IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-774

MARBEL MENDOZA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF CASE AND FACTS

On March 31, 1992, Defendant was charged with the first degree murder of Conrado Calderon, with conspiracy to commit robbery, attempted armed robbery, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. (R. 1-4)[1] The crimes were alleged to have been committed on March 17, 1992. *Id.* The matter proceeded to trial on January 31, 1994. After considering the evidence and argument of counsel, the jury found Defendant guilty as charged to all charges.[2] (T. 1408-09) The penalty phase proceeding commenced on March 11, 1994. (R. 10, 45, T. 1453) On March 14, 1994, the jury recommended the imposition of the death penalty by a vote of 7 to 5. (R. 647, T. 1694) On August 2, 1994, Defendant was sentenced to death for the murder of Conrado Calderon. (R. 926-42, T. 1736-37) Defendant was also sentenced to fifteen years in prison for counts 3 and 4 of the indictment and life in prison for count 2 of the indictment with all sentences to run concurrent to each other and concurrent to the death penalty. (R. 926-30, T. 1736)

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[1] The symbols "R.," "T." and "SR." will refer to the record on appeal, transcripts of proceedings and supplemental record on appeal from Defendant's direct appeal, FSC Case No. SC84,370.

[2] The facts presented at trial are included in this Court's direct appeal opinion. *Mendoza v. State*, 700 So. 2d 670, 672 (Fla. 1997).

In support of the death sentence, the court found three aggravating circumstances: prior violent felony, during the course of a robbery and pecuniary gain. (R. 931-42) The court merged the during the course of a robbery and pecuniary gain aggravators. (R. 932) In mitigation, the Court considered and rejected the claims that Defendant committed the murder while under the influence of extreme mental or emotional disturbance, that Defendant was a minor accomplice in the murder, that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, that Defendant's age was mitigating, that Defendant suffered hardship as a child in Peru, that Defendant was affected by his child's medical problems and that codefendants' sentences were mitigating. (R. 933-39) The trial court gave minimal weight to Defendant's drug use and dependency and his mental health problems that did not rise to the level of statutory mitigation. *Id.*

Defendant appealed his convictions and sentences to this Court, raising nine issues. *Mendoza*, 700 So. 2d at 673 n.1. This Court affirmed Defendant's convictions and sentences. Mendoza, 700 So. 2d at 672. Defendant sought certiorari in the United States Supreme Court, which was denied certiorari on October 5, 1998. *Mendoza v. Florida*, 525 U.S. 839 (1998).

On September 10, 1999, Defendant filed a shell motion for post conviction relief and claimed that a complete motion could not be filed because no records had been sent to the repository. (PCR. 43-87)[3] On October 4, 1999, Judge Postman held a hearing on this motion, at which he found, based on documentation presented by the State that showed the records were at the repository, that the failure to timely file was based on Defendant's lack of diligence. (PCR. 705-22) He originally dismissed the motion without prejudice to refiling within sixty (60) days to amend, but later vacated the dismissal while still finding the motion insufficient. (PCR. 714, 719-20) Instead of filing a timely amended motion, Defendant attempted to appeal the dismissal of the initial motion. This Court dismissed the appeal and ordered that Defendant "timely comply with the order of the circuit court in respect to amending the motion for post-conviction relief so that this case is not further delayed." *Mendoza v. State*, 751 So. 2d 51 (Fla. 2000).

Defendant finally filed his amended motion for post conviction relief on September 5, 2000. (PCR. 231-391) In this motion, Defendant raised 27 claims, including claims of ineffective assistance at the guilt and penalty phases. *Mendoza*

[3] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal, respectively, from the original summary denial of the motion for post conviction relief, FSC Case No. SC01-735.

v. State, 964 So. 2d 121, 126 n.3 (Fla. 2007).

During the course of the proceedings regarding this motion, Defendant moved to disqualify the judge assigned to the case, asserting that certain comments he had made at status hearings indicated that he had prejudged the case. (PCR-SR. 47-62) The lower court denied the motion for disqualification. (PCR. 655) It subsequently summarily denied the motion for post conviction relief, finding all of the claims facially insufficient, conclusively refuted by the record, procedurally barred and/or not ripe for adjudication. (PCR. 665-73)

Defendant appealed the summary denial of his motion for post conviction relief to this Court, raising 20 issues, including a claim that the lower court had erred in summarily denying the claims of ineffective assistance of counsel and a claim that the lower court erred in denying the motion to disqualify itself. Initial Brief of Appellant, Florida Supreme Court Case No. SC01-735. Defendant also filed a petition for writ of habeas corpus.

On April 3, 2002, this Court remanded this matter for an evidentiary hearing on the claims of ineffective assistance of counsel raised in Defendant's September 9, 2000 Motion for Post Conviction Relief before a new judge. *Mendoza v. State*, 817 So. 2d 848 (Fla. 2002). This Court dismissed the habeas petition.

Id.

On remand, Defendant filed a motion for reconsideration of the claims not involving ineffective assistance of counsel in his amended motion for post conviction relief and of the denial of his claim for public records against the City of Miami Police Department. (PCR2. 5-21)[4] In this motion, Defendant specifically argued that this Court's order had the effect of granting his motion to disqualify the first post conviction judge. *Id.* After a hearing on this motion, the lower court refused to reconsider the additional claims in the amended motion for post conviction relief. However, it permitted Defendant to file a new demand for additional public records direct to the City of Miami Police, limited to the matters relevant to this case. (PCR2. 22-28) On June 28, 2002, the City of Miami Police Department delivered additional police reports regarding Defendant's prior convictions. The lower court also gave Defendant until August 27, 2002, to file an amendment to his motion for post conviction relief based on any new claims arising from the records provided by the City of Miami.

On August 27, 2002, Defendant filed a supplement to his

[4] The symbols "PCR2.," "PCT2." and "PCR2-SR." will refer to the record on appeal, transcript of proceedings and supplemental record on appeal, respectively, for the appeal from the denial of the motion for post conviction relief after the first evidentiary hearing, FSC Case No. SC04-1881.

motion for post conviction relief. (PCR2. 32-57) In the supplement, Defendant raised no new claims arising from the City of Miami records. Instead, he claims that his sentence was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). *Id.* After receiving a response to the supplement and listening to argument, the lower court denied this claim.

The lower court then conducted the evidentiary hearing on April 21-23, 2003, April 25, 2003, September 22-24, 2003, and March 15, 2004. On August 18, 2004, the lower court again denied the motion for post conviction relief. (PCR2. 80-81)

Defendant appealed the denial of post conviction relief to this Court, raising two issues concerning the denial of his ineffective assistance claims. Initial Brief of Appellant, FSC Case No. SC04-1881. Defendant also filed a state habeas petition, raising 9 claims of ineffective assistance of appellate counsel. *Mendoza*, 964 So. 2d at 127 n.5. This Court considered the post conviction appeal and state habeas petition together and denied habeas relief. *Mendoza*, 964 So. 2d at 125, 129-35. However, this Court determined that the order denying post conviction relief was insufficient to allow review. *Id.* at 127-29. Because the judge who conducted the evidentiary hearing was dead, this Court remanded for a new evidentiary hearing. *Id.* at 125.

On remand, the State moved to exclude testimony based on qualitative electroencephogram (QEEG) testing because the test was new and novel scientific evidence that was not generally accepted in the scientific community, particularly at the time of Defendant 1994 trial. (PCR3. 238-73) It also moved in limine to exclude the testimony Odalys Rojas, a former investigator for CCRC, because it was hearsay and irrelevant. (PCR3. 231-37)

In response to the motion concerning the QEEG, Defendant argued that exclusion of QEEG related evidence was improper because his expert had other opinions to offer, that the State should have requested a *Frye* hearing regarding QEEG evidence, that such a hearing was unnecessary because QEEG testing is a "refinement" of EEG testing and that it did not matter that QEEG evidence would not have been available at the time of trial. (PCR3. 388-92) In response to the motion concerning Rojas, Defendant asserted that while Rojas would be testifying about the content of conversations with other individuals, her testimony would not be hearsay because it was not being offered for the true of the matters asserted. (PCR3. 384-87) Instead, Defendant asserted that Rojas would be testifying regarding the content of statements to show that mitigation witnesses were locatable and to support her "expert" opinion on the availability of witnesses. *Id.*

On January 28, 2008, Defendant moved to have counsel appointed to represent Alexander Suarez, one of his witnesses, because Suarez had invoked his Fifth Amendment right during deposition. (PCR3. 348-77) The lower court granted the motion and appointed counsel to represent Suarez. (PCR3. 457) When Suarez and his counsel indicated that Suarez would continue to invoke his Fifth Amendment rights, the lower court scheduled an in-court deposition of Suarez so that the judge would be available to rule regarding the relevancy of the questions and the propriety of the invocations. (PCR3. 1836)

During the deposition, Suarez again invoked his Fifth Amendment rights. The lower court determined that the questions about which Suarez invoked his rights were proper cross examination and that Suarez did have a Fifth Amendment right not to answer the questions. As a result, the State moved to strike Suarez as a witness and provided a memorandum of law in support of its motion. (PCR3. 653-59) Defendant filed a responsive memo, claiming that the questions to which Suarez invoked his rights were not proper cross examination. (PCR3. 670-76)

The lower court granted the State’s motion to exclude the QEEG evidence, finding that it was not generally accepted in the scientific community at the time of trial. (PCR3. 677) It also granted the motion to strike Suarez, finding that Suarez’s

invocation of his Fifth Amendment right deprive the State of the ability to cross examine Suarez and that Suarez would not have been available at the time of trial. (PCR3. 678-69) At the time the court entered this order, Defendant insisted that Suarez should not be deemed unavailable because he could have spoken to Defendant's experts and attorneys at the time of trial even if he would have refused to testify. (PCR3. 1837) At Defendant's insistence, the motion concerning Rojas as deferred until the middle of the hearing. (PCR3. 2129)

When the evidentiary hearing commenced on June 9, 2008, Defendant filed a *pro se* motion to discharge his counsel. (PCR3. 718-79, 1633) As such, the lower court conducted a *Nelson* inquiry and denied the motion. (PCR3. 1633-46) Defendant then asked that his investigator be allowed to sit at counsel table to "explain what is going on." (PCR3. 1646) During a discussion of what this meant, the lower court remarked that Defendant spoke perfect English and already had three lawyers with him. (PCR3. 1646-47)

Defendant then called Arnaldo Suri, one of his trial counsel, who had been admitted the practice in 1981 and had practiced criminal law since 1983. (PCR3. 1652-54) He was appointed to represent Defendant in 1992, was trying his first death penalty case and had attended a death penalty seminar

before doing so. (PCR3. 1653-54, 1661-62) Suri testified that he did not hire an investigator or mitigation specialist. (PCR3. 1663-64) He stated that he and his co-counsel did not strictly delineate a division of labor. (PCR3. 1664) However, because he was fluent in Spanish, Suri was primarily responsible for contact with Defendant and his family. (PCR3. 1665-66, 1690) Co-counsel Barry Wax dealt more with the mental health aspects of the case. (PCR3. 1690)

Suri believed that the State was presenting a felony murder case with robbery as the underlying felony. (PCR3. 1666-67) The defense planned to assert that there was no robbery because Defendant was collecting a debt and to raise a doubt regarding the identity of the shooter. (PCR3. 1667-69) He believed that raising doubt about the identity of the shooter would make the death penalty disproportional, given the plea agreements with the codefendants. (PCR3. 1669-70) Suri recalled that Lazaro had made a statement in a deposition regarding collecting a debt and remembered that Lazaro had not seen Defendant with a gun and had asserted that Defendant had said “he shot him” when he got to the car. (PCR3. 1667-68, 1671, 1680) Despite the fact that Suri had testified concerning the content of the deposition, Defendant attempted to admit the deposition, claiming that it was relevant to show what Suri knew about Lazaro and was not

being admitted for the truth of the matters asserted in the deposition. (PCR3. 1672-76) The lower court sustained the State's objection. *Id.*

Suri did not recall which of the codefendants be believed at the time was the shooter but believed that there was evidence pointing to either of them. (PCR3. 1670-71) He did not recall what he said in opening about the identity of the shooter but believed that he had stated that Lazaro would testify concerning the statement in his deposition. (PCR3. 1671) He recalled discussing calling Lazaro as a witness but did not distinctly recall why he chose not to do so. (PCR3. 1679, 1681-82) He believed that he thought that he had already placed the identity of the shooter in doubt and was concerned Lazaro might not implicate his brother at trial. (PCR3. 1681-82)

Suri stated that one of the reasons he believed that doubt about the identity of the shooter had been raised was that he had evidence that both Cuellar brothers had gunshot residue on them after the crime. (PCR3. 1682-83) He recalled that the timing of the gunshot residue tests became an issue at trial and that it affected Rao's opinion. (PCR3. 1663-84) He did not recall discussing hiring another gunshot residue expert. (PCR3. 1685-86) However, he did recall that he believed that using Rao would be advantageous because Rao worked for the State. (PCR3.

1686) He claimed that he had not noticed the discrepancy in the timing of the tests prior to trial. (PCR3. 1686)

Suri claimed that he did not discuss formulating a social history of Defendant because he was too inexperienced. (PCR3. 1690) However, he knew Defendant was from Cuba, recalled that he obtained records from Cuba through Defendant's mother and stated that he must have discussed Defendant's background with her sufficiently to have caused her to produce the records. (PCR3. 1690-91) He did not obtain funds to travel to Cuba. (PCR3. 1690) He knew that Defendant and his family had immigrated to this country through Peru and had spoken to Defendant's mother about their experiences there but claimed not to having considered going to Peru or obtaining an expert about it. (PCR3. 1691-93) However, Suri acknowledged that he spoke to Defendant more frequently than with any other client he had ever represented. (PCR3. 1696) Suri believed that the defense had presented Dr. Toomer, Defendant's mother and Humberto at the penalty phase. (PCR3. 1694-95) He did not recall why Humberto was called and stated that Wax was more involved with Dr. Toomer. (PCR3. 1695) Suri stated that Defendant's courtroom demeanor was terrible, in that he engaged in outbursts before the jury and laughed inappropriately. (PCR3. 1697) He blamed himself for Defendant's actions and stated that they harmed Defendant's case. (PCR3.

1697)

On cross, Suri acknowledged that he had extensive experience in criminal trials and had tried at least 50 cases before representing Defendant. (PCR3. 1701) He admitted that he had taken the seminar on capital cases in 1992 because he was qualified to handle a death penalty case and wanted to be up to date on the law in this area. (PCR3. 1701) He admitted that he had continuously handled capital cases since that time. (PCR3. 1702) He admitted that he had learned a great deal about the law and life in the years since he represented Defendant and that he would do many things differently today but did the best job he could at the time of Defendant's trial. (PCR3. 1702-03) He acknowledged that it was not the practice to hire a mitigation specialist at the time of Defendant's trial and that judges did not appoint experts from other states at the time. (PCR3. 1704) He stated that at the time, the practice when a mental health issue arose was to first request a competency evaluation and then appointment of a defense expert and that he followed that practice in this case. (PCR3. 1705-06) He recalled that Dr. Toomer had been appointed but did not recall the appointments of Drs. Haber, Castiello or Eisenstein. (PCR3. 1706-07) He did not recall requesting the appointment of Dr. Jules Tropp as an addictionologist. (PCR3. 1707) When shown that the docket sheet

reflected that an investigator named Armando Garcia had been retained in this case, Suri indicated that he did not recall the appointment, stated that his bill did not reflect the hearing and admitted that his bill might not be complete. (PCR3. 1707) He suggested that the reason why the bill might not accurate reflect his work in this case was that he was representing Defendant on numerous cases at the same time and was billing for each case separately. (PCR3. 1708-10)

Suri agreed that the State had a very strong case against Defendant in the guilt phase. (PCR3. 1711) While he did not recall all of the evidence again Defendant, he did remember that it was Defendant's fingerprints that were found next to the body and that the victim was shot at close range. (PCR3. 1711-15) In particular, Suri did not recall that Defendant had admitted his complicity in this crime to the police and stated that Lazaro remained in the car. (PCR3. 1715) He acknowledged that he had discussed calling Lazaro with Wax and Defendant. (PCR3. 1717, 1738-39) He originally insisted that the decision not to call Lazaro was not strategic. (PCR3. 1739) However, after reviewing the portion of the transcript where Wax stated it was a strategic decision, Suri admitted it was a strategic decision but asserted he did not recall its basis. (PCR3. 1740-42) He acknowledged that it was sometimes necessary to change tactics

during trial. (PCR3. 1743)

Suri admitted that he had cautioned Defendant about his behavior in the courtroom but insisted that it was his fault that Defendant misbehaved. (PCR3. 1723) He acknowledged that Defendant's actions were not sufficient to have been noted on the record or to have drawn the attention of the trial judge. (PCR3. 1725-26) He admitted that he disagreed with the sentence in this case and believed that he was responsible for it. (PCR3. 1726-27)

Suri admitted that he had spent numerous hours speaking to Defendant and that Defendant told him about his life, his family, growing up in Cuba, immigrating through Peru and using drugs. (PCR3. 1729-30) He admitted that he shared this information with Wax and assumed that Wax provided it to the experts. (PCR3. 1730) He admitted that it was not standard practice to attempt to go to Cuba to investigate a defendant's background at the time of Defendant's trial and stated that he was aware that it would have been difficult to do so. (PCR3. 1731-33) He also acknowledged that he had discussed Defendant's background with his father and extensively with his mother. (PCR3. 1734-36) He even had Defendant's mother get medical records from Cuba. *Id.* He was positive that he discussed the case with other, more experienced attorneys and would have

followed up on any suggestion they made. (PCR3. 1733-34)

Suri stated that he simply did not remember what he knew about the time discrepancy in the gunshot residue tests at the time of trial. (PCR3. 1737) He admitted that he may have just determined that the discrepancy was unimportant and stated that he would still have presented the gunshot residue evidence as he did even with the discrepancy. (PCR3. 1737-38)

On redirect, Suri stated that he never believed that this case warranted a death sentence since the victim had fired first and the codefendants had plead to lenient sentences. (PCR3. 1744) He admitted that this view colored his actions but claimed that his lack of penalty phase experience also contributed. (PCR3. 1744) He stated that it was nice to be able to present a consistent theory but that it was not always possible. (PCR3. 1748-49)

Barry Wax, Defendant's other trial attorney, testified that he had been admitted to the bar and practiced criminal defense since 1985. (PCR3. 1752-53) He was appointed to represent Defendant exclusive for his capital case as second chair. (PCR3. 1753-54) Prior to representing Defendant, Wax represented two other defendants in death penalty cases. (PCR3. 1762-67)

Defendant attempted to admit a bill Wax submitted in the case. (PCR3. 1754) During voir dire, Wax admitted that the bill

did not accurate reflect the time he spent in the case, particularly in the areas of client contact, legal research, penalty phase investigation or motion practice. (PCR3. 1755-57) He also noted that the document did not appear to be complete in that there were no totals at the bottom. (PCR3. 1758) He also noted that he was aware from the prior evidentiary hearing that documents were missing from his file. (PCR3. 1758-59) Since Wax stated the bill was not accurate, the State objected to its admission. (PCR3. 1760) Defendant responded that the bill should be admitted because it had allegedly been submitted to the court and because it allegedly gave some indication of the work done on the case. (PCR3. 1760-62) The lower court sustained the objection because the bill was not accurate. (PCR3. 1760-62)

Wax stated that he and Suri handled both phases of the trial together but that he was primarily responsible for the mental health evidence. (PCR3. 1768-69) All evidence-gathering involving Spanish was delegated to Suri. (EH1. 147.) Wax stated that he believed that Defendant would be convicted of felony murder and attempted to show that Defendant was not the shooter and that a death sentence would be disproportionate, given the codefendants' pleas. (PCR3. 1770) Wax believed that the identity of the codefendant that the defense was claiming was the shooter changed during the course of the case. (PCR3. 1771) He also

believed that the defense had suggested that Lazaro would testify during opening. (PCR3. 1772) He did not recall why this did not happen. (PCR3. 1772-73)

Wax stated that he recalled that Rao was called about gunshot residue but did not recall being involved in preparing his testimony. (PCR3. 1773) He stated that he knew the testimony was dependent on the time of the tests but claimed that he had not realized there was a discrepancy in the documentation regarding the timing. (PCR3. 1773-75) He stated that he did not consider hiring an independent expert and acknowledged that he believed that using a state witness against the State was advantageous. (PCR3. 1776)

Wax stated that Suri was primarily responsible for speaking with Defendant and his family because Suri spoke Spanish but acknowledged he did meet with Defendant's mother on several occasions using a translator to discuss Defendant. (PCR3. 1776) He also believed that he once met with one of Defendant's aunts. (PCR3. 1776) He claimed that he did not consider going to Cuba and did not know Defendant had been involved in an incident in the Peruvian Embassy there. (PCR3. 1777) He stated that he was only vaguely aware that Defendant had been a refugee in Peru and that he did not investigate Defendant's experiences there. (PCR3. 1777-78) However, he acknowledged that the defense did

obtain documents about Defendant from Cuba. (PCR3. 1777) He claimed not to have investigated Defendant's social history and not to have presented evidence about it. (PCR3. 1778)

Wax stated that he retained Dr. Toomer and Dr. Leonard Haber to evaluate Defendant's mental state and that they both sent him reports. (PCR3. 1779) When he received a report from Dr. Toomer, claiming that Defendant was deteriorating and experiencing hallucinations, he sought a competency evaluation. (PCR3. 1781-82) As a result, Dr. Haber was reappointed to conduct a competency evaluation, and Dr. Castiello was also appointed. (PCR3. 1782) However, Wax claimed to have conducted no other investigation. (PCR3. 1782-83) He acknowledged that he had requested the appointment of Dr. Jules Tropp, as a pharmacological expert, and suggested that Dr. Tropp performed no work in the case because he died. (PCR3. 1783) He noted that Dr. Haber had information in his ex parte report that was helpful but that his conclusions were not. (PCR3. 1787-88)

Wax recalled calling Defendant's mother, Dr. Toomer and Humberto during the penalty phase. (PCR3. 1788) He stated that Humberto was called to show that there was no intent to kill and to highlight the plea he received. (PCR3. 1789) He averred that he did not give Dr. Toomer background information but instructed Dr. Toomer to contact Defendant's family directly. (PCR3. 1789-

90) Wax claimed that he considered competency evaluations to be consistent with mitigation evaluations at the time of trial. (PCR3. 1791-92) He admitted that he questioned Dr. Toomer about Defendant's ability to be rehabilitated at the penalty phase. (PCR3. 1796) Wax stated that he also hired Hyman Eisenstein to conduct a neuropsychological evaluation after the penalty phase. (PCR3. 1792) He did not recall why he hired Dr. Eisenstein at that point but believed that he was looking for evidence of brain damage. (PCR3. 1794-95) He stated that he chose the experts he did because of his experience with them and his belief that they testified well. (PCR3. 1795)

On cross, Wax stated that he took his obligations to his clients very seriously and believed he was qualified to handle Defendant's case at the time. (PCR3. 1799) He admitted that at the time of Defendant's trial, the defense was not given unlimited resources and that experts from around the country were not generally appointed. (PCR3. 1799-1800) It was also not common for attorneys to travel to Cuba. (PCR3. 1800-01) Wax stated that Suri had a very good relationship with Defendant. (PCR3. 1803)

Wax acknowledged that the State's case was very strong and that he made a strategic decision not to call Lazaro. (PCR3. 1804-06) He admitted that it was necessary to change strategies

during trial at times. (PCR3. 1807) He acknowledged that he and Suri discussed called Rao and made a considered decision to do so. (PCR3. 1804) He averred that the time discrepancy did not defeat the purpose for calling Rao and that one reason for using Rao was that he was normally a state witness. (PCR3. 1808-09) He simply regretted allegedly failing to realize the State had documentation to establish the time discrepancy. (PCR3. 1808)

Wax admitted that he had interviewed Defendant's mother on three separate occasions and that Suri had also spoken to her on more occasions. (PCR3. 1810) He acknowledged that his discussions with Defendant's mother included asking about Defendant's life beginning with his birth and that he also spoke to Defendant about his life. (PCR3. 1811-12) He admitted that he received information about Defendant's mental health from five mental health professionals. (PCR3. 1813) He knew he had sought the appointment of Dr. Tropp as an expert in addictions and stated that the denial of that appointment explained why Dr. Tropp did no work in the case. (PCR3. 1813, 1821) He stated that he hired Dr. Eisenstein at Dr. Toomer's suggestion and believed he presented evidence about Dr. Eisenstein's evaluation at the *Spencer* hearing. (PCR3. 1816-17) He acknowledged that he had told the court at the *Spencer* hearing that Dr. Toomer had prepared an extensive psycho-social history of Defendant. (PCR3.

1818-19) Wax admitted that the similarities between Defendant's prior violent felony and his actions in this case made the prior violent felony aggravator strong. (PCR3. 1822-24) He acknowledged that he had believed that having Dr. Toomer testify about the possibility of rehabilitation would not make evidence of Defendant's other criminal activity admissible. (PCR3. 1824)

On redirect, Wax acknowledged that the debt collection theory in this case was related to evidence that the victim was a bolitero and influenced the opening statement. (PCR3. 1827) He stated that evidence that the victim was a bolitero was excluded. (PCR3. 1827)

Eugenio Rothe, a psychiatrist specializing in the mental health of immigrants and refugees, testified that in 1994 he was involved in evaluating refugees in Guantanamo Bay, Cuba. (PCR3. 1865-67) While Dr. Rothe had been appointed as an expert in dependency matters, this was his first capital case. (PCR3. 1870) In October 2007, he evaluated Defendant at the request of the defense. (PCR3. 1871) His evaluation consisted of interviewing Defendant and administering a test for Post Traumatic Stress Disorder (PTSD). (PCR3. 1871-72) He did not test Defendant for malingering but did not believe was malingering because the events Defendant described were consistent with Dr. Rothe's understanding of life in Cuba.

(PCR3. 1874) Dr. Rothe stated that documents from Cuba showed that Defendant was treated for bed wetting, hyperactivity, aggression, impulsivity and frequent temper tantrums between the ages of 2 and 13. (PCR3. 1876-77) He also stated that they showed the possibility of a learning disorder. (PCR3. 1876) He claimed Defendant was frequently truant from school, frequently got into fights at school, suffered from separation anxiety and did not do well in school. (PCR3. 1877-78)

Dr. Rothe claimed that Defendant's family decided to leave Cuba when he was 13 because they feared Defendant would be required to serve in the military. (PCR3. 1878-79) He averred that they did so by storming the Peruvian Embassy, spending about two weeks there in overcrowded conditions and then being flown to Peru through Costa Rica. (PCR3. 1879-81) He stated that Defendant stated that he was initially treated well in the camps, although the food was from a prison and the Peruvians saw the refugees in a negative light, but that the camps became overcrowded and violent within a few weeks. (PCR3. 1882) Defendant told Dr. Rothe that he had once witnessed a stabbing in the camp. (PCR3. 1883) Dr. Rothe believed that Defendant and his family remained in Peru for years but stated that they moved out of the camp at some point. (PCR3. 1884) Dr. Rothe opined that Defendant's experiences in Peru caused him to be an

aggressor, to identify with individuals who victimize others and to live by “the law of the jungle.” (PCR3. 1884-85)

Dr. Rothe stated that Defendant claimed to have had difficulty learning English when he moved to this country and did poorly in school. (PCR3. 1885) He stated that Defendant was introduced to drugs by a cousin and that he initially used marijuana and alcohol and subsequently used cocaine as well. (PCR3. 1885-86) According to Dr. Rothe, Defendant tried crack but did not like it because it made him nauseous. *Id.*

Dr. Rothe acknowledged that the PTSD test he gave was designed to be administered immediately after a trauma. (PCR3. 1886) Based on an apparent belief that the trauma was immigrating through Peru, Dr. Rothe administered the test by asking the test questions based on the first three years he lived in this country and then asking about Defendant’s present state. (PCR3. 1886) Defendant received a score of 46 out of 100. (PCR3. 1886) As a result, Dr. Rothe opined that Defendant presently suffered from “a residue of mild chronic” PTSD and that he suffered from moderate to severe PTSD when he first arrived in this country. (PCR3. 1887) He stated that symptoms of PTSD usually disappeared after five years. (PCR3. 1887) He believed that Defendant was predisposed to PTSD and that the PTSD created an increased propensity for drug abuse. (PCR3.

1889) He also averred that depression frequently accompanied PTSD but that depression usually ceases before PTSD does. (PCR3. 1892) He also diagnosed Defendant with polysubstance dependence and suspected Defendant might have attention deficit/hyperactivity disorder (ADHD). (PCR3. 1893) He believed Defendant might have had psychosis not otherwise specified in the past and might suffer from a learning disorder in the area of verbal functioning. (PCR3. 1894-95) He averred that Defendant's drug use would make him more impulsive and violent. (PCR3. 1896) He believed that Defendant had been using large quantities of drugs in the 48 hours before the murder, which impaired his judgment. (PCR3. 1897)

On cross, Dr. Rothe stated that the documents from Cuba on which he relied were the documents that had been introduced at the penalty phase and admitted that he was unaware of the origin of the documents, that he made no attempt to verify the accuracy of the document and that the documents did not appear to be in the form usual for medical records. (PCR3. 1897-1901) He acknowledged that he had relied on Defendant's self report. (PCR3. 1901-02) He admitted that Defendant was well aware that finding mitigation would benefit him when he was provided information. (PCR3. 1902-03) He stated that the information Defendant provided to him was mainly consistent with information

Defendant had previously provided but that there were inconsistencies in the information. (PCR3. 1903) Among the inconsistency was whether Defendant started using substances before or after his immigration. (PCR3. 1915) He admitted that he was hired to diagnose PTSD and that he only skimmed through information about prior evaluations, which he did not deem relevant to that issue. (PCR3. 1901-02) Among the information that Dr. Rothe did not recall reviewing was Defendant's mother's deposition and testimony. (PCR3. 1905) He also did not consider Defendant's criminal history because he was asked to focus on Defendant's childhood, immigration experience and early history in Miami. (PCR3. 1914) While he reviewed Defendant's motion to discharge counsel, he insisted that it merely indicated that Defendant was self destructive and that Defendant must have had help in preparing the pleading because it was inconsistent with his understanding of Defendant's vocabulary. (PCR3. 1906)

Dr. Rothe admitted he had done some work with refugees during his training in 1988 to 1990. (PCR3. 1907) He acknowledged that he was spending time in Cuba in 1994 but stated that he was available in Miami during this time also. (PCR3. 1907-08) He stated that he had passed his boards in general psychiatry in 1987 and did not pass his boards in forensic work until 2005. (PCR3. 1908-09) He admitted that he

was not working in capital cases in 1994, and was mainly involved in evaluating children at that time. (PCR3. 1909-10) He acknowledged that individuals sentenced to death would be likely to malinger and that he had been taught that it was difficult to detect malingering. (PCR3. 1910-11)

Dr. Rothe admitted that Defendant's childhood history was consistent with a diagnosis of either oppositional defiant disorder or conduct disorder. (PCR3. 1916-17) He acknowledged that Defendant had blamed his behavior on the use of drugs and his experiences in Peru and stated that Defendant turned to a life of crime because he could make more money doing so. (PCR3. 1917-18) Defendant also blamed his wife for his commission of domestic violence against her. (PCR3. 1919) He acknowledged that he could not give an opinion regarding Defendant's mental state at the time of the crime. (PCR3. 1921)

Ricardo Weinstein, a psychologist specializing in forensic neuropsychology, testified that he was not board certified and did not begin his training in neuropsychology until 1996. (PCR3. 1933-37) He stated that he had done forensic work for 20 years. (PCR3. 1937) He admitted that he had previously testified in deposition that he did not begin doing forensic evaluations until 1997 or 1998 but claimed that he was confused at the time. (PCR3. 1938) He then stated that he had begun doing forensic

work in 1994 or 1995, and then changed the answer again to the early 1980's. (PCR3. 1938-39) He admitted that he presently worked mainly in doing evaluations in death penalty cases. (PCR3. 1942)

Dr. Weinstein stated that he was hired to evaluate Defendant in 2000. (PCR3. 1955) When he met with Defendant at that time, he interviewed him and administered the Halstead-Reitan Neuropsychological Battery, the Test of Memory Malingering (TOMM), the Rey 15-Item Test, the Multiphasic Aphasia exam, a Spanish version of the WAIS, the Hare Psychopathy Checklist, the Soper Neuropsychological Status Examn, the Rey Complex Figure test, the color trails test and a Spanish neuropsychological battery. (PCR3. 1957-58) He stated that Defendant did very well on the TOMM and Rey 15-item test, which indicated that Defendant was using good effort in the testing. (PCR3. 1958) He averred that the other tests indicated brain dysfunction, particularly in the frontal lobes. (PCR3. 1958) He stated that Defendant's full scale IQ on the WAIS was 87. (PCR3. 1962-63) Defendant's performance on the Hare checklist indicated that Defendant was not antisocial. (PCR3. 1963-64)

Dr. Weinstein saw Defendant again in June 2002, and administered the Delis-Kaplan Executive Functioning Test and the

Ruff 2 & 7 Selective Attention Test. (PCR3. 1960) On the number/letter trail making, verbal fluency and category portions of the Delis-Kaplan test Defendant scored in the significantly impaired range. (PCR3. 1960-62) He had below average scores on the color/word inference and tower portions. *Id.* He had an above average score on the visual scanning and number sequencing portion and average scores on the remainder of the test. *Id.* He also obtained an average score on the Ruff test. (PCR3. 1964)

Dr. Weinstein again saw Defendant in February 2003, and administered the Spanish version of the Woodcock-Johnson test. (PCR3. 1964) He stated that the results indicated that Defendant's IQ was 72, but that his academic achievement was in the low average range, which was significantly better than his IQ indicated. (PCR3. 1964-65) He noted that Defendant did better on tests involving reading and writing than on tests of math. *Id.*

In 2007, Dr. Weinstein was contacted about testifying again and decided that he needed to re-evaluate Defendant to determine if his mental state had changed. (PCR3. 1965) At that time, he re-administered the Rey 15-Item test, the Rey Complex Figure test, the Spanish version of the WAIS and the neuropsychological battery, as well as administering the computerized test of response bias (CARB), the Wisconsin card sort test, a facial

recognition test and the comprehensive test of nonverbal intelligence (CTONI). (PCR3. 1966-67) He stated that Defendant did well on the Rey 15-Item test and the CARB, which indicated that Defendant was not malingering. (PCR3. 1966) On the WAIS, Defendant's full scale IQ was 76, and his nonverbal IQ on the CTONI was 63. (PCR3. 1967) The results of the Wisconsin card sort indicated impairment. (PCR3. 1967-68) On the neuropsychological battery, Defendant's score on the attention index indicated only very mild impairment, the memory index score was below average, the special index score was average and the executive functioning score indicated mild to moderate impairment. (PCR3. 1968)

Based on all his testing, Dr. Weinstein opined that Defendant had significant impairment in his frontal lobes. (PCR3. 1969) He averred that this impairment resulted from both developmental and acquired causes. (PCR3. 1969) He stated that the fact that Defendant had been treated for behavioral problems as a child showed the developmental cause and that Defendant had told him that his head had been repeatedly banged into a sidewalk, that he had been in repeated fights and that he had abused drugs and alcohol. (PCR3. 1970) He also claimed that immigrating through Peru caused Defendant's brain not to develop properly. (PCR3. 1970-71) Dr. Weinstein opined that Defendant's

alleged frontal lobe impairment impacted his ability to control his impulses, his judgment and his ability to plan and act in a goal-directed manner. (PCR3. 1972) He admitted that Defendant did have the ability to plan and exercise judgment but asserted Defendant could not make long term plans. (PCR3. 1972-73)

Dr. Weinstein stated that he was provided with documents by Defendant and stated that he reviewed most of them. (PCR3. 1974-75) Based merely on the fact that Dr. Weinstein had reviewed the documents, Defendant attempted to admit them into evidence, the State objected and the objection was sustained. (PCR3. 1974-79) Defendant then attempted to admit a video-tape of interviews with three people on the basis that Dr. Weinstein watched the video, the State again objected and the objection was again sustained. (PCR3. 1979-80) Dr. Weinstein stated that if extreme mental or emotional disturbance was defined as not thinking logically and considering the consequences of one's actions, Defendant was under extreme mental or emotional disturbance at the time of the crime, although he admitted he did not know the definition of the mitigator. (PCR3. 1980-81)

On cross, Dr. Weinstein admitted that he did not begin conducted neuropsychological evaluations until approximately 1997 or 1998. (PCR3. 1983) He stated that he had not learned the definitions of the statutory mental mitigators in Florida

because he was not asked to give an opinion about them and was only asked to opinion that Defendant had brain dysfunction. (PCR3. 1984-85) Dr. Weinstein admitted that the Ruff 2 & 7 attention span test was using in diagnosing ADHD and that Defendant obtained a normal score on that test. (PCR3. 1988) However, when asked about the implication of that score for a diagnosis of ADHD, Dr. Weinstein evaded the question, claiming that "tests are not diagnostic." (PCR3. 1988)

Dr. Weinstein admitted that he had only ever testified for the prosecution regarding competency. (PCR3. 1989) He acknowledged that he charged twice his normal rate to be deposed. (PCR3. 1989) He insisted that it was proper to continually retest a person to determine how they were functioning years in the past. (PCR3. 1990-91)

Dr. Weinstein stated that he was unaware that Dr. Toomer had obtained a performance IQ of 120. (PCR3. 1991-92) When asked if that result was consistent with his results, he evaded the question insisting that he had never seen that result. (PCR3. 1991-92) He admitted that he had not reviewed information about the tests given by Dr. Eisenstein and Dr. Aguilar-Puentes. (PCR3. 1993) However, he insisted that none of the experts tested Defendant for frontal lobe damage. (PCR3. 1993-94) He stated that he had tested over 100 death row inmates and that

all but one or two of them had frontal lobe damage. (PCR3. 1994) Dr. Weinstein stated that his only knowledge regarding the facts of the case came from reading an appellate decision. He did not ask Defendant about the facts of the crime, about his thinking at the time of the crime or about anything to do with Defendant's other criminal behavior. (PCR3. 1995) As a result, Dr. Weinstein was unaware of whether Defendant planned his criminal activities and targeted particular victims. (PCR3. 1996)

On redirect, Dr. Weinstein reviewed Dr. Eisenstein's report and asserted that Dr. Eisenstein had not tested executive functioning. (PCR3. 1997-98) He criticized Dr. Aguilar-Puentes's testing because he believed she gave a nonstandard translation of the WAIS and for allegedly not testing executive functioning. (PCR3. 1998-2000) He admitted that the neuropsychological battery he gave was not available at the time of trial. (PCR3. 2000) He claimed that the practice effect was not implicated in the tests he repeatedly gave. (PCR3. 2001) He asserted that Defendant's alleged difficulties in planning did not impede his ability to plan to commit crimes. (PCR3. 2003)

The following morning, Defendant's counsel explained to the lower court that he would not have sufficient witnesses available to fill the day because Defendant was prohibiting her

from calling certain witnesses. (PCR3. 2009-12) The lower court then colloquied Defendant and his counsel to ensure that he was voluntarily waiving the presentation of the witnesses. (PCR3. 2012-23) During this colloquy, it was revealed that Defendant did not wish to pursue penalty phase relief. *Id.*

Deborah Mash, a neuropharmacologist, testified that she primarily works doing research but spends less 10% of her time testifying as an expert witness. (PCR3. 2023-30) She was retained to evaluate Defendant in 2007. (PCR3. 2037) She reviewed a social history of Defendant, the reports of the other experts who had evaluated Defendant, transcripts of testimony and depositions and school records. (PCR3. 2040-42) She also spent two hours interviewing Defendant, utilizing in part the addiction severity index. (PCR3. 2042-43)

During her interview with Defendant, Dr. Mash inquired about Defendant’s use of drugs, its onset, its frequency, its effects on his thoughts and moods and his physical condition, his general medical history and his family history and background. (PCR3. 2073-74) Defendant told her that he began using alcohol and marijuana in high school, that he progressed to using cocaine around the age of 19 and that he increased the amount and frequency of his use over time to the point where he was smoking marijuana every day and drinking to the point of

intoxication 3 to 5 times a week. (PCR3. 2075-76) He stated that he would go on cocaine binges for days at a time, would use marijuana to counteract the paranoid he felt from the cocaine use and would use alcohol to ameliorate the effects of going off the cocaine binges. (PCR3. 2076-77) He claimed that he used all the drugs he could obtain and would immediately seeking money for more drugs when he ran out. *Id.* Defendant asserted that he used drugs when he was lonely, anxious, stressed or having trouble sleeping. (PCR3. 2079-80)

Defendant told Dr. Mash that he was irritable, depressed and paranoid at the time but claimed not to be suicidal, to have violent thought or to have experienced memory problems. (PCR3. 2077) He claimed that his drug use caused him to have arguments with his wife, to be thrown out of his house, to be unable to hold a job and to turn to a life of crime. (PCR3. 2077-78) He stated that he had not sought treatment for his drug use but claimed to have head trauma, to have been shot buying drugs and to have developed an intestinal problem as a result. (PCR3. 2078-79) He asserted that he had problems in school but obtained his GED and training as a plumber. (PCR3. 2079) Defendant told Dr. Mash that being in the camp in Peru was frightening and that his parents had difficulty coping there. (PCR3. 2081) When he arrived in this country, he decided to hang out with a group of

people in the neighborhood who used drugs and became involved in drug use through them. (PCR3. 2081-82) He stated that he had a disabled daughter and claimed other family members had mental health problems. (PCR3. 2082-83)

Dr. Mash stated that the use of these drugs would damage the brain and that the combination of cocaine and alcohol was particularly addictive. (PCR3. 2083-86) She claimed the frontal lobes were particularly sensitive to being damaged. (PCR3. 2090) She asserted that Defendant was severely addicted. (PCR3. 2091) She claimed that Defendant could have appeared to have been functioning normally. (PCR3. 2092) While she admitted that she knew nothing about Defendant's criminal activity, she asserted that his crimes were all related to his drug use and that he was under the influence of an extreme mental or emotional disturbance due to his drug use at the time of the murder. (PCR3. 2094-95)

On cross, Dr. Mash stated that Dr. Tropp was an addictionologist who practiced in Dade County before his death. (PCR3. 2096) Dr. Mash first stated that she believed the head trauma was related to the gunshot wound and then stated that the head trauma was minor trauma from fights. (PCR3. 2097-98) When confronted with the fact that her notes contained nothing under head trauma, Dr. Mash stated that the trauma must have been so

minor that she did not write it down. (PCR3. 2098-99) She acknowledged that Defendant did not tell her that his head had been banged repeatedly into a sidewalk. (PCR3. 2099) She admitted that she found Defendant to be intelligent and knew he had obtained his GED. (PCR3. 2099) When asked about her statement that Defendant could have appeared to have been functioning normally, she changed her answer and acknowledged that people would have noticed changes in Defendant's behavior. (PCR3. 2100)

Beatrice Roman testified that she was a social worker who worked for the United Nations Commission of refugees. (PCR3. 2103) In 1980, Roman was given responsibility for assisting 742 Cuba refugees from the Peruvian Embassy. (PCR3. 2105) The Peruvian Government set up 150 tents in a park in Lima to house these refugees. (PCR3. 2105) The park had been used as a sports facility and had public bathrooms associated with it. (PCR3. 2107) She had seen people waiting in line to use those facilities when she visited the camp. (PCR3. 2107) She stated that the food for the camp was provided by the same vendor who provided food for other social services providers and for penal institutions. (PCR3. 2112) She stated that the Red Cross had a first aid station at the camp and that people with more serious health problems were brought to her office. (PCR3. 2113) She

stated that there were stabbings and fights in the camp. (PCR3. 2114)

Roman recalled Defendant's name as being among the refugees and remembered interviewing his father but had little memory of Defendant, never spoke to him and only saw him a few times at her office. (PCR3. 2106-07, 2120-21) The purpose of the interview was to obtain assistance to integrate into Peruvian society. (PCR3. 2115) Roman's organization gave Defendant's father money to purchase a car so that he could work as a taxi driver. (PCR3. 2115-16) Defendant's family sold the car that had been bought for them and disappeared in January 1983. (PCR3. 2119)

During the hearing, the State moved to exclude the testimony of Holly Ackerman. (PCR3. 780-866) The basis of the motion was the proposed subject of her testimony was a description of the events surrounding the immigration of Cuban through the Peruvian Embassy and Peru, which was not the proper subject of expert testimony. (PCR3. 780-86) It also argued that Ackerman was being used merely as a conduit to present inadmissible hearsay. *Id.* The State also moved to exclude the testimony of Steven Potolsky on the basis that any testimony he could offer regarding whether counsel was deficient was an improper opinion on a legal issue, not a factual one and that

any testimony he could offer about the professional norms was unnecessary as the lower court was already aware of the professional norms. (PCR3. 867-73) Defendant filed a consolidated response to both motions. (PCR3. 942-53) Regarding Ackerman, Defendant argued that testifying that a historical event occurred was the proper subject for expert testimony and that because Ackerman could rely on hearsay, she could testify about the hearsay and opine that the hearsay was consistent with the history. (PCR3. 944-49) Regarding Potolsky, Defendant insisted that he would only be testifying about the community standards and that such testimony would assist the trier of fact. (PCR3. 949-51) After hearing argument on these motions, the lower court ruled that it would allow the witnesses to testify and then determine whether anything they said deserved weight. (PCR3. 2123-27)

The lower court then heard argument on the motion concerning Rojas. (PCR3. 2127) The State asserted that her testimony about statements made to her by others would be inadmissible hearsay and that testimony regarding the number of hours she spent in the case would not be relevant. (PCR3. 2128-29) Defendant insisted that the hearsay was admissible because the State could call the people Rojas spoke to as rebuttal, even though Defendant admitted that Rojas wanted to speak about

statements allegedly made by Defendant's parents who were dead. (PCR3. 2129-30) The lower court granted the State's motion to exclude this testimony. (PCR3. 2130-31)

When Defendant attempted to call Lazaro Cuellar, he initially indicated that he was unwilling to testify without an attorney present and only agreed to do so when the lower court threatened him with contempt. (PCR3. 2141-46) On direct, Lazaro stated he drove Defendant and his brother Humberto to Calderon's home because he was told that some money was owed. (PCR3. 2147) He stated that he did not see Defendant with a gun. (PCR3. 2147) On cross, he had to be repeatedly confronted with prior inconsistent statements. (PCR3. 2148-53, 2154-57) He stated that he would not have been willing to testify at trial. (PCR3. 2154) He stated that he had no personal knowledge of Calderon or any money being owed and was merely stating what Defendant told him. (PCR3. 2158-59)

Jethro Toomer, a forensic psychologist with 30 years experience, testified that he was hired by the defense to evaluate Defendant in 1994. (PCR3. 2160-61) He stated that in conducting an evaluation, he interviews the defendant, administers tests to him, reviews records and speaks to people who knew the defendant growing up. (PCR3. 2162) In this case, he met with Defendant on four occasions at the jail in November and

December 1993. (PCR3. 2163) During these meetings, Dr. Toomer interviewed Defendant and administered the Bender Gestalt Design test and the Carlson Psychological Survey. (PCR3. 2164) He claimed that he was not provided with medical records from Cuba, school records or social history records. (PCR3. 2165-66) He also stated that he did not speak to Defendant's family members or friends. (PCR3. 2167) Dr. Toomer stated that after his last visit with Defendant, he became concerned that Defendant was decompensating and reported his concerns to the jail medical staff. (PCR3. 2168) He admitted that he had written a report to counsel, suggesting that Defendant might have competency issues. (PCR3. 2169-70) He stated that he expected to conduct further evaluations of Defendant and that he had suggested neuropsychological testing. (PCR3. 2170-71)

On cross, Dr. Toomer acknowledged that he knew how to evaluate a defendant for mitigation and that he undertook such an evaluation in this case. (PCR3. 2173-75) He simply believed that he had not completed the evaluation in this case because he wanted to do additional testing and review records. (PCR3. 2175) He admitted that he was unaware if there were records available in this case. (PCR3. 2175-78) He acknowledged that Defendant had claimed to have received mental health treatment in Cuba but did not recall if he had ever been able to get records from Cuba in

any case. (PCR3. 2178-80) He admitted that Defendant told him he had used drugs extensively and that he had testified about drug use at trial. (PCR3. 2180) He also acknowledged testifying that he believed Defendant had brain damage at trial and testified that Defendant had other mental health problems, including hallucinations, at trial. (PCR3. 2181-83) He did not know if there were family members and friends available to speak to him at the time of trial and was unaware Defendant had beaten his pregnant wife. (PCR3. 2182-83) Because he had not been provided with any additional information, Dr. Toomer could not say whether the provision of additional information would have changed his opinion. (PCR3. 2184)

Holly Ackerman testified that she was a librarian, received a doctorate in international theory in 1996, and conducted research on Latin American migration. (PCR3. 2186-88) In working on her doctorate, Ackerman took oral histories from individuals who emigrated from Cuba on rafts and through the Peruvian Embassy. (PCR3. 2190-91) She also read news accounts regarding the emigration through the Peruvian Embassy. (PCR3. 2191-92) She had also been to Cuba on three occasions. (PCR3. 2192-93) While she had previously testified as a social worker, she had never testified as an expert in international relations. (PCR3. 2193-94) Ackerman stated that she reviewed a series of documents

provided to her by the defense, watched a DVD and spoke to Defendant. (PCR3. 2197-99)

When Defendant attempted to question Ackerman further about participating in political activities in Cuba, the State objected that the statements were irrelevant hearsay. (PCR3. 2203-07) During argument on the objections, Defendant insisted that the testimony was proper because experts can rely on hearsay and hearsay can be admitted at the penalty phase. (PCR3. 2207) The State responded that Ackerman had not been qualified as an expert and that the mere fact that an expert could rely on hearsay did not make the hearsay admissible. (PCR3. 2207-08) Defendant asserted that testimony regarding the significance of not participating in political activities was relevant and offered Ackerman in an expert on international relations. (PCR3. 2208) During the argument, the lower court inquired what Defendant expected she would be qualified to render an expert opinion regarding, and Defendant stated that the opinion he expected to elicit was that the information Defendant provided was consistent with the information she received from others. (PCR3. 2215–16) Defendant insisted that having a historian consider experiences that Defendant might not have personally had somehow added "a level of accuracy" regarding what Defendant experienced. (PCR3. 2221) After considering the arguments, the

lower court sustained the objection but allowed Defendant to present a proffer regarding information relevant to Defendant. (PCR3. 2223-34)

Ackerman then related what Defendant had told her about why and how Defendant's family elected to leave Cuba through the Peruvian Embassy, what he experienced in the Peruvian Embassy, how Defendant ended up in Peru, what he experienced there and how he came to the United States. (PCR3. 2235-83)

On cross, Ackerman acknowledged that she did not begin conducting interviews regarding emigrating through the Peruvian Embassy until 1994. (PCR3. 2283-85) She could not say when she believed she had sufficient knowledge of the incident to be an expert about it. (PCR3. 2285)

Steven Potolsky testified regarding his experience in criminal law and Defendant offered him as an expert. (PCR3. 2298-05) The State renewed its objection that opinion testimony regarding the community standard would not assist the court and that opinion testimony regarding ineffective assistance was improper opinion on a legal issue. (PCR3. 2306-07) Defendant again insisted that he would only be testifying about the community standard and that such an opinion would assist the court. (PCR3. 2307)

On voir dire, Potolsky stated that he had been given the

trial transcripts, the record on appeal, testimony and depositions from prior proceedings and the prior opinions in the case and that he had read portions of that information. (PCR3. 2309-10) He acknowledged that he had not spoke to the attorneys and did not know what was happening in the case when strategic decisions were made. (PCR3. 2310) He stated that the community standards he was aware were in existence in 1992 to 1994 were codified by the National Legal Aid and the ABA. (PCR3. 2312-13) He admitted that he only used these standards as part of his understanding of how to conduct a defense. (PCR3. 2313) He admitted that the standards of practice had changed since 1994. (PCR3. 2314) He stated that the fact that mitigation specialist were not generally used was an example of how the standards had changed. (PCR3. 2314-16) He acknowledged that Tivan Johnson was a defendant he had represented in 1993 and that he he had hired Dr. Toomer and had not employed a mitigation specialist in that case. (PCR3. 2316-17) He was sure that he had represented individuals from Cuba by the time this case was tried and that some of those people would have had mental health issues. (PCR3. 2318) He admitted that he did not recall sending anyone to Cuba to investigate in those cases or speaking to any other defense attorney who did so at the time this case was tried. (PCR3. 2318-19) The lower court then indicated that it did not believe

that the testimony would assist it in making its decision, particularly given his admissions about the Johnson case. (PCR3. 2325-26)

Thomas Hyde, a neurologist, testified that he spent two hours examining Defendant on September 19, 2007. (PCR3. 2333-37) His examination consisted of taking a history, doing a neurological examination and doing a limited physical examination. (PCR3. 2337-38) He stated that he spoke to Defendant in English with limited difficulty. (PCR3. 2338) He stated that Defendant told him that he had lived in Cuba until he was 14½ years old, that he was an average student but had some problems in math, that he was frequently truant beginning in the eighth grade, that he spent two and a half years in a refugee camp in Peru, that he moved to Miami in 1992, that he attend high school until the tenth grade, dropped out and obtained his GED. (PCR3. 2339-40) Defendant claimed he had a son who suffered from ADHD. (PCR. 2340) He told Dr. Hyde that he spent about 14 days living in the Peruvian Embassy in Cuba, that the experience was stressful and unpleasant, that he ended up in a camp in Peru, that shortly after he arrived an additional 850 refugees, who he described as criminals, joined the camp and that their presence caused life in the camp to deteriorate and become highly stressful. (PCR3. 2341)

Dr. Hyde stated that the neurological history he obtained from Defendant did not include any events, such as a traumatic loss of consciousness, that raised any concerns about a brain injury. (PCR3. 2343) However, Defendant described behavioral problems, which caused Dr. Hyde to be concerned about ADHD and frontal lobe problems. (PCR3. 2344) Defendant told Dr. Hyde about a history of drug abuse but related no relevant medical history. (PCR3. 2344-45) On the neurological tests, Dr. Hyde stated that Defendant did very well on the mental status exam, fine on a cognitive performance test, perfect on a test for dementia and normal on his other tests. (PCR3. 2345-46) Defendant did have some difficulty hands on a clock and copying three dimensional figures, but Dr. Hyde stated that these difficulties were of limited significance. (PCR3. 2346) The physical examination was unremarkable. (PCR3. 2346) After completing his evaluation, Dr. Hyde reviewed records provided to him by the defense. (PCR3. 2347-48) After completing this review, Dr. Hyde recommended neuropsychological testing focused on the frontal and temporal lobes and evaluation by a psychiatrist for PTSD. (PCR3. 2348-49)

On cross, Dr. Hyde stated that it was not appropriate to repeatedly readminister neuropsychological tests because of the practice effect. (PCR3. 2356) He expressed a concern that Dr.

Eisenstein had done his testing in English. (PCR3. 2357) He believed that Dr. Aguilar-Puentes had properly done the testing she had done but would have suggested additional testing of the frontal lobes. (PCR3. 2357) He acknowledged that Defendant had told him that he had been truant and hung out with the wrong people in Cuba. (PCR3. 2359) He admitted that Defendant had told him that he had used marijuana and alcohol on the day before the crime, that he had not used cocaine and that he was not intoxicated when he committed the crime. (PCR3. 2361) He admitted that Defendant had indicated that his use of alcohol was not sufficient to have caused withdrawal symptoms. (PCR3. 2361-62) He admitted that Defendant had told him he had once been punched during a fight as a teenager but did not say his head was pounded against a sidewalk. (PCR3. 2362)

Dr. Hyde admitted that he had tested Defendant's ability to do simple math, and Defendant demonstrated such an ability. (PCR3. 2363) He was also able to count backward from 30 by 3's perfectly. (PCR3. 2363-64) Defendant was able to draw complex geometric figures perfectly, and his problem with three dimensional figures was limited to a little skewing. (PCR3. 2364)

Celia Hartnett, a gunshot residue analyst, testified that she was provided with information about this case by the defense

and reviewed them. (PCR3. 2368-72) When Defendant attempted to introduce the information that had been provided to Hartnett, the State objected, and the lower court sustained the objection. (PCR3. 2373) Defendant then attempted to admit of what purported to be Rao's report, the State objected that it was hearsay and not authenticated and the lower court sustained the objection. (PCR3. 2375-77)

During the ensuing argument, the lower court inquired about the proposed subject matter of Hartnett's testimony, and Defendant responded that he wanted to have her comment on the quality of Rao's work to show that counsel was ineffective for failing to hire an independent expert. (PCR3. 2379-81) The lower court indicated that it recalled that trial counsel had testified that they made a strategic decision to use Rao because he was usually a state expert and asked how this testimony would prove a claim. (PCR3. 2381-85) During his response, Defendant indicated that he planned to have Hartnett contest Rao's conclusions. (PCR3. 2382) However, he admitted that Hartnett had not done any independent analysis of the evidence and that Rao would not be testifying. (PCR3. 2386)

The State then suggested that Hartnett could give an opinion about the gunshot residue based on her review of Rao's raw data but that having her comment on Rao's opinion was

improper. (PCR3. 2390-91) The State also pointed out that some of the documents that Defendant had given Hartnett as Rao's bench notes were not authenticated and that testimony from the prior hearing showed could not be authenticated. (PCR3. 2391-95) Defendant admitted that the prior testimony had been presented but asserted that he should be allowed to use them because he claimed they came from the crime lab and because his expert relied on them. (PCR3. 2395-98)

After taking a recess to consult, Defendant stated that he believed the lower court's questions about the defense attorneys' testimony indicated it was biased and asked for a recess to file a motion to disqualify. (PCR3. 2399-2400) The lower court then reset the matter for July 2, 2008, so that Defendant could file his motion, and informed the parties that they needed to be prepared to proceed if the motion was denied. (PCR3. 2401-07)

On June 24, 2008, Defendant filed his motion for disqualification, claiming that the judge's questions about the purpose of Harnett's testimony and its rulings regarding the *Nelson* inquiry and regarding the admissibility of Potolsky's testimony created an appearance of bias. (PCR3. 1077-84) On June 27, 2008, the State responded to the motion, pointing out that the motion was untimely regarding the second two grounds, that

the motion was insufficient as an initial motion, that the motion was really a successive motion and that it was completely meritless as such. (PCR3. 1086-1123) That same day, the lower court denied the motion. (PCR3. 1085, 2411)

At the hearing on July 2, 2008, the State then reminded the court that it had yet to rule on whether Hartnett could testify based on an unauthenticated document. (PCR3. 2412-14) When the lower court inquired about the admissibility of the testimony, Defendant indicated that he was not prepared to address the issue and requested additional time to find a way of authenticating the documents. (PCR3. 2417-22) The lower court sustained the State's objection. (PCR3. 2419, 2421-23) The parties then both rested. (PCR3. 2423) On April 2, 2009, the lower court denied the motion for post conviction relief, finding that Defendant had failed to prove his claims. (PCR3. 1442-71) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claims of ineffective assistance of counsel at the guilt and penalty phases. Moreover, the successive motion for disqualification was properly denied, and the lower court did not abuse its discretion in any of its rulings regarding the admissibility of evidence.

ARGUMENT

I. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE WERE PROPERLY DENIED.

Defendant first asserts that the lower court erred in denying his claim of ineffective assistance of counsel at the guilt phase. However, the lower court properly denied these claims.

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). Among the factual findings to which this Court must defer are the credibility of witnesses and the determination that counsel made a strategic decision. *Wood v. Allen*, 2010 WL 173369, *4, *5 (Jan. 20, 2010); *Stephens*, 748 So. 2d at 1034. However, this Court may independently review the lower court's determination of whether those facts support findings of deficiency and prejudice to support a holding that counsel was ineffective. *Stephens*, 748 So. 2d at 1033-34.

Here, the lower court denied these claims:

> In subsection A of the Amended Motion, the Defendant alleged that his trial counsel, Mr. Suri and Mr. Wax were ineffective in their representation during the guilt phase. In paragraph 17, Defendant contends that counsel was ineffective by stating that they would call Lazaro to testify during opening statements and then not calling him during trial. Mr.

Suri, who this Court find to be a significantly credible witness, testified the decision not to call Lazaro was a strategic decision because they did not know if he could be trusted to testify consistent with his deposition, since his brother was a co-defendant. Additionally, he thought a reasonable doubt had been established as to who the shooter was. Mr. Wax, who this Court also finds to be a significantly credible witness, testified that the decision not to call Lazaro was a strategic one, which was discussed with Mr. Suri and the Defendant. He does not recall the reason for this strategy; however, based on the testimony of Lazaro during the evidentiary hearing, this strategic decision was supported. This Court finds that Lazaro Cuellar has no credibility. He was impeached at least 6 times during his brief testimony during the hearing. Additionally, he stated he would not have testified during the trial of the Defendant.

Counsel was not ineffective by failing to call Lazaro, as the court finds that it was a strategic decision. The trial transcript also reveals that the decision not to call Lazaro was a strategic decision. Mr. Wax stated:

> Your Honor, I take exception with the state's position that this was calculated. We intended to call Lazaro Cuellar. This was our trial. Mr. Suri and I spoke extensively before the trial, and our position was that it would be in [Defendant's] best interest if we did call Mr. Cuellar.
>
> As you know, when we concluded this trial we ask corrections if we could speak with [Defendant]. We went to the jury room and spoke to [Defendant]. The purpose of that was to discuss the possibility of calling Lazaro Cuellar to testify. After hearing the state's case, the defense made a strategic decision not to call Lazaro Cuellar. We felt that would be in his best interest. We made a strategic decision based on the state's case in chief not to call Lazaro Cuellar, and that is our right. (T. 1212-1213)

The claim is denied.

* * * *

Additionally, the reason there was not more evidence presented on the issue of the victim being a bolitero was because the State filed a Motion in Limine. The Court granted that motion. The defense did proffer the testimony of Det. Trujillo and Det. Royal about their knowledge of the victim being a bolitero. (T. 770-860) Later in the record, Mr. Suri states:

> Can I just put something on the record? Let's talk about bolitero. The fact of the matter is that the Court would not allow it in, but at the time of voir dire and before opening you made—you had not made a decision whether we could get it in through the witness. You just said we bring the guys prior to arrest so in opening we expect there will be evidence that this man was involved in it. (T. 1216)

* * * *

The Defendant also contends in paragraphs 21 and 22 that counsel was ineffective for failing to attempt to prove Lazaro was the shooter. The Defendant did not present any evidence during the evidentiary hearing that Lazaro was the shooter. The Defendant did not show that counsel was ineffective on this issue. This claim is denied.

* * * *

In subsection 2, the Defendant contends counsel was ineffective by failing to present a defense. The Defendant contends that counsel failed to present evidence that the Defendant was there to collect a debt. The Defendant did not present any evidence at the evidentiary hearing that the Defendant was there to collect a debt from the victim. This claim is denied.

The Defendant also contends that counsel was ineffective by failing to present evidence that Humberto or Lazaro actually shot the victim. Humberto testified at trial. At the evidentiary hearing, the Defendant called Lazaro to testify. Lazaro did not testify that the Defendant was not the shooter and that counsel was ineffective. Additionally, this court again notes that the State proceeded on a felony

murder charge. Even if the Defendant was not the shooter, he could have been found guilty of felony murder. This claim is denied.

The Defendant alleges counsel was ineffective by failing to properly prepare Criminalist Rao. Both Mr. Wax and Mr. Suri testified that they made a mistake by looking at the wrong tag for the times. While the time may have been wrong, Rao still testified that Humberto and Lazaro both had gunshot residue on their hands and that it was more likely that either man had fired a gun. Even if it were assumed that counsel was ineffective, the Defendant did not show prejudice. Lazaro's gun, with which Humberto used to hit the victim, was recovered in the car at the hospital. It was not fired, but it did contain the victim's hair. Humberto testified that Lazaro never left the car, The Defendant present no evidence at the evidentiary hearing that either Humberto or Lazaro was the shooter.

The Defendant also contends that counsel was ineffective by not rebutting that Lazaro got gunshot residue on his hands helping Humberto into the hospital. The Defendant failed to present any evidence on this issue. This claim is denied.

The Defendant next contends that counsel was ineffective by failing to consistently assert that either Lazaro or Humberto shot the victim. He claims if this was done, he would not be on death row. The Defendant's finger print was found near the victim. The State proceeded under a felony murder charge. The Defendant could have been conviction of first degree felony murder whether or not he was the actual shooter. Humberto testified that the Defendant planned the robbery and scoped out the victim's house prior to the robbery. The victim of the Defendant's prior felony conviction testified about the circumstances of that planned robbery during the penalty phase. Even if the Defendant could show ineffectiveness, he did not show prejudice. In *Larzelere v. State*, 676 So.2d 394 (Fla. 1996), Virginia Larzelere was convicted of murder and sentenced to death. She was not the shooter, she was the planner. The Florida Supreme Court stated: "Disparate treatment of a co-defendant, however, is justified when the defendant is the more culpable participant in the crime." *Id.*, at 407. In the Sentencing Order, the original trial judge, took

into consideration the relative culpability of Lazaro and Humberto. The Sentencing Order states:

> The alleged driver of the get away car was given 10 years. The brother who was shot by the victim on the scene and pled prior to trial received 20 years. The defendant selected the victim, planned the crime, cased the location, enlisted the aid of the two Cuellar brothers, and fire the fatal shots.

(See, Sentencing Order, Page 8, R. 938)
Even if the Defendant was not the shooter, he, like Virginia Larzelere, selected the victim, planned the crime, and enlisted the help of others. The death penalty would still be appropriate. His prior aggravator also shows how Defendant would stalk a proposed victim prior to the crime.

* * * *

In subsection 3, the Defendant alleges that trial court was ineffective by failing to present an effective closing argument. The Defendant is essentially alleging that counsel was ineffective for not presenting all the exculpatory evidence he alleged in this motion, and likewise failed to present at the evidentiary hearing. The Defendant has not met either prong of the *Strickland v. Washington*, 466 U.S. 668 (1984) test. This claim is denied.

(PCR3. 1459-61, 1462-64)

Here, the trial court's factual findings are supported by competent, substantial evidence. The record does reflect that counsel admitted they made a strategic decision not to call Lazaro at the time of trial, that Suri testified that he believed the reason this decision was made was that he was concerned that Lazaro might recant his deposition testimony and that he believed that they had shown reasonable doubt and that

Wax confirmed a strategic decision was made. (T. 1212-13, PCR3. 1681-82, 1804-06) Moreover, the record also reflects that Lazaro was repeatedly impeached with his prior statements, that he stated that he would not have testified for Defendant at the time of trial and that he attempted to invoke his Fifth Amendment right not to testify at the evidentiary hearing. (PCR3. 2143-44, 2148-57) Further, the is devoid of evidence that either of the Cuellar brothers was the murderer or that Lazaro got gunshot residue on his hands by firing a gun. Moreover, Rao did testify that both Cuellars had gunshot residue on their hand, that it was likely that Humberto had fired a gun and that his opinion on this matter would not change if Humberto's hands had been swabbed an hour earlier. (T. 1177-85)

Additionally, the record does show that Humberto's gun was recovered from the car at the hospital with hair caught in its slide, fully loaded and was consistent with a striking wound on Calderon's head. (T. 695, 697, 698, 828, 892-93, 899-905) Calderon was found between the cars in his driveway, that he had been shot at close range by a gun fired from his left, and Defendant's hand print was the car next to Calderon on the lower part of the door with his hand pointed down. (T. 639, 646-50, 914-31, 997-1000, 1149-53) Moreover, Humberto did testify that Defendant was the person who planned this crime and recruited

him. (T. 1034-47) Further, Robert Street did testify about the planned robbery Defendant committed on him. (T. 1476-84)

Moreover, given these factual findings, the denial of these claims was proper. As this Court has recognized, strategic decisions made after thorough investigation do not support a claim of ineffective assistance of counsel. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Moreover, it is also proper to deny a claim when a defendant fails to prove the claim. *See Ferrell v. State*, 918 So. 2d 163, 173-74 (Fla. 2005). Further, it is proper to reject a claim when the alleged deficiency did not prejudice the defendant. *Strickland v. Washington*, 466 U.S. 688, 693-96 (1984). It is also proper to deny a claim of ineffective assistance of counsel where the evidence that counsel was allegedly deficient for failing to present was not available. *Evans v. State*, 995 So. 2d 933, 944 (Fla. 2008). Thus, the lower court should be affirmed.

In attacking the rejection of his claim, Defendant first argues that the lower court should have found that counsel was deficient for mentioning a different Cuellar brother as the shooter between opening and closing because the ABA Guidelines state that counsel should construct a consistent theory of the case. However, as the Court has recently held, it is improper to treat the ABA Guidelines in this manner. *Bobby v. Van Hook*, 130

S. Ct. 13, 17 (2009). Moreover, treating the ABA Guidelines in this manner is particularly inappropriate in considering claims about counsel's arguments. As the Court has recognized, a court's review of the manner in which counsel present argument must be highly deferential. *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003). Thus, Defendant's argument should be rejected, and the lower court affirmed.

Defendant next suggests that the lower court should have found counsel deficient because they could not recall why they acted as they did during opening and closing. However, in making this argument, Defendant ignores that counsel's decision was presumed to have been a valid strategic decision and that he has the burden of overcoming that presumption. *Strickland*, 466 U.S. at 689-90. In order to overcome a presumption, it was incumbent on Defendant to present evidence that counsel acted unreasonably. *See Marcolini v. State*, 673 So. 2d 3, 4 (Fla. 1996); *see also Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985). As a result, finding ineffective assistance merely because counsel cannot recall a reason for a strategic decision is error. *Skrandal v. State*, 830 So. 2d 109, 115 (Fla. 4th DCA 2002). Thus, Defendant's contrary argument should be rejected. This is particularly true as the trial record reflects the reason why counsel changed their strategy. Counsel directly

stated at the time of trial that the change was the result of the exclusion of the bolito evidence. (T. 744, 747-52, 1213-16) Defendant's argument should be rejected.

Defendant next asserts that the lower court should have found that he was prejudiced by the change between opening and closing because the change allegedly led the jury to believe that he had no defense. However, as the lower court noted, Defendant's hand print was found on the car door next to the body of the victim who had been shot at close range. Moreover, Rosario Estrada, Calderon's wife, testified that Calderon carried a bank bag full of the money he earned in his businesses every morning, that Calderon was shot immediately after he left his home and that she had seen people casing the house in the days before the murder. (T. 765-74) Moreover, Humberto, whose testimony was confirmed by physical evidence, testified that Defendant planned the crimes, and evidence was presented that Defendant was with the Cuellar brothers at the hospital immediately after the crimes and fled and changed his appearance thereafter. Thus, Defendant was guilty of felony murder regardless of whether he was the shooter or not. *Ray v. State*, 755 So. 2d 604, 608-09 (Fla. 2000). The lower court properly found that Defendant did not show that he was prejudiced by the change in argument.

Defendant also seems to suggest that he was prejudiced because he believes that Humberto was not credible. However, Defendant does not explain how the credibility of Humberto was affected by the change between opening and closing. A determination of prejudice is suppose to accept the factual findings unaffected by the alleged deficiency. *Strickland*, 466 U.S. at 696. Moreover, in determining prejudice, this Court is supposed to assume that the jury acted rationally and in accordance with the law. *Id.* at 694-96. As such, Defendant's arguments do not show he is entitled to relief. The lower court should be affirmed. This is particularly true, as the record does not reflect the vast change of tactics that Defendant suggests. During opening statement, Defendant emphasized the lack of physical evidence and the lack of credibility of the Cuellars given the existence of gunshot residue on both Cuellar brothers' hands, the deals received by them and the failure to complete the robbery. (T. 607-13) He also briefly mentioned that Humberto had fired the fatal shots. (T. 611-12) During closing argument, he continued this same theme. (T. 1320-36) The mention of Lazaro as the shooter was only brief. (T. 1332-33) Moreover, counsel began his argument by admitting the he had misspoken during opening and explaining that sometimes events unfold at trial in unexpected ways that reveal the truth. (T. 1319-20)

Defendant's reliance on *Bland v. California Dep't of Corrections*, 20 F.3d 1469 (9th Cir. 1994), *overruled by Shell v. Witek*, 218 F.3d 1017 (9th Cir. 2000), is misplaced. In *Bland*, the court was not confronted with a claim of ineffective assistance of counsel for changing a theory of defense in the middle of trial. Instead, the issue the court was addressing was whether the defendant was entitled to federal habeas relief because the trial court had refused to allow the defendant to substitute counsel without conducting an inquiry regarding the defendant's complaint about his counsel. *Id.* at 1475-79. Moreover, the court noted that his counsel pursued a defense that was inconsistent with the defendant's own prior statements and trial testimony. *Id.* at 1479. Here, the issue is not substitution of counsel; it is ineffective assistance of counsel. Moreover, here, the difference between opening and closing did not contradict Defendant's own statements about what happened. Thus, *Bland* does not compel a different result.

In arguing that the lower court erred in rejecting his claim about not calling Lazaro, Defendant asserts that Lazaro would have provided valuable testimony that the incident was a debt collection and not a robbery. However, Defendant ignores that Lazaro testified both at the evidentiary hearing and in his pretrial deposition that he had no personal knowledge of why

Calderon was targeted and that his statements in this regard were based on what Defendant told him. (PCR3. 2158, PCR3-SR. 80) As such, the statement would have been hearsay had Defendant attempted to offer it to prove that it was a debt collection and would not have been admissible as such. *Lott v. State*, 695 So. 2d 1239, 1242-43 (Fla. 1997). Since counsel cannot be deemed ineffective for failing to attempt to present inadmissible information, this argument does not show that the lower court erred in denying this claim. *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004).

Defendant next asserts that the lower court erred in finding a strategic decision not to present this evidence because counsel could not fully explain why they made the decision. However, as argued above, counsel's lack of memory actual supports denying a claim of ineffective assistance as Defendant bore the burden of overcoming the presumption that counsel was not deficient. Moreover, it should be recalled that strategic decisions made after a thorough investigation are virtually unchallengable. *Strickland*, 466 U.S. at 690. Given this body of law, the lower court did not err in finding that the decision not to call Lazaro was not deficient. This is particularly true, Suri offered several reasons why he believed that the decision was made not to call Lazaro. (PCR3. 1681-82)

Further, Defendant himself has added another reason for not calling Lazaro: je had testified at deposition that Defendant confessed to killing Calderon when he returned to the car. (PCR3-SR. 93) Moreover, Defendant has never presented any evidence that counsel had not fully investigated what evidence Lazaro could present. Instead, he has consistently relied on the deposition that counsel took. Given these circumstances, the lower court properly rejected this claim. It should be affirmed.

Defendant next insists that the lower court should not have rejected this claim because it found that Lazaro was not credible. However, in making this argument, Defendant ignores that this Court's precedent requires it to defer to the factual findings of a lower court in resolving a claim of ineffective assistance of counsel, including its credibility determinations. *Stephens*, 748 So. 2d at 1034. Moreover, the Court required such deference to a lower court's factual findings in *Strickland*, 466 U.S. at 698. The incorrectness of Petitioner's argument that courts are not required to defer to factual findings is further illustrated by *Wiggins v. Smith*, 539 U.S. 510 (2003). There, the Court expressly held that a state court factual finding was clearly erroneous and unreasonable in light of the record before it found that it was not binding. *Id.* at 528-29. Given that the Court itself discussed the presumption of correctness, it is

clear that the presumption does exist. The denial of the claim should be affirmed.

Petitioner's assertion that *Kyles v. Whitley*, 514 U.S. 419 (1995), somehow changed this deference is incorrect. In the portion of *Kyles* on which Petitioner relies, the Court was responding to assertion made by a dissent. *Id.* at 449. A review of the portion of the dissent to which this comment was direct shows that the dissent was not directed to a factual finding regarding evidence presented at a post conviction hearing. *Id.* at 471-72 & n.6. Instead, it was commenting on the credibility of a witness at trial, an issue about which the dissent acknowledged that had not been a factual finding by the jury, the fact finder at trial. *Id.* As such, the dicta in *Kyles* does not show that the Court overruled its holding in *Strickland* regarding the standard of review. Petitioner's contrary assertion should be rejected.

Defendant finally asserts that the lower court should not have considered the unavailability of Lazaro to testify at trial in rejecting this claim. However, a defendant bears the burden of proving that a witness who he claims his counsel was ineffective for failing to call was available to testify at trial. *Nelson v. State*, 875 So. 2d 579, 582 (Fla. 2004). Moreover, the determination that a witness was not available is

a factual finding. *See Pope v. State*, 569 So. 2d 1241, 1246 (Fla. 1990). Here, the finding that Lazaro was not available to testify was supported not only by his express testimony that he would not have done so but also by the fact that he attempted to invoke his Fifth Amendment right when called at the evidentiary hearing. (PCR3. 2143-44, 2154) As such, this finding should be affirmed.

Moreover, Defendant's apparent suggestion that he could have forced Lazaro to testify is incorrect. A person retains a Fifth Amendment privilege against self-incrimination so long as he may potentially suffer further adverse consequences as a result of his testimony. *Mitchell v. United States*, 526 U.S. 314, 326-27 (1999); *Landeverde v. State*, 769 So. 2d 457, 461-65 (Fla. 4th DCA 2000). Here, the fact that Lazaro could have faced adverse consequences from his testimony is apparent from the record. In entering his plea, Lazaro agreed to give a statement about his involvement in the crimes, pass a polygraph about that statement and testify truthfully in all future proceedings. (T. 199-200) Because the State believed that Lazaro's deposition testimony was shown to be false by Humberto's testimony, it moved to vacate Lazaro's sentence. (T. 1444-46, R. 830-31) As such, any testimony Lazaro might have given at trial would have had adverse consequences to him, and Defendant's assertion that

he could have forced Lazaro to testify is incorrect.

In challenging the denial of the claim regarding the gunshot residue, Defendant begins by insisting that counsel's strategy of using a state expert against the State was ill-advised because Rao would be loyal to the State and he allegedly met with the prosecutor before trial to develop cross examination. However, Defendant presented no actual evidence that Rao felt a duty of loyalty to the State, that he met with the prosecutor or that the alleged meeting concerned cross examination because Defendant made a strategic decision not to call Rao at the hearing. (PCR3. 1642) Thus, Defendant's speculation about such matters does not show that the lower court erred. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). The denial of the claim should be affirmed.

Defendant next asserts that the lower court erred because the ABA Guidelines required the hiring of an independent expert to challenge the State's evidence. Again, counsel is not ineffective merely because he did not comply with the ABA Guidelines. *Bobby*, 130 S. Ct. at 17. Moreover, Rao's testimony was not the State's evidence; Rao testified for the defense. (T. 1165-95) Since Rao was Defendant's witness, it is unclear how Defendant believes that he had shown prejudice by presenting evidence that Rao was subject to impeachment the State did not

make. This is particularly true, as Defendant could not have called Rao simply to impeach him. *See Morton v. State*, 689 So. 2d 259 (Fla. 1997). Thus, Defendant's argument should be rejected.

Moreover, in arguing prejudice, Defendant relies on the affidavit from Harnett. However, Defendant seems to ignore that the lower court did not admit excluded Harnett's testimony and permitted Defendant to present the affidavit as a proffer.[5] (T. 2419-20) Thus, Defendant's reliance on information that was not admitted does not show that the lower court erred. This is particularly true, as Defendant's arguments are not even supported by his proffer. In her affidavit, Harnett does not opine that the particles on Humberto's hand made it more likely that he fired a gun. (PCR3. 1165-67) Instead, she merely states that the type of particles on his hand were associated with primer. (PCR3. 1166) In her deposition, Harnett stated that she could not tell how the particles came to be on Humberto's hand. (PCR3. 557-59) Thus, Defendant's argument should be rejected, particularly true, as Rao actually testified at trial that it was more likely than not that Humberto fired a gun regardless of the timing. (T. 1184)

[5] The lower court excluded Harnett's testimony because she based her opinion on information that was not authenticated. (PCR3. 936) Excluding the testimony on this basis was not an abuse of discretion. *See Huff v. State*, 495 So. 2d 145, 148 (Fla. 1986).

Defendant next contends that he did demonstrate prejudice because the impeachment of Rao caused the change between opening and closing and permitted the State to comment about the gunshot residue evidence in closing. However, these assertions do not show the lower court erred. As noted above, the record reflects that the reason for the change was the exclusion of the bolito evidence. As such, Defendant's unsupported speculation that the change occurred because of Rao's testimony should be rejected. *Maharaj*, 778 So. 2d at 951. Moreover, while the timing discrepancy concerning did permit the State to comment about the gunshot residue evidence in closing, the presentation of this evidence permitted Defendant to argue that the State had hidden evidence inconsistent with its case from the jury and that this evidence contradicted Humberto's testimony. (T. 1324-28) Given these circumstances and the fact that Defendant had no real defense to the murder charge, the lower court did not err in rejecting this claim.

Finally, Defendant insists that the lower court did not address his claim regarding the gunshot residue and suggests that the lower court found that counsel's decision regarding the gunshot residue was strategic. However, as seen above, the lower court denied this claim because there was no prejudice. Thus, this argument should be rejected. Moreover, Defendant's

assertion of entitlement to relief based on the cumulative effect of his claims is unavailing as the claims have no merit. *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003).

II. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that counsel had been ineffective at the penalty phase. However, the lower court properly rejected these claims.

Again, in reviewing the lower court's decision, this Court accepts the lower court's factual findings when they are supported by competent, substantial evidence and then reviews its decision based on those facts de novo. *Stephens*, 748 So. 2d at 1033-34. Here, the lower court rejected these claims:

> It is also alleged that counsel was ineffective for failing to investigate the Defendant's addiction to drugs and his use of drugs on the day of the shooting. Trial counsel, Mr. Wax, sought to have an addiction specialist, Dr. Tropp, appointed. The trial court denied the motion to appoint Dr. Tropp. Counsel was not ineffective. Counsel asked the court for the appointment of the expert. The court denied the request. The Defendant's remedy would have been to raise this issue on direct appeal. Dr. Mash, the Defendant's expert during the evidentiary hearing, testified that she used to work with Dr. Tropp, and that he was an expert in the area of addiction. The claim is denied.
>
> In paragraph 25, the Defendant contends that trial counsel was ineffective in their failure to investigate his usage of drugs on the day of the murder, and that there was evidence he was high, and therefore unable to have the specific intent to murder

the victim. Both Mr. Suri and Mr. Wax testified that the State proceeded on the felony murder charge in the indictment. Specific intent is not an element of felony murder. Additionally, the evidence the Defendant present during the evidentiary hearing showed that he was not high when he committed the murder. Dr. Hyde, Defendant's expert, testified that the Defendant told him that he had used marijuana and alcohol in the days before the crime, but that the Defendant was not high at the time he committed these crimes, counsel was not ineffective on this issue. This claim is denied.

The motion also alleges that counsel was ineffective for failing to present corroborative evidence that the Defendant was a heavy drug user. The Defendant's mother testified about his drug use at trial. Dr. Toomer testified during the penalty phase regarding the Defendant's drug use. Dr. Eisenstein testified at the *Spencer* hearing. This claim is denied.

The Defendant also contends counsel was ineffective for failing to present evidence of Defendant's experiences in the Peruvian Embassy and in the Peruvian camps. The Defendant's mother testified at the penalty phase about the horrible conditions in the Peruvian Embassy and how family members, including the Defendant, were beat up. The Defendant's mother testified about the trip from Cuba and the living conditions in the Peruvian camps.

At the evidentiary hearing, Ms. Ramon testified as to the conditions in the camp. Her testimony was cumulative to what Defendant's mother testified to. Failure to present cumulative testimony does not constitute ineffective assistance of counsel. Plus, Ms. Ramon testified she did not know the Defendant, but that she worked with his parents. She does not know of any specific incident that may have affected the Defendant. The Defendant also called Dr. Ackerman, who read articles on the Cubans in Peru. Her testimony was pure hearsay. She does not know the Defendant. She does not know his family. She was a student at the time of the trial. Her testimony would not have been admissible at trial. The claim is denied.

* * * *

The Defendant claims counsel did not meet the ABA standard. The Defendant called Steven Potolsky to testify. This court observed Mr. Potolsky try cases and he is an experienced and accomplished trial attorney. He currently trains attorneys who represent clients facing the death penalty in the Federal Court System. While he is certainly is currently an expert on the death penalty, in the time frams of 1992-1994, Mr. Potolsky tried a capital case in this circuit. He did not seek the appointment of a mitigation specialist. He hired Dr. Toomer, the same expert hired by Mr. Suri and Mr. Wax, as his mental health expert. The Defendant has failed to show herein that Mr. Potolsky represented his clients, between 1992 and 1994, in a manner to substantiate that Mr. Suri and Mr. Wax provided ineffective assistance of counsel. This claim is denied.

* * * *

The Defendant alleges that substantial mitigation never reached the jury or the judge. These claims were raised in other claims of the motion and addressed in more depth previously in this order. The Defendant alleges counsel failed to use experts in addictionology or psychiatry, or experts who could have testified about the Defendant's unique experiences in Peru and his inability to assimilate into American life. Barry Wax testified that he asked the court to appoint Dr. Tropp, an expert in the field of addiction. That motion was denied. Counsel cannot be deemed ineffective for asking for and not receiving an expert in the field of addictionology.

Dr. Toomer testified in front of the jury and Dr. Eisenstein testified at the *Spencer* hearing. Counsel did present mental health mitigation and cannot be deemed ineffective for failing to present cumulative testimony.

The Defendant's mother testified during the penalty phase about the experiences at the Peruvian Embassy in Cuba and leaving Cuba, and the experiences in the camp in Peru. Counsel cannot be deemed ineffective for failing to present cumulative evidence. Additionally, the "expert" who testified during the hearing, Dr. Ackerman, was a student at the time of the trial and could not have testified as an

> expert at that time. Dr. Ackerman had no knowledge of the Defendant's personal living conditions in Peru.
>
> The Defendant's mother also testified about his drug use. Dr. Toomer also testified about the Defendant's drug use at the trial. Dr. Hyde, the Defendant's expert at the evidentiary hearing, testified that the Defendant told him he was not high at the time of the murder. Even if counsel presented no evidence on this issue, counsel cannot show prejudice since the Defendant's own expert testified he was not high. There was no evidence presented at the evidentiary hearing that the Defendant was high on the night and in the early morning hours of the murder.
>
> The jury and the judge heard all the information that it is alleged counsel failed to present. The jury also heard about the Defendant's handicapped daughter. The jury saw the Defendant's daughter.

(PCR3. 1461-62, 1469-70)

Once again, the lower court's factual findings are supported by the record. The record does show that counsel attempted to hire Dr. Tropp to testify about Defendant's addiction, the trial court denied the request and that Dr. Mash admitted that Dr. Tropp was an addiction specialist. (PCR3. 1831, 1821, PCR3. 2096) Dr. Hyde did testify that Defendant denied using drugs on the day of the crime and being high at the time. (PCR3. 2361) Defendant's mother did testify about drug use and the migration through Peru at trial. (T. 1491-1531) Dr. Toomer did testify before the jury about Defendant's mental state, including that Defendant was addicted to drugs and that he was brain damaged. (T. 1552-83) Dr. Eisenstein's report and deposition were presented at the *Spencer* hearing. (SR. 24-25)

Ramon did testify that she did not know Defendant and had never seen him at the camp. (PCR3. 2106-07, 2120-21) Ackerman did testify that she was a student in 1994, and that she did not even begin to conduct her interviews with people from the Peruvian camps until 1994. (PCR3. 2186-88, 2283-85) Thus, the factual findings are supported by competent, substantial evidence.

Moreover, given these factual finding, the lower court properly denied this claim. It is well established that counsel is not ineffective for failing to present cumulative evidence, even where the defendant asserts that the new evidence adds more details to the information presented. *Darling v. State*, 966 So. 2d 366, 378 (Fla. 2007). Moreover, counsel cannot be deemed ineffective for failing to present evidence that was not available at the time of trial. *State v. Riechmann*, 777 So. 2d 342, 354-55 (Fla. 2000). Nor may counsel be deemed ineffective for failing to attempt to present evidence that would not have been admissible. *Pietri*, 885 So. 2d at 252. A defendant does not prove that his counsel is ineffective merely by showing that he has located new experts who would give more favorable opinions. *Card v. State*, 992 So. 2d 810, 818 (Fla. 2008). Further, counsel cannot be deemed ineffective merely because he was unsuccessful in convincing the trial court to rule in his favor. *Heath v.*

State, 3 So. 3d 1017, 1029 (Fla. 2009). Given this body of precedent, the lower court properly denied the claim and should be affirmed.

In attacking the lower court's order, Defendant begins by noting that the trial court had rejected the mitigation presented at trial. He seems to suggest that since counsel did not convince the trial court to accept the mitigation, the fact that counsel investigated and presented the mitigation should be ignored. However, the mere fact that counsel did not convince the trial court does not show that counsel was ineffective. *Heath*, 3 So. 3d at 1029.

Defendant next asserts that the lower court should have found that counsel was ineffective for failing to obtain a social history in accordance with the ABA Guidelines. However, the lower court properly rejected this claim. It is improper to treat the ABA Guideline as rules that counsel must follow. *Bobby*, 130 S. Ct. at 17. Moreover, Potolsky admitted that it was not standard practice to attempt to travel to Cuba. (T. 2318-19) Further, while counsel denied obtaining a social history, they admitted that they had spoken to Defendant and his mother extensively about Defendant's background. (T. 1690-93, 1729-30, 1734-36, 1776-77, 1810-12) Moreover, the record reflects that counsel actually presented a social history through both

Defendant's mother and Dr. Toomer at trial, which included presenting medical records about Defendant from Cuba, and acknowledged they had done so at the *Spencer* hearing. (SR. 61, 64-65) Given these circumstances, the lower court did not err in rejecting this argument. It should be affirmed. This is particularly true, as Defendant did not present any new evidence that had been obtained from Cuba and the lower court properly found that evidence from Peru cumulative. *Rodriguez v. State*, 919 So. 2d 1252, 1266-67 (Fla. 2005).

Defendant next complains that Dr. Toomer was not given background materials. However, Defendant ignores that he present no evidence that providing background materials to Dr. Toomer would have change his opinion. As this Court had held, such evidence must be presented to prove a claim that counsel was ineffective for failing to present background materials to Dr. Toomer. *Sochor v. State*, 883 So. 2d 766, 779-81 (Fla. 2004). The claim should be denied.

Defendant next insists that the lower court erred because counsel allegedly failed to follow up on Dr. Toomer's suggestion that Defendant was decompensating and allegedly equated mitigation with competency. However, the lower court properly rejected these arguments. The record reflects that Defendant did follow up on Dr. Toomer's suggestion that Defendant was

decompensating. (PCR3. 1781-82) Moreover, the record belies the assertion that counsel actually equated mitigation with competence as Dr. Toomer's testimony related to mitigation not competent. Further, counsel also had Defendant evaluated by Dr. Eisenstein, a neuropsychologist, and sought the appointment of an addiction specialist. Thus, the lower court properly rejected this argument.

Defendant next suggests that his counsel should have been found ineffective because he presented several new experts at the evidentiary hearing. However, the lower court properly rejected this argument, as this Court has held that counsel is not ineffective simply because counsel has found new experts. *Card*, 992 So. 2d at 818. This is particularly true here. Dr. Toomer testified that Defendant had brain damage that rendered Defendant impulsive. (T. 1570-71) However, the facts of both this case and Defendant's prior violent felony showed that they were not impulsive acts but planned criminal activity. Thus, presenting more of this same opinion through additional experts would not have changed the fact the opinion was inconsistent with the evidence. *Walls v. State*, 641 So. 2d 381, 390-91 (Fla. 1994). Moreover, the presentation of this evidence permitted the State to present evidence that Defendant was not brain damaged. (SR. 27-56) Further, Dr. Hyde actually testified that

Defendant's performance on the testing he did was normal. (PCR3. 2345-46, 2363-64) His testimony regarding the history that Defendant gave him was inconsistent with the history Defendant had provided to others. Moreover, Dr. Rothe acknowledged that the symptoms of PTSD usually disappear within 5 years of the event that caused the PTSD, which he identified as being in the Peruvian camp but ignored that the crime was not committed during that time. (PCR3. 1887) Moreover, he stated that the effect of this condition was to make Defendant aggressive and violent. (PCR3. 1885-85, 1896). Since this is hardly favorable information, the lower court properly rejected this argument. *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

Moreover, Defendant's reliance on Dr. Mash's testimony is misplaced and his assertion that its presentation would have presented the State from attacking Dr. Toomer's opinion as being based on self report.[6] As the lower court found, counsel attempted to obtain an addiction specialist and cannot be deemed ineffective simply because he was not successful in that attempt. *Heath*, 3 So. 3d at 1029. In an attempt to avoid this result, Defendant insists that the denial was error that

[6] The State would note that Defendant's mother did testify about his social history, and counsel did present a record regarding Defendant's treatment in Cuba. As such, the jury was able to determine for itself whether this information corroborated Dr. Toomer's testimony in these areas.

"rendered" counsel ineffective. However, as the lower court properly determined, any claim about the denial of the expert should have been raised on direct appeal. *Whitfield v. State*, 932 So. 2d 375, 379 (Fla. 2005). Further, couching this claim in terms of ineffective assistance of counsel does not lift this bar. *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995). Moreover, Dr. Mash's testimony was based on Defendant's self report of drug use and reports of others containing this same self reported information. (PCR3. 2037-95) Thus, the presentation of her testimony would not have prevented the State's attack.[7] The lower court should be affirmed.

Finally, Defendant's reliance on *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), is misplaced. There, counsel had information showing that the defendant had been abused by his family and that he had a history of treatment for mental illness. *Id.* at 1340. Moreover, the only mental state evidence was limited to the report of one expert who had evaluated the defendant for competency and sanity and who did not even include information about the defendant's background in his report. *Id.* at 1339. Based on this investigation, counsel presented only the

[7] While Defendant insists that Suarez's testimony provided more than self report, the lower court properly excluded Suarez's testimony as argued, *infra*. Moreover, Defendant himself admitted that Suarez would not have testified at trial. Thus, any opinion based on his testimony would still be subject to attack as unsupported by evidence presented to the jury.

testimony of the defendant's mother who provided inaccurate testimony. *Id.* at 1340. Here, counsel had Defendant evaluated by several mental health experts, had extensive discussions with Defendant and his family about his background and obtained and presented records regarding Defendant's mental health treatment in Cuba. Moreover, Dr. Toomer's testimony shows that he evaluated Defendant for more than competency and sanity and that he was aware of Defendant's social history. Further, Defendant presented no actual evidence that Defendant's mother's testimony about his background was inaccurate. Given these circumstances, *Williams* provides no basis to reverse the lower court. Instead, the more applicable precedent is *Bobby*, 130 S. Ct. at 18, in which the Court determined that counsel was not ineffective for failing to continue an investigation, where counsel received the same information through his investigation and presented that information. The lower court should be affirmed.

Defendant next complains that the lower court rejected his claim that counsel was ineffective for opening the door to information about his criminal activity. However, in making this claim, Defendant ignores that he presented no such claim in his motion for post conviction relief. (PCR. 231-391) Instead, Defendant has merely raised this claim in his post hearing memos. However, this Court has held that doing so results in

this claim being barred. *Hunter v. State*, 817 So. 2d 786, 796-97 (Fla. 2002). As such, the rejection of this claim should be affirmed.

Even if the claim was not barred, it would still have been properly denied. In presenting this claim, Defendant ignores that the door was already opened when counsel asked the question Defendant claims he was deficient for asking. This Court has held that the State is permitted to question an expert about the information he relied upon to form his opinion even if this results in the disclosure of information about criminal activity. *Parker v. State*, 476 So. 2d 134, 139 (Fla. 1985). Here, Dr. Toomer stated that he had conducted a social history and relied on the information he received in formulating his opinion on matters other than Defendant's potential for rehabilitation. (T. 1559-60, 1583) Thus, the door was opened to the State's questioning about the completeness of the history on which Dr. Toomer relied. The lower court properly rejected this claim.

Defendant next assails the rejection of his claim that counsel was ineffective for calling Humberto at the penalty phase. In making this claim, Defendant acknowledged that counsel decided to do so for the strategic purpose of showing that this was a robbery gone bad. (PCR3. 1789) He presented no evidence

that counsel had not fully investigated this evidence before it was presented. Instead, he merely argues that he disagrees with However, this Court has rejected the assertion that such disagreements over strategic decisions support an ineffectiveness claim. *Occhicone*, 768 So. 2d at 1048. The denial of the claim should be affirmed.

Moreover, Defendant was not prejudiced by this action. Humberto's testimony at the penalty phase did not add any aggravation that did not already exist. Moreover, by having him testify it was a robbery gone bad, counsel obtained potential useful evidence from a witness whose testimony had apparently already been credited by the jury. As such, the lower court properly denied this claim.

III. THE MOTION FOR DISQUALIFICATION WAS PROPERLY DENIED, AND THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN RULING ON THE ADMISSIBILITY OF EVIDENCE.

Defendant finally asserts that the lower court erred in denying his motion to disqualify it and that it abused its discretion in excluding certain evidence. However, Defendant is entitled to no relief, as the motion for disqualification was properly denied and the lower court did not abuse its discretion

in ruling on the evidence.[8]

With regard to the motion to disqualify Judge Tunis, Defendant ignores that this was not an initial motion for disqualification. Instead, as Defendant acknowledged at the time, he successfully disqualified the trial judge during the post conviction proceedings. *Mendoza*, 817 So. 2d at 848; PCR-SR. 47-62; PCR2. 5-21. As this Court held in *Kokal v. State*, 901 So. 2d 766, 773-74 (Fla. 2005), a motion to disqualify a judge is a successive motion if movant has previously successful disqualified a judge at any stage of the case. Because this motion was a successive motion, Judge Tunis was required to deny this motion "unless the successor judge rules that he or she is in fact not fair or impartial in the case." Fla. R. Jud. Admin. 2.330(g). Moreover, the standard of review on appeal is "whether the record clearly refutes the successor judge's decision to deny the motion." *Kokal*, 901 So. 2d at 774 (quoting *Pinfield v. State*, 710 So. 2d 201, 202 (Fla. 5th DCA 1998)).

Here, the record does not clearly refute Judge Tunis' denial of Defendant's motion for disqualification. Defendant based his claim that Judge Tunis was biased on comments the judge made in ruling on the admissibility of evidence. (PCR3.

[8] A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000).

1077-84) This Court has repeatedly held that such comments are not sufficient to satisfy even the standard for an initial motion for disqualification. *Waterhouse v. State*, 792 So. 2d 1176, 1194 (Fla. 2001); *Asay v. State*, 769 So. 2d 974, 979-81 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 659-60 (Fla. 2000); *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998).[9] Since Defendant "does not satisfy the lower standard, he certainly does not satisfy the more stringent standard applied to a successive motion." *Kokal*, 901 So. 2d at 775. The denial of the motion should be affirmed.

Petitioner next asserts that the trial court abused its discretion in excluding Potolsky's testimony. As the courts of this state have long recognized, expert testimony on legal issues is not admissible. *Hildwin v. State*, 951 So. 2d 784, 791 (Fla. 2006); *In re Estate of Williams*, 771 So. 2d 7, 8 (Fla. 2d DCA 2000); *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976); *Consolidated Mut. Ins. Co. v. Ramy*, 238 So. 2d 431, 431 (Fla. 3d DCA 1970). This is true because expert testimony is only admissible to assist a trier of fact under §90.702, Fla. Stat. *Hildwin*, 951 So. 2d at 791. In fact, Defendant conceded

[9] Moreover, the motion was not filed until June 24, 2008, and complained about comments made on June 9, 2008 and June 13, 2008, more than 10 days earlier. As such, the motion was also untimely regarding these comments. *Waterhouse*, 792 So. 2d at 1193-94; *Asay*, 769 So. 2d at 980; *Rivera*, 717 So. 2d at 481 n.3.

that expert testimony on a legal issue would not be admissible below. (PCR3. 949, 2124) Whether counsel's actions were strategic is a factual question but whether that strategy was reasonable is a legal question. *Wood*, 2010 WL 173369 at *4, *5 (Jan. 20, 2010); *Casey v. State*, 969 So. 2d 1055, 1058 (Fla. 4th DCA 2007). Here, as a review of Mr. Potolsky's affidavit shows, Mr. Potolsky wanted to opine that counsel's actions were not reasonable. (PCR3. 1144-64) Given these circumstances, the lower court did not abuse its discretion in excluding this testimony.

Moreover, to the extent that Defendant asserts that Potolsky's could have been properly limited to testimony about the standard's for practice in Dade County at the time of trial, the lower court should still have not abused its discretion. Expert testimony is only admissible when it will assist the fact finder. *Lynch v. State*, 2 So. 3d 47, 80-82 (Fla. 2009); *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995). Here, the lower court did not abuse its discretion in finding that Potolsky's testimony would not assist it. As the lower court informed the parties during the hearing, it had been a defense attorney representing capital defendants before rising to the bench. (PCR3. 1950) Moreover, as a review of Potolsky's affidavit shows, his view of what the standard of practice merely involved a parroting of the ABA guidelines and this Court's rule

regarding the qualifications of counsel. (PCR3. 1144-64) Given these circumstances, the lower court did not abuse its discretion in finding that Potolsky's opinion would not assist it. It should be affirmed.

With regard to the exclusion of Ackerman's testimony, the lower court again did not abuse its discretion. Pursuant to §90.702, Fla. Stat., expert testimony is only admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue." As this Court has held, this language imposes two requirements that must be satisfied before an expert witness may testify: (1) the subject matter of the expert's testimony must be beyond the common understanding of the fact finder and (2) it must assist the fact finding in determining a relevant issue. *Jones v. State*, 748 So. 2d 1012, 1025 (Fla. 1999); *Buchman v. Seaboard Coast Line R.R. Co.*, 381 So. 2d 229, 230 (Fla. 1980). In determining whether these elements are met, this Court has stated that a trial court should consider factors such as the experience, age and information about the fact finder and the facts of the case. *Angrand*, 657 So. 2d at 1149. Moreover, this Court has cautioned that an expert should not be permitted "merely to relay matters which are within the common experience of the [fact finder] or

to summarize what the expert has been told by lay witnesses." *Id.* Further, even when these principles are satisfied, a trial court will still not have abused its discretion in excluding the testimony if the undue prejudice outweighs the probative value of the evidence. *Ramirez v. State*, 810 So. 2d 836, 842 (Fla. 2001). The courts of this State have been particularly unwilling to admit expert testimony on the credibility of witnesses. *Cunningham v. State*, 801 So. 2d 244, 246-47 (Fla. 4th DCA 2001); *Hitchcock v. State*, 636 So. 2d 572, 574-75 (Fla. 4th DCA 1994); *Page v. Zordan*, 564 So. 2d 500 (Fla. 2d DCA 1990).

Apply these principles, the lower court did not abuse its discretion. The opinion that Defendant asserts he wanted to elicit from Dr. Ackerman was that Defendant's account of his migration was consistent with the accounts of others. However, determining whether one witness's account of an event was consistent with other witnesses' accounts of the same event is not a matter that a fact finder needed the assistance of specialize knowledge to determine. *See Johnson v. State*, 393 So. 2d 1069, 1072 (Fla. 1980); *see also Williamson v. State*, 994 So. 2d 1000, 1018 (Fla. 2009)(Wells, J., concurring).

Further, it does not appear that such an opinion would have had any relevance to an issue presented in this case. This Court has recognized that evidence regarding the character of

individuals other than the defendant is not relevant mitigation. *Hill v. State*, 515 So. 2d 176, 177-78 (Fla. 1987). As such, presenting evidence that others had related experiences similar to what Defendant claimed would not have proved mitigation. Additionally, a review of the testimony that Defendant proffered at the evidentiary hearing shows that Defendant wanted Dr. Ackerman to do little more than relate what Defendant had told her. (PCR3. 2235-83) Given all of these circumstances, the lower court did not abuse its discretion in excluding Dr. Ackerman. It should be affirmed.

Defendant's reliance on *Wiggins* and the ABA guidelines do not compel a different result. In *Wiggins*, the Court did not cite to the ABA guidelines as an indication that evidence was admissible. Instead, they cited them in support of a conclusion that counsel's investigation of potential evidence was deficient. *Wiggins*, 539 U.S. at 524. In fact, the Court stated that it did not need to determine if the evidence at issue would have been admissible at trial because it was part of the record now. *Id.* at 536. Moreover, the Court has just held that it is not even proper to treat the ABA guidelines as rules that counsel must follow. *Bobby*, 130 S. Ct. at 17. Thus, it would be improper to treat them as rules of evidence that must be followed. The lower court should be affirmed.

Moreover, Defendant's claim that it would have been proper for Dr. Ackerman to recount his statement is also meritless. While Defendant is correct that §90.704, Fla. Stat. does not allow experts to rely on inadmissible information, his assertion that this then allows the admission of the information is incorrect. As this Court held in *Linn v. Fossum*, 946 So. 2d 1032, 1037-39 (Fla. 2006), the mere fact that an expert relied on information that was not admissible in evidence does not permit a party to admit the inadmissible information. Instead, this Court has stated that it expects experts to testify "that they formed their opinions in reliance on sources that contain inadmissible information without also conveying the substance of the inadmissible information." *Id.* at 1038-39. Thus, contrary to Defendant's argument, not permitting an expert to recount hearsay does not preclude an expert from relying on it. The lower court should be affirmed.

Further, while Defendant suggests that the information was admissible because it concerned the penalty phase and the hearsay rule is relaxed at the penalty phase, the lower court did not abuse its discretion in excluding the documents on this basis either. As this Court held in *Hitchcock v. State*, 578 So. 2d 685, 690 (Fla. 1990), "[w]hile the rules of evidence have been relaxed somewhat for penalty proceedings, they have not

been rescinded." Instead, this Court has held that for hearsay to be admissible, the opponent must have the fair opportunity to rebut the evidence. *Marek v. State*, 14 So. 3d 935, 996 (Fla. 2009). Thus, the lower court did not abuse its discretion in rejecting Defendant's argument that all hearsay was admissible at the penalty phase. Further, while Defendant now asserts that the State had a fair opportunity to rebut Dr. Ackerman's testimony about his statements, this is not true. This Court has held that the mere fact that the opponent had deposed a witness prior to trial and was able to call the witness himself does not provide a fair opportunity to rebut. *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000). Here, Defendant is not even suggesting that the State could have deposed or called the hearsay declarant: Defendant himself. Thus, his assertion that the State had a fair opportunity to rebut his statements by questioning Dr. Ackerman or calling another expert should be rejected. *Griffin v. State*, 639 So. 2d 966, 970 (Fla. 1994). The lower court did not abuse its discretion in excluding this testimony. It should be affirmed.

Moreover, Defendant's assertion that *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003), shows that this evidence is admissible is incorrect. First, he relies on a concurring opinion. Concurring opinions do not reflect the holding of the

Court and have no precedential value. *Miller v. State*, 980 So. 2d 1094 (Fla. 2d DCA 2008). Second, a review of even the concurring decision relied upon does not show that it mentions the admissibility of evidence or even how the evidence it cites was admitted. *Armstrong*, 862 So. 2d at 722-25. As such, this citation does not support Defendant's argument. The lower court should be affirmed.

Defendant next asserts that the lower court abused its in excluding testimony from Odalys Rojas because her testimony about what other people told her would not be offered for the truth of the matter asserted but merely to show that evidence was available. However, this Court has held that "[w]hen the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label." *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000). Here, while Defendant asserts that Rojas' testimony about the statements of others would only have been used to show that evidence was available, such testimony would only do so if one accepted as true Rojas' testimony about what the witnesses had said to her regarding the witnesses' knowledge of Defendant and their ability and willingness to appear in court at the time of trial.

This is amply illustrated by the record. As Defendant admitted in arguing the admissibility of Rojas' testimony and as the proffers of her testimony show, one of the main people whose statement Defendant wanted to present through Rojas was Defendant's mother. (PCR3. 2129-30, 1124-34, PCT2. 243-83) However, the availability of Defendant's mother for trial is not subject to dispute, as she testified at trial. (T. 863-76, 1491-1531) As such, Rojas' testimony about her statements would have proven nothing unless one accepted that the truth of those statements. Thus, the lower court did not abuse its discretion in finding that the statements would have been hearsay. *See Banks v. State*, 790 So. 2d 1094, 1098 (Fla. 2001). The lower court should be affirmed.[10]

Defendant next asserts that the lower court abused its discretion in excluding the testimony of Alexander Suarez. As the Court has recognized, a witness may not properly testify about a matter but invoke his Fifth Amendment right to preclude cross examination. *Mitchell*, 526 U.S. at 321, 322. As a result, it is proper to exclude a witness' testimony, where the witness invokes his Fifth Amendment right to refuse to answer pertinent questions on cross examination. *Sule v. State*, 968 So. 2d 99,

[10] Moreover, witness availability is not a subject beyond the understanding of a trial judge, the fact finder in this case. As such, Rojas' opinion on this issue would not have been admissible. *See Johnson*, 393 So. 2d at 1072.

105-07 (Fla. 4th DCA 2007); *see also United States v. Fuentez*, 231 F.3d 700, 705-08 (10th Cir. 2000); *Klein v. Harris*, 667 F.2d 274, 289 (2d Cir. 1981). Moreover, as this Court has recognized, proper cross examination "is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief." *Chandler v. State*, 702 So. 2d 186, 196 (Fla. 1997)(quoting *Geralds v. State*, 674 So. 2d 96, 99 (Fla. 1996)). Moreover, it also includes questions regarding the credibility of the witness. *Id.* at 195-96.

Here, according to the proffer Defendant presented, he wanted Suarez to testify that he and Defendant got together every day and used excessive amounts of marijuana, cocaine and alcohol. (PCR3. 1842-50) However, Suarez invoked his Fifth Amendment right and refused to answer questions about the deliberate and planned crimes he committed with Defendant while they were allegedly using these drugs. (PCR3. 1515-18, 1615-18) As this Court has recognized, evidence of deliberate actions is direct rebuttal of a claim of intoxication. *See Owens v. State*, 986 So. 2d 534, 555 (Fla. 2008). As such, Suarez's testimony about this issue would not have been about a collateral issue, and the lower court did not abuse its discretion in refusing to

allow Suarez to testify. *Sule*, 968 So. 2d at 105-07. It should be affirmed.

In an attempt to avoid this result, Defendant appears to assert that the State should have been restricted to attacking Suarez's credibility under §90.610, Fla. Stat. However, as this Court has acknowledged, the fact that evidence may be inadmissible for one purpose does not make it inadmissible for all purposes. *Breedlove v. State*, 413 So. 2d 1, 6 (Fla. 1982). In fact, this Court has held that it is proper to allow the State to admit even beyond the mere fact that a witness has a number of prior convictions when the evidence is admitted for a purpose other than to impeach the character of the witness. *Dessaure v. State*, 891 So. 2d 455, 468-70 (Fla. 2004). Here, the State was not trying to elicit information about the facts of the other cases to show that Suarez was not a reliable witness because of his character under §90.608(3), Fla. Stat. Instead, the State was attempting to show that Defendant's ability to engage in deliberate actions was inconsistent with Suarez's testimony about the vast amount of intoxicants that Defendant was allegedly using at the time pursuant to §90.608(5), Fla. Stat. Given these circumstances, the lower court did not abuse its discretion in determining that the State was not limited by §90.610, Fla. Stat. It should be affirmed.

Even if the lower court had abused its discretion in refusing to allow Suarez to testify, any error was harmless. As Defendant admitted below, he was not arguing that Suarez would have been available to testify at trial. (PCR3. 352) However, counsel is not ineffective for failing to present witnesses who would not have been available at the time of trial. *White v. State*, 964 So. 2d 1278, 1286 (Fla. 2007). As such, Suarez's testimony could not have affected the outcome of the post conviction hearing.[11] *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The lower court should be affirmed.

With regard to the QEEG, the lower court did not abuse its discretion in excluding this evidence. This Court has held that the opponent of new scientific evidence is required merely to raise the issue of lack of general acceptance with citation to authorities. *Correll v. State*, 523 So. 2d 562, 567 (Fla. 1988). Once the opponent has raised the issue, the burden of showing general acceptance by a preponderance of the evidence is on the proponent of the evidence. *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995). Moreover, the proponent of the evidence does not carry this burden simply by having the expert who used the new evidence assert that it is generally accepted. *Ramirez*, 810

[11] It should be remember that Suarez had informed the police pretrial that Defendant had confessed to this murder. (PCR3. 1501-02)

So. 2d at 844. This Court has required the proponent of the evidence to show general acceptance even when the new evidence is based on a scientific theory that is generally accepted if the evidence is a new use of that theory. *Id.* at 845-46. Moreover, this Court has held that when scientific evidence consists of acquisition of data using a scientific method, use of a mathematic calculation and use of information from a database, the proponent is required to show that both the scientific method and the method of mathematic calculation are generally accepted and to present evidence regarding the database used grounded in authoritative sources. *Butler v. State*, 817 So. 2d 817, 828 (Fla. 2003); *Brim v. State*, 695 So. 2d 268, 270 (Fla. 1997).

Here, the State as opponent of the QEEG evidence raised the issue of the general acceptance of the evidence and provided the lower court with citations to numerous legal and scientific authorities to support its position. (PCR3. 238-73) Defendant as the proponent of this evidence then failed to carry his burden of showing general acceptance. In fact, he argued that a *Frye* hearing was not necessary. (PCR3. 388-92) Moreover, Defendant's theory of why this was true was that QEEG was based on EEG data, which was not new and novel. However, as both the scientific literature presented with its motion and the testimony of

Defendant's own expert at the first evidentiary hearing show, QEEG involves the mathematic manipulation of EEG data and the comparison of the result of that manipulation to a database. (PCR3. 255-56, PCT2. 569-70) Thus, under *Butler*, *Brim* and *Ramirez*, the lower court did not abuse its discretion in rejecting Defendant's argument that the general acceptance of EEG evidence showed the QEEG evidence was admissible. Moreover, since Defendant urged the lower court not to hold a *Frye* hearing, it should not be heard to complain now that it did not do so. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001). This is particularly true, as Defendant has never even suggested that he has any evidence to carry is burden of showing general acceptance. *Ramirez*, 651 So. 2d at 1168. The lower court should be affirmed.

With regard to the materials provided to the experts, the lower court did not abuse its discretion in excluding this evidence. As noted above, this Court held in *Linn*, 946 So. 2d at 1037-39, that an expert's reliance on information did not justify admission of inadmissible information. Since Defendant merely asserted that the documents here were admissible because Dr. Weinstein relied on them (PCR3. 1974-76, 1979, 1976-80), the lower court did not abuse its discretion in refusing to admit these documents on this basis.

Further, while Defendant suggests that the information was admissible because it concerned the penalty phase and the hearsay rule is relaxed at the penalty phase, the lower court did not abuse its discretion in excluding the documents on this basis either. As noted above, hearsay is only admissible at the penalty phase if the opponent has the fair opportunity to rebut it. Here, when the State pointed out that it needed to have a fair opportunity to rebut any hearsay for it to be admissible even at a penalty phase, Defendant may no attempt to show that the State did have such opportunity. (PCR3. 1978-79) Moreover, the evidence included videotape of individuals from Peru whom Defendant had never even produced for deposition. Given these circumstances, the lower court did not abuse its discretion in determining that the documents were not admissible. It should be affirmed.

With regard to the documents from trial counsel's file, the lower court again did not abuse its discretion. Initially, the State would note that this issue is not properly briefed. Defendant does not identify the documents that were allegedly excluded or even cite to the record where the documents were allegedly excluded. Moreover, he does not even provide any argument regarding "counsel's bills" was improperly excluded. In *Smith v. State*, 931 So. 2d 790, 800 (Fla. 2006), this Court held

that such a presentation regarding the exclusion of evidence was insufficient to raise a claim on appeal. As such, this Court should consider this issue waived as it did in *Smith*.

Moreover, the lack of specific pleading is particularly important in this case. While Defendant asserts that the lower court excluded numerous documents during the direct examination of his trial counsel, which he describes as various depositions and counsel's bills, the record reflects that the lower court only excluded one document during Suri's testimony and one document during Wax's testimony. (PCR3. 1672-75, 1754-62) Thus, the record shows that the lower court did not exclude numerous documents.

Moreover, the lower court did not abuse its discretion in excluding either of these documents. The document excluded during Suri's testimony was Lazaro's deposition of Lazaro. (PCR3. 1672-75) While Defendant claimed he was admitting this deposition to show what information Suri had about Lazaro, Suri had just testified regarding the information from Lazaro. (PCR3. 1671-72) As such, the lower court did not abuse its discretion in excluding the deposition itself from evidence. *Parker v. State*, 873 So. 2d 270, 281-82 (Fla. 2004). This is particularly true, as the trial court informed Defendant that he could use the deposition to refresh Suri's recollection if

needed. (PCR. 1674) It should be affirmed.

The document the lower court excluded during Wax's testimony was Wax's bill. (PCR3. 1754-62) The reason why the lower court excluded this document was that it found the document inaccurate based on Wax's testimony that the bill was inaccurate. In fact, Defendant conceded that the bill was not accurate but suggested it should be admitted anyway. (PCR3. 1760-61) However, pursuant to both §90.803(6) and §90.803(8), Fla. Stat., a record is not admissible when "the source of the information or other circumstances show [its] lack of trustworthiness." Thus, the lower court did not abuse it discretion in admitting this bill. It should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Rachel Day, Esq., Assistant CCR, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this _____ day of February, 2010.

_____
SANDRA S. JAGGARD
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CERTIFICATE OF COMPLIANCE

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

_____
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