IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-831

LOWER TRIBUNAL CASE NO. F92006089C
PABLO SAN MARTIN,
Appellant, v.
STATE OF FLORIDA,
Appellee.

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

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.851 relief. The trial court denied all but three (3) of thirty (30) claims brought forth by Mr. San Martin. The circuit court denied Mr. San Martin's claims after an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court; "Supp. R" -- supplemental record on direct appeal; "PCR." -- record on post conviction appeal;

REQUEST FOR ORAL ARGUMENT

The Appellant, Pablo San Martin suggests that the facts and legal

arguments are adequately presented in this brief.

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STANDARD OF REVIEW

A post conviction defendant sentenced to death is entitled to an evidentiary hearing unless the response and record conclusively show that the defendant is entitled to no relief. This Court encourages trial courts to conduct evidentiary hearings on initial post conviction motions in capital cases. See *Finney v. State*, 831 So.2d 651, 656 (Fla. 2002). The rules of procedure provide that such a hearing "shall" be held in capital cases on initial post conviction motions filed after October 1, 2001, "on claims listed by the defendant as requiring a factual determination." *See Finney*, 831 So.2d at 656; *see also*

Fla.R.Crim.P.3.851(f)(5)(A)(i). Upon review of a trial court's summary denial of post conviction relief without an evidentiary hearing, the reviewing court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999) [citations and footnote omitted].

An appellate court's standard of review of a trial court's ruling on an ineffective assistance claim is two-pronged: (1) appellate courts must defer to trial courts' findings on factual issues but (2) must review *de novo* ultimate conclusions on the performance and prejudice prongs. *Bruno v. State*, 807 So.2d 55, 61-62 (Fla. 2001).

STATEMENT OF THE CASE

The Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County Florida entered the judgment of conviction and sentence of death at issue.

On February 18, 1992, a grand jury sitting in Miami-Dade County indictment Mr. San Martin with one count of first degree murder. (R.1-6). Mr. San Martin pled not guilty.

Mr. San Martin was tried by a jury. The jury rendered a verdict of guilt for the charge of First Degree Murder on September 23, 1993. (R. 2483-2485).

After a penalty phase, the jury recommended death by a vote of 9 to 3 on November 4th, 1993. (R 3520-3521).

The jury found Mr. San Martin guilty as charged on all counts and recommended the death penalty by a nine-to-three vote as to the first-degree murder conviction. The trial court found three aggravating circumstances beyond a reasonable doubt: (1) prior violent felony convictions; (2) the murder was committed during the course of an attempted robbery and for pecuniary gain; and (3) that the murder was committed in a cold, calculated, and premeditated manner (CCP). The court found no statutory mitigating circumstances and only one non-statutory mitigating circumstance, that being that Mr. San Martin was a good son, grandson, and brother, had found religion in jail, and displayed a good attitude during his incarceration. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. San Martin to death on the first-degree murder charge. The trial court imposed a death sentence on January 25th, 1994. (R. 3630).

On direct appeal, this Court affirmed the conviction and sentence. *San Martin v. State*, 705 So.2d 1337 (Fla. 1998).

On October 4th, 1999, Mr. San Martin filed a motion to vacate judgment of conviction and sentence with special request for leave to amend (PCR. 31-60). Mr. San Martin filed a contemporaneous motion for continuance of deadline for filing his post-conviction relief motion. Mr. San Martin then filed a motion to disqualify the sitting judge. (PCR. 81). He supplemented this motion on April 18, 2000 (PCR. 104). The Court recused itself at the May 25th, 2000, hearing, due to the specific allegations that the prosecutor in the case, Ms. Millian, had threatened or coerced a witness into testifying falsely. (PCR. T. 215).

The Court held the *Huff* hearing on January 7th, 2002, wherein it denied 28 of the 30 claims of error presented in Mr. San Martin's amended motion. The Court granted an evidentiary hearing as to claims IV, V, and VI. The hearings were held on December 18th, 2002, and February 4, 2003.

Subsequent to the hearings, Defendant filed his notice of appeal as to the denial of his motion for post-conviction relief and the instant appeal ensued.

STATEMENT OF FACTS IN POST CONVICTION PROCEEDINGS

Mr. San Martin testified in his behalf. According to Mr. San Martin, during the guilt phase, he did not testify because his attorney, Mr. De Aguero, told him not to. (PCR. 370). Mr. San Martin specifically stated that during his confession he was under fear of violence and "under depression." He also wanted to tell the jury as to how his life had been. (PCR. 371). During the penalty phase, Mr. San Martin conferred with his trial counsel, Mr. De Aguero, where he was again told not to testify. Had he testified, he would have told the jury that he had not planned to kill anyone. He would have also asked for mercy and would have explained that he was now a changed person. (PCR. 376). He would have also told the jury that his father used to beat him, tied him to a chair and beat him with a chain where such beatings caused him head injuries, and would have plead for mercy. (PCR. 377)

Codefendant Abreu testified. Mr. Abreu was a codefendant who had been offered a life sentence plea agreement in exchange for his testimony. He had testified during the penalty phase of the trial. Mr. Abreu testified that he and his codefendants, which included Mr. San Martin, stole two cars because they would use them to steal some money from some people. He did not know who the future victims would be. (PCR. 418) The cars were stolen the day before the robbery. (PCR. 419) According to Mr. Abreu, codefendant Franqui stated that he (Franqui) would take care of the guard. (PCR. 412).

Abreu was very specific that there did not exist any plan for himself and San Martin to kill anyone. (PCR. 421). Franqui was asked the following questions:

Q. Now, this information that you just gave us, you told that the prosecutors in this case; is that correct?

A. Yes, I told them how it happened, how we had planned that.

Q. And when you say that, you told them that when the cars were stolen there never was a discussion to shoot and kill anyone?

A. When we stole the cars?

Q. Yeah

A. No, not when we stole the cars.

…

Q. Did you tell the prosecutors what you testified here today how it happened?

A. Yeah, I explained it from the very beginning, the truth.

..

During his testimony, it became clear that there was no discussion regarding killing anyone when the cars were stolen. This would have been the day before the actual robbery that resulted in the homicide. (PCR. 423-424).

Mr. Abreu testified that the words as to killing took place about half an hour prior to the actual robbery. (PCR. 424). During cross examination, Mr. Abreu stated that the conversation where he and Mr. San Martin were told by Franqui that he (Franqui) would kill the body guard could have taken place anywhere between half an hour to two hours prior to the robbery. (PCR. 436). Abreu admitted to having told the investigator that the prosecutors told him to testify that Mr. San Martin knew that someone was going to get killed. (PCR. 428).

During cross examination by the State, Mr. Abreu stated that he was not threatened. During cross examination by codefendant's attorney, Abreu stated that they were there to do a robbery. Abreu stated very clearly, "If they don't shoot at us, we don't shoot back." (R. 449). As explained below, this testimony is quite different from the evidence entered during the penalty phase.

Upon further cross examination, Mr. Abreu testified that he and the other codefendants, including Mr. San Martin, spoke "outside the house there." (PCR. 465). This conversation took place "like a day or two before the actual robbery." *Id*. Abreu then admitted that the decision to shoot the bodyguard as stated by codefendant Franqui only took place on the drive to

the actual robbery, and not during the previous meeting for the theft of the cars. (PCR. 466). During cross, Abreu admitted that the statement by Franqui regarding his intention or "need" to kill the bodyguard occurred while they were driving around in a van before the robbery. (PCR. 471). Abreu admitted that the comment was only made after they stole the cars. (PCR. 471-472).

Manuel Vasquez, Esq., was called to testify. He stated that he was not aware of the conversations between Mr. De Aguero, San Martin's lead penalty phase counsel, and Mr. San Martin. (PCR. 512). Mr. Vasquez also stated that he was unaware whether Mr. San Martin had undergone a religious conversion while in jail. (PCR. 513).

Mr. de Aguero testified. He agreed that he had spent a "good many" hours speaking to Mr. San Martin regarding the progress of the case. (PCR. 515). Mr. De Aguero stated that he spoke with Mr. San Martin several times regarding whether or not he should testify. (PCR. 518). According to Mr. De Aguero, Mr. San Martin agreed that he would not testify, but he was not happy with the decision. (PCR. 518). Interestingly, this came as a response to the question as to whether Mr. San Martin made an "independent decision about whether or not it would be in his own best interest to testify?" *Id*. Mr. De Aguero clarified it further, stating that he made a recommendation, a "fairly clear" recommendation, but that ultimately it would be Mr. San Martin's own decision. (PCR. 518). According to Mr. De Aguero, Mr. San Martin never expressed a change of mind regarding his own testimony. It is important to note that the answers from Mr. De Aguero were that "I don't remember that," (PCR. 520), "I have no recollection of that comment to me, to be honest with you." (PCR. 521).

Mr. De Aguero admitted that this was his first capital case. (PCR. 523). He admitted that he and Mr. San Martin had some problems getting through the issue of the felony murder rule. (PCR. 524). He did not recall Mr. San Martin having a problem with the representation before the trial began. (PCR. 524). Insofar his trial file, wherein all of the State provided discovery would be contained, as well as personal notes, work product and evidence of the work done on the case of behalf of Mr. San Martin, Mr. De Aguero admitted that he had destroyed the file or "did not keep it beyond seven years." (PCR. 527). Any notes made contemporaneously with the representation of Mr. San Martin were thus destroyed by trial counsel. (PCR. 527).

Mr. De Aguero stated that Mr. San Martin's disagreement with the felony murder rule and underlying application continued through the entire

process and trial. (PCR. 532). Mr. De Aguero appeared not to recall the number of witnesses that he called during trial, if any, the number of mitigation witnesses or the arguments made by the State during closing, (PCR. 532-534). Mr. De Aguero admitted that none of the family members that testified supported the testimony of Dr. Miranda, one of the psychiatrists who testified. (PCR. 540). The former prosecutor Ms. Millian testified. Mr. Kastrenakes did not testify.

SUMMARY OF THE ARGUMENTS

The trial court committed reversible error where it summarily denied each claims I through III, and VII through XXX of the thirty claims raised by Appellant in his amended motion for post-conviction relief as the claims were not **conclusively** refuted by the record.

The trial court erred in denying claim V of appellant's motion below as the court's reading of the penalty phase testimony of codefendant Abreu is factually wrong

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIMS I THROUGH III, AND VII THROUGH XXX RAISED IN HIS AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT DETERMINING SUFFICIENCY OF THE PLEADING ON ITS FACE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW?

The trial court summarily denied each claims I through III, and VII through XXX of the thirty claims raised by Appellant in his amended motion for post-conviction relief. The trial court erred in that it failed to consider whether any of the issues were legally or factually sufficient, and it failed to demonstrate clearly and objectively from the files and records in the case why each claim ought to be denied without any opportunity for an evidentiary hearing.

It is well held law that the movant in a Rule 3.850 motion filed in a capital case is entitled to an evidentiary hearing unless "(1) the motion, files, and records in the case conclusively show that the [movant] is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000); *see also* Fla. R.Crim. P. 3.850(d).

In the case of *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002), after the defendant filed a motion for post-conviction relief, the trial court summarily denied his claims. In its opinion, this Court clearly expressed the statement of

the Florida law:

This Court has held on numerous occasions that a defendant is entitled to an evidentiary hearing on his motion for post-conviction relief unless (1) the motion, files and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or the particular claim is facially invalid. *See Cook v. State*, 792 So.2d 1197, 1201-1202 (Fla. 2001); *Maharaj v. State*, 684 So.2d 726 (Fla. 1996), Lawrence at 127.

The defendant carries the burden of establishing a prima facie case based upon a legally valid claim. This Court has held the following:

A motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant. *Kennedy v. State*, 547 So.2d 912, 913 Fla. 1989) (citations omitted); see also *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000).

In *Atwater v. State*, 788 So.2d 223(Fla. 2001), where the issues raised included ineffective assistance, this Court provided guidance as to the principles applicable to all post conviction motions [*Atwater*; at 229]:

We begin our analysis with the general proposition that a defendant is entitled to an evidentiary hearing on a post conviction relief motion unless (1) the motion, files and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. *See, e.g., Maharaj v. State*, 684 So. 2d 726 (Fla. 1996); *Anderson v. State*, 627 So. 2d 1170 (Fla. 1993) ; *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987); *Lemon v. State*, 498 So. 2d 923 (Fla. 1986); Fla. R. Crim. Pro. 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. *See Kennedy v. State*, 547 So.2d 912(Fla. 1989). However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. (citations omitted). We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

Applying these principles, the trial court should have conducted the *Huff* hearing under the presumption that Appellant is entitled to a full evidentiary hearing on all of his factual claims. After determining timeliness, the trial court should have determined whether each claim was legally sufficient on its face and, if so, determine whether or not the claim is **conclusively** refuted by the record.

In this case, the trial court failed to properly determine that Appellant's motion, or the files and records in the case, conclusively showed that he was not entitled to relief as a matter of law. The trial court erred in summarily denying all but three of the claims without any evidentiary hearing. Since there was no evidentiary hearing as to twenty seven of the claims, this Court must accept appellant's factual allegations as pleaded because they are completely consistent with the record. As a result, the case should be remanded for an evidentiary hearing as to the following, or any individual, claim.

I-a (Claim III)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER III OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT DETERMINING SUFFICIENCY OF THE PLEADING ON ITS FACE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW INSOFAR THE RECORD SHOWS THAT TRIAL COUNSEL FAILED TO PROPERLY INVESTIGATE AND DEVELOP THE DEFENDANT'S FAMILY BACKGROUND.

Claim number III includes an allegation that trial counsel failed to properly investigate his background. Specifically, Mr. San Martin's life in Cuba, the poverty that Mr. San Martin endured in Cuba, the extent and seriousness of Mr. San Martin's father's alcoholism, the violence that Mr. San Martin's father would inflict on his children, the fact that Mr. San Martin would be tied to a table by his father and beaten with belts. In fact, one of Mr. San Martin's brothers, Javier San Martin, asserted that he was never told to tell the court everything.

It is well held law that beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a

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

Meeting the requirements of individualizing a defendant requires a thorough investigation into the defendant's background. Recently, the U.S. Supreme Court re-emphasized the importance of conducting an investigation into a defendant's personal history for mitigation purposes. In *Wiggins v. Smith*, 123 S.Ct. 2527 (2002), the Court examined the investigation done by a public defender's office in a capital murder case; as it was determined that defense counsel failed to follow up on evidence of their client's troubled past, their representation was deemed ineffective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Throughout the Court's analysis of what constitutes effective assistance of counsel, they turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See id*. at 2536-7

Under the ABA guidelines, trial counsel in a capital case "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id*. at 2537. Furthermore, when examining trial counsel's investigation, a reviewing court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)

Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion.[1] Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with this standard, counsel is obliged to begin investigating **both** phases of a capital case from the beginning. *See id*. at 11.8.3(A).

[1] The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases was updated in February 2003. However, references in this case will be to the edition that was in effect from 1989 to February 2003, during the time of MR. SAN MARTIN 's trial.

In Mr. San Martin's capital penalty phase proceedings, substantial available

mitigation never reached the jury, who plays such a key sentencing role in Florida. See *Espinosa v. Florida*, 112 S. Ct. 2926 (1992). This included the sister's testimony regarding the type of abuse that Mr. San Martin suffered as a child. Testimony such as the details of the family's life in Cuba, violence during drunken binges, beatings of the children while drunk, leaving Mr. San Martin tied to a chair for up to three hours, and beatings with belts, to name a few. (Post Conviction pleading, PCR. 117). As stated in the claim, trial counsel failed to develop the necessary relationship with the client and his family members so as to be able to provide a more balanced and complete picture of Mr. San Martin. Counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. As a result, counsel's presentation of mitigation evidence to the judge and jury was wholly inadequate.

Had counsel properly prepared and investigated, he would have discovered and utilized the complete testimony of the family members, and not, as happened, a watered down version. Instead of hearing the facts as they were, the jury heard that some bad times were had, but not really bad. It is exactly the watering down of the nature of the abuse that renders this failure ever so much more damaging. As stated by the expert, Dr. Miranda, the type of information desperately needed by Mr. San Martin was not brought forth due to its being the family's "dark secret." They would not talk about it so easily. Without this information, the experts could not properly provide a true picture of Mr. San Martin, and explain to a jury why Mr. San Martin should not receive the death penalty.

Counsel's failure to explore, develop, and present readily available mitigating material was unreasonable and deprived Mr. San Martin of his constitutional right to effective assistance of counsel and a reliable sentencing proceeding. The mitigating evidence that counsel failed to properly discover and present is powerful. This available mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of Mr. San Martin's moral culpability, and have provided an insight into Mr. San Martin human condition and served to humanize him before the eyes of the jury, so as to explain his criminal behavior. *Williams v. Taylor,* 529 U.S. 362, 146 L Ed 2d 389, 120 S Ct 1495 (2000).

Mr. San Martin was entitled to an evidentiary hearing on this issue as the records and files do not conclusively establish that he is entitled to no relief.

I-b (Claim IX)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER IX OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND COLLATERAL RELIEF, WITHOUT DETERMINING SUFFICIENCY OF THE PLEADING ON ITS FACE AND WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW INSOFAR THE RECORD SHOWS THAT THERE WAS A LACK OF DEVELOPMENT OF THE DEFENDANT'S BACKGROUND, COORDINATION OF THE EXPERTS AND A FAILURE TO INVESTIGATE APPELLANT'S BACKGROUND.

This claim included several issues or claims within one heading. Failure of counsel to properly investigate defense witnesses is properly raised by a post conviction relief motion. *Young v. State*, 511 So.2d 735 (2 DCA 1987). This Court has repeatedly recognized that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *State v. Lewis,* 838 So.2d 1102, 1113 (Fla. 2002). "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Ragsdale v. State,* 798 So.2d 713, 716 (Fla. 2001) (quoting *State v. Riechmann,* 777 So.2d 342, 350 (Fla. 2000)); *see also Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In a claim for ineffectiveness of counsel, reliability in sentencing is the linchpin, as the defendant has the burden of showing that any deficiency in counsel's performance "deprived the defendant of a reliable penalty phase proceeding." *Rutherford v. State,* 727 So.2d 216, 223 (Fla. 1998).

Failure to Coordinate or Present Coordinated Psychological Testimony from Experts: This claim deals with the lack of coordination by the defense of the experts and the presentation of conflicting testimony from these experts. Trial counsel retained two defense "expert" witnesses, Dr. Marina and Dr. Herrera. However, these witnesses critically contradicted each other. This is so even while the State's own expert had conceded in deposition that Mr. San Martin's judgment was impaired at the time of the offense. (Deposition of Dr. Mutter (10/27/1993), pp. 27-28).

Failure to Fully Present the Defendant's Background Due to a Failure to Develop Adequate Contact with Mr. San Martin's Family: The defense Post-conviction expert, Dr. Eisenstein, explained how the background was not developed, specifically, the Defendant's delay in development; sleep walking; bed wetting until the age of 13; the headaches; his parents illiteracy;

his own poor academic record and difficulties as well as his dire poverty.

Part and parcel of the reason why this information was never presented to the jury and the court is due to the failure to meet or talk with the family members. The Defendant's **experts never met with or talked to the Defendant's family, never reviewed reports in the case, and never interviewed witnesses**. (T 2976-2977 & T 3087). This left Mr. San Martin's explanation of his life as presented by Dr. Miranda appearing as a falsehood since his own mother denied the alleged abuse. (R. 2923). Dr. Miranda explained how Mr. San Martin had "violent memories of his father", but the mother stated that the father was not violent to the children. (R. 2924). This failure allowed the State to confront Dr. Miranda about the statements made by Mr. San Martin in reference to the violence he suffered at the hands of his father, and her own conclusions, with the fact that San Martin's own family not only failed to corroborate the allegations of abuse but in fact contradicted him. (R. 2983). However, Doctor Miranda had not previously spoken with any of Mr. San Martin's family members in order to have a true picture of his mental state or family history.

The poor preparation and presentation of the witnesses resulted in that Mr. San Martin's defense was riddled with unnecessary inconsistencies. Not only did the family contradict Mr. San Martin's complains of abuse, his own experts contradicted each other: Dr. Miranda stated that she searched for organicity, and indication of "neuropsychological dysfunction which leads to something being truly wrong in some part of the brain." (R. 2946). She repeatedly testified that she found no organicity. However, when shown Dr. Laurenco's report, wherein Dr. Lourenco found organicity, Dr. Marina then had to change her diagnosis on the stand. (R. 3013).

While it is axiomatic that "the brevity of time spent in consultation, without more, does not establish that counsel was ineffective" *Jones v. Estelle*, 622 F.2d 124, 127 (5 DCA 1980); See also *Carbo v. United States*, 581 F.2d 91, 93 (5 DCA. 1978) ("brevity of time ... is only a factor to be considered in the totality of the circumstances"); in the case at bar, the record contains significant indications that trial counsel did not devote sufficient time to insure an adequate defense.

It is well held law that the presentation of, or decision not to pursue a particular defense or tactic cannot be deemed ineffective where such defense would have been inconsistent with the overall theory of the case. See *Gavilan v. State*, 765 So.2d 308, 308-09 (5 DCA 2000). However, while trial counsel may make a tactical decision not to pursue a particular defense, a court's

finding that such a decision is tactical is usually inappropriate **without** an evidentiary hearing. *Kitchen v. State*, 764 So.2d 868, 869 (Fla. 4th DCA 2000).

Mr. San Martin Can Show Prejudice Due to the Ineffectiveness of Counsel, leading to his being deprived of a reliable penalty phase proceeding: in the case at bar, the presentation of conflicting psychological theories in such a way as to give rich grounds for closing argument to the State cannot be dismissed by labeling it "strategy."

Mr. Kastrenakes was able to argue the following to the jury:

> "But then on the witness stand she found out the Dr. Lorenco [sic] had organicity. Completely different. You can't have one and the other. They are mutually exclusive. You cannot have a mood swing disorder and have organic disorder dysfunction [sic]. So what did she do on the witness stand? Trust me. She actually changed her opinion. She actually just wheeled around on cross-examination and changed her opinion." (R. 3414).

In fact, the case law is clear that the failure to present any certain evidence can be strategy where it would conflict with the theory of the defense, but the opposite is not so. Trial counsel presented conflicting psychological information through a distinct failure to coordinate, select and properly present its case. Not only was Mr. San Martin deprived of having his psychological profile correctly presented to the jury and the Court, the presentation was so flawed that it left itself open to ridicule. Moreover, trial counsel failed to object to the State's closing argument wherein the State ridiculed and basically accused the defense of fabrication.

This failure cannot be labeled strategy. This Court's decision of *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), makes clear that strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation. *Wiggins* at 2539, citing *Strickland v. Washington*, 466 U.S. 668, 690-691, 104 S.Ct. 2052, (1984).

In *Wiggins v. Smith*, 123 S. Ct. 2526 (2003), counsel's failure to uncover evidence that his client never had a stable home and was repeatedly subjected to gross physical, sexual, and psychological abuse was considered ineffective assistance of counsel. Likewise, in *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000), the U.S. Supreme Court deemed counsel ineffective for failing to

uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison.

In the case at bar, the allegations contained within Appellant's Petition for Post-Conviction relief regarding the failure to adequately investigate, present, and coordinate Appellant's background are not conclusively refuted by the record. As the trial court's summary denial of post conviction relief without an evidentiary hearing, this court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999). Unlike the facts of *Bertolotti v. Dugger***,** 883 F.2d 1503 (11 Cir. 1989), wherein the testimony at the evidentiary hearing showed that counsel conducted a reasonable investigation into the circumstances of Bertolotti's childhood since counsel had interviewed appellant's parents personally and also had them complete a lengthy questionnaire concerning Bertolotti's past experiences. Also unlike *Bertolotti*, the record is void of trial counsel's efforts to delve into Mr. San Martin's background and the record is clear that the trial presentation was flawed and contradictory. Moreover, the quality of the mitigation investigation and review conducted by the attorneys cannot be independently verified by the destruction of the files on the part of the attorneys.

In the case at bar, the record does not conclusive show that the defendant was not entitled to relief. This Court encourages trial courts to conduct evidentiary hearings on initial post conviction motions in capital cases. *See Finney v. State*, 831 So.2d 651, 656 (Fla. 2002).

I-c (Claims X)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER X OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW INSOFAR THE RECORD SHOWS THAT THERE EXISTS NEWLY AVAILABLE AND GREATER MITIGATION, AND SUCH INFORMATION WAS STATED IN THE PLEADINGS

Claim X deals with the defense failure to adequately present arguments and issues for the motion to suppress together with the preservation of the same for appeal. The record is clear that trial counsel failed to allege Mr. San Martin's low IQ as a ground for the involuntariness of any statement. Trial counsel was aware of the fact that Mr. San Martin's IQ gave a result that

placed him in the range of borderline intellectual functioning, or borderline mental retardation. (R. 3050).

While appellate counsel raised the issue of Mr. San Martin's IQ as it related to his confession, trial counsel never presented San Martin's IQ and its effect on his capacity to waive *Miranda* even an argument during the motion to suppress. As this court stated:

Initially, we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review. *See Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). *State v. San Martin*, 705 So.2d 1337 (Fla. 1998).

It is well held law that any inquiry into the voluntariness of a Defendant's waiver of *Miranda* rights has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice, and not the product of intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, (99 S.Ct. 2560, 2572), 61 L.Ed.2d 197 (1979) (citations omitted).

Specifically, when considering the voluntariness of a confession, courts must take into account a "defendant's mental limitations" to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will." *Jurek v. Estelle*, 623 F.2d 929, 937 (5 DCA 1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981), as quoted in *Thompson v. State*, 548 So.2d 198, 204 (Fla. 1989).

While mental sub-normality or impairment alone does not render a confession involuntary, *Ross v. State*, 386 So.2d 1191 (Fla. 1980), the United States Supreme Court has held that permanent or temporary mental sub-normality is "a factor that must be considered in the totality of the circumstances to determine the voluntariness of a confession." *Sims v. Georgia*, 389 U.S. 404,

88 S.Ct. 523, 19 L.Ed.2d 634 (1967).

The central concern in the inquiry when dealing with individuals laboring under subnormal mental conditions is "a mentally deficient accused's vulnerability to suggestion." *Henry v. Dees*, 658 F.2d 406, 409 (5 DCA 1981). In adopting the standard from the Federal circuit, Florida Courts have held that "mental weakness of the accused is a factor in the determination, and that the courts also should consider comprehension of the rights described to him, ... a full awareness of the nature of the rights being abandoned and the consequences of the abandonment." *Kight v. State*, 512 So.2d 922 (Fla. 1987). *Thompson*, *supra*. The failure to even present the depth and seriousness of Mr. San Martin's mental deficiency in the motion to suppress cannot be labeled strategy. It is a clear and inexplicable shortcoming and failure in representation. This was done by the same trial counsel who "recommended" Mr. San Martin against testifying due to counsel's concerns as to his communicative capacity, and who complained to the court that Mr. San Martin could not understand the felony murder rule even though counsel had repeatedly attempted to explain it.

Trial counsel was deficient due to the failure to present this evidence. As the record does not conclusive show that the defendant was not entitled to relief, this Court should remand this case to the trial court to conduct an evidentiary hearing as to this claim.

I-d (Claims X, XI)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER X AND XI OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW INSOFAR THE RECORD SHOWS THAT THERE EXISTS NEWLY AVAILABLE AND GREATER EVIDENCE THAT GOES TOWARDS SAN MARTIN'S INTENT AND PREMEDITATION.

As explained below, in Argument II, the affidavit and testimony of Pablo Abreu when compared and analyzed against his penalty phase testimony clearly shows that San Martin did not have the requisite premeditation for the CCP aggravator. Minimally, the record did not conclusively show that the defendant was not entitled to relief, and this Court should remand this case to the trial court to conduct an evidentiary hearing as to this claim.

I-e (Claim XVII)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER XVII OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW INSOFAR THE RECORD SHOWS THAT THERE EXISTS NEWLY AVAILABLE AND GREATER MITIGATION, AND SUCH INFORMATION WAS STATED IN THE PLEADINGS.

The trial court summarily denied Appellant's claim XVII without a hearing, insofar the claim alleges new mitigation information due to an alleged failure on the part of the Defendant to allege the "other mitigation." (R. 770).

Appellant's writ, however, does clearly allege mitigating information, to wit the information found in Abreu's affidavit. These allegations are clearly stated in the pleadings.

The government's answer only deals with the age factor, not with the information found in the Abreu affidavit. As such, the trial court's order fails to address the issue, and as the motion, files and records in the case do not conclusively show that the defendant is not entitled to any relief, the Court committed reversible error in not granting an evidentiary hearing.

I-f (Claim XXIX)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER XXIX OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT PERMITTING ANY EVIDENTIARY HEARING.

Appellant argues that the Florida Supreme Court ignored the mitigating evidence and failed to conduct a proper proportionality review. Where deciding whether death is a proportionate penalty, this Court has stated that it conducts "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So.2d 390, 407-08 (Fla. 2003). In order to conduct such analysis, this Court considers the totality of the circumstances of the case and compares it to other capital cases. *See Urbin v. State,* 714 So.2d 411, 417 (Fla. 1998). The analysis, thus, entails "a *qualitative* review by this Court of

the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Id* at 416. A proportionality review, then, "is not a comparison between the number of aggravating and mitigating circumstances." *Sexton v. State*, 775 So.2d 923, 935 (Fla. 2000). This Court's opinion failed to include a proportionality review. See *State v. San Martin*, 705 So.2d 1337 (Fla. 1998).

I-g (Claim XXV)

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM NUMBER XXV OF APPELLANT'S AMENDED MOTION FOR POST CONVICTION AND/OR COLLATERAL RELIEF, WITHOUT PERMITTING ANY EVIDENTIARY HEARING OR AN OPPORTUNITY TO MAKE A RECORD FOR REVIEW INSOFAR THE CLAIM WAS PROPERLY BROUGHT FORTH REGARDING THE INEXPLICABLE LOSS ON THE PART OF BOTH TRIAL COUNSELS OF THEIR FILE.

This claim deserved an evidentiary hearing on its face. Trial counsel had lost or misplaced his files, thus, there was no defense attorney file for post-conviction counsel to review. This is not a disputed fact. The effect of this negligence is simply immeasurable, as the amount of work, the discovery actually received, the measure of the work done, the notes, all of what amounts to an objective measure of an attorney's work was denied to Mr. San Martin for post-conviction relief. (PCR. 238).

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING CLAIM V AS THE COURT'S READING OF THE PENALTY PHASE TESTIMONY OF CODEFENDANT ABREU IS FACTUALLY WRONG

In order to properly analyze the importance of the Abreu testimony, it has to be compared to the testimony provided at sentencing. When Pablo Abreu testified on behalf of the State during the penalty phase, he stated: (all emphasis in text below added)

Q. And what did Franqui tell you **or** Pablo that they were going to do to the bodyguard, if anything?

A. That it would be better for him to be dead first than Franqui.

Q. What did Franqui tell **you** that they were going to do with the bodyguard during the crime?

A. First, he was going to crash against him and throw him down the curb side, and then he would shoot at him, but he didn't do it that way.

Q. When we get to how he did it we'll talk about it. What was your job going to be in this plan?

A. To stop in front in the car, the stolen car that we had, with San Martin, and to turn, put on the turn signal as if I was going to turn left, and Pablo and I to get out of the car and shoot, to go where the men behind us were with the money.

Q. And take the money?

A. Uh – uh. (Affirmative)

Q. **After** you all discussed what this plan was going to be, did you in fact help steal the cars?

A. I don't know. I went with them, but I do not know how to steal a car. I went with the, I went in my van.

Q. You rode in your van?

A. Yes.

Q. You found a car that was suitable for stealing?

A. I took them, the three of us went in my van.

After the theft of the first car, the group stole a second car. The group parked the stolen trucks "behind a building on Palm Avenue and Okeechobee". On the day of the robbery/murder, the group rode in Abreu's van to the location where the trucks had been parked. After they reached Mr. San Martin's home, where the weapons were distributed, they rode in Abreu's car from San Martin's residence to Palm Avenue and Okeechobee. There, Franqui left in a stolen car, San Martin in another, and Abreu followed in his van. The group went to the area around the bank where the

victims were to collect the money. The group, Abreu, Franqui and San Martin, then parked the stolen vehicles near the bank and went in Abreu's van to drive the route that the targets of the robbery were expected to take. (R. 2722). It was Franqui who knew the route and showed the locations.

At this point, Mr. Abreu stated: (R. 2723)

Q. What did Franqui say you were supposed to do right before the ambush was supposed to start?

A. To stop the car, to put on the turn signal as if to turn. There was a construction thing there. And the he said I will come behind, I will take care of the escort, the one behind, and you then get down and go get the money.

In the chronology presented by the State through Mr. Abreu, the group then waited at a McDonald's parking lot in Okeechobee, nearby the Bank's location, and then went to the bank, driving around it three times in order to determine whether the intended victims were present. (R. 2723). Franqui pointed out the two target vehicles, and the group went in the van to collect the stolen trucks in order to complete the robbery. (R. 2724).

Mr. Abreu was then asked about the discussion with Franqui **and** San Martin where Mr. Franqui stated that he would run the body guard into the embankment and shoot him (R. 2728). To this statement Mr. Abreu answered "Uh-uh".

During the evidentiary hearing, Mr. Abreu stated that there never was a plan for Mr. San Martin or himself to kill anyone. (PCR. 421). In fact, Mr. Abreu was asked:

q. Was there ever a discussion that you had with Mr. San Martin or Mr. Franqui in which it was told to you that you and Mr. San Martin were supposed to kill anyone?

A. In the van as we were going around, Franqui said I'll take care of the security guard. I know that he's going to fire at me because he's the bodyguard and I'm going to shoot also, and you know, the firing began.

Q. Now, when is it that Franqui made that comment in relation to the actual incident, I'm talking about time wise?

A About half an hour or so, you know, while we were going around.

Q. Was it ever a part of the plan for you and Mr. San Martin to shoot and kill anyone?

A. To kill somebody, no.

Q. Now, this information that you just gave us, you told that to the prosecutors in this case; is that correct?

A. yes, I told them how it happened, how we had planned that.

Q. And when I say that, you told them that when the cars were stolen there was never a discussion to shoot and kill anyone?

A. When we stole the cars?

Q. Yeah.

A. No, not when we stole the cars. (PCR. 421).

This is in direct contradiction with the trial testimony during the penalty phase as detailed above.

In its decision denying relief as to this claim, the court stated "during the penalty phase, the question asked about what Franqui was going to do with the bodyguard did not actually have a time frame." The Court further indicated "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." (PCR. 93). It is clear that in the penalty phase testimony Abreu testified that the disclosure by Franqui as to his plan to kill the bodyguard was revealed to the group **before** the theft of the automobiles. Thus the Court's analysis of the trial testimony is clearly erroneous. The testimony had a clear chronological time frame.

Moreover, Mr. Abreu indicated that what he testified to during the evidentiary hearing in post conviction relief was what he had told the State. Thus, the State was aware that if Franqui had indicated his intent to kill the bodyguard, this only took place a short time before the actual incident. Thus, the State presented misleading evidence.

When the jury entered its recommendation, it did so based on information that was erroneous, with the State's knowledge to the fact that it was erroneous. Moreover, Abreu's trial testimony, when viewed in the light of his more recent testimony, sheds serious doubt as to whether or not Franqui

confided on Mr. San Martin his intentions of shooting or killing the driver at all, since the penalty phase testimony indicates only that Franqui told Mr. Abreu and San Martin that the bodyguard would be better off dead, but only told Abreu – and not San Martin - his actual plan of throwing him down and killing him. The sequence of events do not demonstrate the calculation and planning necessary to the heightened premeditation required to find the cold, calculated, and premeditated aggravator.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. San Martin respectfully urges this Court to reverse the lower court order, grant an evidentiary hearing on Mr. San Martin's claims as detailed above, and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing memorandum of law has been furnished by United States Mail, first class postage prepaid, to all counsel of record on the 20th of June, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellant's Initial Brief, complies with Rule 9.100(1) and Rules 9.210(a)(2), Florida Rules of Appellate Procedure, and that this Brief has been submitted in Times New Roman 14-point font and with Administrative Order No. AOSC04-84.

Respec

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