IN THE SUPREME COURT OF FLORIDA

JUAN CARLOS CHAVEZ,
Appellant,

v.

CASE NO. SC07-952
Lower Ct. F95-37867

STATE OF FLORIDA,
Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR DADE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal comes to this Court after the denial of the Appellant's, JUAN CARLOS CHAVEZ, Motion for Post-Conviction Relief pursuant to Fla. R. Crim. P. 3.851, in a capital proceeding. The Appellant, Mr. Chavez, will be referred to by name and the State of Florida as the State in this Initial Brief.

The record on appeal provided by the Clerk consists of 10 volumes. Volumes I-IV contains the filings of the parties and transcripts of the pre-hearing status conferences. These documents are not in chronological order, however the documents have been sequentially numbered in the lower right hand corner. Volume III also contains the testimony of two witnesses, whose testimony is reproduced in Volume X. Volumes I-IV will be referenced in this brief with the designation "R" following the volume number. Volumes V-X are the transcripts of the evidentiary hearing. These volumes have not been renumbered in accordance with the volumes I-IV. The transcripts contain the original page number assigned by the court reporter in upper right hand corner. The transcripts will be referenced in this brief by the designation "T" following the volume number.

STATEMENT OF THE CASE

An Indictment was brought against Mr. Chavez on December 20, 1995 by the Grand Jury for the Eleventh Judicial Circuit for the first-degree murder of Samuel James Ryce on or about September 11, 1995 contrary to §782.04(1) and §775.087 (Fla. Stat. 1995). (I,R133-135) Mr. Chavez was also indicted for the offenses of Sexual Battery-Victim Under 12 Year contrary to §794.011(2) and §775.087 (Fla. Stat. 1995) and Kidnapping with a Weapon contrary to §787.01 and §775.087 (Fla. Stat. 1995) as well. (I,R133-134) Mr. Chavez was represented by the Office of the Public Defender, specifically APD's Art Koch, Manny Alvarez, Andrew Stanton, Pat Nally, Steve Harper, and Edith Georgi.(I,R2)

Mr. Chavez, through counsel, moved to suppress his statements to police made at the time of his initial detention and arrest.(I,R27-37[court docket]) The motion was denied by the trial court. The trial court's ruling was upheld by this Court in Chavez v. State, 832 So.2d 730 (Fla.2002).

After an unsuccessful attempt in Dade County to seat a jury, venue was changed to Orange County. Mr. Chavez was

tried by jury from August 24, 1998 to September 18, 1998. The jury returned a verdict of guilty as charged on each count of the indictment on September 18, 1998.(I,R64) Penalty phase was conducted on October 26, 1998.(II,R344) The jury returned a unanimous recommendation for death on October 27, 1998.(I,R344) The trial court conducted a Spencer hearing on November 10, 1998, during which a statement of Mr. Chavez was admitted into evidence.(I,R48) Mr. Chavez was sentenced to death on November 13, 1998.(II,R344-352)

Mr. Chavez appealed his conviction and sentence to this Court. Mr. Chavez was represented by Mr. Robert Harper on his direct appeal. This Court affirmed the judgment and conviction in Chavez v. State, 832 So.2d 730 (Fla. 2002).

Attorney John Lipinski was appointed by the trial court to represent Mr. Chavez in post-conviction proceedings.(I,R70) Mr. Lipinski filed a "RULE 3.850 MOTION FOR POSTCONVICTION RELIEF" on July 19, 2004.(I,R136-195) Mr. Lipinski executed an oath which accompanied the motion, however Mr. Chavez did not.(I,R61-62) Mr. Chavez was relieved of Mr. Lipinski's representation and Mr. Lee Weissenborn was appointed to represent Mr. Chavez.

Mr. Weissenborn filed an "AMENDED RULE 3.851 MOTION FOR POST CONVICTION RELIEF".(II,R198-214) The certificate of service contained in the record does not contain a date of service, but carries a date stamp of May 5, 2005 from the Dade County Clerk's Office.(II,R198) The Weissenborn motion raised three grounds and adopted those claims previously raised in the Lipinski motion.(II,R199-213) The State filed a response to both the Lipiniski and Weissenborn motions on July 1, 2005. (II,R217-270)

The trial court, the Honorable Marc Schumacher, entered an ORDER ON DEFENDANT'S AMENDED RULE 3.851 MOTION FOR POST CONVICTION RELIEF on August 22, 2005.(II,R271-280) The trial court addressed each of the claims raised in the Weissenborn motion as follows:

1. Ground No. 1-hearing granted on claim of systemic ineffectiveness of the Office of the Public Defender and conflicts between the various lawyers representing Mr. Chavez, and conflicts with the elected public defender, Mr. Bennett Brummer.(II,R271)

2. Ground No. 2- hearing denied on claim that trial counsel was ineffective in failing to argue that the gun seized during a search of Mr. Chavez's trailer should have been excluded from evidence because it was not specifically

listed in the search warrant denied due to warrant describing a revolver and the defendant's execution of a consent to search form.(II,R271-72)

3. Ground No. 3- claim denied as procedurally barred that the public defender should have required the appellate attorney to raise as an issue that the trial judge should have recused himself.(II,R272)

The trial court then addressed the claims raised in the Lipinski motion as follows:

4. Jury Challenges- claim denied as procedurally barred when could have been raised on direct appeal.(II,R272-273)

5. Weight of Aggravators v. Mitigators- claim denied as procedurally barred because standard jury instructions regarding weighing of aggravators and mitigators could have been raised on direct appeal and there was no showing that the instructions were incorrect or otherwise unconstitutional.(II,R274)

6. Sentencing Utterance of Defense-claim denied as without merit that defense attorney made statement that could be construed as conceding guilt in penalty phase closing argument.(II,R274)

7. Orders of Disqualified Judge- claim denied as

insufficient on its face that trial counsel should have sought reconsideration of orders by substitute judge after recusal of judge who entered original orders.(II,R274-75)

8. Resignation of ASA Michael Band-evidentiary hearing granted on claim that ASA who resigned his position prior to trial could not serve as prosecutor at trial.(II,R278)

9. Crying Juror- claim denied as without merit based on statement by the trial court that the record established the juror was questioned by the court and avowed that her emotional reaction would not prevent her from carrying out her duties as a juror.(II,R275)

10. Opening the Door- claim denied as procedurally barred that the defense opened the door to the introduction of evidence when issue could have been raised on direct appeal.(II,R275)

11. Prosecution Closing Argument-claim denied as without merit because complained of statements were taken out of context and were appropriate reply to defense closing.(II,R275-76)

12. Apprendi/Blakely/Ring- claim procedurally barred because issue was raised and decided on direct appeal. (II,R276)

13. Confession Matching Evidence- evidentiary hearing granted on claim that trial counsel was ineffective in failing to establish that Mr. Chavez's confession did not match the crime scene evidence.(II,R276)

14. Defendant Involvement in Defense- evidentiary hearing granted on claim that defense counsel failed to communicate about the case and defense with client.(II,R277)

15. Chavez Watch- evidentiary hearing granted on claim that defense counsel advised Mr. Chavez to testify falsely under oath that his watch was taken from him by the police when photo of Mr. Chavez showed him wearing his watch during interrogation contradicted this assertion.(II,R277)

16. Horse Trailer- evidentiary hearing granted on claim that trial counsel failed to locate witness who owned and lived in the trailer who would have testified that he was the owner of the items recovered in the trailer.(II,R277)

17. Gun Prints- evidentiary hearing granted on claim that trial counsel failed to obtain the fingerprints of Edward Scheinhaus and compare his prints to a print found on a gun retrieved from the trailer.(II,R277)

18. Ryce Body- claim denied on merits as insufficiently pled.(II,R277-278)

19. State Props- claim denied on merits as insufficiently pled.(II,R278)

20. Mitigation Phase- evidentiary hearing granted on claim that trial counsel did not consult with Mr. Chavez about mitigation phase preparation.(II,R278)

21. Susan Scheinhaus and Ed DUI-claim denied as issue involved a collateral matter not relevant to issues at trial.(II,R278-79)

22. Cuban Police Report-evidentiary hearing granted on claim that trial counsel failed to introduce Cuban police report that established period of time Mr. Chavez spent in Cuban jail, thus precluding impeachment on this issue.(II,R270)

23. Photographing jurors-claim denied as same issue was raised on direct appeal and affirmed.(II,R279)

Following the rendition of the trial court's order, counsel Weissenborn moved to withdraw as counsel. The motion was granted and undersigned counsel agreed to accept appointment.(IV,R784-793)

The Second Amended Motion for Post-Conviction Relief was filed on September 26, 2007.(II,R325-352) The Second

Amended Motion raised the following additional claims for relief which would require an evidentiary hearing:

Claim I: Trial counsel was ineffective in failing to investigate and call witnesses to present evidence that Mr. Chavez's waiver of his Miranda rights was involuntary due to his Cuban heritage/alienage, his unfamiliarity with the American criminal justice system, and the significant dissimilarities between the Cuban and American criminal justice systems.(II,R330-333)

Claim II: Trial counsel was ineffective in failing to present available mental health testimony of Dr. John Quintana, a defense expert retained to evaluate Mr. Chavez prior to trial. Dr. Quintana would have testified that his evaluation of Mr. Chavez led him to conclude that Mr. Chavez was a calm, quiet, bookish man who loved to read, was never violent, but was compassionate and kind in accord with the arguments made by defense counsel in the penalty phase closing argument. Dr. Quintana would have further testified that Mr. Chavez had no pedophilic interests, was not homosexual, violent, or met the profile for a sex offender and in his opinion the defendant did not act alone in the commission of this offense. This opinion supported the testimony of Mr. Chavez and the theory of defense.

Trial counsel was ineffective in failing to present this evidence in penalty phase or at a Spencer hearing.(II,R333-336;)

Claim III: The errors alleged among the three motions for post-conviction relief denied Mr. Chavez a fair trial under a cumulative error analysis.(II,R336-337)

The following claims were raised in the Second Amended Motion for Post-Conviction Relief which did not require a hearing. Those claims were:

Claim I: The standard jury instructions improperly denigrate the role of the jury and dilute the jury's sense of responsibility in the sentencing process.(II,R337-338)

Claim II: The standard jury instructions impermissibly shift the burden of proof from the state to the defendant by requiring the defendant to prove the mitigation outweighs the aggravation instead of the State being required to prove the aggravation outweighs the mitigation.(II,R338-39)

Claim III: The method of lethal injection is cruel and unusual punishment, particularly due to the combination of chemicals used and the lack of medical supervision or adequate training.(II,R339-340)

The State's Response to the Second Amended Motion for

Post-Conviction Relief was filed on October 30, 2006.(II,R290-324) The State did not object to an evidentiary hearing on Claims I and II.(II,R290;292)

The trial court entered an Order on Defendant's Second Amended Motion for Post-Conviction Relief on November 9, 2006.(II,R353-355) An evidentiary hearing was granted on Claims I and II.(II,R354) A ruling on Claim III was properly deferred until the conclusion of the evidentiary hearing.(II,R354) The claims for which no evidentiary hearing were sought were denied as having been raised on direct appeal (claim I), not preserved due to lack of objection at trial or failure to argue on direct appeal(claim II), and adversely decided by this Court (claim III).(II,R354-355)

An evidentiary hearing was held by the trial court on January 9-11 and January 23, 2007. A summary of the hearing testimony will be provided in the Statement of the Facts. The proffered testimony of defense witness Michael F. Amezaga was filed on February 27, 2007.(IV,R718-720) The State's motion to strike this proffer was denied by the trial court.(IV,R721-722;768-69)

The written Closing Argument of the Defendant was served on February 12, 2007. (IV,R660-709) The State's

Response and Post Hearing Argument and Memorandum were filed on February 16, 2007. (III,R508-552) The Defendant's Response to the State's Post Hearing Argument and Memorandum was filed on February 27, 2007. (IV,R710-717)

The trial court issued an Order denying the three motions for post-conviction relief on March 8, 2007.(IV,R723-737;771) The State moved to correct a misstatement of fact in the written order.(IV,R738-739) Mr. Chavez filed a Motion for Rehearing on the order denying relief.(IV,R740-746)

The trial court granted the State's motion for correction.(IV,R760) The trial court denied the defense Motion for Rehearing on April 20, 2007.(IV,R7660-661;777-781)

A timely Notice of Appeal was filed on May 8, 2007. (IV,R762)

STATEMENT OF THE FACTS

The parties convened on January 9, 2007 for the evidentiary hearing in this cause. A summary of those proceedings follows:

The trial court announced that the hearing would be conducted on nine claims from the combined first two motions and two claims from the second amended motion.

(V,T4-6) Defense counsel informed the court that the defense was not waiving any claims denied by the court without evidentiary hearing.(V,T21-22) The defense further requested and the trial court agreed to take judicial notice of the court file and previous record of the trial and pre-trial proceedings in the case.(V,T23)

The defense announced that they would not be proceeding on several issues. After the announcement of each issue, the trial court confirmed on the record from Mr. Chavez that he understood the implications and agreed with the action taken. (V,T15;19;20) The issues abandoned dealt with the role of Michael Band (V,T13-14); the issue relating to fingerprints on the gun being tested against Edward Scheinhaus(V,T16-19); and the Cuban police report(V,T19).

The following testimony was presented as to each claim:

The trial defense attorneys

Mr. Art Koch was admitted to the bar in 1968.(V,T91) After several years in private practice, he joined the Miami Public Defender's Office, where he remained for 26 years.(V,T92) Mr. Koch spent 15 years in the Capital Litigation Unit (CLU).(V,T92) Mr. Koch believed he

represented several hundred first or second degree murder cases and had roughly 28-30 first-degree murder trials.(V,T95) Mr. Koch attended training and CLE seminars over the years, some focused on capital litigation.(V,T98)

Mr. Koch was assigned as first chair, or lead counsel in this case.(V,T67) Final decision making authority rested with him.(V,T67)

Mr. Andrew Stanton began working for the Office of the Public Defender in 1994 after his graduation from Harvard Law School.(VI,T196) After serving in the trial divisions, Mr. Stanton entered the appellate division.(VI,T198) His first assignment as an appellate lawyer was to serve as an appellate liaison in this case.(VI,T198) The trial attorneys in this case needed a lot of help with writing, and legal research.(VI,T199) Mr. Stanton continues to work with the CLU and to do capital appeals.(VI,T198)

Mr. Stephen Harper began his legal career as an APD in 1985 in Dade county, where he is still employed.(V,T26) In 1994 he helped develop the CLU in the public defender's office.(V,T26) He still works in the CLU.(V,T26) Mr. Harper was removed from representation in this case by Mr. Koch prior to trial.

Ms. Edith Georgi Houlihan graduated from law school in

1981 and joined the Public Defender's Office.(VII,T331) In the late 1980's she helped establish the CLU unit.(VII,T331) Georgi has administrative responsibilities and serves as a capital trial attorney.(VII,T331) She has represented approximately 100 capital-charged defendants.(VII,T333) She has tried 25 or 26 first-degree murder cases.(VII,T333) For the past fifteen years she has served as an adjunct professor at the University of Miami Law School teaching in the area of trial litigation and criminal law.(VII,T330) She has been qualified as an expert and testified in one post-conviction case.(VII,T330-31) Ms. Georgi both attends and instructs in capital training seminars, primarily in the area of mitigation.(VII,T333;335) She was removed from this case prior to trial by Mr. Koch.

Patrick Nally began to work in the Public Defender's Office when he graduated from law school in 1981 and remained for six to eight years.(VII,T281) He left and entered private practice for three years, then returned to the Public Defender in 1990.(VII,T282) Mr. Nally worked in the capital division handling five or six cases during his first tenure.(VII,T284-5) He handled capital cases in private practice.(VII,T285) When he returned to the Public

Defender, he was fist assigned to a felony division, but was then reassigned to the CLU unit in 1996 or 1997.(VII,T286) Mr. Chavez was already a client at the time Nally entered the CLU unit.(VII,T286) Mr. Nally entered the CLU unit with the understanding that he would served as second chair to Mr. Chavez.(VII,T287)

After his return to the PD, Nally believed that he attended some capital training programs and was familiar with the Florida PD manual on Defending Capital Cases.(VII,T287) In-house training was also available.(VII,T288)

Mr. Nally was forced to step aside as counsel prior to trial due to personal health problems.(VII,T296) His health concerns prevented him from working on the case after he returned to the office.(VII,T297)

Mr. Manuel Alvarez graduated from law school in 1996 and immediately went to work at the Public Defender's Office.(IX,T432) He stayed for three years, then left to enter private practice.(IX,T432) He returned to the Public Defender's Office three years later and remained there until two years ago.(IX,T432) Mr. Alvarez had no capital experience during his first term with the PD.(IX,T433) He tried one capital case while in private practice the first

time.(IX,T433) He was never part of the CLU unit during his second tenure with the PD, but was brought into this case after Mr. Nally could not continue for health reasons.(IX,T434) Mr. Alvarez had access to various capital litigation training materials, but had not read them prior to working on this case.(IX,T435)

A. The “Brummer” Claim/Claim I of the Amended Motion for Post-Conviction Relief

Mr. Koch acknowledged that Mr. Bennet Brummer held the office of elected public defender and periodically ran for re-election.(V,T99) In recent years Mr. Koch had been particularly critical of Mr. Brummer’s performance as the elected public defender.(V,T100) Mr. Koch made allegations that Mr. Brummer had interfered with his representation of Mr. Chavez in a letter sent to members of the local bar association when Mr. Brummer was running for re-election.(V,T100) Mr. Koch acknowledged that his relationship with Brummer and his administration was difficult after he was put on probation for personal conduct alleged to have occurred in the office.(V,T175) A level of animosity existed between the parties.(V,T175) Mr. Koch believed that the office climate at the time of this case was hostile, with staff divided into two camps-

those that supported Brummer and those that wanted someone to run against him.(V,T176) Mr. Koch believed that he was placed on probation to force his resignation.(V,T176)

Early in the Chavez case, Mr. Brummer told Mr. Koch he wanted weekly meetings about the case.(V,T100) According to Mr. Koch, Mr. Brummer became upset over certain things that were being done by the defense team.(V,T101) Mr. Koch testified that Mr. Brummer was particularly upset over the length of time he spent on the deposition of lead detective Estopian.(V,T101) Mr. Koch testified that Mr. Brummer was very concerned about public opinion reflecting poorly on himself and the office and was concerned that his re-election would be jeopardized by the Chavez case.(V,T102)

According to Mr. Koch, Mr. Brummer would not permit depositions prior to the election. Mr. Koch was told he "need[ed] to give the impression of getting prepared without ever being prepared." by Mr. Brummer.(V,T102) Mr. Koch believed this meant he was not to take long, thorough depositions, but instead "limit them to 30 minutes." (V,T102) Mr. Koch testified that after Mr. Brummer's political concerns abated, all the depositions were taken and some exceeded 30 minutes.(V,T104-5;168) When it became less "politically dangerous", the defense was allowed to

prepare.(V,T168)

Mr. Brummer did not want Mr. Koch to look for a key witness that had direct contact with the crime scene whom Mr. Chavez had told Koch about.(V,T103) Mr. Brummer suggested that instead of the defense finding this person, that the police should look for him or at least go with the defense team so it appeared that it was a police instigated investigation rather than one instigated by the defense.(V,T103)

Mr. Koch further felt that Mr. Brummer hindered the defense by refusing to permit certain motions to be filed.(V,T108) Mr. Koch believed that a motion to recuse all of the Dade County judges should have been filed.(V,T108) Mr. Koch testified that he was approached by three different Dade county judges who all told him that any judge who wanted to keep his job would not grant defense motions or “cut Mr. Chavez a break”.(V,T109-10) Mr. Koch wanted to conduct a survey about public opinion regarding the assignment of judges to this case, but in his words, “Bennett went nuts about that.”(v,T109) Mr. Koch testified that Mr. Brummer was too concerned about the “politics” between he and the judges to allow a recusal motion to be filed.(V,T111)

Neither Ms. Georgi or Mr. Harper were involved in the defense during the period of conflict with Mr. Brummer.(V,T126) Mr. Nally was serving as co-counsel with Mr. Stanton.(V,T126) Mr. Alvarez was not yet on the case.(V,T126) Mr. Koch did not believe, due to the office climate at the time, that he would have shared his difficulties with Mr. Nally.(V,T127)

Mr. Bennett Brummer testified that he has served as the elected public defender of the Eleventh Judicial Circuit since 1977.(VI,T260) He described the Chavez case as being more sensational than most murder cases.(VI,T261) The entire case was politically charged and difficult.(VI,T267) Mr. Brummer did not have belief that a trial in this case could have occurred before the 1996 election, as that would have permitted only nine months for preparation.(VI,T269) Most capital cases in Dade county required two to three years of preparation.(VI,T269) In some ways, a trial before the election would have had a greater political advantage.(VI,T269) Mr. Brummer did not recall any meeting with Mr. Koch where he instructed Mr. Koch to refrain from trial preparation until after the election.(VI,T270) Mr. Brummer denied interfering in the trial preparation of this case in order to further his own

political agenda.(VI,T273)

Mr. Brummer did not have a clear recollection of who served on the defense team during which period, but was familiar with all the lawyers who represented Mr. Chavez.(VI,T262) It was not his practice to interfere in the trial strategies of his attorneys.(VI,T273) He does not get into the tactics of the cases.(VI,T273)

Mr. Brummer took an interest in the proceedings of this case.(VI,T263) He wanted to ensure that adequate resources were provided, that counsel was extremely dedicated, and that counsel had access to whatever experts, support staff, and investigators they needed.(VI,T264) Mr. Brummer had great respect for Mr. Koch, Ms. Georgi, and Mr. Harper and the other lawyers who worked on this case.(VI,T266) Mr. Brummer recalled personally reviewing a number of the written motions in the case to made sure the grammar was correct and they were legally sufficient.(VI,T264)

Mr. Brummer held regular meetings with the lawyers on the case.(VI,T264) He did not place any restrictions on how they would proceed in the case.(VI,T264) Mr. Brummer specifically denied restricting depositions in any way.(VI,T264-5;271) No restrictions were placed on the

depth and timing of any investigation.(VI,T265) No restrictions on motions, including content, were made.(VI,T267;272) Mr. Brummer recalled that a number of actions were taken, such as recusing a judge and referring to Mr. Chavez as a Cuban freedom fighter that proved very unpopular and even generated editorials in the Miami Herald.(VI,T268) Many things were done that were not in the political best interest of the office.(VI,T268)

Mr. Brummer testified that there were numerous bomb threats made to his office due to representation in this case.(VI,T265) In the interest of security for his staff, he may have suggested that if they were going to any place that might place them in jeopardy or in danger of attack, that they take the police with them.(VI,T265) Mr. Brummer could not recall with certainty that he had suggested this, but might have.(VI,T265) Mr. Brummer would not have suggest a police officer be present during any witness interviews or observe the actual investigation.(VI,T266)

Mr. Stanton was never aware of anyone, including Mr. Brummer restricting the defense when he joined the defense team in 1997.(VI,T200) Mr. Koch never mentioned any difficulties to him.(VI,T201) Mr. Stanton was never

restricted by Mr. Brummer.(VI,T201) Mr. Stanton did not recall specific discussions about filing a motion to disqualify all the judges.(VI,T203)

Mr. Nally testified that he was unaware of any interference by Mr. Brummer in the case.(VII,T290) He recalled once or twice that Mr. Koch mentioned something about Mr. Brummer, but Nally didn't understand what he was talking about and it seemed to be nonsense, so he ignored the comments.(VII,T290) Nally did not recall Mr. Koch ever telling him specifically that Mr. Brummer was interfering with his ability to represent Mr. Chavez.(VII,T291) Nally could not recall Mr. Brummer ever interfering with investigations, including locating the occupant of the horse trailer.(VII,T292) He did not recall Mr. Brummer ever interfering with the filing of motions, including motions to recuse judges.(VII,T292) Nally did not believe there was a good faith basis to file a motion to recuse all the judges.(VII,T293) Nally testified that during the time period he was on the case Mr. Brummer did nothing but support the defense team.(VII,T293)

Ms. Georgi testified that she knew that Mr. Brummer wanted to be advised of the status of this case.(VII,T339) Mr. Brummer never told her, or anyone else to her

knowledge, of what to do or not do in this case.(VII,T339) Mr. Koch never indicated to her that Mr. Brummer had restricted his preparation in any manner.(VII,T339-343)

Mr. Harper was aware of Mr. Koch's allegation Mr. Brummer prevented him from adequately and effectively representing Mr. Chavez.(V,T63) Mr. Harper did not believe that Mr. Brummer did anything to prevent him from personally working on this case.(V,T63)

Mr. Harper was not aware of any limitations placed on Mr. Koch by Mr. Brummer.(V,T63) Mr. Harper recalled Koch complaining that he had to regularly meet with Mr. Brummer on this case and Koch complained about "micro-managing", but not interference.(V,T64-5;83) Harper recalled at least one staffing on this case that Mr. Brummer attended and participated in, but he did not interfere at that meeting. Mr. Harper testified that his office was next to Mr. Koch and even after Mr. Koch removed him from this case, he was not aware of any allegations of interference by Mr. Brummer.(V,T64;83)

Mr. Harper acknowledged that he has had significant policy disagreements with Mr. Brummer, but Mr. Brummer has never interfered with how Mr. Harper approached a case and never told him what to do or not to do in his cases.(V,T64)

Mr. Alvarez was unaware of any issues relating to Mr. Brummer interfering in this case.(IX,T436)

The State introduced several depositions taken by Mr. Koch in this case.(IX,T472) The depositions occurred prior to the 1996 election.(IX,T472)

B. Mitigation Development/Lack of communication

Mr. Harper was in the CLU unit for approximately 18 months prior to the office being appointed to represent Mr. Chavez.(V,T28) Mr. Harper had attended CLE training in the area of capital defense and mitigation presentation, including significant training on developing mitigation related to childhood issues.(V,T29) Part of the reason for the implementation of the CLU unit was to hire and train mitigation specialists, a developing area in the 1990's.(V,T32) Mr. Harper could not recall if the office had a mitigation specialist on staff at the time of Mr. Chavez's case.(V,T32) During the initial stages of representation, it was Mr. Harper's job, in conjunction with APD Edith Georgi Houlihan, to develop the mitigation phase for Mr. Chavez.(V,T33;VII,T338) Mr. Art Koch was designated as lead counsel and primarily responsible for guilt phase.(V,T33;VII,T338)

Mr. Harper began to develop the mitigation phase by

speaking with Mr. Chavez, whom he described as a “broken man” on their initial meeting several days after police custody began.(V,T35) Mr. Chavez was severely depressed, expressed suicidal thoughts, and wanted to plead guilty.(V,T35) Mr. Harper had many lengthy discussions with Mr. Chavez over the next several months in which he explained the judicial process and the purpose of mitigation investigation.(V,T35)

Ms. Georgi began to meet with Mr. Chavez shortly after his arrest.(VII,T345) She spent “intensive” amounts of time with him on a daily basis.(VII,T345) Georgi described Mr. Chavez as “quite suicidal”, he was despondent and wanted to die.(VII,T345)

Mr. Harper and Ms. Georgi made efforts to gain the trust of Mr. Chavez, particularly given the unique position a second phase attorney is placed in.(V,T37,39;VII,T346) Mr. Harper and Ms. Georgi believed that an attorney must establish trust with the client before the client will confide things about their life, particularly childhood abuse.(V,T38;VII,T346-7;VIII,T380) It is very difficult to convince clients to reveal embarrassing and sensitive family information that is critical to penalty phase.(V,T38;VII,T347;VIII,T380) It is not uncommon for

individuals who have been abused to deny or block out the abuse for many years.(VIII,T380) Mr. Harper noted that the ABA standards governing capital case preparation specifically require penalty phase investigation even in the face of a client who denies guilt.(V,T47) Mr. Harper further noted that evolving case law requires the investigation and presentation of mitigation evidence that is available to the court.(V,T47) It was the practice of the Miami office, and specifically Mr. Harper, to investigate possible mitigation and then make the strategic or tactical decisions on what to present rather than forgo investigation.(V,T48)

Georgi and Harper met with Mr. Chavez, both jointly and individually, and utilized a mental health professional, Dr. Miranda, to achieve the goal of collecting information for penalty phase.(V,T39;VII,T348)

During the course of their involvement in the case, Harper and Georgi learned that Mr. Chavez was born despite a failed abortion where a twin fetus was successfully aborted.(V,T40-41) The family lived in Cuba and was very poor.(V,T40) Mr. Harper also obtained information about Mr. Chavez's escape from Cuba and his life in the United States.(V,T41)

Mr. Chavez began to discuss with Ms. Georgi incidents of serious childhood abuse.(V,T41;VII,T349) Mr. Chavez indicated that as a child he was forced to participate in spectator fights with other children much like cock fighting.(V,T44;VII,T350) Mr. Chavez was made to prostitute himself and was essentially sold to other adult males for sex.(V,T44;VII,T350) Mr. Harper viewed these experiences as significant and powerful mitigating evidence.(V,T45;49) Before this information could be corroborated, Mr. Harper and Ms. Georgi were removed from the case.(V,T71) Mr. Harper was unaware of any corroborative efforts after his departure from the case.(V,T71)

Shortly after the disclosure of sexual abuse by Mr. Chavez, Mr. Koch met with Mr. Harper and Ms. Georgi and forbade them to continue to meet with Mr. Chavez.(VII,T351) They were told they were to cease any investigation into his background, past, or childhood.(V,T49;VIII,T380,382) According to Mr. Harper, Mr. Koch's position was that any mitigation would not matter in this case, no matter how compelling or dramatic.(V,T50) Koch believed that a guilty verdict would result in a death sentence regardless of what was done or presented in penalty phase.(V,T50) Koch

believed that continued investigation would be upsetting to Mr. Chavez and that Mr. Chavez would not be able to handle the emotional fall out from a penalty phase investigation and still be able to mentally prepare himself to testify at a suppression hearing and trial.(V,T50;VIII,T380) Mr. Koch rejected all requests by Harper and Georgi to proceed with mitigation investigation and prohibited them from speaking to Mr. Chavez.(V,T55)

Ms. Georgi was especially concerned that if communication with Mr. Chavez was cut off in these areas that he would totally shut down and refuse to discuss them again.(VIII,T382) Ms. Georgi had a psychologist, Dr. Bill Mossman, evaluate Mr. Chavez to determine if continued investigation into the abuse would be too detrimental for him.(VIII,T384) Dr. Mossman believed that although it would be painful for him, Mr. Chavez was psychologically capable of dealing with these issues.(VIII,T385) Mr. Harper believed that if it was felt that Mr. Chavez couldn't mentally handle both the suppression hearing and a background investigation, the hearing should have been continued.

Mr. Koch testified he had a major problem with the Georgi/Harper approach.(V,T128) Koch believed Mr. Chavez

was uncooperative about developing information about his past.(V,T128) Mr. Koch thought that Harper and Georgi wanted to introduce evidence that Mr. Chavez was a pedophile, which he did not believe to be mitigating, but to be aggravating.(V,T128,171) Mr. Koch believed evidence of pedophilia would not be effective to a jury.(V,T172) Mr. Koch maintained that he did not know if Mr. Chavez told Georgi and Harper about abuse or if it came from their imagination, and in any case, he was told this information.(V,T129)

Mr. Koch stated that Georgi and Harper were removed from the case because they were developing a defense that was possibly based on perjury.(V,T130) Mr. Koch did not believe in the existence of any childhood abuse because Mr. Chavez did not tell him personally about abuse and because police who went to Cuba and who talked to everyone in Dade county that knew Mr. Chavez were not told of any abuse.(V,T130) Koch believed that Georgi and Harper felt any claim of innocence was irrelevant.(V,T131) Mr. Koch claimed that Mr. Chavez told him that he would not talk to Harper and Georgi any more because he thought they were trying to get him to say he was guilty.(V,T131,135,158) Koch then told Georgi not to pursue any further questioning

or investigation of abuse.(V,T134)

Mr. Koch acknowledged that a relationship of trust between the client and attorney is necessary before a client will divulge embarrassing and personal information.(V,T132) Mr. Koch acknowledged that Mr. Chavez would not talk to him about his childhood in Cuba.(V,T135)

Mr. Koch further testified that not only did he involve Mr. Chavez in the defense, but the defense came from him.(V,T169) Mr. Koch consulted extensively with Mr. Chavez about the actions the defense was taking, probably 40-50 times.(V,T122;170) Mr. Koch reiterated that while he did not give Mr. Chavez discovery, he went over it with him.(V,T170) He did not give Mr. Chavez discovery in order to avoid it falling into the wrong hands and because Mr. Chavez was not good with English and all the discovery was in English.(V,T123-4)

Mr. Stanton observed Mr. Koch’s interactions with Mr. Chavez.(VI,T208) He described the relationship as “formal”, not hostile, but not a buddy relationship.(VI,T208) Mr. Koch would do most of the talking, but Mr. Chavez would occasionally speak. (VI,T208;228) Mr. Stanton did not really discuss his work

on the case with Mr. Chavez, though he was present when the case was discussed.(VI,T227) Generally, Mr. Koch or Mr. Nally would do the talking.(VI,T227)

Ms. Georgi also observed some of Mr. Koch's interactions with Mr. Chavez.(VII,T344) Much of the time Mr. Koch met with Mr. Chavez alone.(VII,T344) Georgi described Mr. Koch as very cordial with his clients.(VII,T344)

Mr. Harper did not agree with Koch's position regarding trial preparation or his assessment of Mr. Chavez's mental state.(V,T51;57) In Mr. Harper's opinion, the stronger the State's case, the harder the defense has to work to obtain mitigation.(V,T53) Mr. Koch shut down penalty phase preparation before the case could be developed and appropriate experts obtained.(V,T61) At Koch's insistence, Mr. Harper and Ms. Georgi were removed as counsel for Mr. Chavez.(V,T62;VIII,T393)

Mr. Nally took over as penalty phase counsel after the removal of Harper and Georgi.(VII,T288) He learned a lot about what Mr. Koch was planning for the first phase in order to understand what would happen in penalty phase.(VII,T288) To that end, he reviewed depositions and

police reports.(VII,T288) As time went on, Mr. Nally would discuss with Mr. Koch what would be done in penalty phase.(VII,T289)

Mr. Nally knew that he was replacing Harper and Georgi due to problems between them and Koch.(VII,T298) Nally viewed his role as doing what Mr. Koch assigned him to do, and that included penalty phase.(VII,T314)

Mr. Nally was aware of the information relating to possible sexual and physical abuse of Mr. Chavez when he was a child very early on.(VII,T298) He learned of this either through reading Harper or Georgi's notes.(VII,T298) Mr. Nally spoke to Koch about this information.(VII,T299) Koch told Mr. Nally that Mr. Chavez denied any abuse to him, that this was a first-phase case, and not to go there.(VII,T299) Nally did not disagree with Koch's opinion that this was a first-phase case.(VII,T318) Mr. Chavez had taken the position he was not guilty and was not interested in life in prison.(VII,T319-20)

Nally did make a limited attempt in a tangential manner to bring up the abuse subject with Mr. Chavez.(VII,T299;315) Mr. Chavez didn't lead him to believe that there was anything there to be found, so he did not proceed further.(VII,T299) Nally had the

impression that Mr. Chavez didn't want to discuss it.(VII,T300;316) Nally testified that Mr. Chavez did not expressly prohibit him from presenting mitigation that was developed- Mr. Chavez agreed to let Nally do his job.(VII,T312) Mr. Chavez just did not go out of his way to assist in this area.(VII,T312) Nally testified that he would have pursued the area of abuse with Mr. Chavez, despite the reluctance on the client's part, if he had not been stopped by Koch.(VII,T326)

Nally opined that it would not be unusual for a client to from refrain or not want to talk about sexual or physical abuse.(VII,T300) Evidence of sexual and physical abuse is significant mitigation.(VII,T302)

Nally acknowledged that it is not unusual for a client to develop different levels of trust with different attorneys.(VII,T300) It is not unusual for a client to discuss sensitive areas with an attorney they trust and to remain silent with an attorney they do not trust.(VII,T300) Nally agreed it would be important to retain counsel who was able to develop a rapport with the client, if the attorney's could get along with each other.(VII,T300)

Mr. Alvarez took over the second phase when Mr. Nally became to ill to continue. He understood that the second

phase was to be “minimal”.(IX,T443) He knew of some abuse allegations from one of the previous attorneys, but couldn’t remember which one first told him about this area.(XI,T443) Mr. Alvarez believed that in the early stages of the case, Mr. Chavez alluded to sexual abuse by a brother and a friend of his brother.(IX,T444) Mr. Alvarez believed that Mr. Chavez had then recanted or denied the veracity of those statements.(IX,T444) Mr. Alvarez didn’t know what Mr. Koch’s position was on this area.(IX,T445) Mr. Alvarez broached the topic with Mr. Chavez, who confirmed that he did not want to go into those areas.(IX,T446;457) Alvarez believed that Mr. Chavez had been abused, but did not want to have it investigated and his family brought in.(IX,T468)

When Mr. Chavez’s mother was brought from Cuba she was asked about abuse.(IX,T446) She did not recall any abuse, but Mr. Alvarez agreed that a parent will not always know of abuse.(IX,T446;458) Mr. Chavez’s brother was asked about abuse and denied any. The brother then refused to cooperate further.(IX,T459)

Mr. Alvarez agreed that many clients do not want to discuss sexual abuse and find it difficult to do so.(IX,T445) He further agreed that developing a

relationship of trust between the attorney and client was essential to reaching a point where the client will divulge information.(IX,T445)

Mr. Harper had no specific knowledge of subsequent mitigation investigation.(V,T71-74) He believed at some point Mr. Chavez denied abuse, but then later acknowledged abuse, but did not want that evidence to be presented.(V,T74;81) Mr. Harper was aware that police officers from Dade county had gone to Cuba and interviewed family members during the investigation and found no evidence of abuse.(V,T78) Mr. Harper did not know who the police talked to, under what circumstances the family was questioned, or what questions were asked.(V,T78) Mr. Harper testified in his experience and based on the seminars and training he had attended, family members would not be likely to admit abuse to law enforcement.(V,T87) Mr. Nally agreed with this conclusion.(VII,T303)

Mr. Stanton testified that after Harper and Georgi were removed, there was some penalty phase investigation.(VI,T214) Mr. Stanton recalled speaking with Mr. Chavez's sister in Cuba and that a mitigation specialist, Mrs. Sosi Alfonso, went to Cuba.(VI,T214) Ms. Georgi did not believe there was any follow-up in the abuse

areas.(VIII,T415)

Mr. Stanton and Ms. Georgi believed that the law required a thorough investigation before strategic decisions can be made.(VI,T216;VIII,T386-88) Mr. Stanton did not believe that standard has changed over time.(VI,T216) Mr. Stanton and Ms. Georgi acknowledged that mitigation evidence can be presented just to the court as opposed to the jury, where the evidence must be considered and weighed.(VI,T217;VIII,T388)

Mr. Nally did not believe that mitigation should be abandoned unless a thorough investigation was done.(VII,T301) A tactical decision to forgo the presentation of mitigation evidence should not be made until a complete investigation is done.(VII,T301) Nally acknowledged that mitigation that might be tactically withheld from a jury would be able to be presented to only the judge at a Spencer hearing.(VII,T302) Ms. Georgi agreed with this assessment of mitigation evidence.(VIII,T386) The requirement of a thorough penalty phase investigation applies even when the strategy is to pursue a first-phase not guilty defense.(VII,T325)

Mr. Koch testified that there was conflict between he, Georgi, and Harper.(V,T112) Mr. Koch believed that they

wanted to use a mental health defense for first phase and he believed that Mr. Brummer agreed with them.(V,T112-13) Mr. Koch testified that it was his opinion that Harper and Georgi presume 99% of capital clients are guilty, so you have to stress the second phase and try to delay a death sentence from being carried out for decades.(V,T126)

Mr. Koch and Mr. Chavez rejected that strategy.(V,T113;158) Mr. Koch testified that he had no difficulties with the Pat Nally and Manny Alvarez, the lawyers who replaced Georgi and Harper.(V,T125) He also got along well with Andrew Stanton, an appellate lawyer who also worked on the case.(V,T125) Mr. Koch was the "captain" of this ship and he made the final decision.(V,T154)

Mr. Stanton was aware at the beginning of his involvement in the case that there was conflict between Harper, Georgi, and Koch about how the case should be handled.(VI,T211) Mr. Stanton knew the dispute centered on what direction mitigation should take.(VI,T212) Because Mr. Koch was the lead attorney, his decisions controlled.

After the first phase verdict, a meeting was convened to reevaluate potential penalty phase mitigation. Georgi, Harper, Stanton, and capital appellate attorney Christine

Spaulding were present at the meeting.(VI,T212;VIII,T396-7 Alvarez vaguely recalled being present, but had no specific recollection of the meeting.(IX,T448) When the possibility of reopening any investigation into abuse was brought up, Mr. Koch became very angry and felt he had been "set up".(VI,T216) Georgi, Harper, and Spaulding were told by supervisors to cease working on the penalty phase of the case.(V,T59;VIII,T397)

B. Alienage

Mr. Harper was one of the first attorneys to meet with Mr. Chavez following his placement in jail.(V,T36) Mr. Harper devoted significant amounts of time trying to explain the American criminal justice system to Mr. Chavez.(V,T36) Mr. Chavez had prior experience with the Cuban criminal/military system.(V,T36)

Mr. Stanton wrote the Motion to Suppress and the memorandum of law that accompanied the motion.(VI,T219) He raised issues relating to Mr. Chavez's Cuban alienage, such as his unfamiliarity with the American judicial system.(VI,T219) Mr. Stanton knew that Mr. Chavez was from Cuba, that he had been convicted of some crimes in Cuba related to military service, and that he had been in the United States for a short period of time.(VI,T219) Mr.

Stanton could recall that Mr. Chavez's contacts with the Cuban police and military were very unpleasant and his view of the justice system in Cuba was not positive.(VI,T219) Mr. Stanton felt the alienage issue was an important component of the motion to suppress.(VI,T220) Mr. Stanton couldn't recall what, if any, steps were taken to find an expert in the Cuban system, but he believed it was discussed.(VI,T220)

Mr. Stanton knew that Dr. Ofshe was an expert in the area of coerced confessions.(VI,T221) Dr. Ofshe operates very differently from most experts because he takes recorded interviews of the defendant.(VI,T222) This is problematic due to discovery obligations because if he is called as a witness, hours of client statements must be disclosed to the State.(VI,T223) A second unique characteristic of Dr. Ofshe is that he will not agree to testify unless he personally believes the defendant is innocent after interviewing him, regardless of his opinion relative to coercion.(VI,T223) In contrast, an attorney has a duty to defend a client, even one who recants a confession.(VI,T224) Ofshe reviewed the confession in this case.(VI,T221) Mr. Stanton testified that if an expert such as Ofshe would not testify because of a personal

belief, the attorney's obligation was to seek a different expert.(VI,T224) Mr. Stanton did not believe that Dr. Ofshe had any expertise in Cuban issues and he was not affiliated with the case for any issues on alienage.(VI,T221)

Mr. Koch testified that he associated 8-10 experts in this case.(V,T137) He did not associate an expert in the Cuban criminal justice system.(V,T137) Mr. Koch acknowledged that one ground emphasized in the motion to suppress Mr. Chavez's confession addressed his alienage and unfamiliarity with the American judicial system in contrast to that in Cuba.(V,T138) Koch testified that everything you put in a motion you do not necessarily believe to be true or can be substantiated.(V,T144) According to him, you write the motion, put everything in, then try to prove your claims.(V,T144)

Mr. Koch said he didn't get an expert because you can't commission an expert to testify the way you want.(V,T139) Mr. Koch then referred to an expert, Dr. Richard Ofshe, from California.(V,T139) Koch maintained he asked Dr. Ofshe to address alienage and the accuracy or inaccuracy of the confession.(V,T139) Dr. Ofshe represents himself to be an expert in coerced confessions.(V,T139;161) After meeting with Mr. Chavez, Dr. Ofshe told Mr. Koch he

could not assist the defense in taking the position that the confession was false.(V,T139;163) Mr. Koch made no attempts to find any other witness to use at the suppression hearing.(V,T140)

Mr. Koch could not say what Dr. Ofshe knew about the Cuban justice system.(V,T140) Koch only knew that Dr. Ofshe had worked with other Cuban defendants and based on his conversations with Dr. Ofshe, he felt Dr. Ofshe was qualified to address aleinage.(V,T140;162)

Mr. Nally was aware that alienage was a component of the Motion to Suppress.(VII,T304) He recalled the issue being discussed and recalled that an attempt was made to hire Dr. Ofshe in this regard.(VII,T304) Nally was also familiar with the unusual requirements that Dr. Ofshe imposed as a prerequisite for his testimony- recorded interviews and his personal belief in the innocence of the defendant.(VII,T305) Nally felt that discovery rules would require a recorded interview to be turned over to the State.(VII,T3070

Nally agreed that a lawyer has an ethical obligation to move to suppress a confession when there is a legal basis to do so.(VII,T308) Suppression should be sought regardless of the guilt or innocence of the defendant.

(VII,T308) Nally opined that if an expert would not testify on behalf of a defendant due to his personal conviction of the defendant's guilt, the appropriate course of action was to seek another expert.(VII,T308) Mr. Brummer did not restrict funding or prohibit the defense team from associating another expert after Ofshe refused to testify.(VII,T308)

Mr. Michael Amezaga is an attorney practicing in Florida.(VII,T354) He worked as criminal defense attorney in New York City for six years, then moved to Florida and worked as an Assistant Public Defender for several years.(VII,T355) Mr. Amezaga then served as an assistant city attorney for West Palm Beach and worked in insurance defense. He went into private practice in 2002. (VII,T355) Mr. Amezaga was born in Cuba and came to the United States at age nine.(VII,T356) Mr. Amezaga speaks and reads Spanish fluently.(VII,T361)

Mr. Amezaga became involved in the Cuban criminal justice system about three years previous when he became a member of the U.S. Cuban Legal Forum.(VII,T356) The Cuban Legal Forum is a group of American business men and lawyers dedicated to learning about the Cuban judicial system, to compare the Cuban system with the American judicial system,

and to foster a dialogue between Cuban and American lawyers.(VII,T357) Access to Cuba was very limited. Only two avenues to study the Cuban judicial system are available- obtaining a license through the Treasury Department to engage in governmental approved activities or as a professor engaged in full-time research.(VII,T357) Travel to Cuba requires the consent of both the American and Cuban governments.(VII,T357)

Mr. Amezaga has been granted permission to travel to Cuba on two occasions.(VII,T358) During his first four day trip in 2003 he met with other Cuban lawyers who practiced criminal law and engaged in dialogue with them about the Cuban criminal justice system.(VII,T358) Approximately three hours of the lectures he heard from the Cuban lawyers and judges dealt with the criminal justice system.(VII,T363) He learned, for example, Cuba has no public defender system.(VII,T358) Mr. Amezaga was also able to meet with and talk to Cuban judges.(VII,T359) Mr. Amezaga was awarded a certificate of attendance for his participation in the conference.(VII,T364)

During his second four day trip to Cuba, Mr. Amezaga spent three days devoted to studying the Cuban criminal justice system.(VII,T365) He was able to conduct more

extensive research in Cuban libraries and was granted access to Cuban statutes and the Cuban constitution. In addition to continued meetings with Cuban judges, Mr. Amezaga was permitted to attend a criminal trial in Cuba.(VII,T359) Mr. Amezaga was able to study the Cuban criminal justice system from the late 1960's to the present.(VII,T368) According to Mr. Amezaga, significant changes occurred in the Cuban criminal justice system in 1994.(VII,T368)

Ultimately, Mr. Amezaga presented his findings to the Cuban Legal Studies Department of Florida International University upon his return to the United States.(VII,T359;363) Mr. Amezaga continues to study the Cuban criminal justice system and continues to communicate with Cuban attorneys with the permission of the Cuban government.(VII,T360)

Mr. Amezaga has not attended any formal training about Cuba in the United States nor be qualified as an expert previously.(VII,T362) Over defense counsel's objection, the trial court ruled that Mr. Amezaga did not meet the qualifications to present expert testimony.(VII,T369-373) A written proffer of Mr. Amezaga's proposed testimony was submitted to the court and is summarized:

In addition to the above activities, Mr. Amizaga met with Mr. Chavez on January 9, 2007.(IV,R719) Mr. Chavez recounted his experiences with the Cuban judicial system to Mr. Amezaga.(IV,R719) During his initial contacts with the police in Cuba, Mr. Chavez would have had no right to legal counsel that was appointed.(IV,T719) The concept of court-appointed counsel would not be familiar to him.(IV,R719) A Cuban suspect does not have a right to remain silent during police interrogations in Cuba.(IV,R720) Mr. Chavez would not have been familiar with the American constitutional protection against self-incrimination and not understood it.(IV,R720) Cuba does not provide criminal suspects with counsel except in limited circumstances, does not provide counsel when incarceration is a potential penalty, and has no Miranda rights or functional equivalent.(IV,R710) Mr. Chavez, based on his short time in this country prior to this first arrest when coupled with the significant differences between his native criminal justice system and the American system would not have understood the rights embodied in Miranda to the degree necessary to make a knowing and intelligent waiver.(IV,T720)

C. Presentation of Dr. Quintana's testimony

Mr. Koch retained Dr. Quintana as an expert in this case.(V,T146) He told Mr. Chavez that Dr. Quintana was only working on first phase.(V,T147) There was a long period of time between the date that Dr. Quintana met with Mr. Chavez and the trial.(V,T147) According to Koch, Dr. Quintana wanted to update his report, but Mr. Chavez would not meet with him again.(V,T148) Mr. Koch couldn't recall why he didn't call Dr. Quintana as a witness for second phase. Mr. Koch thought it might be right that Mr. Chavez didn't want to have Dr. Quintana testify, but he couldn't say for sure.(V,T165)

Mr. Stanton was not aware of Koch lying to Mr. Chavez in order to get him to see Dr. Quintana by telling him that Dr. Quintana would only address first phase issues.(VI,T209) Mr. Stanton could not recall Mr. Chavez refusing to cooperate at any time with Dr. Quintana.(VI,T210) Mr. Stanton could not recall any discussions between the attorneys about whether or not Dr. Quintana should testify.(VI,T210)

Mr. Stanton disagreed with any assertion that Dr. Quintana was only a "lingering doubt" witness.(VI,T241) Stanton felt that Dr. Quintana was a legitimate mitigation witness.(VI,T241)

Mr. Nally became aware of Dr. Quintana early on. (VII,T309) Nally believed that Mr. Chavez was willing to cooperate with Dr. Quintana.(VII,T309) Nally was not aware that Mr. Chavez at any time refused to cooperate with Dr. Quintana.(VII,T310) Koch did tell Mr. Nally that Mr. Chavez did not want to go into sex abuse with Dr. Quintana.(VII,T310) Nally believed that if a client expresses a desire to limit the parameters of a mental health exam that the lawyer should have developed enough trust with the client to assure the client that the information will not be used in an embarrassing or humiliating manner.(VII,T311) The attorney should persuade the client to cooperate fully with the mental health expert.(VII,T311)

Nally intended to use Dr. Quintana to testify at penalty phase and present evidence from Dr. Quintana that that Mr. Chavez was not a pedophile.(VII,T310) Nally believed he would have also used Dr. Quintana for other areas, but couldn’t recall specifics.(VII,T310) Nally had no idea what happened and why Dr. Quintana was not used as a witness.(VII,T313)

Mr. Harper was aware that Dr. Quintana had been retained as an expert to evaluate Mr. Chavez’s sexual

tendencies and determine if he was a pedophile.(V,T60) Mr. Harper saw Dr. Quintana's report and believed it contained helpful mitigation evidence.(V,T60)

Mr. Alvarez was assigned the second phase after Nally's health prevented him from representing Mr. Chavez.(IX,T438;449) Mr. Alvarez believed that Koch wanted the second phase to be "minimal".(IX,T441) Mr. Alvarez had some concerns about what the jury might think about Dr. Quintana's testimony.(IX,T449) Alvarez had three general concerns with Dr. Quintana's testimony: Dr. Quintana did not feel Mr. Chavez was a psycopath despite a "heightened score" in that area; Dr. Quintana diagnosed Mr. Chavez with anti-social personality disorder; and Dr. Quintana's opinion was that Mr. Chavez was unlikely to engage in high risk behavior alone, therefore he probably did not act alone in this offense.(IX,T452;463) Alvarez acknowledged that he did not talk with Dr. Quintana about his findings nor give him an opportunity to explain the testing results. (IX,T450) Alvarez was not familiar with the mitigation aspects of personality disorders such as anti-social.(IX,T451) Alvarez was also concerned with Dr. Quintana's conclusion that Mr. Chavez was not a

pedophile.(IX,T453) He felt that finding contradicted the jury verdict and might alienate the jury if they were told by an expert that they were wrong.(IX,T453;464)

Alvarez identified other information in Dr. Quintana's report that he found beneficial.(IX,T453) This included opinions that Mr. Chavez was not violent and was not a pedophile.(IX,T454) Mr. Alvarez testified that he had not even considered the possibility of presenting Dr. Quintana's report or his testimony at a Spencer hearing until just before his current testimony in the post-conviction proceedings.(IX,T454) Alvarez conceded that the strategic or tactical concerns relevant to whether or not a jury would respond favorably to certain mitigation evidence would be completely different than considerations relevant to a Spencer hearing. Alvarez acknowledged that there was no way to predict how a judge would analyze and weigh mitigation evidence presented at a Spencer hearing without actually doing it.(IX,T470)

Mr. Alvarez had no recollection of ever discussing the use of Dr. Quintana's findings at a Spencer hearing with Mr. Chavez or explaining to him what a Spencer hearing was.(IX,T469) Mr. Alvarez believed that Mr. Stanton was responsible for the Spencer hearing.(IX,T454)

Mr. Stanton identified a Spencer hearing as the opportunity to present additional mitigation evidence to the sentencing court as opposed to the jury.(VI,T217) He acknowledged that a trial judge is required to evaluate all mitigating evidence and assign it weight.(VI,T217) Mr. Stanton was present at the Spencer hearing in this case.(VI,T245) Mr. Stanton could not state any tactical or strategic reason for not calling Dr. Quintana as a witness at the Spencer hearing.(VI,T252)

Mr. Koch confirmed that no mental health evidence was presented in the trial.(V,T147) The State had deposed Dr. Quintana prior to trial.

Dr. John Quintana testified that he is a licensed psychologist.(III,R555) He currently serves as a consultant to the State of New Jersey in their child protection division where he evaluates children and adults to recommend treatment and disposition in child protection matters.(III,R557) He also evaluates adolescents and adult sex offenders.(III,R557) He has previously engaged in treatment for sex offenders.(III,R558) Earlier in his career Dr. Quintana worked for the Federal Bureau of Prisons to evaluate Cuban detainees from the Mariel refugee population.(III,R558) He also did evaluations of Cubans and

other immigrants for the Department of Justice and made treatment and parole recommendations for those individuals.(III,R560) Dr. Quintana is published in the areas of the Mareilitos and the perceptions of Cubans in residential treatment, juvenile sex offenders, and family therapy issues. (III,R564) Dr. Quintana speaks Spanish.(III,R559)

Dr. Quintana was hired to evaluate Mr. Chavez and ultimately issued a psychological report in 1997 after meeting with Mr. Chavez for three days.(III,R565) Dr. Quintana was first contacted by Mr. Koch and asked to do a general psychological evaluations and to determine mental status and clinical functioning.(III,R567) Documents were provided to assist in this evaluation.(III,R567-8) Dr. Quintana conducted both a clinical interview and administered a battery of psychological tests on Mr. Chavez on March 12-14, 1997.(III,R568-70) He was asked not to discuss the facts of the case with Mr. Chavez.

Dr. Quintana spoke with Mr. Chavez about his life and experiences in Cuba, including his experiences with the Cuban judicial system.(III,R570) Mr. Chavez related that he got in trouble and was sent to prison for failing to

report for mandatory military service.(III,R571) At one point in time he joined a group of Cuban deserters who planned to flee to the United States.(III,R571) Since he had military access to equipment, he began to provide supplies to this counter group.(III,R571) The military and police detected his actions and he was ultimately arrested and sentenced to serve eight years in prison.(III,R571) The sentence was reduced to five years and a few months.(III,R571) Mr. Chavez was beaten up in prison and lost some teeth.(III,R571) He was a good worker and prisoner, so he was eventually permitted to be held on an outside work detail.(III,R572) While on a work detail he was able to escape to the United States.(III,R572) Dr. Quintana was also told by Mr. Chavez that he sustained a head injury in a car accident in Cuba, after which a neuropsychological evaluation was done.(III,R586) Dr. Quintana did not have access to the Cuban evaluation.(III,R586) Dr. Quintana did have the opportunity to review a neuropsychological report that was done on Mr. Chavez by Dr. Reyes after Dr. Quintana suggested a neurological examination.(III,R418-422;587-88) Dr. Reyes did not find any evidence of cognitive impairment. (III,R422;587)

Dr. Quintana obtained a medical and psychiatric history of Mr. Chavez which included information about sexual and substance abuse histories.(III,R572) He did a mental status evaluation of Mr. Chavez and found him to be somewhat guarded, but more relaxed as the interviews progressed.(III,R573) Mr. Chavez was able to communicate, but was somewhat nervous as manifested by his laughter, his opinionated and sometimes sweeping generalizations, and his somewhat argumentative and critical statements.(III,R573) For example, Mr. Chavez felt the MMPI test was silly and dismissed it, but stated he answered the questions to his advantage.(III,R574;588) Dr. Quintana acknowledged that the motivation to malinger might be stronger in the forensic setting as opposed to the clinical setting.(III,R5889) The MMPI is specifically designed to detect “faking”- both good and bad.(III,R615) Dr. Quintana did not find any evidence on the validity scale of the MMPI that indicated Mr. Chavez was faking bad or good and he believed that the MMPI was a valid report.(III,R616)

Mr. Chavez did not report hallucinations, delusions, or suicidal or homicidal thoughts, but was frustrated giving rise to some concerns of suicide by Dr. Quintana.(III,R574)

Dr. Quintana administered the following psychological tests to Mr. Chavez: The Bender-Gestalt, the MMPI One Spanish version [as opposed to the MMPI Two], the Wilson Sexual Fantasy Questionnaire, Sexual Interest Card Sort, the Hare, PCL-R[a psychopathy scale], the Wide Range Achievement Test Third Revision, the Escala De Inteligencia Wechsler Para Adultos[an IQ test in Spanish], The S.O.N.E. Sexual History Background Forum, the Buss-Durkee Hostility Inventory, an incomplete sentence questionnaire, and the T.A.T. Thematic Apperception Test.(III,R576) Dr. Quintana describe each test and the results for Mr. Chavez as follows:

Bender-Gestalt: A test for visual motor skills. Mr. Chavez had no signs of dysfunction.

MMPI- an inventory test among the most accepted testing tools. Mr. Chavez answered the questions without extreme defensiveness. His score indicated that he is opinionated and critical to himself and others. In one section of the test Mr. Chavez has a spike one prototype with a point 78 proficient or “fit”. Individuals with this fit point generally report physical pain and are prone to abuse of prescribed medications. They are also often confident, self-reliant, and invest little effort in

understanding the psychological investment of themselves or others. They relate easily, but have no substantial depth to relationships.(III,R578) Mr. Chavez had a “D” score, indicative of individuals who are depressed and pessimistic about the future, often feel guilty and are self-critical with suicidal thoughts.(III,R578) Mr. Chavez had a “P.A.” score consistent with individuals who are suspicious, hostile, and feely mistreated. The M.A.C. score fell within the range of persons more likely to abuse alcohol or other drugs and are often exhibitionistic and have a tendency to take risks.(III,R579) Mr. Chavez had normal scores in over-controlled hostility, manifest hostility, authority conflict, and personality disturbance.(III,R579)

Dr. Quintana administered the MMPI 1.(III,R590) On this test, Mr. Chavez had a psychopathic deviant score of 67, which on the MMPI 1 was not significant as a score of 70 was the cut off for significance.(III,R590) Dr. Quintana did not believe that it would be correct to compare the result on the MMPI 1 with the scoring parameters of the MMPI 2 test.(III,R591-595)

P.C.L.R.- This test measures psychopathy in the male prison population.(III,R580) Mr. Chavez scored below the prison norm in one area and about the norm in terms of

selfish behavior. He did not match the prototypical psychopath.(III,R580)

Dr. Quintana defined a psychopath as a clinical term under the DSM-IV. A psychopath is defined as a person who lies, presents cunning behavior, is manipulative, lacks empathy and uses others for personal benefit.(III,R589-90)

Weschler: a wide-range achievement test. Mr. Chavez demonstrated a reading score of seventh grade and a math score of fifth grade in this test given in English. He had a verbal IQ of 122, in the considerable range.(III,R581)

S.O.N.E.; Wison's Sexual Fantasy, sex interest cards: Mr. Chavez scored below the control group range indicating he does not have abnormal sexual fantasies.(III,R581) Mr. Chavez denied childhood sexual abuse and presented himself as a heterosexual male.(III,R596) Mr. Chavez indicated that he found homosexual activity and homosexual pedophilia repulsive.(III,R600) Dr. Quintana agreed that Mr. Chavez had made statements during his interrogation after his arrest to the police that he was homosexual and engaged in homosexual activity.(III,R597-98) Mr. Chavez also made statements to the police that he had become somewhat interested or aroused by observing some male children in their underwear playing in a ditch or culvert just prior to

seeing the victim walking on the street.(III,R608) Dr. Quintana agreed that the referenced portions of Mr. Chavez's statement would not be consistent with normal, heterosexual male response.(III,R608;614)

Buss-Durkee Hostility Test- this test measures seven hostility sub-scales.(III,R581) The only elevated score for Mr. Chavez was in the controlled hostility range.(III,R582)

T.A.T.- the results suggested that Mr. Chavez had perseverance despite frustration, uncertainty about the future and some discomfort in some heterosexual situations.(III,R583)

Overall, Mr. Chavez appeared emotionally stable, but despondent.(III,R583) He is intelligent, enjoys doing favors for others, can be outspoken, critical, and argumentative. Dr. Quintana found nothing to suggest that Mr. Chavez was a pedophile.(III,R584) There was no indication of violent behavior.(III,R585) Dr. Quintana did not diagnose Mr. Chavez as being anti-social personality disorder.(III,R616) Dr. Quintana opined that the behavior associated with this case would be atypical for Mr. Chavez in light of the test results. Generally, a clinician would expect to see prior acts of violence, additional

indications of sexual interest in children such as the possession of child pornography, and not just an episode like this come out of thin air.(III,R618) Generally, a series of developments lead to an act such as this offense.(III,R618)

D. Investigation of horse trailer witness

Mr. Koch testified that during the trial, the State portrayed the horse trailer that Mr. Chavez had access to as a “love nest”.(V,T105) Mr. Koch believed the State emphasized the significance of the salicious nature of the trailer during the trial by focusing on such items as K-Y Jelly and implying that Mr. Chavez used the trailer for other sexual liasons and that other potential victims had been in the trailer.(V,T105) Mr. Chavez told Mr. Koch that another individual was living in the horse trailer at the time the homicide happened and this person also worked for Ed Schienhaus.(V,T106) Mr. Chavez gave Mr. Koch the first name of the individual.(V,T181) Mr. Koch believed this witness was critical because the items in the horse trailer belonged to him, not Mr. Chavez.(V,T106) The witness was purported to be a migrant worker, so time was of the essence in locating this individual before he moved on.(V,T181) Mr. Brummer precluded Mr. Koch from searching

for this witness.(V,T106-7) Mr. Brummer told Mr. Koch that he wasn't supposed to go down to the Scheinhaus property because he didn't want the defense talking to people and then have those people complain to the police.(V,T106) According to Mr. Koch, Mr. Brummer would only permit investigation of the scene if police were present.(V,T106) It was several months before the defense was allowed to investigate, which according to Mr. Koch, was absolutely improper.(V,T107) A year and half later when they were permitted to investigate by Mr. Brummer, they could not locate the man who lived in the trailer.(V,T166)

Ms. Georgi was aware that another individual lived in the horse trailer.(VII,T342) She recalled receiving this information from Mr. Chavez.(VII,T342) She had no knowledge of any impediment by Mr. Brummer in investigating this information.(VII,T343)

Mr. Stanton was aware of discussions within the defense team that efforts made to locate the person that lived in the trailer.(VI,T202) This person was critical to rebut the evidentiary items found in the trailer.(VI,T202)

Mr. Nally interviewed Mr. Chavez about the man who lived in the horse trailer.(VII,T291) Mr. Chavez told him that Mr. Koch had not found the man who lived there- this

was the first time that Mr. Nally had ever heard anything about another occupant of the trailer.(VII,T291) Nally confronted Mr. Koch about the witness and told Koch that he needed to speak with Mr. Chavez about the inability to find the witness.(VII,T292) Mr. Alvarez knew about the horse trailer witness. He thought an investigator had tried to find the person, but was not successful.(IX,T437)

E. Chavez Watch

Mr. Koch acknowledged that in a case where the defendant repudiates a prior statement it is critical to show that the physical evidence does not the incriminating repudiated statement.(V,117) Discrepancies between a statement and the physical evidence would be extremely important.(V,T120)

Mr. Koch testified that as lead counsel he was the person who prepared Mr. Chavez to testify for trial.(III,R622) Mr. Koch made the decision that Mr. Chavez would testify.(III,R623) The content of his testimony was discussed numerous times prior to trial.(III,R623)

After the State rested at trial, a break was taken.(III,R623) During the break Mr. Koch met with Mr. Chavez to review his testimony in a summary

fashion.(III,R623) Mr. Koch would state what he was intending to ask, then state what he expected Mr. Chavez's response to be.(III,R623) When Mr. Koch was reviewing the issue of the whether or not Mr. Chavez had his watch, he believed that Mr. Chavez did not have his watch during his interrogation and told Mr. Chavez to testify consistent with that belief.(III,R624) Mr. Chavez had a strange reaction when Mr. Koch told him to testify he wasn't wearing the watch, but Mr. Koch continued to insist.(III,R625) Mr. Koch then elicited testimony from Mr. Chavez that he did not have his watch during the interrogation.(III,R501-02;624) Mr. Koch was stunned when the cross-examination by the State revealed a photograph of Mr. Chavez taken during the interrogation that showed him wearing his watch.(III,R506;624) Mr. Koch acknowledged that he made a very significant mistake that dramatically impacted on Mr. Chavez's credibility. (III,R624-625)

Mr. Koch felt this impeachment on the watch devastated the case.(III,R627) The cross destroyed Mr. Chavez's credibility and there was nothing that could be done to repair the damage.(III,R628) Mr. Koch would probably not have talked to Mr. Chavez about his mistake because nothing could be done.(III,R627)

Mr. Koch testified that when he read the post-conviction motion that was written by Mr. Lipinski on this issue he felt that the allegation was being made that he intentionally had Mr. Chavez lie and he did not- he did not remember something correctly and as a result, mistakenly presented testimony that was inaccurate.(III,R629)

Mr. Koch identified a 36 page document containing questions that he prepared in this case for Mr. Chavez.(III,R636) He did not remember when this was prepared.(III,R642) Notes next to the questions are written in Spanish.(III,R638) Some of the handwriting appeared to be that of Mr. Chavez and some did not look like his handwriting.(III,R638) Mr. Koch recalled going over the questions with Mr. Chavez over a period of time, during which some questions were deleted and some expanded upon.(III,R639) Mr. Koch did not remember ever receiving anything from Mr. Chavez that was written in Spanish.(III,R642) Mr. Koch acknowledged that one question asked if anything was taken from Mr. Chavez and the response written in Spanish was “Si. Mirelog”[yes. Watch].(III,R640) Mr. Koch acknowledged the last question on page 36 was “After the confession was your watch

returned to you?" with the answer "Si."(III,R498;641) Mr. Koch insisted that he found the answers in Spanish to be odd because he cannot read or write Spanish.(III,R642)

F. Inconsistent testimony between physical evidence and Mr. Chavez's statement.

Mr. Stanton testified that during trial it would have Mr. Koch's job to develop any inconsistencies between the physical evidence and Mr. Chavez's statement at trial through opening statement, cross-examination, and closing argument.(VI,T205) Mr. Stanton recalled there being some inconsistencies between the testimony of the medical examiner about the trajectory of the bullet and Mr. Chavez's statement regarding the position of the gun and body.(VI,T205-6) Mr. Stanton did not recall discrepancies between the placement of a cabinet with the statement and the ability of the victim to get out of the trailer without being caught.(VI,T205-6) Mr. Stanton couldn't recall if there had been inconsistencies between the statement and evidence as to type of lubricant found in the trailer.(VI,T207)

Mr. Nally did not recall any factual discrepancies between the statement given by Mr. Chavez and the physical dimensions of the trailer or the existence of a cabinet

that would have blocked a gunshot.(VII,T294-5) Due to the passage of time he could not recall inconsistencies between the medical examiner's testimony about the bullet trajectory and Mr. Chavez's statement.(VII,T295) Nally did recall a difference between the type of lubricant alluded to in the statement and the type of lubricant found in the trailer, but could not recall if this was pointed out at trial.(VII,T296)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in ruling that Michael Amizaga was not qualified to testify as an expert in the Cuban criminal justice system and to testify as to the differences between the constitutional rights afforded to suspects in the United States as compared with those afforded to citizens of Cuba. The trial court further erred in ruling that Mr. Amezaga would not be permitted to testify as to his opinion on whether or not Mr. Chavez would have understood his right to counsel and his rights under Miranda at the time of his interrogation and whether the waiver of those rights was voluntary.

ISSUE II: The trial court erred in finding that the failure of the defense to present the testimony of Dr. John Qunitana as mitigation evidence to either the jury or to

the court at a Spencer hearing did not constitute ineffective assistance of counsel. No strategic or tactical reason was given for the failure to present the mitigation evidence, the evidence was relevant and consistent with the penalty phase presentation, but was not cumulative.

ISSUE III: Mr. Chavez was rendered per se ineffective assistance of counsel. The internal disputes between the attorney and dictatorial decision making of lead counsel Koch resulted in a failure to investigate, the presentation of false testimony, and the failure to investigate or present relevant mitigation. The failure of the defense team to exercise independent and reasoned legal judgment resulted in an impermissible breakdown in the adversarial process which denied Mr. Chavez his right to counsel.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT MICHAEL AMIZAGA 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.

In support of his post-conviction claim in the Second

Amended Motion for Post-Conviction Relief that the trial attorneys rendered ineffective assistance of counsel in failing to present testimony that Mr. Chavez's Cuban alienage affected his ability to knowingly, intelligently, and voluntarily waive his Miranda rights, Mr. Chavez sought to present the testimony of Mr. Michael Amizaga as an expert witness at the evidentiary hearing in this case. The trial court erroneously determined that Mr. Amizaga was not an expert and did not permit him to testify as to the differences between the Cuban and American criminal justice systems, the differences in the rights provided to criminal suspects between the two constitutions, and the impact these differences had on Mr. Chavez's decision to waive Miranda.

Section 90.702 (Fla. Stat. 2007) defines an expert in a subject area "by knowledge, skill, experience, training, or education." An expert need not possess scientific or technical knowledge, but may be qualified on the basis of special experience. A witness may also qualify as an expert by his or her study of authoritative sources without any practical experience in the subject matter. Allen v. State, 365 So.2d 456 (Fla. 1st DCA 1978). See, Erhardt, Charles Florida Evidence, §702.1,p.691-92(2007). According

to Erhardt, the question for the court to answer is whether the witness has sufficient knowledge, training, or education to render the opinion offered. Ibid., Erhardt at 692-693. On appeal, the decision of the trial court as to whether or not to qualify someone as an expert is reviewed under an abuse of discretion standard. Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989); Huck v. State, 881 So.2d 1137 (Fla. 5th DCA 2004). In this case, the trial court abused his discretion by finding that Mr. Amizaga was not qualified to testify as an expert. Mr. Chavez carried his burden of establishing the qualifications of Mr. Amizaga in this case and Mr. Amizaga, through the acquirement of specialized knowledge, experience, and training met the standard for qualification as an expert in the area of what was termed "alienage" in the lower court.

Mr. Amizaga testified that he is of Cuban heritage and spoke fluent Spanish. He has practiced law since 1983, is admitted to the bar in Florida and New York, and had devoted the substantial part of his professional practice to the area of criminal law.(VII,T354- Thus, Mr. Amizaga had the requisite knowledge, education, and experience to testify regarding the United States Constitutional rights embodied in Miranda and how those rights were implemented

in the State of Florida.

Mr. Amizaga testified that as part of his role in the U.S.-Cuban Legal Forum he has been able to study the Cuban criminal justice system first-hand, an experience limited to very few individuals due to the restrictions on travel and study in Cuba enforced by the Cuban and United States governments.(VII,T357-358) Mr. Amizaga has been permitted to travel to Cuba twice for the purpose of studying the Cuban legal system, in particularly the Cuban criminal justice system, and to then compare the Cuban system with that of the United States. (VII,T357-368) During his time in Cuba, Mr. Amizaga was able to talk with practicing Cuban criminal defense attorneys, Cuban judges, review the Cuban Constitution and other Cuban statutory rights pertaining to criminal defendants, and to observe a criminal trial in Cuba.(VII,R558-59;363-367) In addition to his trips to Cuba, Mr. Amizaga has continued to study the Cuban criminal justice system and continues to communicate with other Cuban criminal defense attorneys.(VII,T360) Mr. Amizaga was considered sufficiently knowledgeable to have been invited to present his findings at a forum held by the Cuban Legal Studies Department at Florida International University. (VII,T359) The trial court incorrectly

determined that Mr. Amizaga did not posses sufficient qualifications give expert testimony as to the differences between the Cuban and American criminal justice systems.(VII,T370) The court based his ruling on his opinion that “it takes time and it takes practice and it takes education to become an expert, and I think a lot of things is just lacking.”(VII,T370-71) The trial court concluded that “the knowledge of this witness does not rise to the level of an expert” and refused to qualify him as such.(VII,T373) The court did not identify what he perceived as deficiencies in Mr. Amizaga’s qualifications nor did he identify what qualifications he would expect to have presented in order to meet his standard for qualification as an expert in this area. The trial court’s determination that Mr. Amizaga was not qualified to testify as an expert was error.

The trial court’s emphasis on the lack of education or formal training was an insufficient basis to deny qualification. An expert must demonstrate that they have acquired special knowledge of the subject matter of their proposed testimony through study or experience. Individuals have been qualified as experts in many areas of the law based on experience and observation. See, Linn v. Thompson,

946 So.2d 1032 (Fla. 2006); Robinson v. State, 818 So.2d 588 (Fla. 5th DCA 2002)(police officer permitted to give expert opinion testimony and identified a substance as marijuana based on training and experience in the field); Brooks v. State, 762 So.2d 879, 891-94 (Fla. 2000)(crack cocaine dealer permitted to provide opinion testimony that substance in baggie appeared to be cocaine and weighed about one gram); Hammond v. International Harvester, Co., 691 F.2d 646 (3d. Cir.1982)(individual who possessed experience as a seller of automotive and mechanical equipment and who taught high school auto repair properly qualified as expert in area of defect design in a tractor absent any education or degree in engineering or physics); Daniels v. State, 381 So.2d 707, 709-10 (Fla. 1st DCA 1979), aff'd., 389 So.2d 631 (Fla. 1980)(police officer properly qualified as expert witness in the area of 'street' language and drug culture and his interpretation of words used by defendant based on experience as police officer); Sihle Ins. Group, Inc. v. Right Way Hauling, Inc., 845 So.2d 998 (Fla. 1st DCA 2003) and Weese v. Pinellas County, 668 So.2d 221, 223 (Fla. 2nd DCA 1996)(a witness may testify as an expert if he is qualified to do so by reason of knowledge obtained in his occupation or business). What is

required of an expert is to have gained specialized knowledge either by study or by experience. Mr. Amizaga did both- he acquired specialized knowledge about the Cuban criminal justice system by studying the Cuban system and through the experience of traveling to Cuba, meeting with lawyers and judges, attending a symposium designed to foster knowledge for comparative purposes between the Cuban and American judicial systems, and by observing a criminal trial in Cuba.

Expert testimony is admissible under §90.702 when it will assist the trier of fact in understanding the evidence or determining a fact in issue. Mr. Amizaga's testimony was admissible for this purpose. His experience and expertise in illuminating the contrasts between the rights of Cuban citizens charged with crimes with those of American citizens would assist the trier of fact in determining whether or not Mr. Chavez's alienage impacted the voluntariness of his waiver of his Miranda rights. It does not appear from the record that the trial court or parties possessed the specialized knowledge in this area that Mr. Amizaga did. A criminal defendant's understanding and grasp of the American judicial system is critical to a determination of whether or not the waiver of

constitutional rights is voluntary. The waiver of constitutional rights by a foreign national, particularly when significant differences exist between the rights afforded an accused in his country of origin and the United States, is a well-founded basis for the suppression of a defendant's statements. See, United States v. Fung, 780 F.Supp 115, 116 (E.D. NY 1992); United States v. Yunis, 859 F.Supp 9753 (D.C. Cir. 1988); United States v. Kim, 803 F.Supp. 352 (D.Haw. 1992); United States v. Nakhoul, 596 F.Supp. 1398 (D.Mass. 1984). Thus, the trial court erred in declining to recognize Mr. Amizaga as an expert and to permit him to testify on the issue of alienage. This Court should remand this case to the trial court to permit a full and fair hearing on this issue which includes the testimony of Mr. Amizaga.

ISSUE II

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

The penalty phase strategy in this case was to present Mr. Chavez as a calm, bookish, quiet man who loved to read and was never violent, but was compassionate and kind.(Trial Trancripts,R10889-10890[penalty phase opening

argument given by attorney Alvarez]) The same argument was repeated by Alvarez in the penalty phase closing argument.(Trial Transcript, p.11053-11059) Trial counsel was ineffective in failing to present the testimony of Dr. John Quintana when Dr. Quintana's testimony supported the penalty phase strategy, was not cumulative, and provided additional mitigation that should have been presented, at minimum, to the trial court via a Spencer hearing.

Claims of ineffective assistance of counsel are reviewed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires that counsel has a duty to bring to bear such skill and knowledge as will render the trial an adversarial testing process. Stickland, Id. at 688. An ineffective assistance of counsel claim has two components: first, the petitioner must show that counsel's performance was deficient. Second, the petitioner must show that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Strickland, Id.,at 667-668. Prejudice is defined as a "reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been

different." Strickland, Id., at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, Id. The failure to call a witness can constitute ineffective assistance of counsel where there is a reasonable probability that, absent the error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Tompkins v. State, 872 So.2d 230 (Fla. 2003) The standard of appellate review to post conviction claims after an evidentiary hearing affords deference to the trial court's findings of fact as long as they are supported by competent, substantial evidence. McLin v. State, 827 So.2d 948, 954 n.4 (Fla.2002) The legal conclusions of the court are reviewed *de novo*. Connor v. State, 33 Florida Law Weekly S243 (Fla. April 10, 2008)

The testimony of Dr. Quintana was relevant mitigation evidence. Relevant mitigation evidence is evidence which tends to logically prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Tinnard v. Dretke, 124 U.S. 2562, 2570 (2004).

The first prong under Strickland requires the establishment of deficient performance. Mr. Alvarez was the

attorney who ultimately was responsible for the penalty phase. Mr. Alvarez testified that he had some problems with Dr. Quintana's report and chose not to present his testimony to the jury because he believed that an elevation in one score indicated that Mr. Chavez was a sociopath, that he did not want the jury to think that Mr. Chavez acted in concert with a homosexual lover, and because he thought the jury might be insulted if an expert testified that Mr. Chavez was not a pedophile as this would contradict with their verdict. While Strickland affords a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance, the conduct of Mr. Alvarez falls outside this range as demonstrated through the testimony at the evidentiary hearing.

Mr. Nally, who Alvarez replaced, testified that he certainly intended to present Dr. Quintana's testimony if he his health had permitted him to remain on the case. Mr. Nally had reviewed Dr. Quintana's report and spoken with him. While Alavarez testified that he had concerns about one area of a seemingly elevated score on one test, he also admitted that he made no attempt to contact Dr. Quintana and speak with him about the significance of this

particular score. At the evidentiary hearing Dr. Quintana testified that the score was within normal range under the scale ranges appropriate to that test and did not indicate that Mr. Chavez was a psychopath.(III,R590-595) In fact, in additional testing Mr. Chavez fell somewhat below the range in this area among the prison population.(III,R595) Mr. Alvarez clearly did not perform within a reasonable range of conduct when he failed to consult with Nally or Dr. Quintana before deciding to forgo the mitigation evidence from Dr. Quintana. Alvarez made the decision to forgo the presentation of mitigating evidence without an adequate investigation that could have simply involved one phone call to Dr. Quintana. See, Rompilla v. Beard, 125 S.Ct. 2456 (2005); Orme v. State, 896 So.2d 725 (Fla. 2005); Eutzy v.State, 536 So.2d 1014 (Fla. 1988); State v. Michael, 530 So.2d 929 (Fla. 1988) The failure to present Dr. Quintana's testimony was not the result of an informed and reasoned decision. Alvarez's testimony does not support a finding that the decision to forgo mitigation evidence from Dr. Quintana was strategic or tactical.

Alvarez's second reason for not presenting Dr. Quintana's report to the jury was his concern that the jury would interpret Dr. Quintana's finding that the crime would

be outside the character of Mr. Chavez might lead the jury to conclude that Mr. Chavez worked in concert with a homosexual lover. Once again, Mr. Alvarez never spoke with Dr. Quintana about this finding. Neither was this the State's theory- the State argued that Mr. Chavez acted alone. Mr. Alvarez also overlooked that Dr. Quintana's finding was consistent with the testimony that Mr. Chavez gave at trial. Mr. Chavez testified at trial that he did not kill Mr. Ryce, but that he did assist and cover up for Edward Schienhaus, whom Mr. Chavez identified as the perpetrator. The fact that Mr. Chavez's psychological profile did not match that of an independent actor was consistent with his trial testimony. Mr. Alvarez could have pointed this out to the jury had the state made the argument that Dr. Quintana's finding supported a homosexual accomplice theory.

Alvarez's third reason for failing to present mitigation evidence from Dr. Quintana was his fear of the impact that evidence might have on the jury by insulting them. Alvarez admitted that he failed to consider using the mitigation evidence from Dr. Quintana at the Spencer hearing. See, Spencer v. State, 615 So.2d 688 (Fla. 1993) In fact, Alvarez testified that he had not even thought of

using the Spencer hearing until he was asked why he had not done so by defense counsel just prior to his testimony in this proceeding. Alvarez's failure to even recognize the Spencer hearing as a vehicle to present the evidence for consideration by the court and thus avoid any fear of insulting the jury cannot be said to have been made as the result of an informed and reasoned deliberative process. It did not arise from informed, reasoned, professional judgment- the possibility was not even considered until almost ten years after the trial. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), Rutherford v. State, 727 So.2d 216 (Fla. 1998). There is no evidence to support a conclusion that the decision to forgo the presentation of the mitigating evidence at a Spencer hearing was strategic or tactical.

The second prong of Strickland requires that the defendant establish prejudice. Dr. Quintana would have testified in a manner consistent with the penalty phase theory. Mr. Chavez had only one "spike" on the MMPI- that in the area of people who tend to report having a variety of physical pain and may abuse prescription medications.(III,R577-78) The MMPI indicated that Mr. Chavez had hostility scales within the normal range and

there was little evidence from this test to suggest that he had a history of violent behavior.(III,R579;585) His score on a test compared to other prison inmates suggested he had a below than average score for social deviance and a normal score for behaviors that can be selfish or callous.(III,R580;595) Sexual behavior/identification tests did not indicate any homosexuality or pedophilia.(III,R581-82;584) Dr. Quintana summarized his findings by stating that Mr. Chavez was an emotionally stable, but despondent individual with some risk of suicide.(III,R583) He was bright, enjoys doing favors for others, and is mechanical.(III,R584) Dr. Quintana believed that Mr. Chavez did not posses the psychological profile to have committed this crime alone. Mr. Chavez was not a psychopath or a sociopath.

Other attorneys who worked on this case in penalty phase, Nally and Stanton, and who were familiar with Dr. Quintana's report and conclusions, both believed that the evidence should have been presented. Mr. Alvarez's actions prejudiced Mr. Chavez because relevant mitigation evidence that was consistent with the penalty phase theory was not presented to the sentencer for consideration and was thus not weighed under Campbell v. State, 571 So.2d 415 (Fla.

1990). A new sentencing proceeding is required, in which the defense is provided an opportunity to present mental health testimony relevant to mitigation.

ISSUE III

MR. 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.

Per se ineffective assistance of counsel arises in rare circumstances which result in the actual or constructive denial of effective assistance of counsel. In these situations, it is the action or inaction of defense counsel which make the adversarial process unreliable. In instances where per se ineffective assistance of counsel occur, the defendant need only establish the first prong of Strickland v. Washington, 466 U.S. 668 (1984), the deficient performance of counsel. Prejudice need not be shown, it is presumed to be established. United States v. Cronic, 466 U.S. 648 (1984). An actual conflict of interest has been defined as: "'an actual conflict of interest' means precisely a conflict that affected counsel's performance- as opposed to a theoretical division

of loyalties. It was shorthand for the statement in Sullivan[citation omitted] that 'a defendant who shows that a conflict of interest actually affected the adequacy of representation need not demonstrate prejudice in order to obtain relief.'" Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 162 (2002)(quoting and interpreting Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097 (1981).

The record established that the attorneys assigned to work this case were incapable of reaching a reasoned and logical strategy of how to proceed in defending Mr. Chavez in both stages of his trial. The conflicts and climate of distrust between the various attorneys assigned to represent Mr. Chavez affected the adequacy of their representation. The testimony of the attorneys shows a level of infighting, disagreement, and dictatorial decision making that rose to such a level that the interpersonal problems foreclosed a meaningful defense in this case. The internal conflicts between the attorneys resulted in failures to investigate, failures to communicate meaningfully with the client, and ultimately the presentations of false testimony. Taken cumulatively, the failures of defense counsel constituted per se ineffective assistance of counsel as demonstrated below.

The chaos and interpersonal strife between lead counsel Koch and the other members of the Office of the Public Defender and the elected officer, Mr. Bennett Brummer converged to create “the perfect storm”, whose victim was ultimately Mr. Chavez. The preclusion of independent thought and a refusal to acknowledge or respect the viewpoints of all those who played a role in the defense in this case deprived Mr. Chavez of effective assistance of counsel at the most basic level. One critical area that was affected was the investigation of the case at the early stages. For example, one result was the failure of the defense to timely and adequately investigate a potential exculpatory witness- the occupant of the horse trailer where the crime occurred.

The State’s theory at trial was that the crime happened in a horse trailer that Mr. Chavez was living in alone. As part of their case, the State introduced into evidence a number of items recovered from the trailer, including a tube of lubricant which it claimed were owned by Mr. Chavez.

In the early stages of investigation, Mr. Koch testified that Mr. Chavez told him that someone else lived in the horse trailer and the things in the trailer,

including the lubricant, belonged to this man. Mr. Chavez knew only the man's first name, which he provided to Mr. Koch.

Mr. Koch testified that he was precluded from investigating the identity of this man because he was precluded from either going himself or sending investigators to the horse trailer by Mr. Brummer. According to Mr. Koch, Mr. Brummer did not want the defense going to the trailer unless they were accompanied by the police. Koch believed Mr. Brummer was concerned about the public perception that the defense was actually working on the case and was fearful that this type of perception would hinder his chances to win the upcoming election. Police presence would make it appear that the investigation was being brought by the police, not the defense.

Mr. Koch testified that he objected to a police presence at a defense investigation for obvious reasons. As a result, by the time a search of the trailer could be done without the police over a year later, the man could not be found.

Mr. Brummer denied ever telling Mr. Koch he couldn't independently conduct an investigation of the horse trailer. Due to concerns about the safety of the office

personnel because of threats that had been received, Mr. Brummer testified he might have told Mr. Koch to use the police if they were going to sensitive or dangerous areas for protection.

Mr. Nally testified that at one point during the pre-trial stages of this case he had a conversation with Mr. Chavez where it became clear that Mr. Chavez had not been fully advised of the failure to investigate the horse trailer. Mr. Nally told Mr. Koch of the failure to communicate and left it to Mr. Koch to adequately explain the status of the investigation to Mr. Chavez. Mr. Koch did not testify whether he did this or not.

Mr. Koch further testified that he did fully appreciate the significance of this witness/occupant of the horse trailer until the trial when he heard the State's argument and evidence.

The dispute of whether or not Mr. Brummer specifically forbade the investigation or if Mr. Koch incorrectly interpreted Mr. Brummer's safety concerns as a prohibition need not be detrmined. A timely and adequate investigation of potentially exculpatory evidence did not happen. For whatever reason, the fact remains that Mr. Koch, as the lead attorney, did not timely investigate a critical

component of the defense case and the failure resulted in the inability to ever locate the second occupant of the horse trailer. The reason for this failure was the result of miscommunication and ultimately a very adversarial relationship between Mr. Koch and Mr. Brummer. Mr. Chavez ultimately paid the penalty for the failure of these two men to communicate- the witness was irrevocably lost

The breakdown in the defense further led to the presentation of false testimony in this case. As primary counsel for the guilt phase, only Mr. Koch met with Mr. Chavez to prepare him to testify. The lack of any other attorneys being present for this prepping can be attributed to the climate of distrust and fear of being removed from the case that had been created by the early discharge of Georgi and Harper from the case. The message was clearly sent by Mr. Koch that this case was to be handled his way or no way. Mr. Koch completely controlled and directed the information that was given to Mr. Chavez and the information that was received from him. This dictatorial approach resulted in a failure of the other attorneys at trial stepping in even in light of Mr. Koch’s ill health, which he testified resulted in his failure to properly prepare Mr. Chavez to testify regarding his possession of

the his watch during his interrogation.

During his trial testimony Mr. Chavez testified his watch was removed from his wrist by the police at the beginning of the interrogation and not returned to him until the very end. On cross-examination the State successfully and devastatingly impeached Mr. Chavez by offering a photograph taken during the interrogation at the horse trailer that clearly showed the watch on Mr. Chavez's wrist at mid-point in the investigation.

Mr. Koch testified that he was responsible for the false testimony regarding the watch. Mr. Koch testified that during the trial he was quite ill and at times, not himself. Mr. Koch went over Mr. Chavez's trial testimony with him just before his testified in a broad way and instructed Mr. Chavez to testify that he did not have his watch. Mr. Koch testified that Mr. Chavez looked at him strangely, but testified as he was directed. It was not until after the cross did Mr. Koch realized his mistake. At that point nothing could be done to correct the damage that had been done to Mr. Chavez's credibility by the impeachment from the State. No other attorney met with Mr. Chavez to go over this testimony despite the ill health of Mr. Koch.

Lack of communication and the refusal to confront Koch on his faulty decision making played a large role in the failure of the defense to seek an expert in alienage for use at the suppression hearing. Both Nally and Stanton, who were counsel at the time of the suppression hearing, believed Koch's choice of Ofshe was not well-taken. Neither believed that Ofshe was qualified to testify regarding alienage-his specialty was coerced confessions. Both Nally and Stanton expressed grave reservations about Ofshe's unusual and troubling prerequisites before he would testify in a case. Ofshe required extensive taping of his interviews with the defendant, both Nally and Stanton felt this was horrible for the defense since these interviews would have to be disclosed to the State and Ofshe's refusal to work for the defense if he did not personally believe in the defendant's innocence. Koch, in contrast, would not even acknowledge the defense's duty of disclosure to the State. Koch, somewhat remarkably, testified that is was often his practice to limit a defense expert's examination, allow the expert to be deposed by the State, and then send the expert back for further examination of the defendant without disclosing to the State the follow up. When Ofshe fell through, Koch made no attempt to locate a different

expert who was qualified to testify about alienage. Koch did nothing and as lead counsel, his will governed. Nally and Stanton both agreed that an effective lawyer would pursue a second expert opinion if he receives one that is not favorable. However, both bowed to Koch's edict and did not seek additional experts after Ofshe refused to testify. Again, Mr. Chavez suffered the penalty as a result of the rift between Koch and the other lawyers when no expert was presented at the suppression hearing who could testify as to the effects Mr. Chavez's Cuban heritage had on his decision to waive his rights. Koch's failure to investigate possible expert witnesses and his refusal to permit other defense team members to exercise independent judgment constitutes ineffective assistance of counsel. Gorham v. State, 521 So.2d 1067 (Fla. 1988).

The conflict over how the penalty phase would be handled illustrates the depth of animosity between these co-workers. Mr. Koch's myopic and clearly legally unsupportable position that the second phase should not be investigated based upon his incorrect and medically unsupportable view of Mr. Chavez's mental state led to the removal of the two attorneys from this case that had developed the greatest level of trust and rapport with the

client. Other than the limited discussions regarding sexual abuse between Georgi and Mr. Chavez and the statements Mr. Chavez made to the police regarding abuse, no meaningful follow-up was done by the subsequent attorneys. Nally testified that he would have continued to aggressively pursue an investigation into these matters even if Mr. Chavez objected but for the edict from Mr. Koch that forbade any investigation. Nally testified that Mr. Chavez did not preclude him from investigating the case, he would permit Nally to do his job. In what is perhaps the singular source of agreement between all the attorneys involved in this case with the exception of Mr. Koch, was the belief that mitigation strategy should not be carved in stone until an adequate investigation is done- mirroring the rulings of Rompilla v. Beard, 125 S.Ct. 2456 (2005), Wiggins v. Smith, 539 U.S. 510 (2003), and State v. Riechmann, 777 So.2d 342 (Fla. 2000). As early as 1989, the ABA Guidelines for Appointments and Performance in Death Penalty cases 11.3.19(c), p. 93 (1989) and the ABA Standards for Criminal Justice 4-4.1.1 Commentary, p.4-55 advocated a thorough penalty phase investigation as the prevailing professional standard. Yet it was the faulty decision making of Koch that was allowed to carry the day

and to preclude a penalty phase investigation at the time that was appropriate and by the attorneys whom Mr. Chavez had developed a relationship of trust. Mr. Koch unilaterally dictated the direction of this case in a manner inconsistent with governing standards of professionalism and against the advice of equally trained and capable colleagues. The testimony of Georgi, Harper, Nally, and Stanton should be relied upon by this court as an accurate assessment of the climate of discord that existed among the defense team and the source of that discord as opposed to the testimony of Mr. Koch. The trial court specifically determined, after viewing the demeanor of the witnesses, that Mr. Koch was not credible.

Mr. Alvarez, who arrived on the defense team in the eleventh hour, took no independent action separate and apart from what Koch directed. He acknowledged that he perceived his role as minimal. He performed no additional investigation and did not speak at length with the previous attorneys about the penalty phase. It appears that he failed to exercise any independent judgment whatsoever. Alvarez even failed to consider the use of Dr. Quintana at the Spencer hearing. The result was a penalty phase that ignored mitigation presentation to both the jury and the

judge.

The tenor of the evidentiary hearing in this case underscores the inability of these attorneys to have rendered effective assistance of counsel to Mr. Chavez. It is clear that Mr. Koch made legally unsupportable decisions, operated under obvious delusions that one attorney, Nally, deemed "nonsense", yet is was his decision making that was allowed to prevail. Under the unique circumstances of this case, it is apparent that a per se denial of effective assistance of counsel is present. The judgment and conviction should be reversed.

CONCLUSION

Based upon the forging citations of law and arguments, the Appellant, Mr. Chavez, through undersigned counsel, respectfully requests that the order denying relief be set aside, and the proceedings be reversed for either a new evidentiary hearing, a new penalty phase, or a new trial.

Respectfully submitted,

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ANDREA M. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607 this ___ day of May, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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