IN THE SUPREME COURT OF FLORIDA

JUAN CARLOS CHAVEZ,

Appellant,

v.

CASE NO. SC07-952
L.T. No. F95-037867

STATE OF FLORIDA,

Appellee.
________________________________/

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

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

DIRECT APPEAL

This Court's direct appeal opinion in Chavez v. State, 832 So. 2d 730 (Fla. 2002) recites the following facts [quoted in part]:

> MATERIAL FACTS
>
> *Jimmy Ryce's Disappearance*
>
> On the afternoon of September 11, 1995, nine-year-old Samuel James ("Jimmy") Ryce disappeared after having been dropped off from his school bus at approximately 3:07 p.m. at a bus stop near his home in the Redlands, a rural area of south Miami-Dade County. An extensive and well-publicized search of the area followed, but failed to locate the child.
>
> At that time, the defendant, Juan Carlos Chavez, was living in a trailer on property owned by Susan Scheinhaus. Chavez worked as a handyman for the Scheinhaus family, and was permitted to use their Ford pickup truck to run errands or do other work for the family. As part of his duties, Chavez frequently cared for horses owned by the Scheinhaus family, but housed on property owned by David Santana, which contained an avocado grove. There was also a trailer on that property, referred to throughout Chavez's trial as the "avocado grove trailer" or the "horse-farm trailer." [fn1]
>
> In August or September of 1995, Mrs. Scheinhaus reported to the police several times that items (including a handgun and some jewelry) were missing from her residence. Although she suspected Chavez, she lacked evidence of his culpability. She testified at trial that, in November, she had decided to obtain the evidence required to pursue her claim. With the help of a locksmith, on December 5, 1995, while Chavez was away for the day, Mrs. Scheinhaus and her son, Edward Scheinhaus ("Ed"), entered the trailer located on her property which Chavez occupied. She found the hand-gun--which she later identified in court as a gun she

had purchased in April of 1989--in plain view on a counter opposite the trailer door.

As Mrs. Scheinhaus continued to look inside the trailer, she discovered, in the closet area, a book bag which was partially open. Looking inside the bag, she saw papers and books. The work appeared to be in a child's handwriting, and she noticed the name "Jimmy Ryce." She also observed this name on one of the books. [fn2] When Mrs. Scheinhaus asked her son to look at the items, he also recognized the child's name.

As a result of this discovery, Mrs. Scheinhaus notified the FBI. When Chavez returned to the Scheinhaus residence at about 7:15 on the evening of December 6, armed FBI agents quickly surrounded and secured him. After being patted down, he agreed to go with Metro-Dade Police officers, who were also present, to the station for questioning.

Chavez's Detention

…

Over the course of the interrogation, and after having been repeatedly advised of his Miranda rights and knowingly waiving them, Chavez provided several versions of his involvement in Jimmy's disappearance.

…

After the physical evidence resulting from this contemporaneous investigation totally discredited each version of events which Chavez had initially proposed, Chavez agreed to tell the truth. However, Chavez explained that, before he would disclose the location of Jimmy's remains, he wanted the officers to guarantee that he would receive the death penalty. Estopinan advised Chavez that he could not guarantee that the death penalty would be imposed. However, Chavez continued to talk, asserting that the events would not have happened had he not been sexually battered by a relative in Cuba. Estopinan told Chavez that he "felt that it was time for him to be truthful and tell us what really happened to Jimmy, and . . . went back and began to ask him about Jimmy and where Jimmy was located. We wanted to find Jimmy."

A break followed this inquiry and then Chavez reiterated to Sergeant Jimenez the most recent account which he had given Estopinan. Chavez then went to the restroom for another break and, upon returning to the interview room, informed the officers that they were now going to hear the truth: "[W]hat do you want to know? I'll tell you what happened to Jimmy Ryce."

Chavez proceeded to admit to Estopinan and Jimenez that he had abducted Jimmy at gunpoint, traveled to the horse ranch, and sexually assaulted Jimmy before finally shooting him. Estopinan explained that the officers would need details from Chavez, [fn4] and requested permission to take a sworn statement. Chavez agreed to continue the questioning, and Estopinan and Jimenez "began to get details" about what had happened to Jimmy Ryce. At trial, Estopinan testified regarding the final version of Chavez's statement.

Chavez said that he had observed young children playing in water on his way home from Home Depot at approximately 3 p.m. Some of the boys were wearing just their underwear, and "as he saw the young boys wearing just their underwear, he took an interest in them." After observing the children, Chavez drove off, but returned a short while later, because he "still had a mental picture of what happened, meaning that he saw the young boys in their underwear by the canal bank, and decided that he wanted to take another look." Estopinan testified:

> And while this is occurring, he was driving on the avenue, he sees a young -- he sees a figure of a person, and then he realizes it was a young boy that he saw. At the same time he sees the young boy who later turns out to be Jimmy Ryce, again he's thinking about the young boys who are at the canal bank.
>
> . . . .
>
> He said at this point he's feeling some-thing sexual and he wants to -- he is -- what he's doing, he's doing picture -- what he explains to me is that he has a mental picture in his mind of the young boys in the canal with their underwear and he's also picturing Jimmy Ryce the young boy,

and what he does as he's driving the pickup truck in the opposite direction of Jimmy Ryce, he said at the time he had with him the Scheinhaus revolver, the Taurus, .38 caliber. And he said at this time Jimmy is walking on the left side of the road, and what he did is driving on the opposite side, he begins to drive on the opposite side of the traffic and drives and stops right in front of Jimmy Ryce causing him to stop.

The minute that Jimmy stops, he stops the truck, he gets out of the truck with the gun in his hand and tells Jimmy at gunpoint, do you want to die. And Jimmy made a comment to him, no. And he told Jimmy in English to get inside the truck. And Jimmy responds by getting into the truck via the driver's side door.

Once Jimmy is inside the pickup truck, he tells him to -- Jimmy removes his backpack and puts it between his legs and he Chavez gets into the truck with Jimmy, still holding the handgun. It's at that point he takes the revolver and he places it underneath his lap and tells Jimmy to put his head down so Jimmy wouldn't be seen by anyone. And at that point he tells me that he drives back to the horse ranch where the trailer was located.

. . . .

He told me that Jimmy left his backpack inside the pickup truck. Once they both exit the pickup truck, both him and Jimmy at his direction they go inside the trailer that's located inside the horse ranch. He goes on to explain that once inside the trailer he tells Jimmy to sit down on the bed. Jimmy complies. And that he sits on a black office chair close to Jimmy by the entrance and he begins to talk to Jimmy, he notices that Jimmy is, he's nervous and he's scared and Jimmy begins sobbing. And while this is occurring, Jimmy began to ask him, why did you take me? And Chavez explains to him, what he does, he begins to ask, he wants Jimmy to answer his own questions, well, why do you think I took you, things to that effect. He wants Jimmy to answer his own questions. He goes on to explain that at this point he feels like doing something sexual

> and that he tells Jimmy to remove his clothing. He said Jimmy complied by removing his shirt, his shorts, his sneakers and he wasn't sure if Jimmy was wearing socks or not. And then Jimmy remains in his underwear only, his white underwear he believes. He goes on to tell me that at this point he gets up and he tells Jimmy to also go ahead and remove his underwear. Jimmy complies and removed his underwear. And then he tells Jimmy to lay on the bed in the trailer and Jimmy complies. Jimmy lays on his stomach on the bed. Chavez tells me that he went into the bathroom area of the trailer looking for something. And I asked him, what are you looking for. He said, I'll explain. And he told me I was looking for something like a lubricant. And then he goes into the bathroom and he finds a see through plastic container, he said, with some blue lettering on it. And then he took a sample of the contents of the container to see if it would burn, and when it didn't, he came back to where Jimmy was and he placed this, the substance or the lubricant on to Jimmy's rectum, he said, and as he was placing the lubricant on Jimmy's rectum, Jimmy is asking what are you doing. And he mentioned to Jimmy that what do you think is going to happen, things to that effect. He unzipped his pants, he exposed his penis and he inserted his penis into Jimmy's rectum.
>
> . . . .
>
> He told me right after he inserted his penis in Jimmy's rectum, he again has a mental picture of the young boys in their underwear which he had seen at the canal and he said that he quickly ejaculated, and once he ejaculated inside Jimmy, he said he removed himself. [fn5]

Chavez said that he and Jimmy then dressed and left in the truck, indicating that he had intended to leave Jimmy in the area where he had picked him up. However, upon nearing the area where he had abducted Jimmy, Chavez noticed that police cars were present. Believing "that someone had reported Jimmy missing and

they were looking for Jimmy," Chavez kept Jimmy's head down in the truck and returned to the horse farm.

Estopinan testified regarding what transpired when Chavez and Jimmy returned to the horse farm:

> He said once inside the trailer, Jimmy is trembling and crying. And Jimmy asked, what's going to happen to me. Are you going to kill me. He noticed that Jimmy was very frightened. And what he does, he begins to speak to Jimmy in order to calm him down.

Chavez told Estopinan that he tried to calm Jimmy down by asking him questions. [fn6] He then explained how he killed Jimmy:

> Well, the next thing Chavez mentions happened is he heard a helicopter fly over the horse ranch. It was his opinion he believed the helicopter belonged to the police, that the police were searching for Jimmy. When he heard the helicopter flying over him, he went ahead and held Jimmy close by to him so Jimmy wouldn't go anywhere, and eventually he heard the chopper several times flying over him, and at one point he said he got up and began looking out the window to see if he could see the chopper, the helicopter that is.
>
> And while he was looking for the helicopter, Jimmy is still close to the front entrance of the trailer. He said that Jimmy made a dash for the door, Jimmy ran for the door trying to escape. He said that he tried to reach up to Jimmy, but he got tangled on the floor of the bathroom and at that point he said he took out the revolver belonging to Mrs. Scheinhaus, he pointed the handgun in the direction of Jimmy, fired one time hitting him. [fn7]
>
> He said that Jimmy collapsed right by the door and collapsed to the right by the door inside the trailer. He said after he shot Jimmy, he came up to Jimmy, he turned Jimmy around and held Jimmy in his arms and Jimmy took one last breath, he expressed it, and he said that was the last thing Jimmy did.

Chavez described that, to dispose of Jimmy's body, he found a metal barrel inside the trailer at the horse farm, and placed Jimmy's body inside the barrel. He transported the barrel containing the body from the horse farm to the Scheinhaus residence, where he removed the barrel and placed it in Chavez's disabled van, which was parked in the stable area. Chavez removed Jimmy's book bag from the pickup and carried it with him to his own trailer. That night, Chavez looked at some of the note pads inside Jimmy's book bag. Chavez noticed blood on his own clothing and eventually destroyed the clothes. During the night and into the next morning, "all he could think about was what he was going to do with Jimmy's body."

Two or three days later, Chavez attempted to use a backhoe on the Scheinhaus property to dig a hole in which to bury Jimmy, but the machine did not operate properly. Chavez remained concerned, particularly when he noticed that the lid of the barrel which contained Jimmy's body had come off.

Chavez pulled Jimmy's body from the barrel onto a piece of plywood, and, from there, his remains fell to the ground. "And he said at that point he went ahead and began to dismember Jimmy's body with the use of a tool." Chavez described the tool he used to dismember Jimmy's body, and even drew a picture of the implement. He explained that it took him a while to dismember Jimmy's body, as he was becoming sick and vomiting. "[B]ut then he completes it and he places three of Jimmy's parts [into] these three planters. And once he fills these planters with Jimmy's remains, he goes ahead, goes into the stable area of the stable where the building is located and he locates some cement bags. With those cement bags he seals the tops of the planters with cement." [fn8]

The oral interview concluded at 10:50 p.m. on December 8. While an interpreter and a stenographer were being obtained to record a formal statement, Chavez remained in the interview room, and did not further converse with Estopinan until the interpreter arrived. Then, at 11:45 p.m., Chavez began to provide a formal statement. Estopinan, Sergeant Jimenez, and the court reporter were present as the statement was obtained. After some preliminary questions, Chavez was again advised of his Miranda rights. At this time, Chavez confirmed that he had voluntarily agreed to

waive his first court appearance and that he had given the officers consent to search his property. [fn9]

When the statement was completed, each page of the statement was reviewed, and Chavez made any corrections he desired. He acknowledged in the statement that he was making the transcribed statement voluntarily; that no one had threatened or coerced him into making the statement; and that he had been treated well. Estopinan testified that, at the time he made his sworn statement, Chavez was "polite, cooperative and he was alert."

…

Chavez's Trial and Sentencing

Officer Michael Byrd recovered the loaded handgun from Chavez's trailer. Byrd also found a poster in Chavez's trailer bearing the likeness of Jimmy Ryce, which he processed as evidence. A box of bullets containing live ammunition, and one spent shell casing, were also found in the trailer.

Crime scene technician Elvey Melgarejo testified that, on December 8, 1995, he helped search and process a trailer on a horse/avocado farm. He searched the trailer and found "a tube of JR water-based lubricant" on a shelf inside the trailer. Melgarejo collected a sofa cushion and part of the wood floor of the trailer just inside the front door. These items were packaged for transmittal to serology for processing. Melgarejo also traveled to the Scheinhaus property, where he noticed the three concrete--filled planters and became suspicious that they might contain a cadaver.

Fingerprint technician William Miller identified Chavez's fingerprint on the handgun recovered from his trailer. To determine whether fingerprints were present on the handgun, he placed it in a laboratory chamber in which super glue fumes were released, surrounding the handgun and adhering to the residue and oils left by any fingerprints. As a result, a fingerprint matching that of Chavez was found on the firearm. Miller testified that there were "ten points of identification throughout this fingerprint, which is only common to Chavez. It's an absolute and

positive identification that his left thumb print made on the weapon."

On December 8, 1995, Miller also examined the books and notebooks found inside the book bag belonging to Jimmy Ryce. [fn13] He found Chavez's fingerprint on the front of one notebook found in the book bag. The fingerprint located on the interior of the notebook cover was found to "have sixteen points of identification, a positive identification, based on the left thumb print of Mr. Juan Carlos Chavez against the print which was developed on the inside cover." Another print of value was located on the textbook entitled Journeys in Science. He found "this particular print of value from this area to be made by the right middle fingerprint of Chavez. I had nine points of identification." When compared to the prints of Mrs. Scheinhaus and Edward Scheinhaus, the prints on the book bag contents did not match.

Forensic serologist Theresa Merritt of the Metro-Dade Police Department testified that she received items for examination on December 8, 1995. She was dispatched to the horse farm to assist crime scene personnel in attempting to determine whether blood was present. Merritt tested a twin-size mattress from the trailer, a cushion present on the bench in the trailer and a cut-out portion of the threshold area from the floor of the trailer. A scraping from the floor area produced a positive result for the presence of blood. Another sample, from a cushion in the trailer, yielded blood scrapings. (State's Exhibit 135.)

Anita Mathews, assistant director of the forensic identity testing laboratory for "LabCorp" of North Carolina, testified that she was "responsible for doing interpretation on the results of the testing that the technologists conduct." Mathews testified that they were not able to obtain a sufficient quantity or quality of genetic material from samples collected from the body of Jimmy Ryce for testing. However, DNA from the oral swab samples taken from his parents, Don and Claudine Ryce, was compared to the blood found on the floor of the trailer. This comparison produced the conclusion that the blood on the floor was extremely likely to have come from a child of Don and Claudine Ryce. [fn14] Two other blood samples taken from the floor of the trailer carried the same genetic characteristics. Another blood

sample, taken from the cushion found in the trailer, also was consistent with having come from the biological child of the Ryces. [fn15]

Dr. Roger Mittleman, Chief Medical Examiner for the Dade Medical Examiner's Department, testified that, on December 9, he conducted an examination of the contents of the three planters. [fn16] The cement in each planter encased the remains of what appeared to be a young boy. [fn17] The remnants of a cement bag were in at least one of the planters.

Dr. Mittleman described the clothing found on Jimmy's body: "It was dressed in this T-shirt and had on jeans and underwear. There was one sneaker on; one sneaker was off. There were socks." The doctor then corrected himself, and stated that only one sock was found on the body. [fn18] The doctor testified that a body expands as it decomposes due to the breakdown of material and biological processes, causing gases to expand. This process could cause a body placed in a barrel to expand to the point that a lid would be forced off or open.

The remains were significantly decomposed. [fn19] Using dental records from Jimmy's family dentist, a forensic dentist testified that the comparison with the jaw and teeth of the body was so strong that the "skeletal remains" were "positively identified as that of Jimmy Ryce." An X-Ray of the body cavity revealed a flattened projectile jacket that lodged in the area of the heart and "great vessels." The bullet entered at the point where the right sixth rib is located, went upward in the body, through the lung and the heart, and exited from the upper left chest. Based upon the trajectory of the bullet, the gun would have been pointing slightly upward and below the individual who was shot. However, there was no evidence on the body which would demonstrate how far away the gun was when it was fired. [fn20]

On December 20, 1995, Detective McColman had transported a tool known as a "bush hook," which had previously been impounded, to the medical examiner's office. Dr. Mittleman was asked to examine the bush hook to determine if its cutting characteristics were consistent with the injuries inflicted on Jimmy's body. The medical examiner noted that a number of the injuries inflicted on the body during dismemberment were consistent with having been made by the bush

hook. [fn21] However, he also testified that it was possible that more than one instrument had been used.

Firearms examiner Thomas Quirk of the Metro-Dade Police Department Crime Laboratory testified that a .38 caliber Taurus model 85 revolver (State's Exhibit 23) was submitted for his examination after it had been processed by the fingerprint section. He also received one aluminum jacket from a projectile recovered from the body of the victim, and two .38 caliber casings--a projectile identified as having come from a red bullet box (State's Exhibit 36) and a casing that had been fired from a firearm (State's Exhibit 35). The two empty .38 caliber shell casings found in Chavez's trailer were fired from the .38 recovered from Chavez's trailer.

Quirk testified that the manufacture of the barrel and the rifling process provide microscopic differences which are transferred to the bullet during firing and which repeat, similar to a fingerprint. Also, the projectile jacket recovered by the medical examiner and the lead core (the fatal bullet) were positively identified as having been fired by the gun recovered from Chavez's trailer: "My conclusion is that this bullet was fired in this weapon to the exclusion of all other weapons in the world. This is the gun that fired this bullet."

…

Chavez v. State, 832 So. 2d 730, 736-747 (Fla. 2002)(footnotes omitted). This Court affirmed Chavez's conviction and sentence on November 21, 2002. Chavez v. State, 832 So. 2d 730 (Fla. 2002), cert. denied, 539 U.S. 947 (2003).

POST-CONVICTION LITIGATION

On July 19, 2004, Chavez's court-appointed attorney, John Lipinski, filed an unsworn "Rule 3.850 Motion for Postconviction Relief" pursuant to Fla. R. Crim. P. 3.851. In an Order dated August 5, 2004, the court allowed Appellant until September 7,

2004 to file a sworn motion for postconviction relief following Mr. Lipinski's withdrawal and the subsequent appointment of Lee Weissenborn. Appellant's "Amended Rule 3.851 Motion for Post Conviction Relief" was eventually filed May 5, 2005, raising four grounds for relief. The State filed its response to the four grounds raised in the amended motion incorporating a response to the twenty claims raised in the original postconviction motion filed by Mr. Lipinski. In an Order filed August 24, 2005, the court addressed the four issues raised in the 2005 postconviction motion and separately addressed the issues from the 2004 motion. On December 13, 2005 the court granted Appellant another withdrawal of counsel and current counsel, Andrea Norgard, was appointed. Andrea Norgard filed "Defendant's Second Amended Motion for Post-Conviction Relief" on October 4, 2006. The State again responded and an "Order on Defendant's Second Amended Motion for Post Conviction Relief" was filed November 15, 2006 granting an evidentiary hearing on two claims.

The evidentiary hearing was held on January 9-11 and January 23, 2007, before the Honorable Marc Schumacher. After hearing the testimony presented at the evidentiary hearing and the argument of counsel, the trial court issued an order denying

postconviction relief on March 8, 2007. Appellant’s motion for rehearing was denied on April 20, 2007.

Post-Conviction Hearing Testimony

A) Trial Attorneys and Public Defender

Art Koch testified that he had been an Assistant Public Defender for 26 years and a member of the Capital Litigation Unit for “approximately 15” years. (V5, 92). Koch represented “perhaps two to three hundred people charged with first degree murder or capital cases.” (V5, 95). Koch regularly attended seminars on capital litigation when he was in the capital litigation unit. (V5, 97-98).

Koch thought that he and/or Mr. Harper first saw Chavez within 24 to 48 hours after his arrest. (V5, 99). Koch testified that early on in his representation of Chavez, Brummer told him that he wanted to meet with him once a week. (V5, 100). Given the sensitive nature of the case, Koch testified that he had no problem with that. (V5, 101). However, when Brummer learned how long Koch’s deposition of Detective Estopinan had taken, Brummer told Koch he did not want to read in the newspaper that lawyers representing Chavez are keeping detectives “off the street from investigating crime.” (V5, 101). Brummer said he was concerned about how the case would impact the office and “all that he had done for the Public

Defender's Office and for indigent representation in general." (V5, 101). According to Koch, Brummer "was obsessed that a key Republican would run against him." (V5, 102).

Koch testified that he was only assigned one case, Chavez, but that Brummer did not want him "to take long depostitions of significant witnesses." (V5, 102). He said "well, you could take the depositions of the detectives, but can you limit the depositions to about 30 minutes." (V5, 102). Koch responded, by saying, "that is ridiculous" I "could not possibly do that." (V5, 102).

Koch testified that Brummer did not want him looking for a man who, according to Chavez, was a witness who had direct contact with the crime scene and the trailer where Jimmy Ryce was killed. (V5, 103). According to Koch, Brummer suggested he have the police look for this individual so as to appear the search was "authorized by the police and that they should not get upset." (V5, 103). Apparently, according to Koch, Brummer was "of concern" that someone would complain about the Public Defender's Office representing that "horrible, perverted" defendant. (V5, 103).

Koch testified that he did not limit his depositions to 30 minutes, that was "absurd." (V5, 103-04). Koch did not restrict his depositions and "[e]ventually all the depositions

were taken." (V5, 104). There may have been a delay, but, once Brummer got "beyond what he believed would be politically problematic for him, we went ahead and took the depositions." (V5, 105). Koch testified that he faced no restrictions as to contacting expert witnesses and other activities that were under the public's "radar." (V5, 115). Koch estimated that he met with Chavez face to face 40 or 50 times during the course of his representation. (V5, 123).

Koch testified that the prosecution attempted to show that the horse trailer was some sort of "love nest" Chavez had in which he brought personal items like K.Y. jelly. (V5, 105). Assuming they found another person who owned the trailer, and, that "his testimony was appropriate in terms of what Mr. Chavez had represented" Koch would have established at some point he lived in the trailer and that the items found in the trailer where the homicide occurred were his. (V5, 106). It was six months or so before they made an effort to find this person "and were never able to find him." (V5, 106). This was potentially a "crucial" witness that Koch thought he was prohibited from attempting to find. (V5, 106).

Koch admitted that while he initially did not attempt to find the person Chavez said lived or stayed in the horse farm trailer where the murder occurred, he did attempt to find that

individual. (V5, 166). He was never able to find this person. (V5, 166). He did not even "know" if such a person existed, or, what he would have said, if found. (V5, 166-67). The only reason to believe this person existed is from the words of the defendant. (V5, 167).

While Koch did not call it interference from Brummer, he did receive suggestions as to pursuing a mental health defense as it related to the guilt phase. This was the position of Harper and Georgi, but such a course was rejected by Koch and Chavez. (V5, 112-13). Koch testified that he was assisted in this case by three other attorneys, Mr. Nally, Manny Alvarez, and, Andy Stanton. He characterized all three as very capable lawyers and for whom he had a great deal of respect. (V5, 125).

Initially, Georgi and Harper were assigned as co-counsel but they had a philosophical difference on how to proceed. (V5, 125). They wanted to stress the second phase preparation on the presumption that the client is guilty. So, Koch thought the conflict was between those lawyers and Chavez. (V5, 126). The path Georgi and Harper wanted to pursue required cooperation of the client, and, Chavez simply was uncooperative in developing information about childhood abuse. (V5, 128). Koch made specific attempts to develop this information through Dr. Quintana. (V5, 128).

Koch was not aware if Harper or Georgi developed information regarding alleged childhood abuse through Chavez, or "through their imagination." (V5, 129). The problem was that Georgi and Harper wanted to present a defense that Chavez did not support. "The problem developed between myself and Chavez on one side and Harper and Georgi on the other because they felt that what he told me concerning his innocence was pretty much irrelevant. That they would present this mental health defense, you know, that he was abused as a child." (V5, 130-31). But, he had no evidence of that from Chavez and Chavez told Koch he would not talk to them anymore. (V5, 131). Harper told Koch that while Chavez was reluctant to talk about his background, if they kept on working on him he would open up and tell us about his sexual abuse. (V5, 131). "I don't know what defense that they were presenting, frankly, that he was a pedophile, frankly." (V5, 132). Chavez complained to Koch that Harper and Georgi were trying to get him to say things that "were not true." (V5, 133).

Koch denied telling Harper or Georgi not to pursue mitigation. However, he did tell them not to pursue with Chavez the idea that he did it and we know that he was sexually abused. (V5, 134). Chavez did not want to talk to them any more about

that issue and Koch told "Edith [Georgi] not to pursue that general line of inquiry." (V5, 134).

Koch testified that he consulted with "roughly eight or ten" experts in this case. (V5, 137). Koch did not hire an expert in the Cuban criminal justice system. (V5, 137). Koch's motion to suppress did argue that the police exploited his alienage and lack of prior experience with the democratic system. (V5, 137-38). Koch explained that you cannot necessarily commission an expert to testify, but, to examine the circumstances. (V5, 139).

Koch hired Dr. Ofshe, a ten-year professor at the University of California who has written on the issue of false confessions. (V5, 139, 161-62). Dr. Ofshe had a national reputation and had testified in many high profile cases. (V5, 161-62). Dr. Ofhse came to Florida and extensively interviewed Chavez for a period of two or three days on the issue of the confession and its accuracy. (V5, 139). Dr. Ofshe ultimately reported that he could not assist the defense in its attempt to suppress the confession. (V5, 139). Dr. Ofshe had experience dealing with defendants not unlike Mr. Chavez, who come to this country from a totalitarian regime, and "find themselves being read Miranda rights and being under the criminal justice system." (V5, 140). Koch believed that Dr. Ofshe had the

background and expertise to deal with the alienage issue. (V5, 162). Koch had used Dr. Ofshe before and thought that Dr. Ofshe would qualify as an expert in those areas. (V5, 162). Koch had a high opinion of his integrity and skill. (V5, 140).

After examining Chavez for two days or so, Dr. Ofshe told Koch that he could not help him, that he didn't feel comfortable saying the confession was false. (V5, 163). When asked if Dr. Ofshe could not help him, why he simply did not find someone else, Koch responded, in part: "That is why I used Dr. Ofshe. I wanted a solid, credible, believable witness. When that didn't come to pass I did not feel that it was beneficial to Mr. Chavez's case to go out and find a warm body who could come in and testify. I believed it then and in retrospect I believe it now. I made the decision then and I would make the same decision now based upon the criteria that I mentioned and the experience that I talked about." (V5, 142-43).

Koch acknowledged that the second phase of a capital trial is "very important." (V5, 163). Mr. Nally was brought in to develop the penalty phase while Koch concentrated on the first phase. (V5, 164). At some point, Nally became sick and another lawyer, Mr. Alvarez, took over his duties. (V5, 164).

Koch had Chavez evaluated by a mental health expert, Dr. Quintana. (V5, 146). However, Koch did not call Dr. Quintana

to testify. (V5, 147). Chavez was "very, very reluctant to be examined by anyone." (V5, 147). Koch thought Dr. Quintana found that Chavez was not a pedophile. (V5, 148-49). Koch could not be certain of the reason Dr. Quintana was not called without looking at his notes. (V5, 150). Koch had not reviewed Dr. Quintana's report for eight years. (V5, 152).

Koch admitted that he held some personal animosity toward Brummer and Weed because he was put on probation because of his personal conduct. (V5, 175-77). Koch admitted that he was "captain" of the ship so to speak in this case. His focus was on the guilt phase and attacking the confession. If he could get the confession suppressed, it would also be beneficial to the penalty phase, eliminating a great deal of the aggravating factors the State could present. (V5, 156). Koch said that Chavez was asserting his innocence, and, at the same time, Harper and Georgi were telling him that the defendant was guilty and that they could explain away his conduct in the penalty phase. (V5, 157-58). Chavez complained about the conflict, telling Koch that Harper and Georgi were trying to get him to say things "that are not true." (V5, 158). In fact, Chavez told Koch that he did not want to talk to them anymore. (V5, 158). Koch thought he had a good rapport with Chavez, that he was "somewhat guarded, but he was cooperative." (V5, 159). He

thought that Chavez was "intelligent" and generally "quite easy to work with." (V5, 159).

Koch did not believe that pedophilia would be viewed by the jury as a mitigating factor. In fact, Koch believed it would guarantee a death sentence. (V5, 172). Moreover, Koch testified that he did not have evidence "of pedophilia." (V5, 172). Koch explained: "…There is no evidence of it. But in some cases lawyers decide this is what we are going to do. Why? Because we think that this is something that could tie that to -- that could tie up a capital case for decades in the appellate process and the defendant regardless of what he or she says is pretty much irrelevant." (V5, 173). If the defendant had told him that he was responsible for the murder of Jimmy Ryce and that he had been abused Koch testified that he would have been open to a change in strategy. (V5, 174).

Koch was recalled to the stand to testify regarding a watch Chavez said had been taken from him by the police. (V10, 553). Koch testified that prior to Chavez testifying he was going over in a summary fashion the questions he would ask and the answers he expected to receive. (V10, 554). Koch believed he mentioned the State took Chavez's watch and under the pressure of time recited what he, Koch, thought were his "responses to these various topics." (V10, 556). When the prosecutor cross-

examined Chavez, using a photo depicting him with the watch, Koch thought it "destroyed" Chavez's credibility and that for "all practical purposes the case was over." (V10, 558). Koch said he did not do it intentionally, he was simply "trying to reiterate to Mr. Chavez what I assumed incorrectly he told me." (V10, 561).

Koch agreed that he tries to be very thorough in preparing a witness for trial in every case. (V10, 564). Koch thought that he would use an interpreter early on in talking to Chavez, but at some point prior to trial Chavez became proficient in English and an interpreter was not needed. (V10, 565). Koch admitted that he writes out questions for a witness but generally does not go over them verbatim when that witness actually takes the stand. (V10, 566).

B) Koch agreed that he had 36 questions with categories prepared for Mr. Chavez. (V10, 567). There were notes written in Spanish which Koch agreed were probably written by Chavez. (V10, 569). One question indicated that something had been removed from his wrist. In Spanish, the reply to that question was written a "watch." (V10, 571). The question and answer included the name of the detective who removed the watch. (V10, 571-72). The last page of the question, page 36, included the answer in Chavez's writing, "after the confession was your watch

returned to you?" To which the answer, "si" appeared. (V10, 572). Koch thought it was odd that it was written in Spanish and was not sure if that was "something he [Chavez] returned to me." (V10, 573). However, Koch admitted that the trial transcript questions "seemed to" correspond with the practice questions from his file. (V10, 574-75). Koch admitted that Chavez's answers at trial reflected the "same set of questions." (V10, 575). Ultimately, Koch admitted that at "one point Chavez did in fact tell me they took his watch away." (V10, 577). In a deposition taken just one day prior to testifying, Koch stated that Chavez had not previously told him that the police took his watch away. (V10, 579).

Assistant Public Defender Steven Harper testified that he had been employed by the Public Defender's Office in Miami since graduating from law school. He had been the felony division chief and in 1994 started the Capital Litigation Unit. (V5, 26). Initially, it was Harper's primary responsibility to figure out what the defense team, consisting of lead counsel Art Koch and penalty phase co-counsel Edith Georgi Houlihan, would investigate to prepare for the penalty phase. (V5, 32-33). Harper believed he was the first lawyer from the Public Defender's Office to have contact with Chavez in December of 1995. (V5, 33).

When Harper first interviewed Chavez he found that he was a broken man, "he wanted to plead guilty at arraignment and he wanted to die." (V5, 35). Ultimately, he explained to Chavez that they had to find out what circumstances in his life led him here before he made any decisions about his future and "his legal circumstances." (V5, 35). He was successful in changing Chavez's mind about wanting to plead guilty at arraignment. (V5, 35). He hired a Spanish-speaking psychologist who examined Chavez to get some early indication of his mental status and competence after being held for such a long period in police custody. (V5, 37). While Harper thought he could communicate with Chavez in English, when the conversations turned to more complicated matters regarding the legal system, he used someone who spoke Spanish "to make sure that he understood." (V5, 38).

Harper learned early on from Chavez about his poverty in Cuba and that he was born during a botched abortion. He also began revealing to Georgi that he had been "seriously abused." (V5, 41). "So we were beginning to elicit what we thought was critical information that would begin to explain who he was, how he got there and, you know, his behaviour." (V5, 42). They began to receive information, but, had not verified it, that he had been abandoned as a child, made to fight other children, and

made to prostitute himself. "And this was happening to him when he was a young man." (V5, 44).

Harper had not been on the case for long, not even a year before he was removed. (V5, 44-45). Very soon after Chavez was "beginning to - - that he was beginning to talk to us about" he was told by lead counsel Koch not to develop this information or talk and to proceed with their investigation into the alleged abuse. (V5, 49). Koch believed that given the facts and publicity in this case, it would not matter what mitigation was uncovered, that he would be sentenced to death. (V5, 50). Moreover, Koch did not feel that Chavez was emotionally able to both prepare for a motion to suppress and testify in the first phase, and also be revealing things emotionally "that occurred to him." (V5, 50). Koch felt that the only chance they had was to win in the first phase. (V5, 51). Harper disagreed with this strategy, testifying that he needed as much information as possible in order to make an intelligent decision. "In other words, Mr. Koch may well be right. I mean, given the case I did not necessarily disagree with his analysis on what would happen." (V5, 51). But, Harper testified: "so you never know how it is going to turn out even if the case looks very ugly in the beginning unless you, until you have obtained that information and given it to the decision makers." (V5, 52).

After Chavez had revealed personal information to Edith Georgi, Harper thought that they must pursue this area in terms "of trust, relationship, and revealing information." (V5, 62). When Koch said not to pursue it, he took the matter to David Weed, his supervisor, the Assistant Public Defender. Weed told him that "somebody has to be in charge of the case" and that Koch had been "assigned first counsel." (V5, 62). "And there are times, you know, where counsel has to be removed, and that is what happened." (V5, 63).

Harper was aware of an allegation that the Public Defender, Bennett Brummer, prevented Koch from adequately or effectively preparing the case. (V5, 63). However, Brummer did not prohibit Harper from doing anything he felt he should do on the case. (V5, 63). And, he was not aware of, nor did he hear Brummer restrict or limit what Koch could do on the case. (V5, 63). Harper explained that historically he has had "significant policy" disagreements with his boss, but that "he has never interfered with how I approach a case and he has never told me regardless of the case how to litigate or what to do or what not to do." (V5, 63-64). And, Harper was not aware of Brummer interfering in the case at any time after he was removed from the case. (V5, 64). While Mr. Koch did complain about frequent meetings with Brummer, "he never gave me a specific complaint

about interference in the way that it would effect his decision-making and representation." (V5, 83).

Harper had some conversations with Dr. Quintana early on in the case, but he did not see Dr. Quintana's report. (V5, 84). However, Harper was aware that Chavez denied being sexually abused after he and Georgi were removed from the case and he "obviously" denied the abuse to Dr. Quintana as well. (V5, 84).

Harper admitted that his notes from the file show that Chavez "only wants us to function in his voice and to help him through the legal process in order to die, this because he is, quote, guilty, end quote, and for many other reasons. []" (V5, 69-70). While Chavez mentioned that bad things or abuse had happened to him in Cuba, Harper did not get to the point to corroborate that any of those things had "actually happened." (V5, 71). Nor was Harper aware of any attempts made to corroborate this information after he was removed from the case. (V5, 71). Harper was aware through discussions in the office that Chavez did not want abuse to be presented. (V5, 74). Harper was also aware that police had gone to Cuba and that family members denied that Chavez had been abused. (V5, 77).

It was Harper's understanding that Koch thought this must be a first phase case, and, Harper did not necessarily disagree with the analysis. (V5, 78). Nonetheless, Harper thought that

to make a fully informed strategic decision other avenues must be explored. (V5, 78-79). Harper agreed that this case was a parents' worst nightmare, a nine-year-old boy, kidnapped by a stranger, in broad daylight, coming home from school, and sexually assaulted. (V5, 79). Those factors certainly entered into the analysis but Harper thought that he must give a context or explanation, so that it was not just a "pure act of evil." (V5, 79).

After the guilt phase, Harper and Georgi along with other attorneys had a brief meeting to figure out what they were going to present in the penalty phase. (V5, 58). They thought the defense should ask for a continuance in order to develop additional mitigation. (V5, 58). Koch felt "ambushed" at the meeting, that other lawyers who were not on the case were interfering. Koch stormed out of the room and Harper said that he was later instructed by his supervisor not to get involved. (V5, 59).

Andrew Stanton testified that after spending a short time in the Public Defender's Office juvenile and felony divisions, he applied for and was accepted into the appellate division of the office. (V6, 197-98). One of his first assignments in the appellate division was to draft and research capital issues on the Chavez case. (V6, 199).

Brummer never interfered with Stanton's representation of Chavez. Nor did he hear from anyone in the office, including Art Koch, that Brummer interfered in the case. Stanton was aware that some attempt was made to locate a person who may have lived in the horse trailer. (V6, 202). He did not hear anyone complain, nor did he know of any restriction Brummer placed on finding this person. (V6, 202-03). "At the end of the day everything that I know of my knowledge is that we were permitted to litigate this case based on our decisions as lawyers." (V6, 231). There was no attempt to shy away from controversy or unpopular positions. Indeed, Chavez claimed to be a freedom fighter and the reaction against him, and, that position was particularly "unpopular." (V6, 231-32).

Stanton was aware of divergent opinions between Koch on the one hand and Georgi and Harper on the other. This conflict had been resolved prior to Stanton's entry into the case. (V6, 211-12). However, after the guilty verdict there was an attempt to revisit the defense strategy and Stanton was asked to organize a meeting with Koch, Georgi, and Harper. (V6, 212). Stanton thought that they wished to revisit allegations of sexual abuse. (V6, 213). He knew Alvarez was talking to family members and that they retained a mitigation specialist who went down to Cuba. (V6, 214, 233). But, he did not know what specific

investigation was being made into sexual abuse. (V6, 214). Stanton did not know who exactly attended the meeting, but recalled that Koch thought it was a setup. Koch made it clear that they were going to handle the case his way. (V6, 216).

Stanton wrote the motion to suppress and alleged that the police exploited the defendant's alienage and lack of experience with the justice system. (V6, 219). Stanton had no clear recollection of discussions regarding hiring a witness with knowledge of the Cuban justice system. While he believed some discussion on this subject did occur, he did not "remember what precisely was discussed or why we didn't call such a witness." (V6, 220). Stanton was familiar with Dr. Ofshe and the fact that he is an expert in the area of coerced confessions. (V6, 221). Stanton also stated that Dr. Ofshe was somewhat unusual in that he will not testify unless he concludes the confession was actually coerced and that he believed the person was innocent. (V6, 223).

Stanton was the least experienced lawyer assigned to the Chavez case and generally handled legal, not factual issues. (V6, 226). While Stanton talked to Chavez, Mr. Koch and Mr. Nally primarily interacted with and interviewed Chavez. (V6, 227). Stanton thought that the police interviewed family members of Chavez and in their investigation they did not

uncover any sexual abuse in Chavez's background. (V6, 235-36). The sole source Stanton was aware of in the office for any sexual abuse was the defendant, allegedly through Harper and/or Georgi. (V6, 236). "He [Chavez] was not continuing to make these claims [abuse], but I had never heard of him recanting it either." (V6, 238). He admitted that Dr. Quintana's report reflects that the appellant denied being sexually abused or molested. (V6, 240). In Stanton's opinion, Dr. Quintana did not find any significant mental mitigation. (V6, 241).

Stanton acknowledged that mitigation was presented in the penalty phase, including a witness to Chavez's jail behavior, his mother to talk about the botched abortion, the poverty, and circumstances of the defendant's family life in Cuba. (V6, 247-48). Also Chavez had siblings and that he was close to them, was brought up with strong Christian beliefs, that he was provided clothing, food, and had a normal relationship with his father. (V6, 248).

Bennett Brummer testified that he has been the Public Defender for Dade County since 1977. (V6, 260). Several attorneys were assigned to the Chavez case, which, Brummer agreed, was one of the more "sensational" murder cases handled by his office. (V6, 261). At some point, Brummer became aware of a rift between the attorneys assigned to the case. He

thought the rift was between the guilt phase and penalty phase counsel. (V6, 262). Art Koch was the lead counsel and that is the person with ultimate decision-making power over the case. (V6, 263). Brummer took an interest in the case and wanted to ensure the defendant had dedicated lawyers with access to any expert witnesses and investigators that they might need. (V6, 264).

At no point did Brummer place any restrictions on the lawyers as to how they should proceed in the case. (V6, 264). He did not place any restrictions on the length of depositions in the case. (V6, 264-65). He did not place any restriction on who the defense attorneys could interview. He might have suggested, as a precaution for his attorneys' safety, that they take a police officer with them. (V6, 265). In fact, he did have safety concerns for his staff because they received bomb threats and there was a lot of hostility toward his office. (V6, 266). Brummer never prevented the attorneys from filing any motions. (V6, 267). Brummer never told Koch not to depose or to limit his depositions of the detectives. Nor, did he tell Koch not to find, or, to limit his investigation into someone who may have lived in a horse farm trailer. (V6, 271-72).

Pat Nally testified that he worked for the Public Defender's Office for six to eight years before a brief stint in

private practice where he continued to practice in criminal law. (V7, 281-82). After he returned to the Public Defender's Office, he was assigned to the Capital Litigation Unit in 1996 or 1997. (V7, 286). He was assigned to the Chavez case to assist Koch in both the guilt and penalty phase. (V7, 288). He was primarily working up the penalty phase, but, it was important for him to be aware of what was occurring in the guilt phase. (V7, 289).

At no point in his representation of Chavez did Mr. Brummer say anything to him about what they could or could not do in representing Chavez. (V7, 290). At some point Koch did complain about going into an interview with police officers and another claim that was nonsensical, so he "didn't pay any attention to it." (V7, 290). Mr. Koch never complained that Brummer had limited him over political concerns about the 1996 election. (V7, 291). Nally did not hear of any limitation on depositions. (V7, 291). Nally did learn from Chavez about a guy who lived in the horse trailer, but, when he confronted Koch, he simply said "we couldn't find him." (V7, 291-92). Koch never complained that Brummer had restricted his search for this person. (V7, 292).

Koch and Nally discussed filing a motion to disqualify all the judges in the circuit. (V7, 292). However, Nally said that

while they moved to recuse the first judge on the case, they had no "good faith" basis to file a motion to recuse the entire circuit. (V7, 293). Koch never told Nally that Brummer said they could not file such a motion. (V7, 293). Brummer did "nothing but support the defense team and make sure that we were doing as good of a job as we could do." (V7, 293). He saw nothing "that would lead me to believe that Bennett [Brummer] interfered with his case." (V7, 294). Nally left the case prior to trial for health reasons. (V7, 296-97).

Nally was assigned to replace attorneys Harper and Georgi. (V7, 298). Early on, Nally became aware of information suggesting that Chavez had been sexually molested. (V7, 298). Nally spoke to Koch about it, and learned from him that Chavez had denied it, and that the case was going to be a "first phase defense." (V7, 299). Nally attempted to develop further information from Chavez, but, "he didn't lead me to believe that there was anything to be found there and--." (V7, 299). "I got the impression that he didn't want to discuss it." (V7, 300).

Nally agreed that evidence a defendant has been physically or sexually abused is significant mitigation. (V7, 302). Nally spent time trying to get that type of information from Chavez. (V7, 315). He tried to gain a rapport with the defendant and explained that it was in his best interest to disclose this type

of information. (V7, 315-16). He persisted in attempting to elicit this information from Chavez the entire time he represented him. (V7, 316). Nally made phone calls to individuals in Cuba attempting to develop information regarding sexual abuse. However, he never received information from any of these individuals to indicate there was sexual abuse in Chavez's background. (V7, 317).

Nally agreed that the first phase defense was the way to go in this case. (V7, 318). Chavez's position, he wanted a first phase defense and did not want life in prison. (V7, 319). Nonetheless, Nally still made every effort to prepare for the penalty phase and would have included physical or sexual abuse if Chavez had been willing to talk about it or admit it. (V7, 318). Dr. Quintana's report indicates that the defendant denied being sexually abused. (V7, 319).

Edith Georgi Houlihan [Georgi] testified that she worked for the Public Defender's Office in Miami and has been coordinator or co-coordinator of the Capital Litigation Unit since its inception in early or mid 1990's. (V7, 331-32). Georgi "guessed" that she has been involved in a hundred capital cases in the course of her career. (V7, 333). Georgi was initially assigned to the Chavez case along with Koch and was on the case for "around six months." (V7, 338-39).

Brummer encouraged members of the Chavez team to meet with him to keep him up to date on what was happening in the case. (V7, 339). However, at no point did she become aware of any restrictions Brummer allegedly placed on the defense. Nor did Koch indicate that Brummer had placed any such restriction on him in terms of preparation, investigation, or litigation of the case. (V7, 339). There were no restrictions on depositions. (V7, 340). She never heard that Brummer was upset about the length of depositions. (V7, 341). Brummer did not limit or restrict the defense from attempting to find or investigating a witness until after the election. (V7, 342-43).

Georgi and Harper spent a lot of "intensive time" with Chavez. (V7, 345). When she first met with Chavez he was despondent and suicidal. (V7, 345). They frequently met with him and were developing a relationship of trust. (V7, 346). They tried to develop information about his childhood in Cuba and he finally began to disclose how he and either a brother or best friend had been put in a place where people took sexual advantage of children. (V7, 350). Georgi claimed she was alone with Chavez when he disclosed this information. She shared it with Mr. Harper. (V7, 350). The process of talking to Chavez was emotional and she shared some of this information with Koch. (V7, 351). Chavez told her that he had not told other people

about these incidents. (V8, 382). Georgi was not sure if he revealed the abuse after one lengthy, "intensive conversation" or whether he made these disclosures on two visits. (V8, 382). "I was not recording things or writing down details or following up with the questions that one would need to do to really investigate." (V8, 383). She did tell Mr. Alvarez when he came on the case that he needed to follow up on it. (V8, 416). Georgi had "no idea" what was presented in the mitigation phase of Chavez's trial. (V8, 419). When presented with a hypothetical question in which the defendant recanted allegations of abuse and after an independent investigation, no abuse was discovered, then Ms. Georgi admitted that there would be no evidence of abuse that the attorneys could present. (V8, 419-20).

Koch had gone to see Chavez and when he returned said that Chavez was upset and concerned. (V7, 351). Koch said that she was pushing him over the edge toward suicide or an emotional breakdown. (V7, 351). Georgi explained to Koch that they were exploring areas that were very painful for Chavez to disclose. (V8, 380). Georgi noted that it was "common" knowledge that abuse victims are often reluctant to disclose it. (V8, 380-81). Koch, however, did not want Georgi and Harper to continue questioning Chavez on "these very sensitive matters." (V8,

382). Koch thought it was getting Chavez "too upset" and they all knew that he had been suicidal in the past. (V8, 382). Georgi testified that she and Koch "had different ideas about directions to go in and I felt strongly in one way and he felt very strongly in another way." (V8, 389).

Georgi had Chavez examined by a psychologist after Koch expressed concern about his mental state. Dr. Mosman reported back that it was not too psychologically dangerous to pursue "this kind of conversation." (V8, 385). Dr. Mosman also told Georgi that the defendant would always have control of conversations and that he advised her that you will never "force the defendant" to say anything or "manipulate him." (V8, 412).

Koch basically shut them down as lead counsel, as Georgi explained: "So there are some decisions that have to be made and someone has to be ultimately in charge." (V8, 386). When asked if she independently attempted to investigate the abuse allegations, Georgi testified: "It is not something that you are going to stomp down to Cuba and find anybody talking about. So I think that we would have needed a tremendous amount of detail from Mr. Chavez to really follow through on this. I don't think that you could just take a stab at it." (V8, 392). Georgi also testified that she was not on the case much longer

after this “particular disagreement surfaced” to conduct such an investigation. (V8, 393).

Georgi disagreed that she was “removed” from the case, testifying: “Well, Mr. Koch and I mutually agreed that there is no way we could be compatible on this case; it wasn’t going to work.” (V8, 395). Mr. Nally and then Mr. Alvarez eventually came on board to assist Koch. (V8, 395). Georgi thought she would have told Mr. Nally what she had uncovered. (V8, 395).

After the trial but prior to the penalty phase there was a meeting in the office “to see what could be done to prepare for the penalty phase.” (V8, 396). During this meeting, Georgi, along with Harper and Spalding, an appellate specialist, tried to encourage Mr. Koch that additional investigation should be done. They felt that now Chavez had been convicted and was facing the death penalty the family might have a different “mind set.” (V8, 397). However, Koch “blew up” and stormed out of the meeting. (V8, 397).

Manuel Alvarez testified that he went to work for the Public Defender’s Office after he graduated from law school. He spent three years in the office before going into private practice for three years. (V9, 432). In 1992, he returned to the Public Defender’s Office as a felony division lawyer. (V9, 432). Alvarez tried several murder cases with the Public

Defender's Office, but no capital cases. (V9, 433). In late spring of 1998, Mr. Nally developed health problems and Alvarez had to replace him on the defense team. (V9, 434). He was on the case "a little over three months" before the case went to trial. (V9, 434). Alvarez attended one or two death penalty seminars prior to his involvement in the Chavez case. (V9, 434).

Alvarez did not learn anything or hear any complaint from Koch regarding any restriction or prohibition that Brummer had placed on the defense. (V9, 436). Nor did Brummer limit or prohibit him from doing anything during his representation of Mr. Chavez. (V9, 436). Alvarez was aware that Chavez had said that property taken from the horse trailer was not his, that they had been left by a former resident. (V9, 437). Alvarez never heard anything about a prohibition or restriction on finding this person: "My understanding was the investigator had gone out and had made efforts to locate that individual, but was unable to find them." (V9, 437).

Alvarez testified that their "analysis of the case is that given the nature of the defense we felt unless the jury had some residual doubt of some nature it would be very difficult to obtain a life recommendation." (V9, 442). Alvarez did receive information regarding potential sexual and physical abuse in

Chavez's childhood. (V9, 442-43). While he did not have specific recollection of the time frame or source, he received this information from discussions with Harper and Nally. (V9, 443). Mr. Nally was always available to him in terms of getting up to speed on the case. (V9, 443). Alvarez understood that at first Chavez was distraught, "he was remorseful", and that he was alleging abuse by his brother and his brother's friend when he was a child. (V9, 444). He also understood that Chavez had recanted or denied the veracity of that earlier statement and "proclaimed that he was innocent of the crime itself." (V9, 444). "His position was that the client - - well, I mean, Mr. Chavez by the time that I was involved Mr. Chavez denied that it happened and did not want us to, did not want us to question his brother, for example, about that issue and didn't want us to pursue that issue." (V9, 445).

Alvarez testified that he understood the split of opinion on the case was that Harper and Georgi wanted to essentially concede guilt and concentrate on the second phase. (V9, 460). However, that view was not in accord with Chavez's wishes from the time Alvarez was on the case. (V9, 460). Chavez was expressing his innocence to Alvarez. (V9, 460). Chavez was also concerned that if they pursue a mental line of defense in

the penalty phase it would undermine his claim of innocence. (V9. 460-61).

Alvarez had several meetings with Chavez and broached the subject of sexual abuse. Chavez "confirmed that he did, in fact, did not want to pursue it and denied that it happened. When his mother was brought from Cuba I interviewed her and broached this issue and discussed it with her and she claimed to have no awareness of him ever being sexually abused, so - -." (V9, 445-46).

Alvarez had a vague recollection of a meeting with Georgi, Harper, and appellate lawyer Chris Spalding. He thought the meeting occurred prior to the guilt phase, and, they wanted to turn the case into a "second phase defense case." (V9, 448). "And my position was that the trial is a few weeks away, the client is denying any type of sexual abuse, and I don't, I don't have the authority nor do I, do I see a point in this trying to take the case away from Art and turn the case around and turn it into a second phase defense when I don't have the evidence to confirm it and I don't have the cooperation of the client with respect to that." (V9, 448).

Although a strategic decision had been made to present a first phase defense, there was "no cutting off" of efforts to find mitigating evidence. (V9, 456). Although Mr. Nally told

him Chavez was now denying abuse, he did not leave it there and made his own efforts to try and develop this information. (V9, 457). He broached the issue of sexual abuse with him on several occasions and spent maybe 20 or 30 hours with Chaavez attempting to develop matters of mitigation. (V9, 457). He inquired into family and friends. While Chavez denied abuse and asked him not to pursue it with family members, Alvarez nonetheless, talked to the mother about it. (V9, 458). It was also his understanding that the brother had been telephonically interviewed and was no longer willing to discuss the issue. (V9, 458). Prior to his involvement, the brother was talked to and "denied it and subsequently the brother refused to discuss it." (V9, 459). Chavez consistently denied abuse. (V9, 458). Consequently, without Chavez's cooperation, he did not have any evidence of physical or sexual abuse to present. (V9, 461). In fact, Alvarez testified: "My state of mind is that probably that he was abused, but without his cooperation, without the cooperation of other family members, I had no way to pursue it." (V9, 468).

Alvarez thought that they were hoping to maintain some residual or lingering doubt but thought that Dr. Quintana had a heightened score on the a psychological test which measures sociopathic tendencies. (V9, 449-50). Alvarez thought his concern was based upon the report and a discussion about Dr.

Quintana with Mr. Nally. (V9, 450-51). Also, there was a conclusion in the report that if Chavez committed the offense he "probably did not act alone." (V9, 452). Chavez had a homosexual paramour who would visit him or who had visited him when he lived on the Scheinhaus property. (V9, 452). Also, the police investigated the person who was suspected of possible involvement in the case. He thought it would "open up" a can of worms. (V9, 452). Also, Alvarez was concerned that the jury had just convicted Chavez and putting on an expert to say that Chavez was not a pedophile was an attempt to tell them their judgment was wrong. (V9, 453). "If you admit that Mr. Chavez committed the offense then obviously he was a pedophile. And by in large we did not feel this would be particularly persuasive to the jury. And the other issues really off-set any benefit in presenting it before the jury." (V9, 453). But, the fact Dr. Quintana found he wasn't violent, wasn't a "pedophile was beneficial." (V9, 453-54).

Alvarez testified that he had to balance the risk and benefits of presenting Dr. Quintana. (V9, 462). He and Koch both agreed that the risk of presenting Dr. Quintana outweighed the benefits and made a strategic decision not to present his testimony. (V9, 462). Alvarez did not want the State to throw around the work psychopath or antisocial when talking to the

jury about his client. (V9, 462-63). It was also possible that putting on Dr. Quintana to opine that the defendant was not a pedophile would offend the jury. (V9, 464). Alvarez explained: "And again, think that for example on cross-examination if asked, well, if Mr. Chavez did these things then wouldn't he, in fact, be a pedophile, what is this doctor going to say? Obviously if he committed the crime then I think that you would have to concede that he was a pedophile, which means that it would not validate his psychological opinion." (V9, 464). Alvarez simply did not think that Dr. Quintana was going to "be very persuasive." (V9, 464). The same rationale would apply to failing to offer Dr. Quintana during the Spencer hearing. (V9, 465).

Alvarez testified that other than Dr. Quintana, they did not hold back on any other mitigation that they had uncovered. The defense presented witnesses to speak about Chavez and his character. (V9, 466).

Mr. Michael Amezaga (Alienage)

Michael Amezaga testified that he received a BA and Masters from the University of New York and his law degree from the same school in 1983. (V7, 354). After graduating from law school, he was hired as a legal aid attorney in Queens and Bronx Counties. (V7, 355). After approximately six years he moved to

Florida, passed the Bar, and worked for the Dade County Public Defender's Office from 1991 to 1994. (V7, 355). He moved to West Palm Beach and became an assistant city attorney as a municipal prosecutor and legal advisor. Amezaga then worked for two insurance defense firms "for a couple of years" before entering private practice in 2002. (V7, 355). In private practice he handles "some criminal, some family, some P.I., some civil rights, general litigation." (V7, 355). He was born in Cuba and came to the United States when he was nine. (V7, 355-56).

About three and one half years prior to testifying, he joined a group "called the U.S. Cuban legal forum." (V7, 356). He described this as a group of businessmen and lawyers interested in opening up lines of communication between Cuban and American lawyers. Its purpose was to "initiate conversation and dialogue between certain Cuban lawyers and Cuban dignitaries as well as Cuban American lawyers and some American lawyers also." (V7, 357).

Amezaga took two trips to Cuba, the first of which occurred about "three years ago." They "met some Cuban lawyers over there and then some of the discussions involved the justice system as it stood in Cuba." (V7, 358). His initial contact on his first trip was limited to a "discussion with other lawyers

who practice in criminal law." (V7, 358). In Cuba, he spoke to Judges, but "didn't speak to prosecutors." (V7, 359). As part of learning about the Cuban justice system, he familiarized himself with the Cuban constitution and specific Cuban statutes. (V7, 359). On his second trip to Cuba, he became "more involved" and "actually went to the library", looked at the books in "more detail." (V7, 359). He presented his findings to the Cuban Legal Studies Department of the Florida International University. (V7, 359). He also met with judges, discussed the criminal justice system and observed a criminal trial. (V7, 359). He dug into books as much as he could "given the occasional power failures that the Cuban electrical system undergoes and it suffers and I went to the library and I read the statutory provisions." (V7, 359-60). Amezaga "occasionally" [receives] e-mails from "Cuban lawyers" and (unintelligible, in Spanish), and "look[s] at those articles." (V7, 360).

Amezaga testified that he thought he was called as an expert in alienage in this case, referring to the context of where an individual comes from, "but I have heard that alienage may refer to a mitigating type of factor or an area to be discussed." (V7, 362). Mr. Amezaga admitted that he has no formal training in the differences between the United States and

the justice system in any other country. (V7, 362). He has not attended formal training or conferences except for the one in Cuba. (V7, 363). But, he did have a meeting "down at FIU, where we presented our findings during that meeting, and the different parts of the Cuban justice system and legal system were also discussed and that is where I presented my findings." (V7, 363). His first trip to Cuba lasted four days. (V7, 363). The conference he attended was not "really formal classroom training" but there were Cuban lawyers who presented different areas of the justice system, probate, intellectual, international, as well as criminal justice. (V7, 364). Of the four days he spent in Cuba on his first trip, "three hours" were focused on criminal law. (V7, 364). The first trip to Cuba was made in 2003 or 2004, some six years after the Chavez case was tried. (V7, 364). His second trip also lasted four days, with one day spent "touring." (V7, 365). He spent approximately three days either speaking to judges, lawyers, or "taking notes for my independent research or observing a trial." (V7, 365). Amezaga called his second trip a "trade" of information. (V7, 366).

Amezaga acknowledged he did not know how things were before he went to Cuba, stating: "Yeah, I did say that. However, I don't know whether that was sort of like a general comment of

how things were. It could have been. I don't know how, you know, things were because I wasn't there. I don't think that I was asked whether I gained through independent study or otherwise knowledge of how the criminal procedure, contacts of the criminal procedure law was and before that time." (V7, 368). He could tell though, from books and articles given to him how the law changed. (V7, 368). Amezaga has never testified in court on the issue of alienage. Nor has he been declared an expert in this area. Id. The trial court declined to recognize Mr. Amezaga as an expert in this case.

Dr. John Quintana

Dr. John Quintana testified that he was a licensed psychologist in New Jersey and that he had been a consultant with the Miami Public Defender's Office between 1997 and 2005. (V10, 485-89). He was fluent in Spanish and was available as an expert to advise the office on psychological issues as well as being available as a potential witness. (V10, 489-90). Dr. Quintana interviewed and tested Chavez in March of 1997. (V10, 495). He was contacted by Art Koch of the Public Defender's Office and asked to conduct a general psychological examination of Chavez. (V10, 498). He was given material to review and conducted clinical interviews of Chavez. (V10, 498-99). He interviewed and tested Chavez and the results are reflected in

his written report. (V10, 500). Chavez was coherent during the interviews, he was "opinionated", made some "sweeping" generalizations, and was "somewhat argumentative and critical during the interview." (V10, 504). Chavez was critical of the MMPI, he "thought the questions were silly and he dismissed the test." (V10, 504). He administered a number of tests, including the MMPI, Wilson Sexual Fantasy Questionnaire, Sexual Interest Sort Card, S.O.N.E., sexual history background forum, and, intelligence testing. (V10, 506-07).

Intelligence testing revealed Chavez possessed a verbal IQ of 122. (V10, 511). Chavez was "certainly a bright individual." (V10, 515). The sexual testing revealed below the control group or within normal limits. (V10, 512). Given what Chavez told him about his history and what was gleaned from his psychological testing, Dr. Quintana did not "see any sufficient evidence to say that he was a pedophile." (V10, 515). Dr. Quintana concluded that Chavez appeared emotionally stable, although based on his history and current situation, "there remains a risk for suicide." (V10, 514).

On his personality, Dr. Quintana said that Chavez can be "outspoken," "critical" and "can be argumentative, which may frequently bring him into conflict with others." (V10, 515). "At times he can make sweeping generalizations and at times be

somewhat grandiose." (V10, 515). He also did not see anything in his history to believe that he ever displayed violence. (V10, 516). Dr. Quintana thought that the instant offenses were "incongruent" with his protocol and report. (V10, 516).

Dr. Quintana agreed that he found no impairment in Chavez's ability to conform his behaviour to the requirements of the law. He found that Chavez was intelligent and probably above average, verbally, in intelligence. (V10, 516-17). Dr. Quintana agreed that he recommended that Chavez receive a neuropsychological examination. (V10, 518). He was shown a neuropsychological report from Dr. Reyes which concluded that "detailed neuropsychological testing" did not "indicate areas of cognitive impairment." (V10, 518).

Dr. Quintana agreed that Chavez told him he answered questions "to his own advantage". Consequently, Dr. Quintana concluded that Chavez wanted to make himself look good. (V10, 519). Most of his practice has been clinical and, at the time of his report, he had only testified in one criminal case. (V10, 519-20). Dr. Quintana agreed that someone charged with capital murder in a "forensic" setting might have a different motivation than a person in a clinical setting. (V10, 520). In a clinical setting, the "motive to lie" is a concern but "less of a concern" than in a forensic setting. (V10, 520).

A psychopath or psychopathic personality is characterized by a person who lies, presents cunning behaviors, manipulates, and lacks empathy. (V10, 520). Chavez scored 67 on the MMPI psychopathic deviate scale, which approached the cut off for significance [70], but he believed it was not "significant." (V10, 521). In fact, if Chavez had answered one or two questions differently it would probably given him a score of 70, which would be clinically significant in the "complicated scoring of the MMPI, but it is a very complicated system." (V10, 521). When asked if Chavez had an elevated PD score, Dr. Quintana testified: "Well, definitely anything - - it would be, yes." (V10, 525). Further, Dr. Quintana administered the HARE PCL-R (a test measuring psychopathic tendencies) and found that his factor two score was elevated, or about average for those in prison. (V10, 526). Dr. Quintana admitted that this factor "score represents selfish, callous, remorseless use of others." (V10, 526). However, Dr. Quintana did not find that Chavez had an antisocial personality disorder. (V10, 547).

Chavez denied that he had been sexually molested as a child. (V10, 527). Dr. Quintana agreed that Chavez portrayed himself as a normal heterosexual male, both in his sexual interest testing, and, in his own words. (V10, 527). Dr. Quintana admitted that the sexual testing he administered did

not test for validity and that he required or expected an individual to answer those questions truthfully. (V10, 527).

Dr. Quintana thought he read something that mentioned Chavez admitted he was a homosexual to a detective. (V10, 528). He was confronted with transcripts wherein Chavez acknowledged he was a homosexual and had homosexual relationships in the military. (V10, 528). Chavez also mentioned that one of his friends in Cuba was his lover, and, that his parents were not aware of that. (V10, 529). Dr. Quintana admitted that this information contradicted what Chavez told him during his interview and also the information he provided on the sexual questionnaires/tests. (V10, 529). It was not surprising to Dr. Quintana that Chavez had not told his parents that he was a homosexual. (V10, 529). Dr. Quintana also agreed that most people don't tell anyone that they are a pedophile. (V10, 529-30). According to his testing material, not only was Chavez not a homosexual, but, he was repulsed by that activity. (V10, 531). Dr. Quintana agreed that Chavez was either being untruthful to the detective in his confession or he was untruthful in answering his testing. (V10, 531). Moreover, on another question Chavez specifically indicated that he found homosexual pedophilia repulsive. (V10, 531).

Dr. Quintana acknowledged that the questions on the sexual interest sort card were not subtle. (V10, 531-32). If someone like Chavez wanted to make it appear that he was not a pedophile, it would not be difficult. (V10, 532). Dr. Quintana agreed that if someone was taking this test and wanted to make himself look good and not look like a pedophile, it is rather easy to do so. (V10, 532). If Chavez was answering the testing questions "truthfully" Dr. Quintana agreed that Chavez would not be "the least bit interested in having sex with a young boy." (V10, 533).

Dr. Quintana agreed that he had no information that Chavez had any girlfriends, nor, any collateral data that he had a girlfriend. (V10, 533). But, Dr. Quintana agreed that he had information wherein Chavez admitted he was a homosexual and even named his homosexual lover. (V10, 533).

Dr. Quintana admitted that he did not discuss any facts of this case with Chavez on the advice of his attorney. (V10, 533-344). Dr. Quintana was confronted with a copy of Chavez's confession wherein he admitted he was excited by a group of boys in underwear. (V10, 537-38). He also acknowledged Chavez indicated he passed by a small boy and was feeling the need for something sexual. (V10, 538-39). Dr. Quintana agreed that he

did not expect a normal heterosexual male to be aroused by children in their underwear. (V10, 539).

Dr. Quintana acknowledged that Chavez's confession reflected that he took the young boy into his truck by threatening him at gunpoint. (V10, 542). Mr. Chavez took him to a trailer and told him to remove his clothing. (V10, 542). Chavez stated that the child was "crying" and that he took his underwear off. (V10, 542-43). Chavez admitted penetrating the sobbing child, that he was "very excited" and that it did not take him long to ejaculate. (V10, 544). Dr. Quintana admitted a normal heterosexual male is not going be "excited by a naked, sobbing child." (V10, 545). Dr. Quintana "wouldn't expect" a normal heterosexual male "to rape a nine year old boy." (V10, 545). When asked if he agreed that the "the man who did that to Jimmy Ryce is very likely both a pedophile and dangerous, Dr Quintana stated: "You would expect that from reading this, this report [Chavez's confession], yes." (V10, 545).

SUMMARY OF THE ARGUMENT

ISSUE I—-The trial court did not abuse its discretion in failing to recognize Mr. Amezaga, a general practice attorney, as an expert on "alienage." Mr. Amezaga lacked the training, knowledge, and experience to be qualified as an expert and render an opinion in this case.

ISSUE II—-Trial counsel made a reasonable tactical decision not to present the testimony of Dr. Quintana. Dr. Quintana's testimony established little, if any, non-statutory mitigation and risked opening the door to damaging cross-examination. Consequently, appellant failed to establish either deficient performance or resulting prejudice from failing to call Dr. Quintana during the penalty phase.

ISSUE III—-Appellant's various motions for post-conviction relief contained some specific and some vague allegations that the lower court, in an abundance of caution, granted an evidentiary hearing upon. The trial court properly denied these claims because the evidence presented at the hearing failed to demonstrate that the defendant received ineffective assistance of counsel in any portion of the representation by his attorneys at trial or sentencing.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN RULING THAT MICHAEL AMEZAGA WAS NOT AN EXPERT QUALIFIED TO OFFER OPINION TESTIMONY ABOUT THE DIFFERENCES BETWEEN THE CUBAN AND AMERICAN CRIMINAL JUSTICE SYSTEMS AND THE DIFFERENCE IN THE RIGHTS AFFORDED TO CRIMINAL SUSPECTS IN CUBA AS OPPOSED TO THE UNITED STATES.

Appellant argues that the trial court erred when it ruled that Michael Amezaga was not qualified to render an expert opinion on the Cuban justice system and the differences in those systems as they related to the voluntariness of Chavez's confession. The State disagrees.

This Court has stated "that expert opinion is admissible when it meets the following four requirements: (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice." Glendening v. State, 536 So. 2d 212, 220 (Fla. 1988). "A trial judge has the discretion to determine if a witness's qualifications render him or her an expert, and this determination will not be overturned absent clear error." Simmons v. State, 934 So. 2d 1100, 1117 (Fla. 2006)(citing Johnson, 438 So. 2d at 777).

Michael Amezaga, a general practice attorney, simply did not have the requisite knowledge, qualifications, or demonstrated expertise to render an expert opinion in this case. Appellant has failed to establish the trial court abused its broad discretion in refusing to recognize Amezaga as an expert.

After hearing defense counsel's attempt to qualify Mr. Amezaga as an expert, the trial court stated:

> …I am most concerned about as a trial Judge are the qualifications of individuals being presented to the Court to testify as an expert. I am, based upon what has been presented I can tell you right now that the qualifications do not seem to rise to the level of Mr. Amizaga being qualified as an expert. I would not let him, I will tell you right now, based upon his qualifications right now, if this was a trial right now to come and give an expert opinion as to the differences between the Cuban justice system and the United States justice system. And he has not set forth sufficient qualifications to testify in a trial and therefore really doesn't have the qualifications to testify before the Court on this particular issue.
>
> And so my main question to you, because I wasn't sure to tell you the truth when Mr. Amizaga came before this Court why he was being presented. I probably should have asked you to give me an indication, because I thought that there was something that was well beyond what I thought his testimony was going to be. But I can tell you right now that the questions asked - - I mean, he is an attorney who went to Cuba and read some books and spoke to some people, and that in and of itself doesn't qualify someone as an expert to be able to testify as to the differences in the two systems as an expert. If that was the case, everyone, all of us could just do that and become experts. It takes time and it takes practice and it takes education, and I think that a lot of things [are] just lacking. This is not anything as to the qualifications as an attorney here in the State of Florida, it is just as to the qualifications to

> testify as to the comparison of the legal system in Cuba with the legal criminal system in the United States.

(V7, 370-71).

First, appellant asserts that Amezaga gained experience in American Constitutional rights through being licensed as an attorney and having devoted a "substantial" part of his practice in criminal law. (Appellant's Brief at 68). Consequently, appellant contends that Amezaga had the requisite knowledge, education, and training to testify regarding the "Constitutional rights embodied in Miranda and how those rights are implemented in the State of Florida." (Appellant's Brief at 68-69). However, when collateral counsel was attempting to qualify Amezaga, he never questioned him regarding his familiarity with Miranda, suppression issues, or whether or not he had even litigated a single suppression motion in a court of law; much less, a suppression issue based upon a suspect's familiarity or unfamiliarity with the American and Cuban justice systems. Certainly, the trial judge and, indeed, all of the defense attorneys who testified in this case possessed much greater criminal law experience than Mr. Amezaga. He certainly displayed no special or particularized knowledge regarding the waiver of Miranda rights or confessions in general.

With regard to Amezaga's qualifications to testify as an expert on "alienage", his knowledge was derived almost entirely from two trips to Cuba.[1] On his first trip, he apparently attended a conference or seminar on Cuban law over the course of four days. (V7, 363-64). Amezaga admitted this was not "really formal class room training" but Cuban lawyers did present information on different areas of the legal system. Amezaga testified that only "three hours" of this conference or training were devoted to or focused upon criminal law. (V7, 364). His second trip to Cuba lasted four days with one day spent "touring." (V7, 365). This second trip was not even a conference or a seminar but apparently three days of self-study. Amezaga apparently spent his time speaking to judges, lawyers, observing a trial, or studying in a Cuban library. (V7, 365). Amezaga has never testified in a court of law on the issue of alienage nor had he ever been declared an expert in this area. (V7, 368).

Amezaga was shown to have an interest in Cuban law, but did not testify that he ever used that experience in his law practice. So, while appellant correctly points out that

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[1] Amezaga's membership in a group called the U.S. Cuban Legal Forum" does not reflect any special knowledge or accomplishment. (V7, 357). There were apparently no tests or certifications required to join the group and he described it as a group which included businessmen as well as lawyers to foster "conversation and dialogue." (V7, 357).

individuals have been recognized as experts by experience and not formal training, Amezaga simply did not display a significant or even a reasonable modicum of experience in Cuban law. His self-study, without taking any courses demonstrating any particular proficiency in Cuban law, did not rise to the level of qualification required for an expert. The trial court simply did not have any confidence that Amezaga's limited self-study of the Cuban justice system rendered him competent to render an expert opinion in this case. See Jordan v. State, 694 So.2d 708, 716 (Fla. 1997)("Simply reading large amounts of scientific literature, all which falls well outside a person's area of educational expertise, cannot serve to create an expert out of a non-expert.").

Appellant has not cited any comparable cases where an expert with such limited qualifications as Mr. Amezaga has been qualified as an expert. C.f. Anderson v. State, 863 So. 2d 169, 180 (Fla. 2003)(while agreeing that proposed expert's "qualifications are open to reasonable question" where blood spatter expert "had a single 40 hour course" in blood spatter, "three prior qualifications" as an expert, and "field experience" the court found no abuse of discretion in allowing expert to testify). Moreover, it appears that through defense counsel's belated proffer, submitted only with his written

closing argument, counsel intended to have Amezaga render an opinion on the voluntariness of Chavez's confession. This was based largely upon his interview with Chavez and necessarily relied upon Chavez's hearsay statements. Such testimony would not, in the State's view, have even been admissible in court. See Gulley v. Pierce, 625 So. 2d 45, 50-51 (Fla. 1st DCA 1993), rev. denied, 637 So. 2d 236 (Fla. 1994)(an expert should not be allowed to "express an opinion" which "applied a legal standard" to a given set of facts)(citing Town of Palm Beach v. Palm Beach County, 460 So. 2d 879, 882 (Fla. 1984) and Charles W. Ehrhardt, Florida Evidence 703.1, at 513-14 (1993 ed.)). Thus, there can be no error in precluding Amezaga from testifying during the evidentiary hearing below.

In sum, appellant has failed to demonstrate the trial court abused its "broad discretion" in excluding Amezaga's testimony. Finney v. State, 660 So.2d 674, 682 (Fla. 1995), cert.denied, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996). Furthermore, on the facts of this case any failure to allow Amezaga would clearly be harmless. Amezaga was arguably relevant to appellant's claim that his trial counsel was ineffective for failing to hire an expert on alienage or the difference between the Cuban and American justice systems. However, even if Mr. Amezaga had testified at the evidentiary hearing, the defendant failed to

establish that Mr. Koch's failure to present an alienage expert was deficient. It is simply a matter of common knowledge that a citizen of Cuba, a communist dictatorship, is provided with fewer rights or protections than a citizen of the United States.

Koch testified that he had retained Dr. Richard Ofshe, who was an expert in coerced and false confessions, to review the circumstances of the confession. (V5, 139). He asked Dr. Ofshe to talk to the defendant about his knowledge of the American criminal justice system. Dr. Ofshe told Mr. Koch that he was qualified to discuss that issue with the defendant. Mr. Koch testified that Dr. Ofshe had worked with people like the defendant before, i.e., either they were from Cuba or another totalitarian system. (V5, 140) Dr. Ofshe reported that he could not assist the defense in its effort to suppress the confession. (V5, 139). Mr. Koch stated that he was not going to go witness shopping. (V5, 143).

Defense counsel is not required to "shop" around for an expert who will testify in a particular way. See Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2001) ("The fact that Cherry found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted under Florida Rule of Criminal Procedure 3.850…")(citation omitted); Elledge v. Dugger, 823 F.2d 1439,

1447 n.17 (11th Cir.), opinion modified 833 F.2d 250 (11th Cir. 1987). Aside from his general lack of qualifications, Mr. Amezaga was not even available to counsel when this case was tried.[2] Moreover, a very lengthy hearing on the motion to suppress the defendant's statements was held at the time of trial. Defense counsel raised numerous grounds for the suppression, which are set forth in this Court's opinion on direct appeal. See Chavez v. State, 832 So.2d 730, 747-758 (Fla. 2002). Among the grounds raised was that the defendant's confession was involuntary because his alienage, lack of prior experience with the United States criminal justice system, and his limited understanding of English. This Court rejected the claim, stating:

Chavez's Alienage

> Chavez next claims that his confession should have been suppressed as involuntary because his alienage, lack of prior experience with the United States criminal justice system, and limited understanding of English produced an involuntary confession. Cf. United States v. Fung, 780 F.Supp. 115, 116 (E.D.N.Y.1992) (reflecting that Fung's poor language skills and ignorance of the American legal system were sufficient to show that she lacked understanding of Miranda rights even though she read them aloud in her native language). In this

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[2] Mr. Amezaga's first trip to Cuba was in 2003 or 2004, well after the Chavez case was tried. Consequently, Amezaga had not completed his course of self-study upon which his qualifications to testify are arguably based.

> case, Chavez began the interview process speaking in English; however, Detective Murias translated all questions into Spanish from the beginning, until Estopinan entirely assumed the questioning which was conducted in Spanish (after administration of polygraph tests). Chavez's lengthy handwritten statement in Spanish (his first version of what happened to Jimmy, in which he recounted having crushed the boy accidentally against the horse farm gate), which is contained in the record, is grammatically correct, reflecting a literate person, and even contains the caveat that Chavez wished "it to be considered that the dates he has included in the statement are not considered to be exact." In fact, when Chavez's formal statement was transcribed, he was careful to correct both spelling and grammatical errors. He was repeatedly advised in Spanish of his Miranda rights, and stated that he knew his polygraph test result was not admissible evidence. The record clearly reflects that Chavez's intelligence, education, and alienage did not adversely affect his understanding of his rights during the police interrogation progress. Finding no support in the record, the argument that Chavez's background caused him to misapprehend his rights in the American system fails.

Chavez v. State, 832 So.2d at 750 -751.

In light of the evidence that indicated that the defendant understood the American criminal justice system, it is clear that even if counsel had presented an expert to testify as to the differences between the American and Cuban criminal justice systems, there is no reasonable probability that the result of the proceeding, i.e., the finding that the defendant voluntarily

waived his Miranda rights, and the denial of the Motion to Suppress, would have been different.[3] Thus, trial counsel was not ineffective under the standards of Strickland[4].

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PRESENT THE TESTIMONY OF DR. QUINTANA AS MITIGATION EVIDENCE.

Chavez claims that his defense attorneys were ineffective in failing to present the testimony of Dr. Quintana during the penalty phase of his trial below. The State disagrees. The trial court properly rejected this claim after an evidentiary hearing.

(A) Standard Of Review

This Court summarized the appropriate standard of review in State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000).[5]

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

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[3] The State would also submit that even if the confession had been suppressed, neither the results of the trial nor the sentencing would have been different.

[4] Strickland v. Washington, 466 U.S. 688 (1984).

[5] This standard of review applies to all issues of ineffectiveness addressed in this brief.

This Court has stated that "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

(B) Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight.

Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied, 516 U.S. 856 (1995) (citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

(C) Appellant's Experienced Defense Attorneys Were Not Ineffective In Making A Tactical Decision Not To Call Dr. Quintana To Testify During The Penalty Phase

The trial court rejected this claim below, stating:

> The Defendant contends that counsel was ineffective for failing to provide mental health mitigation. Dr. John Quintana was hired to investigate mitigation. Mr. Koch testified that since Dr. Quintana determined that the Defendant was not a pedophile, to tell the jury that after they found the Defendant guilty of a crime where a child was raped, would be insulting to the jury. Also, the Defendant had

> elevated scores in the antisocial/psychopath areas and he did not want the jury to hear this information.
>
> Dr. Quintana testified that the Defendant told him that he answered questions to his own advantage. The definition of psychopath is someone who lies, is cunning and engages in manipulative behavior. The Defendant scored a 67 on the test. The cut-off score for psychopathology is 70. Since the Defendant answered questions to his own advantage, it is possible his actual score would be 70.
>
> Dr. Quintana further testified that the Defendant's answers in some areas were not consistent with test results. The Defendant told Dr. Quintana he was a heterosexual male. His test scores indicated anxiety in heterosexual areas. The answers to the fantasy questions indicate that the Defendant is not a pedophile, yet in actuality he raped a young boy.
>
> It is clear that if Dr. Quintana testified, his testimony would have been attacked on cross-examination. Additionally, the Defendant failed to call a mental health expert at the evidentiary hearing to testify what mental health problems the Defendant suffers from and what could have been presented at trial.
>
> While collateral counsel repeatedly attempted to point out that mitigation could have been presented at the Spencer Hearing, the Defendant refused to cooperate in the presentation of mitigation. Additionally, given the facts of this crime and the numerous aggravators, the Defendant cannot show prejudice.
>
> The Defendant has failed to establish that either the 'deficiency prong' or the 'prejudice prong' of the Strickland test was met on this issue.
>
> This claim is DENIED.

(V4, 731-32). The trial court's ruling is well supported by the record and should be affirmed.

The record establishes that trial counsel made a strategic decision not to call Dr. Quintana to testify during the penalty phase. Such strategic decisions are almost immune from post-

conviction attack. Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second-guessed on collateral attack."); Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions."); Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000)(the petitioner's burden of persuasion is a heavy one, "petitioner must establish that no competent counsel would have taken the action that his counsel did take."). Mr. Alvarez made a strategic decision, one that the defendant has not shown to be unreasonable even using prohibited "20/20 hindsight." Indeed, the record of the post-conviction hearing establishes that counsel's reasons for not presenting Dr. Quintana were well founded. Gaskin v. State, 822 So. 2d 1243, 1248 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.")(citing Ferguson v. State, 593 So. 2d 508, 510 (Fla. 1992).

Manny Alvarez, whose primary responsibility was the penalty phase, testified as to his strategic reasons that he did not

call Dr. Quintana.[6] Mr. Alvarez testified that psychological testing conducted by Dr. Quintana revealed a "heightened" or above average psychopath score. (V9, 449-50). He did not want the State to be able to "throw" around the word psychopath through its cross-examination of Dr. Quintana. (V9, 462-63). Moreover, Mr. Alvarez testified that Dr. Quintana asserted that it would be unlikely that the defendant acted alone, which opened up the possibility of revealing that the defendant had a homosexual lover and potential accomplice. (V9, 452).

Finally, Mr. Alvarez explained that he would not want to offend the jury by putting Dr. Quintana on the stand to say that the defendant was not a pedophile, when the jury had just found him guilty. He testified that cross-examination would pose a problem because "the validity of Dr. Quintana's psychological testing turns upon the defendant not having committed the offense. If you admit that Mr. Chavez committed the offense then obviously he was a pedophile. And by in large we did not feel this would be particularly persuasive to the jury. And the other issues really off-set any benefit to presenting it before the jury." (V9, 464). The jury had already found that the defendant was in essence, a pedophile. Mr. Alvarez explained: "Obviously if he committed the crime then I think that you would

[6] Stanton testified that in his opinion Dr. Quintana did not find any significant mental mitigation. (V6, 241).

have to concede that he was a pedophile, which means that it would not validate his psychological opinion." (V9, 464). Under the circumstances of this case, Mr. Alvarez testified that his opinion "was not going to be very persuasive" and might "anger the jury." (V9, 464-65).

The reasonableness of Mr. Alvarez's decision not to call Dr. Quintana was established by Dr. Quintana's testimony and the cross-examination that it elicited during the evidentiary hearing below. First, Dr. Quintana's testimony did not establish any compelling mitigation. In fact, Dr. Quintana acknowledged that he found no impairment in the defendant's ability to conform his conduct to the requirements of the law. Moreover, he found that the defendant was probably slightly above average in intelligence. (V10, 516-17). Dr. Quintana did not testify that the defendant had an abusive childhood and, in fact, the defendant denied that he had been sexually abused. (V10, 527).

Second, Dr. Quintana's testimony elicited evidence about Chavez that would not be viewed favorably by a jury or the trial court. Dr. Quintana admitted that the defendant told him he answered questions to "his own advantage" which Dr. Quintana took to mean that he wanted to make himself look good. (V10, 519). Despite this test-taking attitude, Dr. Quintana admitted

that the defendant's score on the psychopathic deviate scale on the MMPI was "definitely" elevated. (V10, 525). Moreover, when questioned about the HARE PCL-R, Dr. Quintana acknowledged that the defendant's factor 2 score was elevated, or about average for prison populations. (V10, 526). That score reflects a selfish, callous, and remorseless use of others. Id.

Dr. Quintana's testing regarding the defendant's sexual orientation was severely tested on cross-examination. The defendant portrayed himself as a normal heterosexual male, who was [allegedly] repulsed by both homosexuality and pedophilia. However, Dr. Quintana admitted that his testing on sexuality was based primarily upon a clinical, rather than forensic, setting and the assumption that the individual would answer the questions truthfully. (V10, 527). Dr. Quintana was confronted with a transcript wherein the defendant admitted to a detective that he was a homosexual with a history of homosexual relationships. (V10, 528-29). This information contradicted what the defendant told Dr. Quintana during an interview and the results of the sexual interest testing administered to the defendant. Dr. Quintana admitted that the defendant was either untruthful in the testing or he was not telling the truth to the detectives. (V10, 531).

Dr. Quintana admitted that pedophiles most often don't tell anyone they are in fact, pedophiles. (V10, 529-30). Dr. Quintana admitted that his testing on sexuality was not subtle, if someone like the defendant wanted to make it appear he was not a pedophile, it would not be difficult. (V10, 531-32). If the defendant answered the sexual questionnaires truthfully, he would not have any interest in sexually molesting a young boy.[7] (V10, 533).

Dr. Quintana acknowledged that in his confession, Chavez found the mental image of young boys in their underwear exciting. (V10, 537-38). And, after observing a child walking by the road Chavez felt the need for something "sexual." Dr. Quintana admitted that a normal heterosexual male, as the defendant portrayed himself in the testing, is not likely to be aroused by children in underwear, much less act upon that arousal. (V10, 539). Dr. Quintana was further cross-examined on the portion of the defendant's confession wherein the defendant admitted taking the victim by gunpoint back to the horse trailer and raping the sobbing child. (V10, 542). Dr. Quintana would not expect a normal heterosexual male to be

[7]Dr. Quintana admitted that he had no collateral data to suggest that the defendant had a girlfriend. But, Dr. Quintana admitted he did have some data that named a homosexual lover of Chavez. (V10, 533).

excited by a naked crying child. And, a normal heterosexual male would not kidnap and rape a nine year old boy. (V10, 544-45). Finally, Dr. Quintana admitted that the man who raped and murdered Jimmy Ryce is likely both a pedophile and dangerous. (V10, 545).

In summary, Dr. Quintana provided little in the way of mitigation but opened the door for the State to elicit testimony concerning the defendant's admission to being a homosexual, his psychopathic tendencies, and most damaging, allowed the State to again elicit the details of this horrible offense in an effort to test the doctor's opinions. See Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995)(decision not to offer expert testimony as to mental condition at trial was reasonable tactical decision where counsel "feared that the presentation of psychiatric testimony would 'open the door' to **allow the prosecution to parade the horrible details** of each of the murders before the jury under the guise of asking the psychiatrist or other expert whether Bonin's acts conform to the asserted diagnosis.")(emphasis added). Ultimately, Dr. Quintana admitted that the man who raped and murdered Jimmy Ryce was likely both a pedophile and dangerous. (V10, 545). The jury had just convicted the defendant of both sexual battery and murder on what can only be described as overwhelming evidence. Defense

counsels' decision not to call Dr. Quintana was not shown to be deficient. Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004)("which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.").

Assuming, *arguendo,* some deficiency can be discerned from counsels' decision not to call Dr. Quintana, Chavez clearly failed to establish prejudice. As for the second prong of the Strickland test, "[a] petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1322 (11th Cir. 2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Instead, when a petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695, 104 S.Ct. at 2069.

Even if Dr. Quintana had testified regarding his interview and testing of the appellant, and his apparent lack of violent history, much of that evidence was introduced at the sentencing hearing through family and friends. From that evidence the

trial court found and gave weight to the following mitigating circumstances: that the defendant did not have a violent history, that he was able to establish positive relationships, his family background and his good family relationship. Chavez, 832 So.2d at 767, n. 44.

The jury voted 12-0 for death in this heavily aggravated case involving the rape and murder of a nine-year-old boy. Dr. Quintana's testimony provided no statutory mitigation and little, if any, non-statutory mitigation. Addressing a more serious asserted deficiency in presentation of mitigating evidence in a case involving the rape and murder of a nine-year-old boy, a federal court observed:

> This was no crime of anger, no quick burst of uncontrollable rage immediately regretted. The lead-up was cold and calculated, at points terrifyingly clinical. We cannot fathom what could cause one to desire to rape a broken and bleeding child. Perhaps that is what we simply call "evil." **But we are certain counsel's failure to throw a few more tidbits from the past or one more diagnosis of mental illness onto the scale would not have tipped it in Eddmonds' favor.**

Eddmonds v. Peters, 93 F.3d 1307, 1322 (7th Cir. 1996)(emphasis added).

Similarly, nothing offered by collateral counsel during the evidentiary hearing would have tipped the balance in the

appellant's favor in this case. Dr. Quintana's testimony during the evidentiary hearing did not establish a single significant mitigator. His testimony fails to raise the slightest possibility of a different outcome below, much less the reasonable probability required to show prejudice under Strickland. Consequently, this claim must be denied.

ISSUE III

WHETHER CHAVEZ WAS DENIED PER SE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 2 AND 16 OF THE FLORIDA CONSTITUTION WHERE THE DEFENSE ACTIONS AND INACTIONS CAUSED THE ADVERSERIAL PROCESS TO BECOME INHERENTLY UNRELIABLE.

Appellant next argues his convictions and sentences must be reversed based upon a combination of deficiencies on the part of counsel. Perhaps recognizing that this post-conviction record contains essentially no evidence of prejudice based upon these asserted deficiencies, he cites United States v. Cronic, 466 U.S. 648 (1984), for the proposition that he need not establish prejudice. Appellant's reliance upon Cronic is clearly misplaced.

In Cronic the Court recognized that some extremely limited factual scenarios may obviate the need for a defendant to demonstrate prejudice for ineffective assistance of counsel. However, despite the fact that the trial court in Cronic had

appointed an inexperienced real estate lawyer who was given only a limited time to prepare the defendant's case against fraud charges, the Court declined to find such a situation *per se* ineffective. Instead, the Court found in Cronic that the defendant must plead and prove deficient performance and resulting prejudice. Cronic provides no support for appellant's post-conviction claims for relief in this case. See Morris v. State, 931 So. 2d 821, 829 n. 10 (Fla. 2006)(noting that outside of the limited circumstances mentioned in Cronic "'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'" Id. at 659 n.26. (quoting Cronic); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990)(prejudice prong required even where counsel advised defendant to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-645 (2d Cir. 1990), cert. denied, 498 U.S. 990 (1990)(applying both prongs of Strickland despite defendant's claim that counsel's errors were so serious that it amounted to "no counsel at all.").

In this case, appellant did not have one trial defense counsel, but three, through his trial and penalty phase. There were as many as six attorneys assigned at one point or another

to assist Chavez. Lead attorney, Art Koch, possessed significant capital litigation experience. Numerous experts were retained and consulted by the attorneys in an effort to assist Chavez. Koch testified that he retained or consulted with "roughly eight or ten" experts in this case.[8] (V5, 137). Appellant's attempt to eliminate the prejudice component of Strickland under the facts of this case, while perhaps understandable, is a frivolous argument. See Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989)(a defendant must allege specific facts that, when considering the totality of circumstances, are not conclusively rebutted by the record, and demonstrate that counsel's performance was so deficient that but for the deficiency, the outcome of the trial would have been different).

Appellant's allegations merit little discussion but, the State will nonetheless briefly address the issues raised in the initial brief.

Conflict of Interest Claim

It is unclear why appellant mentions conflict of interest cases like Mickens v. Taylor, 535 U.S. 162 (2002) in his brief. Appellant failed to plead, much less prove, a conflict of

[8] The Public Defender, Bennett Brummer, took an interest in the case and wanted to ensure the defendant had dedicated lawyers with access to any expert witnesses and investigators that they might need. (V6, 264).

interest during the post-conviction hearing below. Such a claim is procedurally barred from being raised for the first time on appeal. Green v. State, 975 So. 2d 1090 (Fla. 2008). "This claim is procedurally barred because it was neither raised in Green's 3.851 motion nor addressed by the trial court."). In any case, it is clear that his attorneys were not operating under an apparent, much less an actual, conflict which prejudiced the appellant.[9] Moreover, this type of asserted conflict is appropriately governed by the principles of Strickland.

Appellant apparently bases his claim on the so-called conflict on strategy among some of the six attorneys involved in this case. However, the only conflicts within the Public Defender's Office involved Mr. Koch, Ms. Georgi and Mr. Harper, an issue not fully pled by the defendant. However, even if it had been pled, it is clear that these conflicts resulted from a difference in strategy on how to best defend the defendant.

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[9] In Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002), this Court observed that the Sixth Amendment encompasses the right to representation free from "actual conflict." However, to establish a violation of this right "the defendant must 'establish that an actual conflict of interest adversely affected his lawyer's performance.'" (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). Thus, even if appellant had made a legitimate conflict claim below, he must still establish prejudice.

What is clear is that the defendant denied that he had killed Jimmy Ryce and the case necessarily required a first phase defense. (V5, 126, 131, 157-58; V7, 318-19; V9, 444). Although Chavez allegedly told Ms. Georgi and/or Mr. Harper that he was guilty and had been physically and sexually abused as a child in Cuba, he later denied that to Mr. Koch, Mr. Nally, and Mr. Alvarez, as well as to Dr. Quintana. An admission and avoidance defense as suggested by Georgi and Harper early on in the case required the cooperation of the defendant.[10] Ultimately, it is clear that the first phase strategy pursued by Koch was governed by the defendant's claim that he was not guilty. See Rose v. State, 617 So. 2d 291, 294 (Fla. 1993)("when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.").

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[10] The State submits that much of the testimony from Mr. Harper and Ms. Houlihan is irrelevant to these proceedings. Once both of them left the case, despite their attempts to become involved again (i.e., the post trial, pre-sentencing meeting), neither one of them was aware of what the defendant had been telling the attorneys and was not aware of what was actually presented in mitigation. (V5, 71; V8, 419). In fact when presented with a hypothetical in which the defendant recanted allegations of abuse and after an independent investigation, no abuse was discovered, then Ms. Houlihan had to admit that there would be no evidence of abuse that the attorneys could present. (V8, 520).

The trial court noted that the early conflict on strategy did not compromise the defense in this case. The trial court held, in part:

> The testimony is consistent among all the attorneys in the Public Defender's Office that Mr. Koch had a disagreement with Steven Harper and Edith Georgi over mitigation. Mr. Koch was first chair, and Mr. Harper and Ms. Georgi were removed from the defense team. They were replaced by Mr. Nally. Mr. Harper testified that he did not disagree with Koch's belief that if the Defendant was found guilty, he would be sentenced to death. Based on what the Defendant told his attorneys, they went with a reasonable first phase strategy, with mitigation that humanized the Defendant. This claim was replete with mere conclusions and was proven to be totally lacking in merit at the evidentiary hearing.
>
> The Defendant has failed to establish that either the 'deficiency prong' or the 'prejudice prong' of the Strickland test was met on this issue.

(V4, 727-28).

The record clearly supports the trial court's finding.

Failure to Find The Alleged Occupant Of The Horse Trailer

Appellant asserts that trial counsel were ineffective for failing to find the occupant of a horse trailer. The State submits that whatever the reason for Mr. Koch not acting more quickly to try to find this alleged witness, the appellant's claim of ineffective assistance must still fail as the defendant has not presented any evidence of who this witness was, and what this witness, if found, would have testified to. Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003)(reversible error cannot be

predicated on "conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)). The trial court rejected this claim below, stating, in part:

> Mr. Brummer denied that he interfered with the investigation into the identity of the occupant of the horse trailer. Mr. Alvarez testified that Mr. Koch never told him that Mr. Brummer was interfering with this investigation. It was his understanding that investigators went out and couldn't find anyone. Mr. Nally testified that they did not find the person who lived in the trailer. Mr. Stanton was aware that efforts were made to locate the alleged owner.
>
> Mr. Koch's testimony concerning his alleged conversation with Bennett Brummer on this issue is unsupported by the evidence and completely lacking in credibility.
>
> The testimony established that counsel for the Defendant conducted a reasonable investigation into the identity of the individual but was unable to locate him. The Defendant alleged but was unable to establish how the delay in the investigation affected the outcome of the trial. The identity of the occupant of the horse trailer was not an issue because the Defendant confessed that he sexually battered the victim in the horse trailer.
>
> The Defendant has failed to establish that either the 'deficiency prong' or the 'prejudice prong' of the Strickland test was met on this issue.

(V4, 729-30).

The appellant did not establish how, given his detailed confession that placed the murder in the horse trailer, finding a prior resident/witness could alter the outcome of his case. It must be remembered that the murder weapon was found in Chavez's trailer (with his fingerprint on it), Jimmy's body was found where he said it would be, in the condition he described,

with the fatal wound that he admitted he inflicted. In addition, the fact that the defendant knew who the prior occupant of the horse trailer was may have turned out to be more incriminating than exculpatory as it would have been a further link between the defendant and the horse trailer. Among many more incriminating facts, it becomes apparent that even if some prior resident of the horse trailer existed and could have been found, the outcome of the defendant's trial would remain the same. Thus, as the trial court found below, the appellant did not establish either deficient performance or prejudice under Strickland.

Chavez's Watch Testimony

Appellant alleged below that Mr. Koch coerced him into falsely testifying under oath that his watch had been taken by the police during the interrogation and that this false testimony ultimately destroyed his credibility before the jury. The trial court rejected this claim below, stating in part:

> Mr. Koch testified that when he was preparing the Defendant for his trial he inadvertently told the Defendant to testify falsely that the police took his watch from him and would not return it to him until after he had confessed. He reiterated that he assumed was what the Defendant had previously told him.
>
> The Defendant alleges that his counsel had coerced him into testifying falsely at trial about the watch and that this testimony destroyed his credibility before the jury. In response to this allegation the State produced drafts of Mr. Koch's written trial preparation materials including a

> questionnaire that appears to be answered by the Defendant prior to trial in his own handwriting. (State Exhibit 3). In the questionnaire Koch asked the Defendant about his watch. In response to that question, the Defendant gave a written answer that was consistent with his trial testimony and confirmed the truthfulness of the statement that the Defendant alleges his attorney coerced him to make.
>
> Mr. Koch's testimony that he got confused and told the Defendant to testify falsely about the watch is completely lacking in credibility. The Defendant's allegation on this issue is contrary to the evidence.
>
> The Defendant has failed to establish that either the 'deficiency prong' or the 'prejudice prong' of the Strickland test was met on this issue.

(V7, 728-29).

As the trial court found below, Koch's testimony on this issue was simply not credible. It was the defendant, not Koch, who told him the police removed his watch. There was no evidence that Mr. Koch "coerced" the defendant into testifying falsely. The evidence clearly established that for whatever reason the defendant chose to testify as he did about the watch, it was not because of any lack of pretrial preparation by Mr. Koch or by Mr. Koch inadvertently giving a "false" answer to the defendant to just parrot at trial. Any false answers that came from the defendant at trial (and the State submits that almost all of his testimony was false, as the jury believed) was due strictly to what the defendant had told Mr. Koch had happened.

During the evidentiary hearing below, Koch was confronted with typed questions prepared by him, and the handwritten

answers of Chavez. Mr. Koch ultimately admitted that the defendant had told him that the watch was taken from him by the detectives prior to the interrogation. (V10, 577). The written questions prepared by Mr. Koch and the answers written by the defendant parroted the questions propounded by Mr. Koch and the answers given by the defendant during his direct testimony at trial. (V10, 574-75). It is clear that these questions and answers were asked in an attempt to discredit the interrogation techniques employed by the police which led the appellant to give his confession.

At trial, Mr. Koch attempted to minimize the perceived damage by having the defendant explain on cross-examination and on redirect that the detectives had returned the watch to him the two or three times they took him out on the scene. (T53, 10498, 10500). Regardless, the evidence is clear, the answers about the watch were the defendant's answers.

Even assuming that Mr. Koch had inadvertently suggested a false answer to the defendant in pre-trying him, the defendant knew the true answer. He cannot obtain relief due to his own perjury. In DeHaven v. State, 618 So. 2d 337, 339 (Fla. 2d DCA 1993), the defendant alleged that his counsel was ineffective because his trial strategy was to present a false theory that a masked intruder had killed the victim, rather than the defendant

having killed the victim in self defense, the alleged true version. The Second District denied relief, quoting from decisions from other states, stated: "Courts have disallowed relief to the defendant who 'attempts to reap a windfall new trial on account of his own perjury.'…Though 'effective counsel always-that is, by definition-conduct[s] himself in accordance with the Disciplinary Rules,' to award a new trial to the client of one who is 'ineffective' in this peculiar sense 'would be to reward a perjurer for his perjury.'" The Court stated that even if counsel had joined in or encouraged the defendant's perjury, this would be a matter for the Florida Bar, but would not require vacation of the defendant's conviction. Id. at 339-340.

Despite appellant's attempt to characterize the watch testimony as devastating (Appellant's Brief at 87),[11] such was not the case and appellant clearly failed to show prejudice under Strickland. This Court has characterized the evidence against the defendant as simply overwhelming. Chavez v. State, 832 So. 2d 730, 762 (Fla. 2002). The defendant's testimony was incredible on so many other levels, such as how he came across Ed Scheinhaus after Scheinhaus allegedly killed Jimmy Ryce, why he was forced to help Scheinhaus dispose of the body, and why he

[11] This Court is not bound by an attorney's admission that he is ineffective. Breedlove v. State, 692 So. 2d 874, 877 n. 3 (Fla. 1997).

did not tell the police or anyone about Scheinhaus being the actual murderer, i.e., that he was a Cuban freedom fighter and was afraid he would be deported). The State mentioned the watch one time (T53, 10574) during a thirty-three (33) page initial closing argument, and one other time (T54, 10669) during its forty-five (45) page rebuttal argument. The closing arguments did not focus on this one lie, but on how illogical and incredible the defendant's total testimony was. Whether or not he testified he had a watch on or off at the time of the interrogation did not alter the outcome. Consequently, the trial court's denial of relief should be affirmed.

Failure to Present an Alienage Expert

Appellant next contends that his defense attorneys were ineffective in failing to procure an expert on "alienage." This issue was largely addressed under Claim I, supra. Nonetheless, the State will briefly address it again here. Koch retained a noted expert on false confessions, Dr. Ofshe, and extensively litigated the motion to suppress on numerous grounds including Mr. Chavez's Cuban heritage and experience. See Chavez v. State, 832 So. 2d 730, 747-758 (Fla. 2002). While collateral counsel faults the defense team for failing to shop around to find another expert when Dr. Ofshe proved insufficiently beneficial, his own witness on "alienage," Mr. Amezaga, had such

minimal qualifications that he could not even be qualified as an expert. If collateral counsel, given the benefit of time, hindsight, and, an extensive budget could not find an expert in this area, it can hardly be said trial counsel was deficient in failing to go witness shopping for such an expert. As the trial court recognized below, appellant failed to establish either deficient performance or prejudice on this claim during the evidentiary hearing below.

The trial court rejected this claim below, stating:

> The Defendant alleges that trial counsel performed deficiently by failing to investigate and call witnesses to present evidence that the Defendant's waiver of his Miranda rights and to a first appearance hearing was involuntary due to his Cuban alienage and the significant differences in the Cuban and American criminal justice systems. The Defendant attempted to support this claim by presenting the testimony of Michael Amanzaga, an attorney, who was born in Cuba in 1950, and came to the United States in 1959 and was familiar with the criminal justice system in Cuba. He testified he made two trips to Cuba three years ago and met with Cuban lawyers to study the Cuban legal system. The total time that he spent in Cuba was approximately three days. The Court held that Mr. Amanzaga was not qualified to testify as an expert on alienage. Thus, it is clear that the Defendant failed to present any admissible evidence to establish any prejudice from counsel's failure to present an alienage expert.
>
> Mr. Koch testified that he hired Dr. Richard Ofsche, an expert in coerced confessions in preparation for the suppression hearing. Mr. Koch further testified that Dr.Ofshe informed trial counsel that he would not be able to help at the suppression hearing, because after he interviewed the Defendant, Dr. Ofsche felt that the Defendant did not meet his personal criteria for testifying. Mr. Stanton and Mr.

> Nally testified that Dr. Ofsche was hired for this purpose and they determined that he was unable to assist the defense team.
>
> Mr. Koch did hire an expert, who was unable to assist them. Counsel cannot be deemed deficient for hiring an expert, only to discover that the expert was unable to assist. The Defendant has failed to show that there was an expert at the time of the suppression hearing who was available and would have testified on his behalf.
>
> The Defendant has failed to establish that either the 'deficiency prong' or the 'prejudice prong' of the Strickland test was met on this issue.

(V4, 734-35).

Koch testified that he had retained Dr. Richard Ofshe to review the circumstances of the confession. (V5, 139). When Dr. Ofshe reported back that he could not help the defense, Koch was under no obligation to scour the country in the hope of finding a more favorable expert. See Cherry, 781 So. 2d at 1052. While attorneys Nally and Alvarez were not aware of why an attempt to hire another expert was not made, neither attorney stated that he was aware of any such expert who was available to testify in this case. Faulting trial counsel for failing to go witness shopping is an absurd proposition in this case where collateral counsel's own efforts failed to produce a recognized expert in "alienage." The trial court's order denying relief should be affirmed.

Failure to Introduce Evidence of Sexual Abuse

Appellant next alleges that conflicts among the defense attorneys resulted in a failure to investigate and present evidence of sexual abuse in the penalty phase. However, as the trial court noted below, there was no conflict among the attorneys that represented the appellant through the trial and penalty phase. The trial court found, as follows:

> As to the allegation about the lack of harmony within the defense team, no evidence was produced to establish any lack of harmony between Mr. Koch, Mr. Nally, Mr. Alvarez or Mr. Stanton. Andrew Stanton testified that Mr. Koch and the Defendant got along. When they had discussions with the Defendant, Mr. Koch did most of the talking. They discussed with the Defendant what was happening at a hearing. He also testified that Mr. Nally talked to the Defendant, as did Mr. Alvarez, after he became involved. Mr. Alvarez testified that the Defendant was of the opinion that if he presented a mitigation defense, it would undermine his claim of innocence. Based on the testimony at the evidentiary hearing, it is clear that the attorneys communicated with the Defendant and that he had input.
>
> The strategy that they employed was dictated by what the defendant told them. He told them he did not commit the murder and he retracted his earlier claims of abuse and denied being abused physically or sexually as a child in Cuba, both to his attorneys and to the mental health expert, Dr. Quintana.[12] At the penalty phase, defense counsel presented the evidence that the

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[12] In denying a related claim, the trial court noted that defense counsel did investigate abuse allegations but that the defendant refused to cooperate. The trial court stated: "Mr. Koch testified that the Defendant did not want to present a mitigation defense. The Defendant told him he was not guilty and that to present mitigation evidence would be inconsistent with that defense. Mr. Nally testified that he still made phone calls to Cuba and talked to some of the Defendant's relatives. He made efforts to into the areas of sexual abuse with them, but was unable to get anything…" (V4, 730-31).

> defendant would permit them to do so, which included his mother and friends who knew the defendant both in Cuba and in the United States, as well as testimony as to his ability to be a good prisoner.

(T. 10925-10979; PCT. 245-249). Due to the limitations put on counsel by the defendant, there was nothing more that counsel could present. Even at the Spencer hearing, the defendant in his letter to the Court that was read by Mr. Stanton, continued to deny his guilt.

Chavez did not present any evidence at the evidentiary hearing to substantiate any claim of sexual or physical abuse or any other type of mitigation that was available and not presented. In Gorby v. State, 819 So. 2d 664, 676 n.11 (Fla. 2002), the Florida Supreme Court stated:

> Trial counsel was not ineffective for not presenting evidence of Gorby's possible victimization in the form of childhood sexual abuse. The record reflects no sound evidentiary support for this allegation; indeed trial counsel testified during the postconviction proceedings that Gorby denied being the victim of any sexual abuse. **Based upon the record before us, we decline to determine that counsel was ineffective for not presenting evidence regarding the possibility of his client's victimization by child abuse when the client himself did not acknowledge such abuse and no other evidence substantially supports such an assertion.** *See generally Porter v. Singletary*, 14 F.3d 554, 559-60 (11th Cir. 1994). Furthermore, we agree with the postconviction judge's finding that Gorby's proffered evidence of exposure, while a child, to inappropriate sexual behavior by his mother is inconclusive.

(emphasis added).

Similarly, in Stewart v. Secretary, 476 F.3d 1193, 1210-11 (11th Cir. 2007), the Court held:

> …That despite frequent interaction between Stewart and his trial attorney prior to the penalty phase, Stewart never mentioned Mr. Scarpo's alleged abuse... Stewart does not dispute that he never told Barbas about the abuse during the nine months that Barbas represented him prior to trial. In fact, Barbas testified that Stewart indicated "[j]ust the opposite" of poor treatment by Mr. Scarpo in conversations with Stewart. Furthermore, Stewart never contradicted Mr. Scarpo's penalty phase depiction of Stewart's happy childhood in the Scarpo household. The Constitution imposes no burden on counsel to scour a defendant's background for potential abuse given the defendant's contrary representations or failure to mention the abuse. See Henyard, 459 F.3d at 1245 (denying ineffective assistance claim for failure to uncover evidence of sexual abuse in childhood where the defendant repeatedly denied a history of sexual abuse); Callahan v. Campbell, 427 F.3d 897, 934-35 (11th Cir. 2005), cert. denied, U.S. , 127 S. Ct. 427, 166 L. Ed. 2d 269 (2006) (finding that counsel performed reasonably despite a failure to investigate the possibility of childhood abuse where the defendant never mentioned any abuse); Van Poyck, 290 F.3d at 1324-25 (concluding that counsel was not ineffective by failing to investigate childhood and prison abuse based on the defendant's denial that he had been abused).

Appellant cannot fault counsel for failing to develop evidence of abuse when he denied the abuse and actively frustrated their attempts to develop such evidence. Indeed, appellant failed to introduce any evidence of sexual or physical

abuse during the evidentiary hearing below. Defense counsel did not render ineffective assistance during the penalty phase or before the judge in the Spencer hearing. As no basis for finding deficiency or prejudice exists on the state of this record, post-conviction relief must be denied.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the denial of Chavez's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. mail to Andrea M. Norgard, Esq., Norgard and Norgard, Post Office Box 811, Bartow, Florida 33831 and to Penny Brill, Assistant State Attorney, Dade County State Attorney's Office, 1350 N.W. 12th Avenue, Miami, Florida 33136-2111, this 26th day of August, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

s//Scott A. Browne
SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com
COUNSEL FOR APPELLEE