santos cases. (R. 1125)

Defendant appealed his convictions and sentences to this Court. In his initial brief, Defendant raised 16 issues:

> I.
> THE COMBINATION OF THE PRACTICE OF DEATH QUALIFYING THE JURY ON VOIR DIRE AND THE REFUSAL OF THE COURT TO GRANT THE DEFENSE MOTIONS FOR INDIVIDUAL VOIR DIRING OF THE PROSPECTIVE JURORS DENIED [DEFENDANT] HIS FEDERAL AND STATE DUE PROCESS AND FAIR TRIAL RIGHTS AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.
>
> II.
> THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT [DEFENDANT'S] OFT-ASSERTED MOTIONS FOR A TRIAL SEVERANCE FROM FRANQUI IN VIOLATION OF [DEFENDANT'S] CONFRONTATION RIGHT, HIS DUE PROCESS RIGHT, HIS FAIR TRIAL RIGHT, AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED HIM BY THE CONSTITUTIONA OF THE UNITED STATES AND OF THE STATE OF FLORIDA.
>
> III.
> THE COURT ERRED IN ALLOWING THE PROSECUTION TO HAVE USED AS EVIDENCE AGAINST [DEFENDANT] THE INCULPATING PART OF HIS PURPORTED STATEMENTS TO THE POLICE AND TO HAVE USED AS EVIDENCE AGAINST HIM THE PARTS OF LEONARDO FRANGUI'S THAT WERE INCULPATING TO BOTH DEFENDANT, OR TO FRANGUI ALONE, WHICH RULING WERE IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTIONALLY PROTECTED RIGHTS TO HAVE COUNSEL, TO REMAIN SILENT, TO BE ACCORDED THE DUE PROCESS OF LAW, TO HAVE A FAIR TRIAL AND TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL

PUNISHMENT.

IV.

THERE WAS AN INSUFFICIENCY OF EVIDENCE FOR THE COURT TO HAVE SUBMITTED TO THE JURY THE STATE'S CLAIM THAT DEFENDANT [] WAS GUILTY OF PREMEDITATED FIRST DEGREE MURDER IN THE KILLING OF RAUL LOPEZ.

V.

THERE WAS AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN THE CONVICTIONS OF [DEFENDANT] FOR PREMEDITATED MURDER BECAUSE THE ONLY PLAN THE EVIDENCE SHOWED TO BE WORTHY OF BELIEF WAS THE PLAN TO COMMIT AN ARMED ROBBERY.

VI.

[DEFENDANT'S] CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION ---- HIS RIGHT TO REMAIN SILENT ---- WAS VIOLATED BY THE PROSECUTOR'S BRINGING TO THE JURY'S ATTENTION THAT AFTER [DEFENDANT] GAVE AN INFORMAL STATEMENT, HE REFUSED TO GIVE A FORMAL ONE, AND THE COURT ERRED IN REFUSING TO GRANT [DEFENDANT] ANY RELIEF THEREFROM.

VII.

[DEFENDANT] WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO BE ACCORDED DUE PROCESS, TO BE GIVEN A FAIR TRIAL AND TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE FACT THAT THE COURT BELOW NEVER REQUIRED THE MEMBERS OF THE JURY TO ADVISE THE COURT WHETHER THEY FOUND HIM GUILTY OR NOT GUILTY OF PREMEDITATED FIRST DEGREE MURDER AND WHETHER THEY FOUND HIM GUILTY OR NOT GUILTY OF FIRST DEGREE FELONY MURDER.

VIII.

THE COURT ERRED IN REFUSING [DEFENDANT'S] RIGHT FOR HIS COUNSEL TO UTILIZE THE SERVICES OF A JURY SELECTION EXPERT AND BY THE REFUSAL OF THE COURT TO ALLOW THE DEFENSE TO GO TO DENMARK TO TAKE THE DEPOSITION OF THE MEDICAL EXAMINER'S REPRESENTATION WHO PREPARED THE AUTOPSY OF THE BODY OF RAUL LOPEZ.

IX.

[DEFENDANT'S] RIGHT TO NOT BE DEPRIVED OF HIS RIGHT TO LIFE WITHOUT BEING ACCORDED THE DUE PROCESS OF LAW AND NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT

WERE VIOLATED BY THE PENALTY PHASE JURY HEARING THE STATE'S MENTAL HELATH REBUTTAL DOCTOR MISSTATE THE LAW THAT NO STATUTORY OR NON STATUTORY MENTAL HEALTH MITIGATING CIRCUMSTANCE WOULD BE APPLICABLE TO [DEFENDANT] OTHER THAT THAT HE DIDN'T KNOW RIGHT FROM WRONG, AND BY THE COURT'S SENTENCING HIM TO DEATH BEING BASED ON SUCH MISREPRESENTATION OF THE LAW, AND BY ITS FAILING TO GIVE ANY WEIGHT TO [DEFENDANT'S] CLAIMED MITIGATING CIRCUMSTANCES CONSIDERED BY IT.

X.

THE COURT ERRED AT THE PENALTY PHASE IN CHARGING THE JURY THAT IT SHOULD CONSIDER AGGRAVATING CIRCUMSTANCE (5)(I), I.E., "THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION," AND IT ERRED THEREAFTER IN ITSELF IN CONSIDERING AND FINDING THE APPLICABILITTY OF THIS AGGRAVATING CIRCUMSTANCE.

XI.

THE COURT ERRED IN PRECLUDING DEFENSE COUNSEL FROM ARGUING TO THE ADVISORY JURY AT PENALTY PHASE AS TO THE NUMBER OF YEARS TO WHICH [DEFENDANT] COULD BE SENTENCED ON THE COUNTS OF THE INDICTMENT OTHER THAN THE FIRST DEGREE MURDER COUNT AND IN KEEPING FROM THE JURY THE FACT THAT [DEFENDANT] HAD PREVIOUSLY BEEN SENTENCED TO TWENTY-SEVEN YEARS IN A SEPARATE CASE.

XII.

[DEFENDANT] WAS DENIED HIS DUE PROCESS, FAIR TRIAL, AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT RIGHTS BY THE PROSECUTION BEING ALLOWED TO PLACE BEFORE THE SENTENCING JURY EXTENSIVE TESTIMONY REGARDING [DEFENDANT'S] INVOLVEMENT IN TWO OTHER ALLEGED VIOLENT FELONIES, BUT WITH HIS COUNSEL NOT BEING ALLOWED TO ATTEMPT TO MINIMIZE HIS ROLES IN THESE TWO OTHER VIOLENT FELONIES.

XIII.

THE COURT ERRED IN REFUSING TO CHARGE THE ADVISORY JURY AS TO THE SUBSTANCE OF ANY OF THE NON-STATUTORY MITIGATING CIRCUMSTANCE BEING CONTENDED FOR BY [DEFENDANT] BEING APPLICABLE.

XIV.

IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION THAT IF THE JURY DETERMINED THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY, IT'S NEXT DUTY WAS TO DETERMINE WHETHER THERE WERE SUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATED CIRCUMSTANCESM THE COURT VIOLATED [DEFENDANT'S] CONSTITUTIONAL DUE PROCESS, FAIR TRIAL RIGHTS AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUSNISHMENT BY SHIFTING THE BURDEN OF PROOF TO HIM TO SHOW WHY HE SHOULD NOT BE GIVEN THE DEATH PENALTY.

XV.

THE SENTENCE IMPOSED UPON DEFENDANT [] VIOLATES HIS RIGHT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ART I SECT. 17 OF THE FLORIDA CONSTITUTION TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, AND IT VIOLATES ONE OF THE MOST IMPORTANT STANDARDS OF DECENCY FOLLOWED BU CIVILIZED SOCIETIES i.e., THAT THEY DO NOT PUT HIMAN BEINGS TO DEATH.

XVI.

THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT IN THIS CASE WHICH ROSE TO LEVEL OF DEPRVING [DEFENDANT] OF A FAIR TRIAL, THE DUE PROCESS OF LAW, AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

Initial Brief of Appellant, FSC Case No. 83,611. After oral argument, Defendant filed a supplemental brief, adding an additional issue:

XVII.

THE SENTENCING COURT VIOLATED [DEFENDANT'S] RIGHT TO BE PRESUMED INNOCENT BY MAKING REFERENCE TO THE SEPARATE BUT UNTRIED CHARGE (AT THAT TIME) THAT HE WAS UNDER AN INDICTMENT FOR THE MURDER OF POLICE OFFICER STEVEN BAUER.

Supplemental Point on Appeal, FSC Case No. 83,611.

On December 24, 1997, this Court affirmed Defendant's conviction and sentences. *San Martin v. State*, 705 So. 2d 1337

(Fla. 1997). This Court determined that the issues regarding death qualification of the jury and individual voir dire were not preserved or meritorious, that some of the arguments in support of the suppression issue were not preserved, that the rest of the issue was without merit and that Defendant lacked standing to raise an issue regarding the suppression of Franqui's confession, that the issue also lacked merit and that testimony about his refusal to have his confession recorded did not amount to a comment on silence. *Id.* at 1342-45, 1346. This Court determined that the evidence was sufficient to sustain the convictions under either a premeditated or felony murder theory and there was no requirement for a special verdict regarding the theory of first degree murder. *Id.* at 1345-46. It determined that the issue regarding the jury selection expert was not fully preserved and was without merit and that the issue regarding traveling to Denmark was waived. *Id.* at 1346-47. It determined that any error in the admission of the rebuttal testimony was invited, that the trial court had properly found the aggravators and rejected the mitigators, that the trial court had not abused its discretion regarding the admissibility of evidence at the penalty phase and that the jury instruction on nonstatutory mitigation was proper. *Id.* at 1347-50. This Court also determined that the issues regarding the alleged burden shifting

and the State's comments were unpreserved and without merit. *Id.* at 1350. However, this Court did determine that the trial court erred in denying Defendant's motion for severance but the error was harmless. *Id.* at 1344. This Court also determined that the trial court had erred in discussing the disparity in roles in the Bauer murder in discussing Abreu's life sentence but found that error harmless. *Id.* at 1350-51.

Defendant then sought certiorari review in the United States Supreme Court. The Court denied certiorari on October 5, 1998. *San Martin v. Florida*, 525 U.S. 841 (1998).

On October 14, 1998, the State notified the Office of the State Attorney and the Department of Corrections of the affirmance of Defendant's convictions and sentences. (PCR-SR.[4] 1-4) The State Attorney then notified the Florida Department of Law Enforcement (FDLE), the Miami-Dade Police Department, the North Miami Police Department, the Hialeah Police Department and the City of Miami Police Department of the affirmance on November 4, 1998. (PCR-SR. 5-14) On January 12, 1999, the State Attorney also notified the Office of the Attorney General that the FBI, Dade County Department of Corrections, Dade County

[4] The symbols "PCR." and "PCT." will refer to record on appeal and transcript of proceedings in this appeal, respectively. The symbol "PCR-SR." will refer to the supplemental record on appeal. The State is moving to supplement the record with the missing documents concurrently with the filing of this brief. As such, the page numbers are estimates.

Medical Examiner and Sweetwater Police Department had additional public records. (PCR-SR. 15-16) On January 25, 1999, the Office of the Attorney General notified the court and parties that the FBI was not covered by Fla. R. Crim. P. 3.852 and would not be notified. (PCR-SR. 17-20) It also sent notices to produce public records to the Dade County Department of Corrections, the Dade County Medical Examiner's Office and the Sweetwater Police Department on that same day. (PCR-SR. 21-26)

On May 18, 1999, Defendant moved for an extension of time to file requests for additional public record. (PCR-SR. 27-29) Defendant claimed that agencies had not complied with their public records obligations but did not identify which agencies had allegedly not complied nor did he attempt to compel compliance. (PCR-SR. 28-29) The post conviction court granted a 30 day extension. (PCR-SR. 30, PCT. 25-26) On July 2, 1999, Defendant again moved to extend the time for seeking additional public records. (PCR-SR. 31-38) This time he asserted that none of the agencies except the Office of the State Attorney, the Department of Corrections and the Medical Examiner had complied. *Id.* However, Defendant still took no action to compel compliance. At the hearing on the motion, the State objected because Defendant had not diligently sought the allegedly missing records by moving to compel. (PCT. 29-33)

The post conviction court granted a 60 day extension, ruling that Defendant had no responsibility to seek the records diligently and stated that it would keep granting extension unless the State moved to compel for Defendant. (PCT. 34)

On July 29, 1999, the State moved to compel the agencies that allegedly were not in compliance to produce public records. (PCR-SR. 39-61) At the hearing on the State's motion, the agencies indicated that they were in the process of complying and would have all the records sent within 30 days. (PCT. 37-38) Defendant then moved the lower court to have the sealed records transported to the court for an *in camera* inspection. (PCT. 38-41, PCR-SR. 62-69) The lower court agreed to do so. (PCT. 39, PCR-SR. 70-71)

On September 9, 1999, Defendant again moved to extend the time for seeking additional public records. (PCR-SR. 72-80) Defendant noted that several agencies had complied but that the records were unavailable for review because they were being processed. *Id.* The lower court again granted an extension. (PCT. 47)

On October 4, 1999, Defendant filed a shell motion for post conviction relief. (PCR. 31-60) Defendant claimed that the motion was incomplete because his counsel was overworked and underfunded and because he did not have public records. *Id.*

However, the motion did not identify any agencies that were not in compliance and merely complained that the *in camera* inspection had not occurred. (PCR. 42-43)

At the next status hearing on October 12, 1999, the State informed the Court that all of the agencies were in compliance. (PCT. 50) With regard to the *in camera* inspection, the State informed the Court that an order to transport the records had never been served. (PCT. 50) At that point, the lower court directed that the order be faxed to the repository and reset the matter. (PCT. 50-52)

On October 29, 1999, Defendant again moved for an extension of time to seek additional public records. (PCR-SR. 81-87) In this motion, Defendant complained that he believed the State should have noticed other, unspecified agencies to submit public records. *Id.* At the next hearing, the State informed the court that the clerk's office had received the exempt materials and that a hearing needed to be set to open the boxes. (PCT. 55-58) After the hearing was set, Defendant then complained that records from Biscayne Park, Opa Locka and South Miami were not at the repository and asked for an extension of time to seek additional public records. (PCT. 59-60) The State responded that it had not noticed those agencies and that the appropriate procedure if Defendant believed these agencies had additional

records was for Defendant to file additional public records requests. (PCT. 60-62) Defendant insisted that the State should do his requests for additional public records for him or that he should be given more time to make the requests himself. (PCT. 61-65) The lower court agreed to allow Defendant to make untimely requests for additional public records but ordered that Defendant file his final amended motion by December 10, 1999, a month after the hearing. (PCT. 64-68) The next day, the Court extended that deadline until January 11, 2000. (PCR-SR. 88)

On December 16, 1999, the lower court held a hearing to open the boxes containing the sealed records. (PCT. 78-85) On December 23, 1999, Defendant moved to continue the deadline for filing his final amended motion until March 8, 2000, because he had been granted extensions to seek additional public records. (PCR. 61-64) The lower court granted the motion and extended the filing deadline until March 8, 2000. (PCR. 65) At the beginning of the next hearing, the lower court indicated that he had reviewed the trial transcript and realized that Marilyn Milian, a close personal friend, had been one of the trial prosecutors. (PCT. 94-95) At that point, Defendant voiced no objection to the participation of the particular judge. (PCT. 95) The State, however, provided the lower court with this Court's decision in *Maharaj v. State*, 684 So. 2d 726 (Fla.

1996), and asked the lower court to review it and act appropriately. (PCT. 130) After reviewing the opinion, the lower court recused itself. (PCT. 130)

At the first hearing before the new judge assigned to handle the matter, Defendant again sought a continuance because the public records had not been reviewed. (PCT. 146-58) When the court inquired what Defendant had done to review the records, it was informed that Defendant had simply waited for the State to compel his discovery for him. (PCT. 158-59) The lower court found that Defendant was responsible for getting his own discovery and set a deadline for the filing of a final motion for March 22, 2000. (PCT. 159)

On March 10, 2000, Defendant moved to recuse the new judge. (PCR-SR. 89-99) The motion claimed that the new judge could not be fair because Marilyn Milian was now a judge herself and that *Maharaj* required a recusal. *Id.* At the same time, Defendant also moved for another extension of the filing time, asserting that he had only recently obtained the record from direct appeal, gotten the public records from the repository and learned that trial counsel's file was lost. (PCR-SR. 100-03) The State filed a response to the motion to recuse, asserting that the motion was untimely and legally insufficient. (PCR. 81-87)

At the hearing on the motion to recuse, the lower court denied it as untimely and insufficient. (PCT. 173-80) However, it indicated that it might reconsider the issue if there was a claim of egregious prosecutorial misconduct made. *Id.* With regard to the extension, the lower court found there was no good cause but granted an additional 30 days because it had extended the time for Franqui to file his motion based on a personal problem experienced by Franqui's counsel. (PCT. 184-85)

On April 18, 2000, Defendant finally filed his final amended motion for post conviction relief, raising 30 claims:

> I.
> [DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADINGS, UNDERSTAFFING, AND THE WORKLOAD ON PRESENT COUNSEL AND INVESTIGATOR, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SPALDING V. DUGGER.
>
> II.
> [DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.
>
> III.
> [DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE

BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

IV.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL AND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENDANT WAS NOT ALLOWED TO TESTIFY BY HIS ATTORNEYS AT THE GUILT AND PENALTY PHASES OF HIS TRIAL.

V.

[DEFENDANT'S] CONVICTIONS ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS ESTABLISHED BY NEWLY DISCOVERED EVIDENCE.

VI.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

VII.

[DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING VOIR DIRE WHETHER DUE TO COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION OR COURT ACTION.

VIII.

[DEFENDANT] WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASE PRESENTED IMPERMISSIBLE CONSIDERATIONS

TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED [DEFENDANT] EFFECTIVE ASSISTANCE OF COUNSEL.

IX.

[DEFENDANT] WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS AT THE GUILT/INNOCENCE AND SENTENCING PHASES OF HIS CAPITAL TRIAL, WHEN CRITICAL INFORMATION REGARDING [DEFENDANT'S] MENTAL STATE WAS NOT PROVIDED TO THE JURY AND JUDGE, ALL IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

X.

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

XI.

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

XII.

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

XIII.

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

XIV.

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

XV.

[DEFENDANT'S] DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

XVI.

[DEFENDANT'S] EIGHT AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN, CONTRARY TO FLORIDA LAW, THE JURY WAS MISLED BY THE JURY RECOMMENDATION THAT A MAJORITY VOTE IS REQUIRED TO RECOMMEND LIFE OR DEATH. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL WAS INEFFECTIVE.

XVII.

[DEFENDANT'S] EIGHTH AMENDMENT RIGHT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES SET OUT CLEARLY IN THE RECORD.

XVIII.

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

XIX.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] ATTORNEYS FROM INTERVIEWING JURORS TO

DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

XX.

[DEFENDANT'S] RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE JURY AND JUDGE WERE PROVIDED WITH, AND RELIED UPON, MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING [DEFENDANT] TO DEATH.

XXI.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

XXII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

XXIII.

[DEFENDANT] WAS DENIED A PROPER DIRECT APPEAL FROM HIS CONVICTIONS AND SENTENCES, INCLUDING HIS SENTENCE OF DEATH, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO OMISSIONS IN THE RECORD. TO THE EXTENT COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL WAS INEFFECTIVE.

XXIV.

[DEFENDANT] WAS DENIED A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XXV.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSING HIS POST-CONVICTION REMEDIES BECAUSE HIS TRIAL ATTORNEYS HAVE LOST OR MISPLACED ALL OF THEIR FILES.

XXVI.

[DEFENDANT'S] EIGHTH AND FOURTEENTH AMENDMENTS AND THE CORRESPONDING FLORIDA CONSTITUTIONAL PROVISIONS WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GIVE APPROPRIATE INSTRUCTIONS AT THE GUILT AND PENALTY PHASES. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL WAS INEFFECTIVE.

XXVII.

[DEFENDANT'S] EIGHTH AND FOURTEENTH AMENDMENTS AND THE CORRESPONDING FLORIDA CONSTITUTIONAL PROVISIONS WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GIVE CONSIDERATION IN ITS ORDER TO MITIGATOR OF AGE. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL WAS INEFFECTIVE.

XXVIII.

[DEFENDANT'S] EIGHTH AND FOURTEENTH AMENDMENTS AND THE CORRESPONDING FLORIDA CONSTITUTIONAL PROVISIONS WERE VIOLATED WHEN THE TRIAL COURT DENIED DEFENDANT'S MOTIONS IN LIMINE PRIOR TO THE PENALTY PHASE. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY. AND/OR FAILED TO OBJECT, COUNSEL WAS INEFFECTIVE.

XXIX.

THE FLORIDA SUPREME COURT IGNORED MITIGATING EVIDENCE IN UPHOLDING DEFENDANT'S DEATH SENTENCE AND DID NOT PROPERLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. THE FLORIDA SUPREME COURT DID NOT CONDUCT A PROPER PROPORTIONALITY REVIEW ESPECIALLY IN LIGHT OF THE FACT THAT DEFENDANT WAS NOT THE SHOOTER. THE FLORIDA SUPREME COURT DID NOT CONDUCT A PROPER HARMLESS ERRPR ANALYSIS ON BOTH GUILT AND PENALTY PHASE ISSUES.

XXX.

THIS COURT SHOULD DISQUALIFY ITSELF FROM CONSIDERING DEFENDANT'S MOTION TO VACATE CONVICTION AND SENTENCE.

(PCR. 104-297)

On April 28, 2000, the State filed a response to the motion

for disqualification contained in claim XXX of the motion for post conviction relief. (PCR. 341-47) The State again asserted that the disqualification request was untimely and facially insufficient. *Id.* At the hearing on the motion, the lower court stated that it did not believe the motion was timely but recused itself anyway because it did not believe he could fairly adjudicate the claim that Ms. Milian coerced Abreu to testify falsely. (PCT. 204-15) Moreover, because these same grounds could apply to every judge in the circuit, the lower court agreed to ask the Chief Judge to recuse the entire circuit and ask this Court to appoint judge from another circuit. (PCT. 215-18) The Chief Judge agreed, and this Court appointed Judge Paul Backman to hear this matter. (PCT. 222-23, 229)

On July 6, 2000, the State filed its response to the amended motion for post conviction relief. (PCR. 351-417) The State agreed that an evidentiary hearing was necessary on the claims that Defendant was prevented from testifying at the guilt and penalty phases (Claim IV) and that Abreu was recanting his testimony at the penalty phase, claiming it was coerced (Claims V and VI). *Id.*

On January 8, 2001, the lower court held the *Huff* hearing. (PCT. 252-319) Defendant asked the lower court to continue the hearing because he wanted to have a motion to compel public

records considered and wanted the lower court to complete its *in camera* review of the exempt materials. (PCT. 288-89) The lower court refused to delay the hearing but stated that it would hold additional hearings if any new records were disclosed. (PCT. 289) During argument on the motion for post conviction relief, Defendant conceded that Claim XXX was moot. (PCT. 304) He then argued that an evidentiary hearing was necessary on the other 29 claims, claiming that the motion fully detailed his allegations. (PCT. 304-12) The State responded that it had agreed to an evidentiary hearing regarding claims IV, V, and VI but that the rest of the claims were procedurally barred and facially insufficient. (PCT. 312-15) The State also asserted that while the claim about the attempted murder counts was really a claim of ineffective assistance of appellate counsel, it would concede that the convictions were due to be vacated. (PCT. 315-16)

On January 7, 2002, the lower court entered its order regarding the *Huff* hearing. (PCR. 550-66) In the order, the lower court summarily denied claims I, XXI, XXII, XXV and XXIX as without merit as a matter of law. (PCR. 550-51, 561, 562, 564) It denied claim II because it had conducted an *in camera* review of the sealed materials from the repository and found that nothing was improperly withheld. (PCR. 551, 548-49) It determined that claim III and IX were in part facially

insufficient and in part conclusively refuted by the record. (PCR. 551-52, 554, 610-24) It summarily denied claims VII, VIII, X, XIII, XIV, XV, XVI, XVII, XVIII, XX, XXII, XXIII, XXIV, XXVI, XXVII and XXVIII as procedurally barred. (PCR. 552-55, 556-559, 560, 561-64) It summarily denied claims XI, XII and XIX as facially insufficient. (PCR. 556, 560) However, it granted an evidentiary hearing on claims IV, V and VI. (PCR. 552) It also held that Defendant's convictions for the attempted murders should be vacated pursuant to *State v. Gray*, 654 So. 2d 552 (Fla. 1995), but that the vacation of these convictions did not affect Defendant's death sentence. (PCR. 555)

On March 20, 2002, Defendant moved for leave to amend to add an additional post conviction claim and filed a supplement to his motion, adding one claim:

> [DEFENDANT] WAS DENIED HIS RIGHT TO DUE PROCESS BECAUSE SECTION 921.141, FLORIDA STATUTES, IS UNCONSTITUTIONAL, IN THAT IT DOES NOT REQUIRE AGGRAVATING CIRCUMSTANCES TO BE CHARGED IN THE INDICTMENT, DOES NOT REQUIRE SPECIFIC, UNANIMOUS FINDINGS OF AGGRAVATING CIRCUMSTANCES, AND DOES NOT REQUIRE A UNANIMOUS VERDICT TO RETURN A RECOMMENDATION OF DEATH.

(PCR-SR. 104-18) On March 26, 2002, the lower court granted leave to add the claim. (PCR-SR. 119)

On September 10, 2002, Defendant again moved to leave to add yet another claim and filed a second supplement to his motion for post conviction relief, adding another claim:

> [DEFENDANT] WAS DENIED HIS RIGHT TO BE FREE FROM CRUEL AND/OR UNUSUAL PUNISHMENT UNDER ARTICLE I, SECTION 17, FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, IN THAT IT IS UNCONSTITUTIONAL TO SUBJECT AN INDIVIDUAL TO EXECUTION WHERE SAID INDIVIDUAL SUFFERS FROM SUBSTANTIAL LIMITATIONS IN PRESENT FUNCTIONING AND/OR HAS SIGNIFICANT SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING.

(PCR-SR. 120-35) On September 13, 2000, the State responded to the two additional claims. (PCR. 736-58)

At the next status hearing, Defendant requested the opportunity to file a reply to the State's responses, which the lower court granted. (PCT. 341-45) The lower court then set the evidentiary hearing for December 18, 2002. (PCT. 347-54) On November 13 and 19, 2002, Defendant submitted his replies to the State's responses to his supplemental claims. (PCR. 948a-48o, PCR-SR. 136-44)

At the beginning of the evidentiary hearing, Defendant asserted that he was not prepared to discuss his second supplemental claim, as he had only recently had an MRI conducted and needed to obtain a report. (PCT. 362-63) He also asked the lower court to consider granting an evidentiary hearing on ineffective assistance of counsel at the penalty phase. (PCT. 363-64) The State briefly responded that the issue of whether Defendant was retarded had already been raised and rejected. (PCT. 364-65) The lower court decided to defer consideration of

the issues. (PCT. 367)

Defendant then presented his own testimony. (PCT. 368-93) According to Defendant, he wanted to testify at trial and informed Fernando de Aguero, his attorney, of his desire to testify. (PCT. 368) Defendant did not recall testifying at the hearing on the motion to suppress. (PCT. 368-69) Defendant stated that he told the trial court that he did not want to testify because his attorney "had directed me not to testify." (PCT. 369) Defendant stated that he still wanted to testify. (PCT. 369-70) Defendant did not remember why he had been advised against testifying. (PCT. 370) Defendant did recall having discussed the issue of his testimony with Mr. de Aguero and did not recall if Mr. Vasquez, his other attorney, was present for these discussions. (PCT. 370)

Defendant asserted that he would have testified about the circumstances regarding his confession. (PCT. 370) According to Defendant, he would have stated that he was "under depression and under violence from the detectives." (PCT. 371) He would have stated that he was directed to sign the confession "under violence." (PCT. 371) He stated that he would also have testified about his life. (PCT. 371)

Defendant claimed that he also wanted to testify at the penalty phase. (PCT. 375) He stated that he again discussed

testifying with Mr. de Ageuro. (PCT. 375) Defendant stated that Mr. de Aguero again advised him against testifying but that he again did not recall why Mr. de Aguero had given that advice. (PCT. 375) Defendant again claimed that he told the trial court he did not want to testify because Mr. de Aguero had "directed me not to testify." (PCT. 376)

Defendant stated that he would have stated that there was no plan to kill anyone. (PCT. 376) He would have asked the jury for mercy and claimed to be a different, religious person. (PCT. 376) He would have told the jury that he once fell from a bike, hit his head and lost consciousness. (PCT. 376) He would have informed the jury that he had worked for 3 to 5 years in a factory. (PCT. 376) He would have claimed that his father beat him and tied him to a chair with a chain. (PCT. 377)

Defendant asserted that he did not get along with Mr. de Aguero. (PCT. 378) He stated that he had once sought to have Mr. de Aguero removed as counsel. (PCT. 378)

On cross, Defendant admitted that evidence about his background, including the alleged abuse by his father and the injury from the fall, was introduced at trial through the testimony of Dr. Marina and Defendant's family members. (PCT. 380-31) He also acknowledged that evidence about his alleged religious conversion was presented through the testimony of his

two pastors. (PCT. 381-82)

Defendant stated that he wanted to testify at the penalty phase that he never intended to kill anyone. (PCT. 382-84) He would have stated that he did plan to rob the Cabanases but that he fired his gun in a panicked response to the shots fired by the victims. (PCT. 382-85)

Defendant denied having had a colloquy with the trial court regarding his right to testify. (PCT. 386-87) Instead, he insisted that the trial court merely asked if he wanted to testify and that he answered no because Mr. de Aguero had told him to say no. (PCT. 386-87)

Defendant insisted that he did not recall the hearing on the motion to suppress. (PCT. 388-90) He stated that he did not recall ever testifying at it. *Id.*

Defendant admitted that he carried a load gun to the scene of the robbery. (PCT. 390) He acknowledged that he knew his codefendants were armed and that one of them had a submachine gun. (PCT. 390) He admitted that he planned to rob the Cabanases. (PCT. 391)

Defendant next called Monica Jordan, his post conviction investigator, to testify. (PCT. 393-96) When Defendant attempted to ask about Jordan's visit to Abreu, the State objected that it appeared that Defendant was attempting to

elicit hearsay. (PCT. 396) Defendant responded that he was attempting to admit Abreu's affidavit. (PCT. 396) The State replied that the affidavit was inadmissible hearsay. (PCT. 396-97) The trial court ruled that the affidavit was inadmissible but that Defendant could ask questions about the circumstances under which it was procured. (PCT. 397-98) Jordan then testified that he visited Abreu in December 1999 and March 2000, and obtained an affidavit from him on the second visit. (PCT. 399)

On cross, Jordan admitted that she did not speak Spanish and that Abreu spoke Spanish more fluently than English. (PCT. 400-01) No interpreter was used in Jordan's discussions with Abreu. (PCT. 401)[5]

Defendant next called Abreu. (PCT. 415-77) Abreu testified that he was involved in the planning and execution of these crimes. (PCT. 418-19) The day that Abreu, Defendant and

[5] After Jordan testified, Franqui attempted to call his investigator to testify regarding an affidavit procured from Fernando Fernandez, which allegedly bolstered Abreu's recantation, and to present Fernandez's testimony. The lower court refused to allow the investigator to testify until Abreu and Fernandez testified. (PCT. 402-14) When Franqui subsequently attempted to call Fernandez, Fernandez invoked his Fifth Amendment privilege and refused to testify, and the lower court refused to admit his affidavit. (PCT. 478-89, 497-500) Fernandez's attorney explained that Fernandez invoked his rights because his actions in Fernandez's own post conviction litigation had caused the State to consider whether there was sufficient evidence to charge Fernandez in this matter. (PCT. 490-95)

Franqui stole the cars, they did not discuss killing anyone. (PCT. 419) However, the day that the crimes were committed, Abreu, Defendant and Franqui drove around in Abreu's van, the plan was again discussed and the fact that Franqui would kill the bodyguard while Abreu and Defendant took the money was discussed. (PCT. 420-21) Abreu stated that this discussion occurred a half an hour or so before the crimes were committed. (PCT. 421) Abreu stated that he had informed the State of this discussion and its timing before trial. (PCT. 421) He recalled his trial testimony having been the same as his evidentiary hearing testimony. (PCT. 423) When asked if the State had ever asked him to change his testimony, Abreu responded that he had always been consistent in his statements. (PCT. 424)

On cross, Abreu stated that he had also been truthful in his testimony and meetings with the State. (PCT. 429-30) He stated that he was not threatened. (PCT. 430) No one ever suggested that he testify in a particular manner. (PCT. 430) Abreu acknowledged that the plan always called for Defendant, Franqui and Abreu to be armed and they always knew there was a bodyguard. (PCT. 431-32) He stated that Franqui had originally planned to run the bodyguard off the road. (PCT. 433) He averred that the morning of the crime, he, Defendant and Franqui drove through the route they expected the Cabanases to take

leaving the bank after the bank opened at 8 a.m. (PCT. 434) During this time, Franqui announced that he was going to shoot the bodyguard in everyone's presence. (PCT. 434)

After this discussion, the group picked up the cars they had stolen to use in the crimes. (PCT. 435) Abreu acknowledged that he did not have a watch and that the discussion about killing the bodyguard may have happened a couple of hours before the Cabanases were accosted. (PCT. 435-36) He acknowledged that the crimes were committed according to the plan except that the group did not expect the Cabanases to be armed as well as their bodyguard. (PCT. 436)

Abreu stated that Jordan had spoken to him in English even though he only knew a little English and could neither read not write in English. (PCT. 436-37) Abreu believed that the affidavit he had signed said that he had fired a gun during the crimes but had not personally killed Mr. Lopez. (PCT. 437-38) Abreu did not know that the affidavit said that the police and State had told him what to say during his testimony and that he had been threatened. (PCT. 439) Abreu denied being threatened. (PCT. 439-40)

On questioning by Franqui's counsel, Abreu denied being under mental health treatment at or near the time of trial. (PCT. 455) He stated that he had never discussed this case with

Fernandez. (PCT. 456-57) He denied telling Fernandez he had testified falsely in this case. (PCT. 457)

On redirect, Abreu acknowledged that there had been a discussion of shooting the bodyguard at a meeting at a house a day or two before the crimes occurred. (PCT. 465-66) He then said that only stealing the car was discussed at this meeting. (PCT. 466)

The State presented the testimony of both of Defendant's trial counsel. (PCT. 502-44) Manuel Vasquez testified that he represented Defendant at trial. (PCT. 502-03) Mr. Vasquez recalled having discussions with Defendant about testifying. (PCT. 503) He stated that Defendant insisted that he should not be held responsible for Mr. Lopez's death because he had not fired the fatal shot. (PCT. 503-04) In response to this assertion, Mr. Vasquez attempted to explain felony murder to Defendant and that he was responsible for the death. (PCT. 503-04)

Mr. Vasquez denied preventing Defendant from testifying. (PCT. 504) He averred that he did not coerce Defendant and did not tell Defendant that he had to follow counsel's instructions. (PCT. 504) After their discussions, Mr. Vasquez believed that Defendant had come to a personal decision not to testify. (PCT. 504) He recalled the trial court holding a colloquy with

Defendant to ensure that he understood he had a personal right to testify. (PCT. 504-05) He denied that Defendant ever insisted upon testifying against counsel's advice. (PCT. 506) He denied ever telling Defendant to give any particular answer to the trial court during the colloquy. (PCT. 507)

Mr. Vasquez stated that he presented evidence regarding Defendant's injuries and background through family members and Dr. Marina. (PCT. 505-06) Mr. Vasquez stated that Defendant never stated that he wanted to make a personal plea for mercy. (PCT. 506)

Mr. de Aguero testified that he represented Defendant at trial. (PCT. 514-51) During his representation, he had many discussions with Defendant. (PCT. 515) Through these discussions, Mr. de Aguero came to the opinion that Defendant had difficulty expressing himself in a clear and concise manner. (PCT. 515-16) As such, Mr. de Aguero felt that Defendant would not make a good witness, and he decided to seek other witnesses who could testify about the information that Defendant could provide. (PCT. 516-17)

Mr. de Aguero stated that he discussed testifying with Defendant. (PCT. 517) He informed Defendant of the pros and cons of testifying and advised Defendant not to do so. (PCT. 517) Mr. de Aguero recalled that Defendant wanted to testify

that the felony murder rule was illogical in his opinion and that it should not apply to him because he did not believe in it. (PCT. 517-18) Mr. de Aguero stated that he discussed with Defendant the fact that giving this testimony would result in Defendant's admission of guilt. (PCT. 518)

At the conclusion of these discussions, Defendant grudgingly agreed that it was in his best interest not to testify. (PCT. 518) However, Mr. de Aguero insisted that Defendant made the decision not to testify. (PCT. 518-19) He denied ever telling Defendant he could not testify. (PCT. 518-19) Mr. de Aguero stated that Defendant never insisted on testifying against his advice. (PCT. 519-20) Mr. de Aguero denied ever coercing Defendant about anything. (PCT. 523)

Mr. de Aguero stated that he recalled Defendant claiming that the police did not provide him with drinks in a timely manner when he was being interrogated. (PCT. 520) However, he did not recall Defendant ever expressing a desire to testify about this to the jury. (PCT. 520) Mr. de Aguero did not recall Defendant expressly stating that he wanted to make a personal plea for mercy. (PCT. 520-21) However, if Defendant had ever done so, Mr. de Aguero would have agreed that Defendant could testify to do so. (PCT. 521)

Mr. de Aguero felt that he had an understanding of

Defendant's background as Mr. de Aguero had a similar background and did his best to present this background to the jury through other witnesses. (PCT. 521-23)

On cross examination, Mr. de Aguero stated that Defendant has once sought his discharge, alleging that Mr. de Aguero did not provide him with all documentation about his case and was not always available to take his phone calls. (PCT. 524-26) However, Mr. de Aguero did not believe that he and Defendant had problems communicating. (PCT. 526)

Mr. de Aguero reiterated that he and Mr. Vasquez did not believe that Defendant would be an effective witness and counseled Defendant against testifying. (PCT. 534) Mr. de Aguero insisted that Defendant was never adamant about testifying. (PCT. 535-36) Instead, Defendant, Mr. de Aguero and Mr. Vasquez discussed the pros and cons of testifying, and the attorneys gave Defendant advice against testifying because they felt that Defendant would damage his case. (PCT. 536) Mr. de Aguero stated that Defendant never expressed any interest in testifying about the circumstances of his confession before the jury. (PCT. 536-37) Instead, Defendant was fixated on his perspective on the felony murder rule. (PCT. 537)

On redirect, Mr. de Aguero stated that the reason why a defendant might be presented to testify at a suppression hearing

and not at trial was that the scope of cross examination at a suppression hearing is limited. (PCT. 542) Mr. de Aguero's biggest fear in having Defendant testify was that Defendant would admit his guilt to felony murder. (PCT. 542) Mr. de Aguero also did not think that Defendant's plea for mercy would have been very availing because Defendant would have insisted on disputing the felony murder rule; not his guilt. (PCT. 542-43)

Mr. de Aguero insisted that Defendant made the ultimate decision that he would not testify. (PCT. 543) He denied ever telling Defendant to give false answers. (PCT. 543) Instead, he always told Defendant to answer the Court's questions truthfully. (PCT. 543)

The State also called Marilyn Milian, one of the prosecutors at Defendant's trial. (PCT. 544-45) Ms. Milian testified that the State decided to offer Abreu a plea in exchange for his testimony before trial. (PCT. 545) The details of the plea agreement were disclosed to the defense. (PCT. 545-46)

During the course of entering into the plea agreement and in preparing for trial, Ms. Milian met with Abreu and discussed his testimony. (PCT. 546) During these discussions, Ms. Milian never instructed Abreu to testify in a particular manner. (PCT. 546) She also denied ever threatening any cooperating

codefendant in any case, particularly Abreu in this case. (PCT. 546-47)

On cross examination, Ms. Milian acknowledged that Abreu's plea agreement required Abreu to testify truthfully and contained a definition of what Abreu's truthful testimony would be. (PCT. 550) She explained that the definition of the truthful testimony was based on a proffer Abreu had provided to the State and had agreed was truthful. (PCT. 550-51) She admitted that the State could have sought to revoke the plea if Abreu had changed his testimony. (PCT. 551)

Ms. Milian stated that she did not independently recall Abreu stating that killing Mr. Lopez had always been part of the plan in this case but had seen notes indicating that Abreu had told the State that information. (PCT. 551-52) Ms. Milian did not recall Abreu having told Det. Fabrigas that killing Mr. Lopez was not part of the plan at the time of his arrest. (PCT. 552) However, she did not find it surprising that a defendant would have attempted to have minimized his culpability in a statement to the police. (PCT. 552-53)

On questioning by Franqui's counsel, Ms. Milian acknowledged that the Bauer case was high profile, that this case was tried first so that it would be an aggravator in the Bauer case and that the agreement with Abreu was motivated by a

desire to have as many aggravators as possible in the Bauer case. (PCT. 555-57) However, Ms. Milian denied that entering into a plea agreement with anyone was necessary in this case. (PCT. 558) Ms. Milian acknowledged that Abreu's plea agreement covered both this case and the Bauer case and stated that the State obtained a proffer directly from Abreu before entering into the agreement. (PCT. 558-59) She stated that one reason why an agreement would have been offered to Abreu and not the other defendants was that the State believed Abreu was the least culpable. (PCT. 575)

While Ms. Milian did not recall when Abreu testified at the time of trial, she believed that he was only called during the penalty phase. (PCT. 568) Ms. Milian stated that even during the guilt phase, the State was still considering whether to call Abreu at that phase. (PCT. 580) She stated that part of the decision about when to call Abreu would have been that he was a cooperating codefendant and such witnesses generally have credibility issues. (PCT. 581)

After the evidence was presented, Defendant argued he was entitled to relief based on *Ring v. Arizona*, 536 U.S. 584 (2002). (PCT. 593-95) With regard to the claims about Defendant testifying, Defendant argued that his own testimony about wanting to testify at trial and the content of his proposed

testimony proved his claim. (PCT. 595-601) He asked the lower court to disregard the attorneys' testimony because Defendant had asked the trial court to discharge Mr. de Aguero prior to trial, Mr. de Aguero had not kept his file and he was trying his first death penalty case. (PCT. 601-03) He further asserted that the lack of Defendant's testimony at the penalty phase was particularly harmful because it would have humanized Defendant and the evidence he wanted to present was not otherwise presented to the jury. (PCT. 603-06)

With regard to the claims about Abreu, Defendant admitted that Abreu's testimony did not comport with what was asserted in the claim. (PCT. 606-09) However, he claimed that Abreu's evidentiary hearing testimony showed that the murder was not planned because it was discussed the morning of the crimes instead of the day before the crime. (PCT. 609-12) He further asserted that because Abreu had insistent that he had provided a consistent statement to the State pretrial, there was a *Brady* violation. (PCT. 610) Defendant did acknowledge that the claim that Abreu had been coerced to provide false testimony at trial was unsupported by the evidence, but asserted that Abreu was not a credible witness. (PCT. 612)

The State responded that the *Ring* claim was procedurally barred, *Ring* did not apply retroactively and the claim was

without merit. (PCT. 613-14) With regard to the claim about Defendant testifying, the State asserted that the trial attorneys' testimony was more credible than Defendant's testimony and that their testimony did not support a finding of deficiency. (PCT. 614-15) The attorneys' credibility was further bolster by Defendant's own responses to the trial court's colloquies at the time of trial. (PCT. 618-19) Moreover, there was no prejudice as Defendant's testimony at the guilt phase would have resulted in Defendant confessing in front of the jury on cross and his testimony at the penalty phase was cumulative to the evidence already presented. (PCT. 615-16)

With regard to the Abreu claims, the State responded that Defendant had failed to show that the State ever knew that Abreu's testimony would be anything other than that which he testified to at trial. (PCT. 616-17) Further, the minor inconsistency regarding how long before the crimes were committed the plan to kill Mr. Lopez was formulated did not alter the fact that the plan was in place before the crime started. (PCT. 617-18) As such, CCP still applied, and there was no prejudice. (PCT. 618, 619)

At the conclusion of the arguments, Defendant asked the court to vacate the two attempted murder convictions under *Gray*. (PCT. 629) The State responded that the issue was technically

not properly raised in the proceeding but that the convictions were due to be vacated. (PCT. 629) At the conclusion of the hearing, the lower court permitted Defendant to file written closing arguments within a month and to present information about the MRI. (PCT. 635-42)

Instead of submitting a post hearing memo, Defendant filed a supplement to his motion for post conviction relief on March 6, 2003. (PCR. 1162-77) In this pleading, Defendant asserted that he had recently had an MRI and been evaluated by a psychologist, who found that Defendant had borderline intellectual functioning and neuropsychological deficits. *Id.* As such, he asked the trial court to order an evidentiary hearing on his previously denied claims of ineffective assistance of counsel at the penalty phase and on his claim that he was retarded. *Id.* On March 12, 2003, the State responded that the issue was untimely, that it still did not show ineffectiveness and that the MRI had nothing to do with retardation. (PCR. 1178-1252)

On April 3, 2003, nearly a month after the deadline for presenting post hearing memorandum, Defendant filed a post hearing memo. (PCR. 1259-65) In this pleading, Defendant reiterated the arguments he had made to the court two months earlier. *Id.* The State responded to the memo, asked that it be

stricken as untimely and argued that Defendant had failed to carry his burden of proof at the evidentiary hearing. (PCR. 1266-85)

In the months after the proceedings had concluded, Defendant made motions to the trial court to authorize additional medical testing without notice to the State. (PCR. 1289-99) On August 7, 2003, the State wrote to the lower court and asked that Defendant be sent back to prison. (PCR. 1316) Defendant then wrote to the lower court indicating that additional medical testing was being conducted and asking that Defendant not be returned to prison. (PCR. 1315) Defendant then moved to stay his return to prison while additional medical testing was conducted. (PCR. 1318-22) The State filed a response, asserting that any claim of ineffective assistance regarding the test results would be time barred, that the tests were irrelevant to the issue of retardation and that Defendant should be returned to prison. (PCR. 1323-48) At the hearing on the motion, Defendant asserted simply that his experts had told him that these tests were necessary to perfect a retardation claim and that it was easier for them to be done in Miami. (PCT. 647-49) The State responded the time had come to bring a conclusion to the post conviction litigation, given that the matter had been pending for about 5 years. (PCT. 649-50) The

lower court agreed that the matter had been pending too long but agreed to give Defendant until October 3, 2003, an additional month, to complete his testing and until October 31, 2003, to file any additional pleadings. (PCT. 651-52, PCR. 1347-48)

On October 15, 2003, Defendant moved to extend the deadlines because his expert wanted to do additional testing but Defendant had been informed that he had exhausted his funds for expert's fees and expense so the work had not been completed. (PCR. 1379-84) At the hearing on the motion, Defendant asserted that another MRI had been completed but that his expert wanted to conduct more neuropsychological testing and Defendant had refused to submit to the other tests because he was afraid of needles. (PCT. 656-58) The State objected that the only issue that remained pending was retardation and that none of the testing Defendant sought was relevant to that issue. (PCT. 658-59) The lower court then extended the deadline for returning Defendant until October 31, 2003, and the deadline for additional pleadings until December 1, 2003. (PCT. 660-61, PCR. 1387-88)

On December 1, 2003, Defendant submitted an additional supplement to his claims. (PCR. 1391-1405) In this pleading, Defendant asked the lower court to hold an evidentiary hearing on his claims of ineffective assistance at the penalty phase and

his claim that he was retarded. *Id.* According to the allegations in the motion, Defendant had scored 80 on an IQ test in 1999-2000, 74 on an IQ test in 2003 and probably had multiple sclerosis. *Id.* On December 19, 2003, the State responded to the supplement, arguing that the attempt to get reconsideration of the previously denied ineffective assistance claims was barred and that the retardation claim was barred, facially insufficient and conclusively refuted by the record. (PCR-SR. 145-92)

At a subsequent hearing, Defendant asserted that what he was trying to prove was that Defendant had multiple sclerosis, which he claimed was related to retardation. (PCT. 669-71) The State responded that any claim that Defendant had multiple sclerosis would be barred and that having such a condition was irrelevant to the issue of retardation. (PCT. 672-74)

On July 21, 2004, Defendant filed a motion to reconsider Claim X and a motion to reconsider Claims X and XXIV. (PCR-SR. 193-203) In the motion to reconsider Claim X, Defendant argued that the *Miranda* rights waiver form was inadequate. (PCR-SR. 193-97) In the motion to reconsider Claims X and XXIV, Defendant argued that *Crawford v. Washington*, 541 U.S. 36 (2004), showed that the admission of Franqui's confession at their joint trial was error. (PCR-SR. 198-203) The State filed

a response to these motions, asserting that the case law upon which Defendant relied was not retroactive and did not apply to this matter. (PCR. 1663-64A)

On March 31, 2005, the lower court entered orders denying Defendant all relief. (PCR. 88-103, 1665-67) The lower court found that Defendant had failed to prove either deficiency or prejudice regarding the claim about him testifying. (PCR. 89-91) It also determined that Defendant had failed to prove any of the elements of his Abreu claims. (PCR. 91-95) It denied the *Ring* claim because *Ring* is not retroactive. (PCR. 97-98) It found the retardation claim procedurally barred and facially insufficient. (PCR. 99-102) It further found no basis to reconsider the denials of the claim about the *Miranda* waiver form and the alleged *Crawford* claim. (PCR. 1665-67)

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied claims. The claims the lower court summarily denied were insufficiently plead, procedurally barred, refuted by the record and without merit as a matter of law.

The lower court properly denied the claims regarding Abreu's alleged change in testimony. Defendant failed to prove that Abreu testified falsely, that the State knew he did so and

that the State possessed any favorable information that it suppressed. Moreover, the minor inconsistency in the testimony that Defendant did prove was not material.

ARGUMENT

I. THE SUMMARY DENIAL OF CLAIMS WAS PROPER.

Defendant first asserts that the lower court erred in summarily denying claims. Specifically, Defendant complains about the summary denial of his claims that his counsel was ineffective for failing to investigate and present evidence of his family background, that counsel was ineffective for failing to investigate and present evidence of his mental state properly, that he is entitled to relief based on the alleged effect of cumulative errors in the proceedings, including that his confession should have been suppressed, that Abreu's affidavit constitutes newly discovered evidence that shows he is innocent of first degree murder and the death penalty, that the trial court improperly rejected mitigation, that this Court failed to conduct a proper proportionality review on direct appeal and that he was entitled to post conviction relief because counsel lost his file.[6] However, the lower court

[6] In the heading and introductory sentence to this issue, Defendant mentions the summary denial of other claims by claim number. However, other than these vague references, Defendant presents no additional statements or any argument regarding the denial of any of these claims. As such, Defendant has waived

properly summarily denied these claims as they were insufficiently pled, refuted by the record, procedurally barred and without merit as a matter of law.

With regard to the claim concerning Defendant's family background, the lower court properly denied this claim. This Court has repeatedly held that counsel cannot be deemed ineffective for failing to present cumulative evidence. *Booker v. State*, 32 Fla. L. Weekly S537, S541 (Fla. Aug. 30, 2007); *Darling v. State*, 32 Fla. L. Weekly S486, S489 (Fla. Jul. 12, 2007); *Jones v. State*, 949 So. 2d 1021, 1036 (Fla. 2006); *Valle v. State*, 705 So. 2d 1331, 1334 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 546 (Fla. 1990); *Card v. State*, 497 So. 2d 1169, 1176-77 (Fla. 1986). Moreover, this Court had held

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any issue regarding the denial of these claims by failing to properly brief them. *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Even if the claims had not been waived, Defendant would still be entitled to no relief. This Court has repeatedly rejected many of the claims Defendant raised. *Griffin v. State*, 866 So. 2d 1, 14, 17, 18, 20-21 (Fla. 2003)(Claims I, II, VII, XIII, XIV, XV, XIX, XXI, XXII, XXIII); *Cook v. State*, 792 So. 2d 1197, 1200-01 (Fla. 2001)(Claim XVI); *Zack v. State*, 753 So. 2d 9, 23-24 (Fla. 2000)(Claim VII); *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998)(Claim VIII); *State v. Wilson*, 686 So. 2d 569 (Fla. 1996)(Claim VII). Further, Claims XVIII, XX, XXIV, XXVI and XXVIII consisted of nothing but conclusory statements concerning issues that could have been, should have been or were raised on direct appeal. (PCR. 270-71, 273, 276-77, 277-78) As such, these claims were properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Finally, Claim XXX asked that Judge Ferrer recuse himself, which he did. (PCR. 278-92) Thus, the claim was properly denied as moot.

that counsel cannot be deemed ineffective for failing to present testimony from witnesses when the witnesses had provided contrary statements at the time of trial. *Puiatti v. Dugger*, 589 So. 2d 231, 233-34 (Fla. 1991); *Correll v. Dugger*, 558 So. 2d 422, 426 n.3 (Fla. 1990).

Here, the record reflects that counsel presented two of Defendant's brothers, his sister, his mother, his grandmother, his cousin Abreu and Dr. Marina to testify concerning his family background. (T. 2764-67, 2825-35, 2843-46, 2850-60, 2861-63, 2865-71, 2921-28) Through these witnesses, Defendant elicited evidence that Defendant's father had a drink problem, that he had abused Defendant when the family had lived in Cuba, and that the family always had a home, food and clothes. Counsel presented Defendant's school records that showed that he did not do well in school. (R. 706-36) Further, Defendant's brother Juan and Dr. Herrera testified that Defendant never completed high school. (T. 2828, 3047) Counsel had Dr. Marina testify that the reason why the family members of accounts of Defendant's father's drinking and the alleged abuse he suffered were not fully consistent with each other and the information she received from Defendant was that the family members were in denial. (T. 2983, 3022-23) Moreover, Defendant's brother Juan, his sister Daisy and his mother testified that they had always

considered Defendant to be nervous. (T. 2832, 2856, 2858, 2869) The record also reflects that counsel had Defendant's father available as a witness. (T. 2812)

In his motion, Defendant asserted that the information that counsel would have gleaned from a proper investigation was that Defendant grew up in poverty, that his father was an alcoholic who abused Defendant, that Defendant was taken for mental health evaluations as a child, that Defendant was a bed-wetter and sleep-walker as a child and that he dropped out of school and was not a good student when he was in school. (PCR. 116-18) The witnesses through whom this evidence would have been presented were Defendant's sister Daisy, Defendant's mother Francisca, Defendant's brother Javier and Defendant's father Luis. *Id.* However, as seen above, counsel did actually call Daisy, Francisca and Javier at the penalty phase and had Defendant's father available. Moreover, the information that these witnesses allegedly would have provided, other than the bed-wetting and sleep-walking as a child and that his mother took him to a psychologist, was either presented to the jury or was directly contrary to the witnesses' testimony at trial. Under these circumstances, the lower court properly rejected this claim because it involved the presentation of cumulative evidence or evidence that was unavailable to counsel because the

witnesses provided contrary information. *Booker*, 32 Fla. L. Weekly at S541; *Darling*, 32 Fla. L. Weekly at S489; *Jones*, 949 So. 2d at 1036; *Puiatti*, 589 So. 2d at 233-34; *Correll*, 558 So. 2d at 426 n.3.

Additionally, the record reflects that counsel was aware that Defendant's mother could have testified that she took Defendant to a psychologist as a child. He elicited this information from her at deposition.[7] (PCR. 521) Thus, Defendant's claim that counsel did not have this information because he failed to investigate is refuted by the record. The lower court properly rejected it.

Moreover, the lower court also properly rejected the claim because of a lack of prejudice. In order to obtain post conviction relief, a defendant must show that but for counsel's alleged deficiency, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Here, Defendant's death sentence was supported by numerous convictions for prior violent felonies, the fact that the murder was committed during the course of a robbery and for pecuniary gain, and CCP. The jury heard evidence that Defendant did no do well in school and

[7] The failure to elicit this information before the jury is understandable, as Francisca testified that the doctor did not find anything wrong with Defendant and simply stated he had "lively blood." (PCR. 521)

dropped out, that his father drank and that his father abused him. They heard that the family members always considered Defendant nervous and a follower. They heard Dr. Marina explain that the family members did not fully divulge information about drinking and abuse because they were in denial and saw that contradictions between the family members' statements about his school performance and the school records to bolster this theory. While Defendant's mother had taken Defendant to a psychologist in Cuba, no illness was found. (PCR. 521) The only other information that the jury was not provided that was not inconsistent with the testimony provided at trial was that Defendant wet the bed and walked in his sleep as a child. Given that this information had nothing to do with Defendant's decision to participate in a series of planned crimes, it would have added little. Under these circumstances, it cannot be said that had this information been presented, there is a reasonable probability that Defendant would not have been sentenced to death. As such, the lower court also properly summarily denied this claim because of a lack of prejudice. It should be affirmed.

With regard to the claim concerning Defendant's mental state, the lower court properly denied this claim. In presenting the claim, Defendant acknowledged that the

presentation of both Dr. Marina and Dr. Herrera was a "defense gambit." (PCR. 204) By doing so, Defendant acknowledged that counsel had made a strategic decision to present both experts. Moreover, Defendant did not assert that counsel had failed to investigate the alleged inconsistency between these two experts before deciding to present both experts. As such, the lower court was presented with a claim that counsel was ineffective for making a strategic decision regarding what witnesses to present after an investigation. However, the law is clear that strategic decisions made after an investigation are not ineffective assistance of counsel. *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))). Under these circumstances, the lower court properly denied this claim. It should be affirmed.

Moreover, even if Defendant had not conceded that the claim was based on a strategic decision, he would still be entitled to no relief. While Defendant asserted below that the testimony of Dr. Marina and Dr. Herrera was entirely inconsistent, the record refutes this assertion. Based on her assessment, Dr. Marina found that Defendant had borderline intellectual functioning, poor judgment, a learning disability, and a potential for a lack

of future dangerousness while incarcerated. (T. 2961-63) She stated that she had reviewed Dr. Lourenco's report and found it to be consistent with her opinion and continued to do so even when asked if it showed brain damage and agreed that it could. (T. 2961-63, 3011-12) Dr. Herrera also found impulsivity and poor judgment, a learning disability, borderline intellectual functioning and a lack of future dangerousness. (T. 3049, 3059, 3073-75) Moreover, while Dr. Marina admitted that her original testing showed no brain damage, she eventually stated that the symptoms she observed were consistent with Dr. Herrera's finding of brain damage. (T. 3011-12) Dr. Herrera explained that the different in test results for brain damage between him and Dr. Marina were consistent because of the nature of the brain damage. (T. 3109) As such, Dr. Marina and Dr. Herrera provided largely consistent testimony.

Moreover, Dr. Marina added that Defendant came from a dysfunction family, suffered abuse as a child, drank and had a narcissistic personality disorder. (T. 2923, 2928, 2940, 2954) Dr. Herrera added evidence of brain dysfunction as the result of head trauma. (T. 3065-66) Thus, by calling both witnesses, Defendant was able to present additional mitigation from each that otherwise would not have been present. Further, Dr. Marina's conclusion that the extreme mental or emotional

disturbance mitigator was based on her findings that were largely consistent with Dr. Herrera's finding. (T. 2961) Dr. Herrera provided the capacity to appreciate mitigator and minimized the contradiction in his failure to find the extreme disturbance mitigator by saying he was not looking for it. (T. 3081-82)

Further, it should be remembered that both doctors testimony was contradicted by Dr. Mutter's testimony that neither mitigator applied and that Defendant had no mental illness at all. (T. 3247, 3247-49, 3251-52) While Defendant attempts to suggest that Dr. Mutter's testimony was consistent with Dr. Marina's and Dr. Herrera's testimony because they all used the words impaired judgment, this is not true. Dr. Marina and Dr. Herrera stated that Defendant's bad judgment was the result of his mental state. Dr. Mutter explained that his answer about impaired judgment was based on his belief that anyone who committed this type of crime had bad judgment but that it was not the result of his mental state. (T. 3317)

Additionally, it should be noted that while Defendant asserted that the alleged inconsistency between Dr. Marina and Dr. Herrera resulted in both statutory mitigators being rejected, the trial court's sentencing order shows that it only considered the consistency in passing. (R. 1100, 1106) It then

rejected both of their testimony in favor of Dr. Mutter's testimony because his testimony was consistent with the facts of the case. (R. 1100-04, 1106-07)

Under these circumstances, there was no reasonable probability that but for counsel's decision to present both experts, he would not have been sentenced to death. *Strickland*, 466 U.S. at 694. The summary denial of the claim should be affirmed.

Regarding Defendant's contention that both experts did a bad job of evaluating him because Dr. Eisenstein so opined and they had not reviewed reports or spoken with Defendant's family member, the lower court properly denied this claim as well. In presenting his claim about failing to provide reports and family members to the experts, Defendant did not allege how the presentation of this material to his experts would have altered their opinions in anyway. (PCR. 209-10) He further did not allege that the failure to have provided the information created a reasonable probability of a different result. *Id.* Instead, he merely alleged that Dr. Marina's lack of review caused her to be unaware that the family members downplayed the drinking and abuse in the home and that Dr. Herrera's lack of review caused him to be unable to square his opinion with the facts of the case. *Id.*

However, in order to present a facially sufficient claim of ineffective assistance of counsel, a defendant must allege both deficiency and prejudice. *Strickland*. In order to show that there was prejudice from a failure to provide background materials to an expert, it is necessary for a defendant to show that the provision of these materials would have changed the opinion of his trial experts in a favorable manner. *Breedlove v. State*, 692 So. 2d 874, 877 (Fla. 1992); *Oats v. Dugger*, 638 So. 2d 20, 21 (Fla. 1994). The presentation of the testimony of a new expert is not sufficient to make this showing because counsel cannot be deemed ineffective for failing to shop for an expert. *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990); *see also Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000); *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999); *Rose v. State*, 617 So. 2d 291, 294 (Fla. 1996). Since Defendant did not make allegations that he was prejudice, the claim was facially insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Its summary denial should be affirmed.

Moreover, the lack of specific pleading is particularly important in this case. Dr. Marina testified that she prefers to perform her evaluations without considering outside sources. (T. 2922) She further stated that she did not consider interviewing family members to be valuable. (T. 3004) She

stated that knowing that the family members had denied abuse and minimized the father's drinking would not affect her opinion. (T. 2983, 3022-23) Thus, it appears that Dr. Marina did not wish to speak to the family and that hearing from them would not have changed her opinion.

Dr. Herrera indicated that he was evaluating Defendant solely for evidence of brain damage due to head trauma. (T. 3042) Dr. Herrera admitted that the facts of the case were inconsistent with his opinion of Defendant's abilities. (T. 3089, 3091) Thus, it appears that providing him with reports would not have caused a favorable impact on his opinion.

Given these circumstances, it was important for Defendant to have proffered that the experts opinions would have been favorable influenced by the provision of the background materials. Since Defendant did not make these allegations, the lower court properly denied the claim. It should be affirmed.

Even if Defendant could establish a claim of ineffective assistance simply by naming a new expert, the lower court would still have properly summarily denied the claim. The new expert upon which Defendant based his claim was Dr. Eisenstein. (PCR. 206-07) However, at the time this matter was being tried, Dr. Eisenstein had been appointed as the mental health expert for Ricardo Gonzalez, Defendant's codefendant in the Bauer case.

(PCR. 408) The Bauer case was pending throughout the time this matter was pending. Thus, it appears that Dr. Eisenstein would not have been available to evaluate Defendant and testify on his behalf at the time of trial. *Sanders v. State*, 707 So. 2d 664, 668-69 (Fla. 1998)(attorney-client privilege must be waived before defense expert can testify if not called by defense); *see also Cuyler v. Sullivan*, 446 U.S. 335 (1980)(simultaneous representation of codefendants a conflict of interest). Counsel cannot be deemed ineffective for failing to present evidence that was not available at the time of trial. *State v. Riechmann*, 777 So. 2d 342, 354-55 (Fla. 2000)(claim of ineffective assistance properly denied where evidence did not definitely show that evidence was available at time of trial); *see also Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987). As such, the lower court properly summarily denied this claim.

Even if Dr. Eisenstein had been available, the claim would still have been properly summarily denied because it was insufficiently plead. In the motion, the only allegation regarding a conclusion by Dr. Eisenstein was a conclusory statement that Defendant was dominated by Franqui. All of Defendant's other allegation in the claim merely asserted that Dr. Eisenstein believed that the experts should have further

evaluated areas of possible mitigation and had an MRI conducted without any allegation that evaluating these areas or having an MRI would produce any opinion. (PCR. 206-07) However, conclusory allegations are not sufficient to state post conviction claims. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The claim was properly summarily denied.

Moreover, it should be remembered that Dr. Herrera testified that he did not believe that medical imagining was particularly useful in evaluating brain damage. (T. 3064) Dr. Marina testified that she spent close to 30 hours evaluating Defendant. (T. 2920) She stated that had her evaluation indicated a need for further evaluations, she would have done more or referred Defendant to another expert. (T. 2947) Thus, it appears that the reason why counsel did not seek the further evaluation that Defendant now claims was necessary was because the experts did not consider it necessary. Under these circumstances, counsel's failure to have sought further evaluation would not support a claim of ineffective assistance of counsel. *See Walls v. State*, 926 So. 2d 1156, 1177 (Fla. 2006); *Williams v. Head*, 185 F.3d 1223, 1239 (11th Cir. 1999). The claim was properly denied.

To the extent that Defendant is also claiming that counsel was ineffective for failing to object to the State's comment in

closing about Dr. Marina's alteration of her testimony, this issue was not raised below and is not properly before this Court. *Griffin*, 866 So. 2d at 11 n.5. Moreover, the claim is procedurally barred. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). Further, Dr. Marina did alter her opinion on the stand. (T. 3011-12) Thus, there was nothing improper about the State commenting on this issue in closing, and counsel cannot be deemed ineffective for failing to make a contrary claim. *Rodriguez v. State*, 919 So. 2d 1252, 1281-84 (Fla. 2005). Defendant is entitled to no relief.

With regard to the claim concerning cumulative errors and suppression, the lower court properly denied the claim. While Defendant now asserts that the issue was raised as a claim of ineffective assistance of trial counsel for failing to seek suppression based on Defendant's IQ level as part of Claim X, the record belies this contention. Claim X was labeled as a claim that the cumulative effect of errors at Defendant's trial entitled him to relief. (PCR. 211) In the course of presenting the issue, Defendant asserted numerous claims of error. (PCR. 211-67) One of the issues that Defendant raised was the suppression of his confession on numerous grounds. (PCR. 222-45) While Defendant made general allegations about a waiver having to be knowing, intelligent and voluntary and that low

intelligence was a factor to be considered, he did not assert that his confession should have been suppressed because of his level of intelligence or inability to understand his rights. (PCR. 223, 224-25) Moreover, the only mentions of ineffective assistance of counsel were conclusory assertions that counsel had "failed to present specific arguments in support of suppression," and that counsel should have claimed that his confession should have been suppressed because of a delay in his arrest. (PCR. 223, 240, 241, 245) Thus, the record shows that no claim that counsel was ineffective for failing to seek suppression of Defendant's confession based upon his intelligence level was raised below, and in fact, no issue concerning his intelligence level being grounds to suppress was raised. Since the issue was not presented below, it is not properly before this Court now and should be rejected. *Griffin*, 866 So. 2d at 11 n.5.

Even if the issue had been presented below, it should still be denied. The issue of whether Defendant's confession was admissible was the subject of extensive pretrial litigation, which terminated unsuccessfully for Defendant. (R. 124-42) Defendant raised an issue regarding the denial of his motion to suppress on direct appeal, and this Court affirmed. *San Martin*, 705 So. 2d at 1344-45. This Court has held that attempts to

relitigate issues that were raised and rejected at trial and on direct appeal using different arguments are procedurally barred. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). Moreover, this Court has held that assertions of ineffective assistance of counsel cannot be used as an attempt to avoid the procedural bar on an issue that was raised and rejected on direct appeal. *Cherry v. State*, 656 So. 2d 1069, 1072 (Fla. 1995). Here, Defendant is attempting to relitigate the issue of the voluntariness of his confession by asserting different grounds and couching the claim in terms of ineffective assistance of counsel. However, doing so does not prevent the claim from being procedurally barred. Since the issue was procedurally barred, it was properly summarily denied. The lower court should be affirmed.

Even if the issue had been raised below and was not procedurally barred, Defendant would still be entitled to no relief. In *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Court held that a defendant's mental state did not render a confession or a waiver of one's *Miranda* rights involuntary, absent evidence of coercive police activity. *See also Hudson v. State*, 538 So. 2d 829, 830 n.4 (Fla. 1989). Moreover, in *Godinez v. Moran*, 509 U.S. 389 (1993), the Court rejected the concept that there is a special level of mental competence to

waive a constitutional right. Instead, the Court held that a defendant who was competent to stand trial is also competent to waive his rights. Thus, pursuant to these cases, the only issue to which Defendant's mental state would have been relevant would be whether Defendant understood his rights generally when he waived them.

At the suppression hearing, Defendant testified that he did not understand his rights the first time they were read so he asked that they be read again. (T. 386) According to Defendant when the right were read a second time, he invoked his right to counsel but his invocation was ignored and that his subsequent confession was the result of his fear from hearing others being beaten. (T. 386-87) In contrast, Det. Santos testified that he read Defendant his rights, Defendant indicated he understood and was waiving his rights and Defendant signed a waiver of rights form. (T. 268-72, 275) Det. Albert Nabut also testified that he read Defendant his rights and Defendant indicated he understood his rights and was waiving them when he interviewed Defendant a couple of days later. (T. 167-68, 171-73) After considering this testimony, the trial court found that Defendant's testimony was not credible and the officers' testimony was credible. (R. 138)

Given that Defendant testified that he eventually

understood and invoked his rights, any claim that his waiver was invalid because he did not understand his rights would have been without merit. *Connelly*; *Godinez*. As such, counsel cannot be deemed ineffective for failing to make the meritless claim that the waiver of rights was invalid because Defendant did not understand his rights. *Franqui v. State*, 32 Fla. L. Weekly S210, S212 (Fla. May 3, 2007). The denial of the claim should be affirmed.

With regard to the claim regarding Abreu's affidavit, the lower court properly rejected these claims.[8] In Claims XI and XII, Defendant asserted that he was innocent of first degree murder and the death penalty, respectively. (PCR. 267-68) As the United States Supreme Court has held, a claim of actually innocence of a crime is a claim of newly discovered evidence. *Herrera v. Collins*, 506 U.S. 390 (1993). In order to prevail on a claim of newly discovered evidence, a defendant must show that the evidence was unknown to defendant, his counsel or the court at the time of trial, that it could not have been learned through the exercise of due diligence, and that it would

[8] In the heading of this claim, Defendant asserts the issue pertains to the denial of Claims X and XI in the motion for post conviction relief. However, Claim X in the motion for post conviction relief was a claim of cumulative error that had nothing to do with the Abreu affidavit. (PCR. 211-67) Instead, the issues regarding the Abreu affidavit that were summarily denied were Claims XI and XII. (PCR. 267-68)

probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991).

In order to state a facially sufficient claim of innocent of the death penalty, a defendant must show "based on the evidence proffered plus all record evidence, a fair probability that a rational fact finder would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992)(quoting *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991)). The Court further noted that "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347. In applying this test to Florida's sentencing law, the Eleventh Circuit stated:

> a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the constitutional error, the sentencing body could not have found any aggravating factors and thus petitioner was ineligible for the death penalty.

Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991)(en banc). This formulation was cited with approval in *Sawyer*. *Sawyer*, 505 U.S. at 347 & n.15.

The totality of Defendant's allegations regarding Claim XI was:

> Defendant is innocent of First Degree Murder. Defendant did not plan to the killing of Lopez as claimed by the State. Abreu's affidavit clearly puts into question the finding of premeditation necessary to support a conviction for First Degree murder. Had Abreu's truthful testimony been presented Defendant may have been convicted of lesser offense on homicide.

(PCR. 267) The allegations regarding Claim XII were:

> Defendant is innocent of the death penalty imposed for First Degree Murder. Defendant did not plan the killing of Lopez as claimed by the State. Abreu's affidavit clearly put into question the finding of heightened premeditation necessary for the fining of CCP. Had Abreu's truthful testimony been presented Defendant would probably have received a life sentence.

(PCR. 268) In the affidavit mentioned in both claims, Abreu admitted that he and Defendant planned to commit the robbery and that the murder occurred during the robbery. (PCR. 314-16)

As can be seen from the foregoing, Defendant's claims consisted of little more than conclusory allegations that Abreu would testify that there was no plan to kill Mr. Lopez, which would allegedly affect the findings of premeditation and CCP. Even in these conclusory allegations, evidence was presented that Defendant committed first degree felony murder and that the during the course of a robbery and for pecuniary gain aggravators were applicable. Moreover, no allegation was made regarding the prior violent felony aggravator. Given that the

allegations were conclusory, that the allegations showed that Defendant was guilt of felony murder and two aggravators applied and that the allegations did not address another aggravator, the claims were facially insufficient and properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, the lack of specific allegations was particularly acute in this case. The State did not present Abreu's testimony that there was a prearranged plan to kill Mr. Lopez until the penalty phase. The State did present evidence that Defendant confessed to being involved in these crimes at the guilt phase. (T. 2114-23) Despite the lack of any statements of intent to kill, this Court found the evidence sufficient to support a conviction under premeditated and felony murder theories on direct appeal based on the plan to rob the Cabanases and the evidence of the defendants' actions:

> In issues 4 and 5, [Defendant] argues that the evidence was insufficient to sustain his conviction for premeditated first-degree murder. We find no merit to these issues. Both of the Cabanases testified that the masked men initiated the shooting immediately upon exiting the first Suburban. Cabanas Senior also testified that these assailants shot into the passenger compartment of the Blazer, with one shot only missing his head because he ducked quickly. The physical evidence confirmed extensive bullet damage to the victims' vehicles. The Cabanases' Blazer sustained ten bullet holes, including holes in the windshield and the passenger seat. Lopez's vehicle revealed evidence that one bullet had passed through the windshield over the steering wheel, through the back window, and landed in the bed of the truck; another

> bullet ricocheted off the windshield. The firearms evidence revealed that at least four shells were ejected at the murder scene from the gun that [Defendant] admits using; four other spent casings from the same gun were found near the Suburban that [Defendant] abandoned at another location. This evidence is sufficient to support [Defendant's] conviction for premeditated murder. Furthermore, the jury returned a general verdict on the first-degree murder charge and the circumstances of this case clearly support a conviction under the felony murder theory: [Defendant] was a principal and a direct, active participant in the attempted robbery which resulted in Lopez's murder and his actions clearly indicate a reckless indifference to human life. *See Tison v. Arizona*, 481 U.S. 137, 158, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987)(holding that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy culpability requirement for imposing death sentence under felony murder theory). Thus, we find no error as to [Defendant's] conviction for first-degree murder.

San Martin, 705 So. 2d at 1345-46. Since this holding has nothing to do with Abreu's testimony, Claim XI was properly denied. *Diaz v. State*, 945 So. 2d 1136, 1147-48 (Fla. 2006). The lower court should be affirmed.

Additionally, it should be remembered that while the lower court summarily denied these claims, it did grant an evidentiary hearing on the claims that Abreu's affidavit demonstrated violations of *Brady* and *Giglio*. At that hearing, Abreu testified that there was a plan to kill Mr. Lopez in place before the defendants started to commit the robbery. (PCT. 420-21, 430-36, 465-66) Based on this testimony, the lower court

rejected the *Brady* and *Giglio* claims. (PCR. 91-95) As this Court has noted, the standard for newly discovered evidence claims is stringent. *Melton v. State*, 949 So. 2d 994, 1011 (Fla. 2006). Thus, the fact that Defendant did not prove that he was entitled to relief under the lesser standard of prejudice for *Brady* and *Giglio* claims shows that these claims too were without merit. The denial of the claims should be affirmed.

With regard to the claim regarding the rejection of mitigation, the lower court properly denied this claim as facially insufficient and procedurally barred. The totality of Defendant's allegations was:

> The trial court failed to adequately consider the mitigating circumstances set out in the record. In addition, newly available evidence now establishes much greater mitigation for Defendant.

(PCR. 270) Given the conclusory nature of these allegations, the lower court properly denied this claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). It should be affirmed.

Moreover, this Court has held that claims regarding a trial court's rejection of mitigation are issues that are procedurally barred in post conviction litigation. *Griffin v. State*, 866 So. 2d 1, 18 (Fla. 2003). As such, this claim was properly denied as procedurally barred.

While Defendant now suggests that the trial court should have granted an evidentiary hearing on this claim by considering

Abreu's affidavit as newly discovered mitigating evidence, this claim is not properly before this Court. This claim is being raised for the first time before this Court. This Court has held that claims raised for the first time on post conviction appeal are procedurally barred. *Griffin*, 866 So. 2d at 11 n.5. As such, this assertion should be rejected.

Moreover, the lower court granted an evidentiary hearing on Defendant's claims that the Abreu affidavit demonstrated a *Brady* and *Giglio* violation. After considering the evidence presented in support of these claims, the lower court denied them, finding that Defendant had not proven any element of either of these claims.[9] This Court has held that the standard for relief under a claim of newly discovered evidence is stringent. *Melton v. State*, 949 So. 2d 994, 1011 (Fla. 2006). Thus, the fact that Defendant did not prove that he was entitled to relief under the lesser standard of prejudice for *Brady* and *Giglio* claims shows that this claim too was without merit. The denial of the claim should be affirmed.

With regard to the claim concerning this Court's proportionality review, the lower court properly denied this claim because it was facially insufficient, procedurally barred and without merit. The totality of Defendant's allegations

[9] The propriety of the denial of these claims is addressed in Issue II, *infra*.

under this issue was:

> The Florida Supreme Court ignored mitigating evidence in upholding Defendant's death sentence and did not properly weigh the aggravating and mitigating circumstances. The Florida Supreme Court did not conduct a proper proportionality review especially in light of the fact that Defendant was not the shooter. The Florida Supreme Court did not conduct a proper harmless error analysis on both guilt and penalty phase issues.

(PCR. 278) Given the conclusory nature of these allegations, the lower court properly denied this claim because it was facially insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). It should be affirmed.

Even if the claim could be considered facially insufficient, the lower court should still be affirmed because the claim was procedurally barred. This Court has held that claims regarding this Court's analysis of the aggravating and mitigating circumstances on direct appeal, its conduct of a proportionality analysis and its analysis of errors raised on direct appeal are procedurally barred in post conviction motions. *Trotter v. State*, 932 So. 2d 1045, 1050 (Fla. 2006); *Rodriguez v.* State, 919 So. 2d 1252, 1287 (Fla. 2005); *Griffin v. State*, 866 So. 2d 1, 18 (Fla. 2003). As such, the claim was properly denied as procedurally barred. Its denial should be affirmed.

Further, this Court has held that it is not this Court's

function to find aggravators and mitigators or to reweigh the aggravators and mitigators that the trial court found. *See Connor v. State*, 803 So. 2d 598, 612 (Fla. 2001); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). Moreover, this Court has held that it conducts a proportionality review in every case even when it does not mention the issue in its opinion. *Patton v. State*, 878 So. 2d 368, 380-81 (Fla. 2004). As such, the claim is also without merit. Its denial should be affirmed.

With regard to the claim that the lower court erred in denying his claim regarding the loss of trial counsel's file, Defendant does not now, nor did he in the lower court, suggest any basis upon which he would be entitled to post conviction relief because his trial counsel's file has been lost. However, this Court has treated such claims as claims regarding the loss or destruction of evidence. *Jones v. State*, 928 So. 2d 1178, 1192-93 (Fla. 2006). In order to state a claim based on the loss or destruction of evidence, a defendant must show (1) either that the State lost or destroyed the evidence in bad faith or that the lost or destruction of the evidence occurred when the State was delaying the case and (2) that the loss of the evidence prejudiced him. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *McDonald v. State*, 952 So. 2d 484, 494-95 (Fla. 2006); *Rogers v. State*, 511 So. 2d 526, 531 (Fla. 1987).

Here, Defendant did not allege that the file was lost or destroyed in bad faith, that the destruction occurred when the State was delaying the proceedings or that any specific prejudice occurred. Instead, the entirely of Defendant's allegations in the lower court were:

> Defendant is denied his Florida and U.S. constitutional rights in pursing his post-conviction remedies because his trial attorneys, Manuel Vasquez and Fernando DeAguero, have lost or misplaced their trial files. As such, the undersigned has been unable to thoroughly investigate issues of ineffective assistance of counsel.

(PCR. 276) Given the nature of these allegations, the lower court properly denied this claim because it was facially insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). It should be affirmed.

Moreover, rather than showing that the loss of trial counsel's file occurred because of bad faith or while the State was delaying the proceedings, the record actually shows that the lack of trial court's files is attributable to Defendant's lack of diligence. Defendant's trial counsel represented him through the entry of the sentencing order on November 23, 1993. (T. 3635) Defendant's post conviction counsel was appointed to represent him on February 11, 1999. (PCR. 6) From the time counsel was appointed until he was forced to file a motion for post conviction relief in April 2000, Defendant did nothing but

take extensions while the State sought his discovery for him. At the evidentiary hearing, Mr. de Aguero, Defendant's lead counsel, testified that he kept his file for seven years and then destroyed it because he had ceased practicing law and had kept the file for the period required by the rules. (PCT. 527) Thus, the record shows that the file was not destroyed in bad faith and that it was lost while Defendant delayed the proceedings. Having caused the delay, Defendant is not entitled to complain about it. *Keen v. State*, 775 So. 2d 263, 277 (Fla. 2000); *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997). The denial of the claim should be affirmed.

II. THE LOWER COURT PROPERLY REJECTED THE CLAIM REGARDING ABREU.

Defendant next asserts that the lower court erred in denying his claim regarding Abreu. However, Defendant is entitled to no relief, as the lower court properly determined that Defendant failed to prove any of the elements of his claims.

While Defendant does not clearly identify the legal basis of his claim in this Court, Defendant raised the claim in the lower court as a claim that the State knowingly presented false testimony from Abreu in violation of *Giglio v. United States*, 405 U.S. 150 (1972), in claim V of his motion, and as a claim that the State withheld evidence in violation of *Brady v.*

Maryland, 373 U.S. 83 (1963), in claim VI of his motion. (PCR. 146-55) In order to establish a *Giglio* violation, a defendant must prove: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). To demonstrate perjury, a defendant must show more than mere inconsistencies. *Maharaj v. State*, 778 So. 2d 944, 956 (Fla. 2000); *see also United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994). False testimony is material if there is a reasonable likelihood that it contributed to the verdict. *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003). *Giglio* violations are mixed questions of fact and law and reviewed de novo after giving deference to the lower court's factual findings. *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004).

In order to prove a *Brady* claim, a defendant must show:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). To show prejudice, the

defendant must show that but for the State's failure to disclose this evidence, there is a reasonable probability that the results of the proceeding would have been different. *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003). The question of whether the evidence is exculpatory or impeaching is a question of fact, as is the question of whether the State suppressed the evidence. *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). Questions of fact are reviewed to determine if they are supported by competent, substantial evidence. *Way*, 760 So. 2d at 911. The question of whether the undisclosed information is material is a mixed question of fact and law, reviewed de novo, after giving deference to the lower court's factual findings. *Rogers v. State*, 782 So. 2d 373, 377 (Fla. 2000); *Stephens v. State*, 748 So. 2d 1028, 1032-33 (Fla. 1999).

Here, the lower court denied these claims after an evidentiary hearing, finding:

CLAIM V

* * * *

> The Defendant has alleged that the State coerced Pablo Abreu to falsely incriminate the Defendant by presenting perjurious testimony to the jury during the penalty phase in order to establish the cold, calculated and premeditated aggravator. Mr. Abreu testified during the penalty phase that a meeting regarding stealing cars to be used during the robbery took place a couple of days before the shooting. When asked about what codefendant Franqui was going to do about the bodyguard (the victim, Raul Lopez), Mr.

Abreu responded, “First he was going to crash against him and throw him down the curb side, and then he would shoot him, but he didn’t do it that way.” *Trial Transcript, pp. 2717-2718*. Later in his testimony, Mr. Abreu was asked about the discussion he had with Franqui and the Defendant about killing the bodyguard that occurred before the cars were stolen. Mr. Abreu indicated that Franqui told him that he was going to run the bodyguard off the road then shoot him. *Trial Transcript, pp. 2727-28*.

During the evidentiary hearing, Mr. Abreu stated that the killing was discussed the day of the robbery while he, the Defendant and Franqui were driving around in his van before the robbery. Mr. Abreu testified on direct that this discussion occurred thirty minutes before the robbery. On cross-exam, he testified that this discussion could have taken place several hours before the robbery. Mr. Abreu testified that his testimony on this subject had always been consistent and truthful. *Transcript, p. 60, 66-68, 88, 102-04*.

In order to prove that the State intentionally presented perjurious testimony to the jury, the Defendant must show:

1. that the testimony was false;
2. that the State knew the testimony was false; and
3. that the statement was material

Routly v. State, 590 So.2d 397, 400 (Fla. 1991).

Based on the record and the testimony of the witnesses at the evidentiary hearing, this Court finds that the Defendant has failed to establish that the state forced Pablo Abreu to present perjurious testimony to the jury. During the penalty phase, the question ask about what Franqui was going to do with the bodyguard did not actually have a time frame. The Defendant’s claim assumes that the discussion regarding stealing the cars which occurred several days before the robbery included the interchange about killing the bodyguard. Mr. Abreu’s testimony during the penalty phase does seem to indicate that the discussion about killing the bodyguard took place before the cars to be used in the crime were stolen. The testimony from Abreu during the evidentiary hearing indicates that the discussion about the killing took place between thirty minutes and several

hours before the robbery and the killing of the bodyguard. The Defendant, at most, has shown that the difference between Mr. Abreu's trial testimony and the testimony during the evidentiary hearing was an arguable inconsistency. This Court finds that the Defendant did not prove that Mr. Abreu's testimony was false. Inconsistencies are insufficient to show that testimony is false. Maharaj v. State, 778 So.2d 944 (Fla. 2000).

Marilyn Milian, the trial prosecutor testified during the evidentiary that she only asked witnesses to truthfully relate what they knew. She stated, "Under no circumstances in this case or any other case would I ever tell a defendant who is flipping what to testify to or suggest to him that if he doesn't say it my way he won't have a plea agreement or force anybody to testify contrary to what it is truthfully happened." *Transcript, p. 171*. She further stated, "that is all we did and anything else would not only be unethical but suborning perjury. I never did that in my career and certainly not on this case either." *Transcript, p. 172*. Ms. Milian testified that she never witnessed John Kastrenakes suborn perjury or suggest that a witness testify a certain way or else. Transcript, p. 203. This Court finds that the Defendant failed to prove that the State knew any testimony was false or that the State knowingly presented perjurious testimony.

The inconsistency in Pablo Abreu's testimony regarding the time that the plan to kill the bodyguard was discussed. During the penalty phase, Mr. Abreu testified that the discussion took place before the cars were stolen and perhaps several days before the robbery. During the evidentiary hearing, Mr. Abreu testified that the discussion took place thirty minutes to several hours before the robbery, after the cars had been stolen. In either event, the time was sufficient to support the CCP aggravating circumstance. See Knight v. State, 746 So.2d 423,436 (Fla. 1998); Durocher v. State, 569 So.2d 997 (Fla. 1992); Valle v. State, 581 So.2d 40 (Fla. 1991). This Court finds that the Defendant had failed to prove that the Mr. Abreu's statement was material. For the foregoing reasons, this claim is denied.

CLAIM VI

* * * *

> The Defendant claims that a Brady violation occurred because exculpatory evidence favorable to the Defendant was suppressed by the State and the State presented false or misleading evidence to the jury. To prove a Brady violation occurred, the Defendant must proven:
>
> 1. that the State possessed evidence favorable to the defendant'
> 2. that the defendant does not possess the evidence nor could he obtain it for himself with reasonable diligence;
> 3. that the prosecution suppressed the favorable evidence; and
> 4. that had the evidence been disclosed to the defense a reasonable probability exists that the outcome of the proceedings would have been different.
>
> Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992); Hegwood v. State, 576 So.2d 170, 172 (Fla. 1991)(quoting United States v. Meros, 886 F.2d 1304, 1308 (11th Cir. 1989), cert denied, 493 U.S. 932 (1989)).
>
> Based on the record and the testimony of the witnesses during the evidentiary hearing, this Court finds that the Defendant has failed to establish any of the Brady elements. As discussed above, Pablo Abreu testified that he was always truthful and that no one told him how to testify. The difference between Mr. Abreu's testimony during the penalty phase and the evidentiary hearing was slight, a mere inconsistency. No evidence was presented that the State suppressed or failed to disclose any evidence to the Defendant. Because the Defendant's motion and the evidence failed to establish a Brady violation, this claim is denied.

(PCR. 91-95) Here, the trial court's factual findings are supported by the record. The penalty phase transcript does reflect that there was no time frame stated in the questions about Franqui stating that he would kill the bodyguard. (T.

2712-18) However, it also reflects that the subject was discussed during a larger discussion of a meeting that had occurred days before the crime occur. (T. 2713-18) Abreu did testify that the plan to kill the bodyguard occurred between a half hour and several hours before the crimes were actually committed. (PCT. 419-20, 431-36) Abreu did testify that he had always been consistent in his statements, including when he spoke to the State pretrial, at trial and at the evidentiary hearing. (PCT. 421, 423, 424, 429) He did testify that he was not told how to testify and that he was not threatened. (PCT. 424, 430) Ms. Milian did testify that she did not instruct Abreu regarding testifying in a particular manner or threatening Abreu about his testimony. (PCT. 546-47) Under these circumstances, the lower court's factual findings are supported by competent, substantial evidence and must be accepted by this Court. *Sochor*, 883 So. 2d at 785.

Moreover, given these factual findings, the lower court properly determined that Abreu's testimony was not false, that the State did not know Abreu's testimony would be false, and that the State did not possess any favorable evidence that it had suppressed. *Sochor*, 883 So. 2d at 785-86; *Maharaj v. State*, 778 So. 2d 944, 954, 956 (Fla. 2000)(State cannot be said to have suppressed evidence it did not have and inconsistencies

insufficient to show false testimony). The denial of this claim should be affirmed.

Further, the lower court properly determined that the inconsistency in Abreu's testimony was not material. The only change in Abreu's testimony was that it appeared from the penalty phase testimony that the discussion of the plan to kill Mr. Lopez was discussed in the days before the crime while he stated at the evidentiary hearing that the plan was discussed the morning of the crime at some point between 30 minutes and several hours before the plan was put into effect.[10] (T. 2713-18, PCT. 420-21, 435-36) However, under both versions of Abreu's testimony, the plan to kill Mr. Lopez was made in advance of the commission of any crime. This Court has upheld a finding of CCP when the time between the formulation of the plan and its execution did not extend for days. *Knight v. State*, 746 So. 2d 423, 436 (Fla. 1998)(CCP properly found even though defendant may not have decided to kill kidnapping victims until the drive from bank where defendant had force one victim to withdrawal money to secluded area); *Durocher v. State*, 569 So. 2d 997 (Fla. 1992)(CCP properly found where defendant thought about killing victim for a few minutes during robbery before doing so); *Valle v. State*, 581 So. 2d 40 (Fla. 1991)(CCP

[10] However, Abreu did tell the jury at the penalty phase that the plan was discussed "when we went around." (T. 2746)

properly found where defendant decided to kill victim 2 to 5 minutes before doing so). As such, the lower court properly determined that the minor inconsistency regarding the timing of the plan was not material. The denial of the claim should be affirmed.

Despite the support for the lower court's factual findings, Defendant asserts that the lower court erred in finding that there was no time frame in the question about the plan was clearly erroneous because the question was asked in a larger discussion about the meeting in the days before the crime. However, the finding was not clearly erroneous. The lower court acknowledged that the discussion of the plan to kill the bodyguard was part of a larger discussion about a meeting in the days before the crime. (PCR. 93) The finding regarding the lack of a time frame was limited to "the question asked about what Franqui was going to do with the bodyguard." (PCR. 93) In fact, that question did not have a time frame in it. (T. 2717-18) Thus, the lower court's findings that the question did not have a time frame in it but that it appeared that Abreu was speaking about a meeting that occurred in the days before the crime is not clearly erroneous. Defendant's contrary suggestion should be rejected.

Moreover, Defendant's challenge to this finding ignores the

context in which the finding was made. The lower court made these findings in support of its conclusion that Defendant had merely shown that Abreu's testimony was inconsistent, not false. (PCR. 93) In this context, the distinction between the time frame in the question at issue and the time frame of a larger discussion is significant. This Court has held that a defendant had failed to show that a witness had testified falsely, where the inconsistency in the testimony could be attributed to the witness's failure to understand the question fully or to the facts that the witness may have understood the subject matter differently. *Riechmann v. State*, 32 Fla. L. Weekly S135, S139 (Fla. Apr. 12, 2007); *Maharaj*, 778 So. 2d at 957. Here, it is clear that Abreu did not understand that he was changing his testimony, as he repeatedly stated that his statements had not changed since the time he spoke to the State pretrial. (PCT. 421, 423, 424, 429) Under these circumstances, the lower court's findings regarding the difference between a question and a larger discussion were proper. The lower court should be affirmed.

Defendant also asserts that the lower court should have found that the State was aware that the testimony was false because Abreu stated that his pretrial statement to the State was the same as his evidentiary hearing testimony. However, in

making this argument, Defendant ignores that Abreu testified that not only were his pretrial statement and his evidentiary hearing testimony the same but that this was also true of the testimony that he gave at trial.[11] (PCT. 421, 423, 424, 429) Given that Abreu did not perceive any inconsistencies in any of his testimony and that Ms. Milian testified that she simply asked Abreu to be truthful, the lower court's finding that the State did not know that there was any falsity in the testimony is correct. It should be affirmed.

Defendant also asserts that the lower court should have found that Abreu testified falsely about whether he and Defendant were the ones who were supposed to kill anyone. However, this claim is not properly before this Court. Defendant did not claim that Abreu's testimony was false because the plan did not call for Defendant or Abreu to be the killer. Instead, his claim was that he never knew that Franqui planned to kill anyone and that his testimony that Franqui had told him and Defendant that Franqui would kill the bodyguard was false. (PCR. 146-55) As such, this claim is not properly before this Court. *Griffin*, 866 So. 2d at 11 n.5.

Even if the claim was before this Court, Defendant would

[11] In fact, Abreu had testified at trial that shooting Mr. Lopez was planned "when we went around." (T. 2746) As such, it appears that the defense did not perceive the inconsistency at the time of trial either.

still be entitled to no relief. Abreu testified at the penalty phase that the plan was for Franqui to kill Mr. Lopez. (T. 2717-28, 2727-28) He stated that he and San Martin were supposed to get the money. (T. 2723) He claimed that he and San Martin were only shooting at the Cabanases to defend themselves. (T. 2730) In fact, when this Court affirmed the finding of CCP on direct appeal, this Court rejected the argument that because the plan called for Franqui to commit the murder, CCP should not apply to Defendant. *San Martin*, 705 So. 2d at 1349. Abreu's evidentiary hearing testimony was the same: the plan was for Franqui to commit the murder, not Abreu and San Martin. (PCT. 421) As such, the claim that Abreu's testimony was false because the plan did not call for Abreu and San Martin to commit the murder is without merit. It should be denied.

Defendant further appears to assert that Abreu's testimony makes it doubtful that Franqui's plan to kill Mr. Lopez was ever communicated to Defendant. However, this claim too is not properly before this Court as it was not asserted below. *Griffin*, 866 So. 2d at 11 n.5. Moreover, Abreu testified at the penalty phase that the plan was discussed in Defendant's presence. (T. 2717-18) At the evidentiary hearing, Abreu reiterated that Defendant was present during the discussion of the plan to kill Mr. Lopez. (PCT. 419-20, 434) Given the

consistent testimony that Defendant was present during the discussion of the plan, the lower court properly denied this claim and should be affirmed.

CONCLUSION

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

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Gustavo Garcia-Montes**, 6780 Coral Way, Miami, Florida 33155, this 17th day of September 2007.

_____
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CERTIFICATE OF COMPLIANCE

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

_____
SANDRA S. JAGGARD
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