IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-774

MARBEL MENDOZA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Mendoza's motion for post-conviction relief following a remand by this Court for an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"TRT " -- transcript of trial proceedings contained in record on direct appeal to this Court;

"PCR" -- record on initial 3.850 appeal to this Court;

"Supp. PCR" -- supplemental record on initial 3.850 appeal to this Court;

“PCR2” – record on appeal following remand to the circuit court for first evidentiary hearing (SC04-1881);

“EH”– transcript of evidentiary hearing following remand to circuit court (C04-1881);

“PCR3”-record on instant appeal;

“Supp PCR3”-supplemental record on appeal in the instant cause;

All other citations and references will be self explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Mendoza has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Mendoza, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

A grand jury indicted Mr. Mendoza and two co-defendants, brothers Lazaro and Humberto Cuellar, for first-degree murder, conspiracy to commit robbery, attempted armed robbery, armed burglary with an assault, and possession of a firearm during the commission of a felony (R 1 - 4). The indictment was predicated on both premeditation and felony-murder theories. (R 1).

On May 20, 1993, Lazaro entered into a plea agreement in which he agreed to plead guilty to the lesser offense of manslaughter and to plead guilty as charged to the offenses of conspiracy to commit robbery and attempted armed robbery (TRT 196-205). He was sentenced to three concurrent terms of ten (10) years in prison (TRT 202). The plea agreement specifically stated that if Lazaro failed to perform any of the required conditions, he would be re-sentenced to twenty-seven (27) years in prison (TRT 199-200, 202). One of the required conditions was that Lazaro testify truthfully in depositions, trial, and all court hearings in the State's case against Mr. Mendoza (TRT 200). **After** Lazaro entered his plea and was sentenced, in October 1993, he swore under oath in his deposition that he, Humberto, and Mr. Mendoza went to Mr. Calderon's house to collect a debt from Mr. Calderon, **not** to commit a robbery. Lazaro also swore in his deposition that, both before and after the shooting, he **never saw Mr. Mendoza with a gun**. He also indicated that Mr. Calderon ran a *bolito* (gambling) operation.

On January 18, 1994, approximately two weeks before the start of Mr. Mendoza's trial, Humberto pleaded guilty to second-degree murder, as well as the remaining charges. (TRT 239-240), and was sentenced to twenty (20) years in prison (TRT 237). In exchange, Humberto agreed to testify against Mr. Mendoza (TRT 241, 1086). Humberto was also required to testify consistent with the State's attempted robbery theory. As with Lazaro's plea agreement, if the prosecution thought that Humberto did not testify "truthfully," then the agreement called for Humberto to be re-sentenced to more than the agreed upon twenty-year sentence (TRT 1118-9).

During opening statements of Mr. Mendoza's trial, Mr. Mendoza's trial counsel told the jury that the evidence would show that **Humberto** was the person who shot the victim, Mr. Calderon (TRT 610). Trial counsel also told the jury that the evidence would show that Mr. Mendoza and the two co-defendants did not confront Calderon in order to rob him but, instead, did so in an attempt to collect a debt (TRT 610, 611). To support this defense, counsel stated that **Lazaro Cuellar would testify** that there was no attempted robbery, and referred to the deposition. (TRT 607-08, 611-12). Trial counsel told the jury that the evidence would also show that gun-shot residue was found on both Humberto's and Lazaro's hands (TRT 608-09).

The State built its entire case on the testimony of co-defendant Humberto

Cuellar. Humberto testified that Mr. Mendoza approached him and asked him if he wanted to rob a person, who, according to Humberto's testimony, Mr. Mendoza said always had money on him because he was a "boletero" (TRT 1034). Humberto testified that he agreed to commit the robbery with Mr. Mendoza and at some point asked his brother, Lazaro, to be the driver (TRT 1035, 1038). According to Humberto, on several dates prior to the shooting, they drove by Mr. Calderon's house to learn his routine (TRT 1039, 1041).

Humberto testified that after Lazaro drove them to a location near Mr. Calderon's house, Humberto and Mr. Mendoza got out of the car when they saw Mr. Calderon exit the house (TRT 1047). When Mr. Calderon opened the door to his vehicle parked in the driveway, Humberto and Mr. Mendoza allegedly struggled with him until Humberto hit him on the head with a gun that Humberto had removed from Lazaro's car (TRT 1050). Other than Humberto's testimony, there was no evidence that Humberto was the person who hit Mr. Calderon over the head. Police had no fingerprints from the gun linking Humberto to the Taurus nine millimeter, the gun the State claimed was used to strike Mr. Calderon over the head. After the trial, the prosecutor told the court that Lazaro "had the gun" according to all his statements (TRT 830).

According to Humberto, after getting hit over the head with a gun, Mr. Calderon pulled out his own gun and fired three times, striking Humberto once

in the chest (TRT 1051). Humberto testified that once Mr. Calderon shot him, Humberto ran back to the car and that, while he was running back, he heard a few more shots (TRT 1052-53). Humberto claimed at trial that when Mr. Mendoza returned to the car shortly thereafter, Mr. Mendoza stated that he had shot the man (TRT 1055).[1]

After the State rested, the State conceded that it had failed to establish a prima facie case of premeditation (TRT 1157). Thus counsel knew that, in order to return a guilty verdict for first degree murder, the jury necessarily would have to find that Mr. Mendoza committed the underlying felonies.

Counsel for Mr. Mendoza called as the only defense witness, Mr. Gopinath Rao, an expert in gunshot particle analysis. At the time of trial, Mr. Rao was a criminalist for the Metro-Dade police Department (TRT 1165-66). Mr. Rao had conducted the particle analysis of hand swabs taken from Lazaro and Humberto while they were at the hospital on the morning after the shooting. Counsel for Mr. Mendoza elicited from Mr. Rao very significant exculpatory evidence in the form of Mr. Rao's expert opinion. Mr. Rao gave the opinion that, based upon his analysis of the particles found in the swab taken from Lazaro's hands, it was "more likely than not" that Lazaro Cuellar **fired** a gun as opposed to having simply

[1] Humberto's testimony directly contradicted Humberto's own statement to police that he passed out when he got in the car and did not even know if Mr. Mendoza got into the car afterward (R 326-7; TRT 1079-80)

“handled” a gun that had been fired (TRT 1205, 1207). Mr. Rao indicated that his opinion was specifically grounded on his assumption that Technician Gallagher swabbed Lazaro’s hand **at 9:00 a.m.** (the shooting occurred at approx. 5:40 a.m.) (TRT 1181-83, 1200, 1207). In its rebuttal case, the State established the 9.00 am time to be incorrect.

Mr. Rao’s opinion that Lazaro more than likely fired a gun as opposed to simply handled a gun that had been fired was significant because it strongly suggested that Lazaro–not Mr. Mendoza–shot Mr. Calderon. The State’s theory was that particles were found on Lazaro’s hands due to Lazaro’s handling of the gun that was present at the scene but not fired and/or due to his contact with Humberto, who had been shot by Mr. Calderon. The State’s star witness, Humberto, had testified that Lazaro–his brother–never got out of the car. Mr. Rao’s opinion was exculpatory evidence that not only suggested that Mr. Mendoza did not shoot Mr. Calderon but, at the same time, also discredited Humberto’s trial testimony.

On cross examination the State got Mr. Rao to agree that his opinion was “based on this time frame” (TRT 1208) and that, consequently, if he was wrong regarding the time, his entire opinion was “invalid” (TRT 1207). Then, in rebuttal, the State called Technician Gallagher as a rebuttal witness. Technician Gallagher confirmed that he swabbed Lazaro’s hands at 7:45 a.m., not 9:00 a.m. (TRT 1282-

83). In closing arguments, the prosecutor attacked Mr. Rao's opinion, arguing that, because Rao incorrectly believed that Lazaro's hands were swabbed at 9:00 a.m., his opinion was invalid (TRT 1302, 1341). The prosecutor, Flora Seff, went even further and dramatically argued that Mr. Mendoza's trial counsel **knew** that Rao's was mistaken as to the time police swabbed Lazaro's hands and **deliberately presented false evidence** in a scandalous ploy to mislead and confuse the jury (TRT 1302-03, 1316, 1318, 1319).

The jury found Mr. Mendoza guilty of first-degree murder, conspiracy to commit robbery, attempted armed robbery, armed burglary with an assault, and possession of a firearm during the commission of a felony.

After the trial, the State filed a motion to vacate Lazaro's sentence for non-compliance with the terms of his plea agreement on the ground that his version of events as set forth in his sworn pretrial deposition constituted a violation of his plea agreement (i.e., that, per the State Attorney Office, he was not "truthful" in his pretrial deposition) (R 829-31; TRT 1444-5). In support of its motion to vacate Lazaro's sentence, the State emphasized that because Humberto's trial testimony contradicted Lazaro's version of events, the State did not call Lazaro as a witness (TRT 829-30). In the end, however, the court denied the State's motion on the grounds that the State waited too late to file the motion to vacate Lazaro's sentence (TRT 832). Also significant is the prosecutor's admission during the hearing to

vacate Lazaro's sentence that Lazaro indicated in all his statements that he "had the gun" (TRT 830).

The jury voted to recommend death by a vote of 7-5. The court sentenced Mr. Mendoza to death based upon two aggravating circumstances: prior violent felony and during the commission of a robbery and for pecuniary gain (merged) The trial court found no mitigating factors (R 956; TRT 1735). On direct appeal, this Court affirmed the conviction and sentence. Mendoza v. State, 700 So. 2d 670 (Fla. 1997). The Court specifically relied upon the trial court's rejection of these mitigating circumstances as a basis to conclude that the death penalty was not disproportionate. Id. at 678. Mr. Mendoza timely petitioned the United States Supreme Court for *certiorari*. This petition was denied on October 5, 1998. Mendoza v. Florida, 525 U.S. 839 (1998).

Mr. Mendoza filed his final amended motion for post-conviction relief on September 5, 2000 which was summarily denied on January 26, 2001.

On appeal, this Court remanded the case with orders for the lower court to conduct an evidentiary hearing on Mr. Mendoza's claims of ineffective assistance of counsel. An evidentiary hearing was held before the Circuit Court, Judge Manuel Crespo in March, 2004. Judge Crespo entered an order denying relief on both claims. An appeal was taken to this Court who again remanded the case back to the Circuit Court, the Honorable Judge Dava Tunis, for another evidentiary

hearing in the light of Judge Crespo's death.. The hearing was held on June 9, 12, 13, 16, 17, and 18, 2008. At the hearing, Mr. Mendoza presented the testimony of trial counsel Arnaldo Suri and Barry Wax, psychiatrist Eugenio Rothe, M.D., neuropsychologist Ricardo Weinstein Ph.D., molecular and cellular neuropharmacologist Deborah Mash Ph.D., trial psychologist Jethro Toomer, Ph.D., neurologist Thomas Hyde M.D., Ph.D., Cuba history expert Holly Ackerman, Ph.D., attorney expert Steven Potolsky, Esq., gunshot residue expert Celia Hartnett, and lay witnesses Beatriz Roman, Lazaro Cuellar, and Alexander Suarez. The State chose not to put on any rebuttal witnesses. The lower court entered an order on April 2, 2009 denying relief on both counts of ineffectiveness of trial counsel. (PCR3 1422-71) This appeal follows.

SUMMARY OF THE ARGUMENT

Argument I - Trial counsel rendered deficient performance that prejudiced Mr. Mendoza at his guilt phase. Because of their failure to investigate the case they presented mutually exclusive theories of the case to the jury, broke opening statement promises to the jury and failed to investigate the GSR evidence.

Argument II – Trial counsel rendered ineffective assistance at Mr. Mendoza's penalty phase when they failed to investigate and present available mitigating evidence, opened the door to admission of evidence of other crimes, and put on the testimony of Humberto Cuellar, the State's star witness at the guilt

phase.

Argument III – Mr. Mendoza was denied a full and fair evidentiary hearing before a detached neutral judge.

ARGUMENT I

MR. MENDOZA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Introduction

The jury's verdict finding Mr. Mendoza guilty of first-degree murder was predicated exclusively on the theory of felony-murder. Had Mr. Mendoza's trial counsel not rendered deficient performance, there is a reasonable probability that the jury would have concluded that the State failed to prove the existence of the alleged underlying felonies and, therefore, would have acquitted Mr. Mendoza of first-degree felony-murder. Because there is a reasonable probability that the outcome of the trial would have been different had trial counsel not been deficient, Mr. Mendoza is entitled to a new trial.

Absent the testimony of the State's key witness, Humberto Cuellar, the State simply had no evidence to support the charge of first-degree felony murder. The physical evidence established that the victim, Mr. Calderon, himself fired his gun first and shot Humberto before the victim was shot. The physical circumstantial

evidence actually contradicted the State's robbery theory because the victim was found with the victim's bank bag containing a large amount of cash. Also, the victim was found still wearing his Rolex watch. The State presented absolutely no evidence that any property was taken from the victim. Other than Humberto's testimony, the State presented no evidence of the alleged underlying felonies. Conversely, given the lack of any other evidence to support the charge of first-degree felony murder, if the jury did not believe Humberto's testimony, the jury would have necessarily acquitted Mr. Mendoza. Had trial counsel not performed deficiently, there is more than a reasonable probability that the jury would not have returned a guilty verdict

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court enumerated the now familiar principles that a convicted defendant must show both deficient performance and prejudice to establish a claim that his or her counsel rendered constitutionally ineffective assistance at trial. Deficient performance means that counsel's performance fell "below an objective standard of reasonableness" measured under "prevailing professional norms"

In order to show prejudice, a claimant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 521, 534,

536 (2003) (citations omitted). However to the extent that any purportedly "strategic" choices are the result of an incomplete or incompetent investigation, they cannot be considered reasonable. See Wiggins, 539 U.S. at 522. Applicable professional standards are set forth in the American Bar Association (ABA) Standards of Criminal Justice, "standards to which we have long referred as guides to determining what is reasonable." Wiggins v. Smith, 539 U.S. 510 at 524.

Wiggins makes clear that the ABA Guidelines[2] supply the guide to what is reasonable in investigating a capital case.

Trial counsel lacked any meaningful experience in trying capital cases. Mr. Mendoza's counsel, Mr. Suri and Mr. Wax, had little to no experience trying capital cases. Prior to representing Mr. Mendoza, Mr. Suri had never tried a capital case (PCR3 1661). Mr. Wax's only previous capital case experience was a last minute assignment as second chair in the case of State v. Bobby Robinson (PCR 31764), which involved o no investigation, and in a re-sentencing in the case of State v. Harry F. Phillips.[3] Thus Mr. Mendoza was burdened with two

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[2] American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter "ABA Guidelines").

[3] Significantly, Mr. Wax handled the re-sentencing for Mr. Phillips by himself with no co-counsel and did so during the period of time between Mr. Mendoza's guilt and penalty phases (PCR3 1765). He did not do the investigation for Mr. Phillips's new penalty phase, but relied on the work done by the post conviction counsel who had obtained the new penalty phase (PCR3 1766).

inexperienced lawyers, one of whom had an excessive workload which limited the amount of time available for Mr. Mendoza's representation.[4] While Mr. Suri had attended just one seminar on representing clients in death penalty cases (PCR3 1652), Mr. Wax had not attended any seminars on representing individuals facing the death penalty (PCR3 1788). Neither lawyer was at that time familiar with the ABA Guidelines (PCR3 1663, 1768).

Despite their lack of experience, counsel failed to utilize the services of either an investigator or a mitigation specialist for either the guilt-innocence of penalty phase investigation even though counsel obtained approval from the trial court to use county funds to do so (PCR3 1663). Counsel had no reasonable explanation as to why they did not use the available funds to enlist the assistance of an investigator and candidly admitted that looking back, it was "hard to understand" (PCR3 1663). The ABA Guidelines are clear that the defense team should include "at least one mitigation specialist and one fact investigator." Guideline 10.4 (C) (2) (a) (2003). Mr. Mendoza was afforded neither type of investigator despite counsel's complete lack of experience in this area.

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[4] Guideline 10.3 (2003) which sets forth counsel's obligations regarding workload states that "Counsel representing clients in death penalty cases should limit their caseloads to the level needed to ensure high quality legal representation in accordance with these Guidelines." Mr. Wax patently did not do this.

B. Trial counsel asserted contradictory and inconsistent arguments to the jury as to the identity of the shooter

Counsel made contradictory and inconsistent representations to the jury as to who actually shot and killed the victim. During opening statements, trial counsel unequivocally represented to the jury that Humberto Cuellar was **the one who did the shooting. That's who Mr. Calderone shot.** (TRT 609-10) (emphasis added). Yet, in closing argument, without any explanation to the jury for the switch and without any asserted intervening reason for doing so, counsel completely flip-flopped and argued that **Lazaro** Cuellar was the person who shot the victim, because he "had gun powder residue all over his hands" , and that he was **"**not in the car," and that Humberto Cuellar and his brother, who shot this man, the evidence tells you he shot this man, the evidence tells you they all lied they all lied and got away with it. (TRT 1327, 1328-29. 1332-33).[5]

[5] At the evidentiary hearing, counsel testified that their theory of the case was "that the evidence and the testimony would be unclear as to who the shooter was" (PCR 1679). If this had been the case, counsel could easily have framed his opening argument without specifying the identity of the shooter. However from the testimony of Rao and counsel's closing argument, it would appear that counsel changed the theory of the case from Humberto being the shooter to Lazaro being the shooter after Rao was cross examined by the State. As noted in Argument I D *infra*, this whole scenario could have been avoided if counsel had properly investigated criminalist Rao's parameters and assumptions and hired an independent gunshot residue expert. See Argument I D, *infra*. Similarly, had trial counsel met with Alexander Suarez, they would have learned that Humberto had admitted to being the shooter and blaming Mr. Mendoza. See Argument III B. 4., *infra*.

After the State rested, and in direct contradiction to Mr. Suri's earlier opening statement to the jury that **Humberto** shot Mr. Calderon, Mr. Wax announced on the record that, now, instead: "**It's the defense theory of the case that Lazaro Cuellar shot and killed Conrado Calderon**. (TRT 1225) (emphasis added).

Counsel's performance fell short of the ABA Guidelines, which as made clear by Wiggins, supply a norm as to what amounts to "reasonable" standards of representation in a capital case. Guideline 10.10.1 (2003) which deals with overall trial preparation makes it clear that counsel should formulate an internally consistent theory of the case; that will minimize inconsistencies between guilt and penalty phases. See ABA Guideline 10.10.1 (2003) .[6]

While counsel is exhorted to develop a theory of defense that is consistent between the guilt and the penalty phase, it is even more self evident that the theory should be consistent within the confines of the guilt phase. At the evidentiary hearing, trial counsel could articulate absolutely no strategic reason for this

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[6] The Commentary to the Guideline emphasizes that credibility will be lost if counsel takes inconsistent positions at different stages of the trial. It states that "it is critical that well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. Counsel should then advance that theory during all phases of the trial including jury selection, witness preparation, pretrial motions, opening statements, presentation of evidence and closing argument." Commentary to Guideline 10.10.1 (2003). Manifestly, Mr. Mendoza's representation did not comport with this essential principle.

completely ruinous course of action.

Absent any explanation to the jury by counsel in closing argument, counsel's flip-flop, and counsel's urging of inconsistent and contradictory versions of events constitutes deficient performance under Strickland. Counsel gave no explanation to the jury for his inconsistent arguments. The prejudice to Mr. Mendoza is obvious. As a consequence of counsel's contradictory arguments to the jury, the jury could have concluded nothing else but that Mr. Mendoza had no *bona fide* defense to the State's charges and that nothing trial counsel argued had any credibility or validity.

Trial counsel asserted a reasonable doubt defense grounded on counsel's argument that this was not a robbery and that Humberto Cuellar's trial testimony as to the events in question was false. However, due directly to trial counsel's blunder, the jury found Humberto credible enough to reject the defense's reasonable doubt argument. The jury quite reasonably treated **counsel's** contradictory version of events as proof of the complete and utter lack of credibility on the part of Mr. Mendoza's defense. Because the defense did not dispute that Mr. Mendoza was present with the other co-defendants on the night in question, the jury naturally would assume that Mr. Mendoza likely **knew** the truth of what had occurred, i.e., that he knew who shot the victim. Therefore, in the eyes of the jury, trial counsel's inexplicable and contradictory argument as to the true identity of the shooter established in the jury's mind that Mr. Mendoza's defense

was grounded on nothing but deceit and trickery. With respect to the prejudice prong of Strickland, "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," but only that there is a "reasonable probability that the result would have been different." A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." Id. at 687. Mr. Mendoza has established both deficient performance and prejudice of Strickland.

In Bland v. California, 20 F.3d 1469 (9th Cir. 1994) (overruled on other grounds), the Ninth Circuit Court of Appeals held that the presentation of inconsistent theories by defense counsel meets the Strickland prejudice requirement and undermines confidence in the outcome of the trial. As in Mr. Mendoza's case, counsel presented differing theories as to the identity of the shooter. See id. at 1479. The court concluded:

> Inconsistencies between the theories presented by the defense and prosecution are a given. **However, when those inconsistencies also arise from the defense's own camp, 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'** Strickland, 466 U.S. at 694.

Bland, 20 F.3d at 1479 (emphasis added). As in Bland, where the inconsistent theories presented by "defense's own camp" involved the identity of the shooter,

Mr. Mendoza was prejudiced when his own counsel presented to the jury contradictory versions of the facts with no intervening evidence or even an attempt by counsel to justify to the jury this remarkable, mid-trial change in the defense.

Both trial counsel stated that their theory of the case was that Mr. Mendoza was not the shooter, and that there was no plan to commit a robbery. Mr. Suri explained that he thought the evidence was "inconclusive" as to the identity of the shooter especially in light of the "fairly generous plea offers" given to the Cuellar brothers. (PCR3 1669).

Mr. Wax affirmed this theory, stating that "our theory in the case was to try to establish that Marbel was not the individual that shot the victim." (PCR3 1770). The record does not reflect any reason why counsel should flip flop their theory of the defense. The forensic evidence was inconclusive as to the identity of the shooter. The forensic pathologist Emma Lew could not say whether the person who shot Calderon was to the left of the victim nor whether the shooter was left handed (T. 939, 942). The State conceded as much in its closing argument with its heavy emphasis on the theory that the identity of the shooter does not matter in cases of felony murder.

As noted previously, proper investigation would have given counsel a better theory as to the identity of the shooter. However even absent such investigation, counsel easily could have not named the shooter in opening statement. Counsel

could have made a more general opening statement without losing persuasiveness with the jury. Then, after all the evidence was presented, counsel could have argued vigorously a specific theory without having lost credibility.

The State's case for first degree felony murder rested entirely upon the jury's assessment of the Humberto's credibility. The trial record establishes that Humberto's credibility was questionable at best. He had a personal interest and a familial interest in testifying against Mr. Mendoza. He gave a myriad of statements to police that were inconsistent with his trial testimony. Given that the State rested its case for felony murder solely on Humberto's credibility there is a reasonable probability that the outcome of the trial would have been different.[7]

The jury knew that Humberto was testifying against Mr. Mendoza in order to earn a 20-year prison sentence for second degree murder and thereby avoid the possibility of a first degree murder conviction and either life in prison or the death penalty (TRT 1061, 1063, 1083). The jury also knew that Humberto and Lazaro Cuellar were brothers and that he would not be required to testify against his brother, Lazaro (TRT 1031, 1086).

The jury had good reason to question Humberto's credibility because **the content** of his trial testimony was **directly tied to the very viability of his deal**

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[7] This is even more the case given that counsel's failure to investigate the State's criminalist Rao and Alexander Suarez meant that additional valuable impeachment evidence against Humberto was not put on. See Argument I D, II B d *infra*.

with the State to avoid a first degree murder charge and a possible death sentence or life in prison. The jury had further reason to doubt his testimony because of his interest in protecting his own brother. As explained below, the jury also knew that Humberto's trial testimony contradicted his prior sworn statements to police on very significant and material matters.

In addition to the State's generous deal given to Humberto in exchange for his testimony, the jury had other reasons to doubt his credibility. At trial, Humberto admitted that: 1) he failed to tell police in his initial statement that he hit the victim over the head with his gun (TRT 1076); 2) he lied when he told police that he never pulled out his gun (TRT 1078); 3) while he testified on direct examination that, when Mr. Mendoza returned to the car, he told Humberto that he had shot the victim, Humberto told police that he (Humberto) passed out when he (Humberto) reached the car, that the next thing he knew, he was in the hospital, and that **he did not know what Mr. Mendoza did after the shooting** (TRT 1079-80); 4) he originally told police that he was unsure what caliber gun Mr. Mendoza was allegedly carrying at the time of the shooting, yet, he now (at trial) believed that Mr. Mendoza carried a .38 Special Revolver, which was the caliber of bullets that killed the victim (TRT 1067, 1084-5); 5) while he testified on direct that he did not know how many bullets were in the Taurus nine millimeter gun (the gun Humberto allegedly used to strike the victim over the head), he had told police that

the gun contained 14 or 15 rounds (TRT 1089-90); 6) that, contrary to his trial testimony that his brother, Lazaro, knew about the alleged planned robbery, he told police that Lazaro did not know about it (TRT 1091); 7) that while he testified on direct examination that Lazaro brought the Taurus nine millimeter, Humberto told police that Lazaro was not armed (TRT 1087, 1092); 8) that, contrary to his trial testimony, Humberto told police that he and Lazaro drove by the victim's house together before the day of the shooting (TRT 1093-4); and 9) that contrary to his trial testimony that it took Mr. Mendoza thirty seconds to one minute to return to the car after Humberto was shot (TRT 1054), Humberto had told police that Mr. Mendoza came back to the car in "a few seconds" (TRT 1094).

Given that the jury already had significant and substantial reasons to doubt the veracity of Humberto's testimony, there is more than a reasonable probability that the outcome of the trial would have been different had counsel not been deficient. Humberto's credibility was placed into serious doubt at trial. While the jury must have ultimately found him credible enough to return a guilty verdict,[8] had counsel not been deficient, the verdict would not have been the same.

The lower court denied this claim because the identity of the shooter is not dispositive of whether a first degree felony murder conviction is merited. See

[8] As previously noted, the State's entire case rested on Humberto's testimony. Without Humberto's testimony, the State had no evidence to support the charge of first degree felony murder.

PCR3 1463-4. The lower court however fails to take any account of the effect on the jury of the diametrically opposite theories presented by counsel at the opening statements and closing arguments. The lower court fails to take any account of the inflammatory language of the prosecutor Ms. Seff in this regard. The lower court did not engage in any discussion of the Strickland standard, nor any analysis of the proper determination of prejudice. Relief is warranted.

C. Trial counsel broke his promise to the jury in opening statement and failed to present available evidence that there was no attempted robbery by failing to call Lazaro Cuellar as a witness.

Trial counsel was ineffective because counsel failed to call as a defense witness Lazaro Cuellar. Lazaro would have provided exculpatory evidence that the reason he, Humberto, and Mr. Mendoza made contact with the victim was **not** to attempt a robbery, but to collect a debt. Lazaro would have testified that neither Mr. Mendoza nor Humberto ever indicated to him (Lazaro) that robbery or theft was the motive behind their confronting the victim. Also, he would have testified that he **never** saw Mr. Mendoza with a gun. This evidence would have completely undermined the credibility of the State's star witness, Humberto, and, at the same time, provided the jury with highly credible exculpatory evidence negating the alleged underlying felonies that formed the basis for the charge of felony-murder. Had trial counsel presented this evidence to the jury, there is more than a reasonable probability that the outcome would have been different. See

Montgomery v. Peterson, 846 F.2d 407, 415 (7th Cir. 1988) (counsel's failure to investigate and present evidence held prejudicial when evidence would have "directly contradicted the state's chief witness . . . upon whose testimony the state depended in order to secure a conviction" and, at the same time, exonerated the defendant of the crime). Not only did trial counsel not call Lazaro to testify but, in not calling him, counsel broke his promise to the jury that the jury would hear this evidence. In opening statements, trial counsel purportedly laid out for the jury a map of the defense,[9] which included the defense that there was no plan or intention to rob Mr. Calderon (TRT 610-11). Counsel represented to the jury that Humberto was going to falsely testify that it was a planned robbery and that Mr. Mendoza was the shooter because Humberto had asserted this version of events in order to secure more favorable treatment from law enforcement and, ultimately, obtain his deal with the State (TRT 611). Most critically, counsel then informed the jury that the evidence was going to show that, in direct opposition to Humberto's testimony, Lazaro would maintain that they went to Mr. Calderon's house in order to collect a debt, not to commit a robbery. Counsel very dramatically told the jury in opening statement that the jury would hear from Lazaro that, contrary to what State witness Humberto would tell them, there was

[9] As discussed in section B, counsel subsequently and inexplicably changed the defense's theory regarding who it was that actually shot the victim, rendering the defense entirely incredible in the eyes of the jury.

no attempted robbery, based on the deposition that Lazaro had previously given and that they **went there to collect a debt from Mr. Calderone [sic] . . .** He further told the jury that **"the evidence is going to come in in the form of Mr. Cuellar"**, and that Lazaro said "We went there not to rob anybody, but to make a debt." (TRT 607-8, 611-12) (emphasis added).

Counsel unequivocally informed the jury that the defense would call Lazaro to testify. Consistent with his opening remarks to the jury, counsel had made known to the Court his intention to call Lazaro as a defense witness (TRT 593)

However, despite counsel's representation to the jury, counsel never called Lazaro as a witness. No other evidence was presented to show that the men confronted Mr. Calderon merely to collect a debt.[10] Had counsel called Lazaro Cuellar, Lazaro would have contradicted State witness Humberto's testimony and provided powerful exculpatory evidence that negated the felonies underlying the first degree felony murder charge.

In Lazaro's deposition, given **after** he entered into and was sentenced pursuant to his plea agreement, Lazaro stated that the brothers had had never discussed doing a robbery on Mr. Calderon, either between themselves or with Mr. Mendoza. He further said that Marbel Mendoza told him that the victim owed

[10] Counsel could argue only that the circumstantial evidence that Mr. Calderon's money and watch were not taken suggested this was not an attempted robbery.

him some money. (Deposition of Lazaro Cuellar, 10-15-93, p.16-17, filed in the court file on November 4, 1993). He further said that he never saw Mr. Mendoza with a gun.

By not calling Lazaro to testify, as counsel promised the jury, counsel failed to present exculpatory evidence to the jury that negated the alleged felonies underlying the charge of first degree murder. The fact that Lazaro would have testified that there was no intent to rob, in conjunction with the fact that nothing was actually taken from the scene, totally undermines the State's theory of felony murder. Not only was this evidence exculpatory, but it also would have called into serious question the credibility and veracity of Humberto, the State's star witness. Ironically, trial counsel himself correctly emphasized to the jury in his opening statement that Lazaro's version of events as set forth in his sworn testimony is highly credible due to the fact that, under the terms of his plea agreement, his testimony as to facts that directly contradicted the State's theory, placed him at risk of the State moving to vacate his plea agreement.[11] That is exactly what happened.[12]

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[11] Under the terms of his plea agreement, Lazaro was required to testify "truthfully" in deposition, trial and all court hearings in the instant case (TRT 200).

[12] After Mr. Mendoza was found guilty, the State filed a motion to vacate Lazaro's sentence for non-compliance with the terms of his plea agreement on the ground that his version of events as set forth in his sworn pretrial deposition constituted a violation of his plea agreement (R 829-31; TRT 1444-5). The State emphasized

Counsel's failure to call Lazaro as a witness constituted deficient conduct that prejudiced Mr. Mendoza. See Strickland. At the evidentiary hearing, counsel could simply not articulate a reason why they did not call Lazaro. Mr. Suri testified that " . . . our theory of the case was that there was some question as to whether in fact this was a robbery", and that there was information from [Lazaro] that Mr. Calderon owed Mr. Mendoza and Mr. Humberto Cuellar some money and they went there to seek repayment" (PCR3 1667).

At the evidentiary hearing, Lazaro testified consistently with his 1993 deposition. He stated that the reason he was driving Humberto and Marbel to the Calderon residence was that "I was supposed to drive him over there for some money owed to him or something" (PCR3 2147). He also confirmed that he had never seen Marbel with a gun (PCR3 2147). There is no reason to suppose that this testimony would have been any different at trial.

After the State rested, it conceded that it had failed to present sufficient evidence to get to the jury on the premeditation theory of first-degree murder. Consequently, prior to making the decision whether to call Lazaro, counsel knew

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that because Lazaro's sworn deposition statement contradicted Humberto's trial testimony, the State did not call Lazaro as a witness (TRT 829-30). Lazaro's version of events as set forth in his pre-trial deposition so blatantly contradicted the State's theory of the case that the State felt compelled to attempt to have him re-sentenced to 27 years. for violating the provision of his plea agreement that he "truthfully" testify (i.e., to testify consistent with the State's theory).

that, in order to return a verdict of guilty of first degree murder, the determinative issue for the jury was whether Mr. Calderon was killed during an attempted robbery. The prosecutor argued this very point to the jury when she argued that, even if Mr. Mendoza did not shoot Mr. Calderon, if the jury found that an attempted robbery occurred, then they had to find Mr. Mendoza guilty of first degree murder (TRT 1337). See also (TRT 1338) (where prosecutor tells the jury in closing arguments, "It doesn't matter whether or not [Mr. Mendoza]'s the shooter . . . [L]et's say he's not the shooter. He's guilty of first degree felony murder."). Lazaro's testimony would have gone directly to negate felony murder by negating the alleged underlying felonies. Counsel's error was compounded and magnified because counsel had promised the jury that the defense would call Lazaro as a witness and that he would testify that there was no attempted robbery.

Because the identity of the shooter was no longer determinative of Mr. Mendoza's guilt, any suggestion that trial counsel's failure to call Lazaro as a witness was reasonable because Lazaro indicated in his deposition that when Mr. Mendoza returned to the car, he indicated he had killed Mr. Calderon, is without merit.[13] Even if the jury had concluded that Mr. Mendoza was not the person who shot Mr. Calderon, the jury still could have found Mr. Mendoza guilty

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[13] In fact, according to Mr. Lazaro Cuellar's deposition Mr. Mendoza came back to the car and said "lo mato, lo mato" In Spanish "lo mato" means "he killed him" (PCR3 1680). In other words, Marbel stated that Humberto had killed Calderon.

of first degree felony murder. In fact neither Mr. Suri nor Mr. Wax could articulate a reason as to why they did not call Lazaro Cuellar.[14]

The **only way** for counsel to obtain a not guilty verdict on the charge of first degree felony murder was to persuade the jury that the State had failed to prove that this was an attempted robbery. Lazaro would have provided direct evidence of this fact. Counsel's decision not to call him was not reasonable given that only the felony murder theory of first degree murder was presented to the jury.

At the evidentiary hearing, Lazaro Cuellar testified that the purpose for going to the Calderon house was because Calderon owed Marbel some money. He also reiterated his deposition testimony that he never saw Marbel with a gun. Had the jury heard this testimony, there is more than a reasonable probability that they would not have found Mr. Mendoza guilty of first degree murder.

The case of Harris v. Reed, 894 F.2d 871 (7th Cir. 1990), is similar to the instant case on this issue. The Harris Court held that trial counsel was ineffective for not calling either of the witnesses who would have supported the defense that the defendant, Harris, did not shoot the victim. Id. at 878. Trial counsel's reason for not calling these witnesses was that he felt the prosecution's case was weak and

[14] As Mr. Suri testified "I can't think why we didn't do it" (PCR3 1682) Any suggestion of a strategy is after the fact guesswork, prompted by his conversations with Ms. Seff (PCR3 1682). Similarly Mr. Wax stated that he did "not recall the reason why" (PCR3 1773)).

that the jury would return a not guilty verdict. Id. The Seventh Circuit concluded that trial counsel's decision not to present the two witnesses **especially** "**after preparing the jury for the evidence thought the opening,**" was unreasonable professional conduct. Id. at 879 (emphasis added) . Mr. Mendoza's trial counsel did exactly the same thing as counsel did in Harris: failed to present evidence promised to the jury in opening statement that would have contradicted the State's evidence–specifically, evidence that would have directly contradicted the State's version of events as testified to by key witness Humberto Cuellar. See also Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988). The court found prejudice **as a matter of law** for counsel to promise the jury it would hear such powerful evidence and then not produce it. Id. at 19.

The court in Anderson focused on both the lower court's and the state courts' failure to include in their Strickland analyses the "**effect on the jury** of counsel's not putting the doctor's on the stand after he had said he would do so." Id. at 17-18. The lower courts had treated as two separate issues counsel's decision not to call the doctors and counsel's failure to comply with his promise to the jury. The First Circuit rejected this approach and made clear that, in order to properly assess the defendant's claim of ineffective assistance of counsel, the court had to "consider **the totality** of the opening [statement] and the failure to follow through." Id. at 17 (emphasis added).

In Mr. Mendoza's case, not only did counsel not call Lazaro to present evidence that there was no attempted robbery, counsel, as in Anderson and Harris, broke his promise to the jury in opening statement to present this evidence. The prejudice to Mr. Mendoza is obvious: the jury never learned of material evidence that supported Mr. Mendoza's version of the facts and directly contradicted the prosecution's evidence. See Berry v. Gramley, 74 F. Supp. 2d 808 (N.D. Illinois 1999) (trial counsel held ineffective under Strickland for failure to call witnesses that directly contradicted the prosecution's evidence against the defendant).

The prosecution capitalized on trial counsel's failure to live up to his promise that the jury would hear evidence that this was not an attempted robbery, arguing to the jury in closing argument:

> **You heard no evidence about what they [defense counsel] think you are going to hear or they thought may have happened in this case. The only evidence I heard about what actually happened . . . was when Humberto Cuellar took the witness stand. Because of all the witnesses that testified to you, he's the only one that was there.**
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> **There is nothing to the contrary of what Humberto Cuellar tells you. Nothing in the evidence of this case that contradicts that. In fact, everything supports it.**

(TRT 1301-02, 1304, 1318-19).

Mr. Mendoza was prejudiced by trial counsel's failure to call Lazaro Cuellar because there is reasonable probability that, "if presented to a jury acting 'conscientiously . . . and impartially,' would have led the jury to have a 'reasonable

doubt' respecting" the existence of the alleged felonies underlying the charge of first-degree felony murder. United States v. Tyrone, 878 F.2d 702, 713 (3rd Cir. 1989). In Tyrone, the court reversed the lower federal court's denial of the defendant's federal habeas corpus petition and concluded that trial counsel's failure to call a witness who would have testified to facts consistent with the defendant's defense and contrary to the testimony of government witnesses was ineffective. Id.

The lower Court found that counsel was not ineffective for failing to call Lazaro, because they had a strategy, and because Lazaro was not credible and would not have testified at trial. (PCR3 1459) . However neither the trial record nor the evidentiary hearing show what the strategy was. Even if there was a strategy, it is necessary to consider whether it was reasonable. The lower court did not enter into any such analysis. Furthermore the credibility finding against Lazaro is not determinative of the prejudice prong of Strickland. The Court's focus is on "whether the nature of the evidence is such that **a reasonable jury** may have believed it." Light v. State, 796 So. 2d 610, 617 (Fla. 2d DCA 2001) (emphasis added). The lower court made no mention of the effect of Lazaro's testimony on the jury, especially given that they had been led to believe that they would hear from him. As noted *supra*, the only testimony that there was an attempt to rob the victim came from the highly impeachable Humberto. Lazaro's testimony, however

credible would have cast doubt on Humberto's version of events.

As the United States Supreme Court has explained in the related context of materiality attendant to a Brady v. Maryland claim,[15] the issue is whether **the jury** "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles v. Whitley, 514 U.S. 419, 441-43 (1995). Kyles thus made it plain that the finding of the lower evidentiary hearing court as to credibility of a witness is not the standard. The materiality test for a Brady claim is identical to the prejudice test for a Strickland claim. See Strickler v. Greene, 527 U.S. 263 (1999). As such, the Kyles analysis applies with equal force to a Strickland prejudice analysis.

Furthermore the issue of whether Lazaro would testify is simply a distraction. Lazaro's plea agreement required him to testify. At trial there was no suggestion that he would refuse to testify. He was not called and did not refuse to testify. The only issue was whether trial counsel were going to call him or not. The lower court's finding that Lazaro would not have testified was based solely on his evidentiary hearing testimony that he was "not willing" to testify at the trial. However not being 'willing" to testify and being required to testify are not

[15] 373 U.S. 83 (1963).

mutually exclusive states.[16] The evidentiary hearing record is clear that Lazaro was not "willing" to testify at that hearing either. Nevertheless he did so. The lower court's reasoning is without merit.

D. Trial counsel was ineffective in preparing and presenting exculpatory evidence of gunshot residue.

Trial counsel was ineffective for failing to prepare and investigate the evidence surrounding the gunshot residue swabs taken of Lazaro and Humberto at the hospital following the shooting and for failing to provide Mr. Mendoza with competent expert assistance in violation of Ake v. Oklahoma, 470 U.S. 68 (1985).

Trial counsel called as a defense witness Mr. Gopinath Rao, a criminalist for the Metro-Dade Police Department (TRT 1165-66). Mr. Rao had conducted the particle analysis of the hand swabs taken from Lazaro and Humberto while they were at the hospital during the morning after the shooting. On direct examination, Rao gave the opinion that, based upon his analysis of the particles found in the swab taken from Lazaro's hands, it was "more likely than not" that Lazaro Cuellar **fired** a gun as opposed to having simply "handled" a gun that had been fired (TRT 1205, 1207). Rao made perfectly clear to the jury that his opinion was specifically grounded on his assumption that Technician Gallagher swabbed

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[16] The American Heritage Dictionary (Office Edition) (1995) defines "willing" as "1. done, accepted or given readily and without hesitation; voluntary, 2. disposed to accept or tolerate, 3. acting or ready to act promptly or gladly."

Lazaro's hand **at 9:00 a.m**. (TRT 1181-83,1200,1207). Mr. Rao testified that he reached his opinion because, since more and more particles fall off as time passes, the number of particles found on Lazaro's hands at 9:00 a.m. was significant given that the shooting occurred almost three and one-half hours earlier at 5:40 a.m. (TRT 1181-83).

Mr. Rao's opinion that Lazaro more than likely fired a gun as opposed to simply handled a gun that had been fired was obviously significant because it strongly suggested that Lazaro, and not Mr. Mendoza, shot Mr. Calderon. The State's theory was that particles were found on Lazaro's hands due to Lazaro's **handling** of the gun that was present at the scene but not fired and/or due to his post-shooting contact with Humberto, who had been shot by Mr. Calderon. The State's star witness, Humberto, had testified that Lazaro never got out of the car. Mr. Rao's opinion not only suggested that Mr. Mendoza did not shoot Mr. Calderon but, at the same time, discredited Humberto's trial testimony.

Knowing that Rao's was wrong on the timing of Lazaro's swabbing, on cross the State got Rao to admit that his opinion was "based on this time frame" (TRT 1208) and that, consequently, if he was wrong regarding the time Gallagher took the swabs, his entire opinion was invalid: See (TRT 1207).

The final blow to the jury's perception of the reliability of Rao's opinion came when the State called Technician Gallagher as a rebuttal witness. Technician

Gallagher confirmed that Rao's assumption upon which his opinion was based was wrong because Gallagher swabbed Lazaro's hands at 7:45 a.m., not 9:00 a.m. (TRT 1282-83).

Either trial counsel failed to review their own deposition of Technician Gallagher who, as the State pointed out during Gallagher's rebuttal testimony, unequivocally told trial counsel in his deposition that he took Lazaro's swab at 7:45 or 7:50 a.m. (TRT 1289-90), or they did not think it was important.[17] As the prosecutor strenuously and repeatedly pointed out at trial, trial counsel therefore should have known that Lazaro's swab was taken at 7:45 a.m., not 9:00 a.m. Obviously, neither counsel nor Mr. Rao considered or took this into account because Mr. Rao's predicated the entirety of his opinion on the incorrect assumption that Lazaro's swab was taken at 9:00 a.m. Further illustrating counsel's mistake as to the time, during an argument on an objection made when the prosecutor asked Mr. Rao about a "hypothetical" in which Lazaro's hands were swabbed at "approximately 7:30," trial counsel Mr. Suri objected specifically because that "was not the facts of the case" (TRT 1194). Counsel clearly objected because he assumed that Lazaro's hands were swabbed at 9:00 a.m. due to his

[17] Mr. Suri testified that he had overlooked the fact (PCR3 1686) and did not prepare Mr. Rao for cross examination on the subject. He also confirmed that he had not cross referenced Mr. Rao's deposition with that of Technician Gallagher (PCR3 1687). Mr. Wax testified that they "made a mistake" (PCR3 1774).

failure to investigate and prepare for this witness.

The State was easily able to undermine Rao's opinion that Lazaro more likely than not fired a gun as opposed to simply handled a gun that had been fired. In closing arguments, the prosecutor hammered home the point and argued that, because Rao assumed incorrectly that Lazaro's hands were swabbed at 9:00 a.m., his opinion was invalid (TRT 1302, 1341).

Ms Seff, the prosecutor, not only argued that Mr. Rao's opinion was invalid because he had the time wrong, but also argued that Mr. Mendoza's trial counsel **deliberately presented false evidence.** (TRT 1302-03, 1316, 1318, 1319). During closing arguments, Ms. Seff attacked the integrity of trial counsel:

> **They [k]new, Mr. Wax, in June of 1992**.[18] That was told to them by the technician when he took those tests and yet he proceeded to put on an expert witness who based an opinion on something that wasn't accurate. That it was nine o'clock. **He knew it wasn't nine o'clock all along.**
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> * * *
>
> And you know now that the time element was wrong and they know it was wrong and **they tried to get you to believe something different than they know to be the evidence in this case.**
>
> * * *
>
> **. . . they purposely put it on to mislead you because they knew the**

[18] Referring to the date that trial counsel took Technician Gallagher's deposition during which Gallagher told counsel that Lazaro's hands were swabbed at 7:45 a.m.

right time.

(TRT 1302-03, 1318-19, 1341) (emphasis added).

Trial counsel both testified that their strategy was to use Rao because he was a State witness which would enhance his credibility with the jury, and that because he had found gunpowder residue on both Cuellar brothers, it would be good for Mr. Mendoza's case (PCR3 1666).[19] However it is clear that this strategy decision was predicated on ignorance, which was itself the product of inadequate investigation. Both counsel testified that they never consulted with an independent gunshot residue expert (PCR3 1665, 1775). Had they done so, they would have determined that the timing discrepancy was not crucial to Rao's opinion, and would have been able to counter the State's devastating arguments in closing.

The declaration[20] of Celia Hartnett, an independent GSR expert who has reviewed Rao's work shows the extreme prejudice resulting from counsel's omissions. In pertinent part the declaration states

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[19] Counsel apparently did not consider the potential significant disadvantages of calling Rao, namely that as a police criminalist who had testified multiple times for the State, his loyalties would be inextricably tied to the State, and as such would work with the State in any way to undermine the defense case. In fact it appears that Ms. Seff met with Rao for a "pre trial" on February 2, 1994 two days before defense counsel called Rao as a witness. See PCR3 1156 It seems likely that this meeting at this late stage was to discuss Ms. Seff's cross examination of Rao.

[20] In California where Ms. Hartnett resides and works, the term "declaration" is used for the type of instrument referred to as an "affidavit" in Florida.

My name is Celia Hartnett.

1. I am the Chief Executive Officer and Lab Director at Forensic Analytical Sciences Inc., a full service independent laboratory specializing in the identification, analysis and interpretation of physical evidence. Forensic Analytical Sciences serves the civil and criminal justice communities throughout the United States from facilities located in the San Francisco Bay Area. Clients include district attorneys, public defenders, independent law firms, law enforcement agencies, private investigators and insurance claims investigators.

2. I have been in the forensic science field for over 35 years. I have been employed by Forensic Analytical since 2002. I have attached my curriculum vitae to this declaration as Appendix A.

3. On July 06, 2007, I was contacted by the Capital Collateral Regional Counsel and asked to review records and testimony transcripts, and to consult with counsel regarding the analysis and interpretation of gunshot residue evidence in the Marbel Mendoza case.

4. I subsequently received three sets of documents pertaining to the case which I reviewed. Included in these documents were copies of court opinions, transcripts of expert witness testimony (deposition, trial and post-conviction hearings), evidence packaging, crime lab reports with supporting analytical data and bench notes, crime scene and follow-up reports, property receipts, transcripts of testimony by detectives and medical examiners (deposition and trial), and closing arguments.

5. As a result of my review, and in the context of my education, training and experience in the field, I made the following observations and formed the following opinions in regards to the gunshot residue evidence in the Marbel Mendoza case:

6. The method used to collect the samples (swabbing with isopropyl alcohol carried in the field by officers) was not appropriate for the type of analysis that was subsequently employed (scanning electron microscopy with energy dispersive x-ray). This collection

and extraction method allows both for potential contamination and even more likely, for the loss of particles that may have been present.

7. There was a discrepancy between documents in the recorded time of the collection of the gunshot residue samples from Humberto and Lazaro Cuellar. This was considered an issue at trial. I formed the following opinions:

That the time of collection of samples from Lazaro Cuellar most likely occurred as recorded on the front of the evidence envelope: 3/17/92 7:45 am.

That the time of collection of samples from Humberto Cuellar most likely occurred as recorded on the front of the evidence envelope: 3/17/92 8:05 am.

That the time of collection recorded on the information sheet accompanying Lazaro Cuellar's kit (9 am) is most likely incorrect.

No specific time of collection is recorded on the information sheet accompanying Humberto Cuellar's kit.

The discrepancy demonstrates a lack of attention to accuracy.

8. The net effect of the time discrepancy on the interpretation of the gunshot residue evidence is insignificant. The principal significance of elapsed time is that the interpreter must consider any activity of the subject in the intervening time frame which would provide opportunity for either loss of evidence or potential for contamination. Theoretically, the longer the time frame, the more potential exists for alteration of the evidence. In consideration of the facts in this particular case, I am of the opinion that the time difference is not meaningful to the interpretation of the results.

9. The scientific process demands that the report be an accurate representation of the analytical data collected. The report issued by Mr. Rao did not accurately reflect the analytical data he developed. Mr. Rao's report states that the "examinations conducted revealed significant number of lead particles present on both the suspects." A review of his data (and his testimony) shows that in actual fact

particles comprised of lead, antimony and barium were found on the samples from the backs of Humberto Cuellar's hands, in addition to particles comprised of two of the three critical elements.

10. The analytical results show a significant number of particles containing lead with barium on the left web sample collected from Humberto Cuellar. The presence of barium in a particle of gunshot residue is typically associated with the primer as a source.

11. Furthermore, testimony must accurately reflect both the data and the lab report. Mr. Rao's testimony did not accurately portray the actual analytical findings in terms of the number and composition of the particles confirmed as being consistent with gunshot residue.

12. No record is found in the documentation pertaining to the morphology (shape) of the particles that were deemed to be gunshot residue. This is particularly critical in evaluating the particles on Lazaro Cuellar's hands because more specific particles were not found. Lead is fairly common in the environment; therefore particles containing lead must be evaluated for the molten or spherical form that is consistent with gunshot residue before they can be attributed to a potential source.

Also, in the absence of highly specific particles, all other lead-bearing particles in the same sample should be considered in evaluating the likelihood that lead-only particles are in fact from gunshot residue. For example, the presence of particles containing lead with tin might suggest that the individual has been exposed to an environmental source of lead that originates from an environmental source rather than gunshot residue.

13. Mr. Rao's testimony shows a limited understanding of the interpretation of gunshot residue evidence.

(PCR3 1165-1171).

The combined effects of counsel's failing to understand the significance to Rao of Rao's belief that the timing was so crucial to his conclusion, and the failure

to investigate Rao prior to putting him on the stand completely undermines confidence in the outcome of Mr. Mendoza's capital trial. As noted above and as Wiggins makes clear, the ABA Guidelines provide the reasonable professional norms for what constitutes adequate investigation in a capital case. Guideline 10.7 is clear that "Counsel at every stage have an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty" Guideline 10.7 A (2003) . Furthermore, the Commentary to this Guideline states that "With the assistance of appropriate experts, counsel should then aggressively reexamine the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." Commentary to Guideline 10.7 para. 4 (2003) . Here, trial counsel neither aggressively reexamined the State's evidence surrounding the gunshot residue swabs taken of Lazaro and Humberto at the hospital following the shooting nor provided Mr. Mendoza with competent expert assistance in violation of Ake v. Oklahoma. Effective counsel would have known the correct time and thereby avoided the State being able to completely discredit the entire defense.

Competent counsel and a competent expert would have established that "the net effect of the time discrepancy on the interpretation of the gunshot residue evidence is insignificant" (PCR3 1166). Additionally, counsel should have been aware "that the method used to collect the samples (swabbing with isopropyl

alcohol carried in the field by officers) was not appropriate for the type of analysis that was subsequently employed" (PCR3 1165). Because of this inaccuracy in collection, it is likely that substantially more particles would have been gathered from both Lazaro and Humberto, had the evidence collection been performed appropriately. Had counsel been aware of this fact, and the logical corollary that there would have been even more particles present than Rao had found, this would have made the case for Mr. Mendoza not being the shooter even more compelling, as well as further showing the time discrepancy as being insignificant.

Even more significant, and completely un-investigated by trial counsel is the fact that the types of particles swabbed from Lazaro and Humberto were qualitatively different. A review of Rao's data (and his testimony) "shows that in actual fact particles comprised of lead, antimony and barium were found on the samples from the backs of Humberto Cuellar's hands in addition to particles comprised of two of the three critical elements" (PCR3 1166). Those taken from Lazaro contain only lead. The fact that Lazaro had lead on his hands does not necessarily mean that he fired a gun, since the lead particles could have come from environmental sources. (PCR3 1166). Without further analysis of the morphology of the lead particles on Lazaro's hands, it is simply impossible to say whether or not Lazaro "more likely than not" fired a gun. By contrast, the fact that Humberto had not only lead, but also antimony and barium in his swabs is highly significant.

This is because, while the lead and antimony particles would have originated in the gunshot residue itself, “the presence of barium in a particle of gunshot residue is **typically associated with the primer as a source**” (PCR3 1166). This in turn suggests that **the particles on Humberto are more likely to have originated from Humberto having fired the gun**, rather than merely having been shot. Had trial counsel been aware of this crucial distinction, they would have been able to stick with their theory of the case as stated during opening statements that Humberto was the shooter. Thus there would have been no perceived necessity to change course midstream, with the resultant total loss of credibility with the jury. See Argument I B *supra*.

Furthermore, counsel’s failure to consult with obtain an independent GSR expert caused them to miss a valuable tool for further impeaching the State’s star witness Humberto Cuellar. If the jury had known that Humberto had gunshot **primer as well as residue on his hands** they would have believed that he was the shooter, and his credibility would have been shredded to tatters. Trial counsel would have established that Mr. Mendoza was not the shooter, maintained credibility with the jury and impeached the State’s star witness to the extent that no reasonable jury would have convicted Mr. Mendoza of first degree murder.

As noted, *supra*, in her closing argument to the jury, the prosecutor pointedly argued that the jury should disregard Mr. Rao’s opinion because he made

an error as to the time Lazaro's hands were swabbed. If trial counsel had investigated the basis of Rao's opinion, this scenario could have been avoided. If trial counsel had hired an independent expert, counsel could have shown that had the ID technician used appropriate collection techniques, there would have been an even stronger case to show that Mr. Mendoza was not the shooter. Had trial counsel hired a competent GSR expert, they could have shown with more certainty that Humberto was the likely shooter, and further impeached the State's star witness, Humberto.

The lower court did not specifically address this aspect of Mr. Mendoza's claim of ineffectiveness. The denial appears to be predicated on counsel's purported strategy of utilizing the State GSR examiner Rao. However the Court did not address the failure to investigate, and failed to consider the case law that is clear that strategy based on inadequate investigation is not defensible.[21] Counsel failed to competently present the exculpatory gunshot residue that existed by failing to investigate the basis of Rao's methodology and the parameters of his opinions. In light of all these errors and their effects on the outcome of the trial,

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[21]". . . it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable." Miller v. Francis, 269 F.3d 609, 615-16 (6th Cir. 2001) citing Strickland, 466 U.S. at 681 (1984).

Mr. Mendoza is entitled to a new trial.

E. Cumulative error

In analyzing the prejudice to Mr. Mendoza caused by trial counsel's errors, this Court must examine and assess the cumulative effect of all counsel's errors. See State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996) (cumulative effect of numerous error by counsel may undermine confidence in the outcome of the original trial); see also Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995). This Court's analysis of the prejudice to Mr. Mendoza must include an analysis of the prejudice caused not only by counsel's contradictory arguments to the jury, as discussed above, but also the combined effect of the prejudice caused by the additional errors discussed throughout the remainder of the instant appeal.

ARGUMENT II

MR. MENDOZA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY/ SENTENCING PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Trial counsel failed to investigate, discover and present mitigation evidence.

1. Introduction

Trial counsel was ineffective for failing to present significant available statutory and non-statutory mitigation to both the penalty phase jury and the sentencing judge. Trial counsel's failure in this regard rendered his death sentence

unreliable. The jury recommended the death penalty by a vote of 7-to-5. The judge found only two aggravating circumstances to justify the death sentence: (1) prior conviction for a violent felony; and (2) committed while engaged in the commission of a robbery (merged with pecuniary gain). See Mendoza, 700 So. 2d at 673. The trial court concluded that Mr. Mendoza failed to establish any mitigating factors, (TRT 1726-3, 1733, 1734; R 948-54). When this Court affirmed the death sentence, the Court specifically relied upon the trial court's rejection of these mitigating circumstances as a basis to conclude that the death penalty was not disproportionate. See Mendoza 700 So. 2d at, 678 Consequently, the established law of the case is that trial counsel completely failed to establish **any** mitigation, statutory or non-statutory. As was established at the evidentiary hearing, this occurred not because Mr. Mendoza does not have mitigating factors in his life history and background, but because counsel was ineffective in not investigating, discovering, and presenting this evidence to the sentencing jury and judge. As will be demonstrated, Mr. Mendoza is entitled to relief in the form of a new penalty phase.

2. Deficient performance

"To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. at 521. The Supreme Court further held that counsel

has a duty “to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Strickland, 466 U.S. at 668 (citation omitted). Mr. Mendoza has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at trial.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 529 U.S. 362, 415 (2000). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that ”In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith 539 U.S. 510, 527. Furthermore. “Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.” Id. at 2539, citing Strickland, 466 U.S. at 690-691.

Both the record of Mr. Mendoza's penalty phase and the evidence presented at his evidentiary hearing reveal trial counsel made a "less than complete investigation" and that his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation. As a result, counsel's performance was deficient, with

regard to both mental health evidence and other mitigation evidence.

At the penalty phase, trial counsel's case consisted of the testimony of Mr. Mendoza's mother, Nilia Mendoza, Dr. Jethro Toomer, a psychologist, the introduction of a childhood medical record from Cuba, and the testimony of the State's star witness Humberto Cuellar. Mrs. Mendoza testified in very limited and general terms about Mr. Mendoza's childhood health and the family's subsequent move from Cuba to Miami via the Peruvian tent city. Regarding drug use, Mrs. Mendoza testified that there were no indications that he had a drug problem. While she testified that she suspected that he smoked marijuana (TRT 1515-16, 1522-23) and saw him drunk on one occasion (TRT 1523-4), she also testified that she had no reason to believe that he was taking any other drugs, including cocaine (TRT 1522-23, 1527).

Clinical Psychologist Dr. Jethro Toomer evaluated Mr. Mendoza and testified at trial that, **based solely on what Marbel told him**, and his face to face evaluation, Mr. Mendoza suffered from deficits in reality testing as reflected in cognitive impairment and emotional ability (TRT 1583). He also saw evidence of brain damage but could not so conclude without further testing (TRT 1571, 1574, 1583). He noted that Marbel had a history of auditory and visual hallucinations and childhood psychiatric evaluations (TRT 1562-64). He also noted indications of poor impulse control, high anxiety, poor judgment, and poor self-esteem

(TRT 1570, 1574, 1580). Dr. Toomer did not obtain any information from sources other than Mr. Mendoza himself (TRT 1560-61, 1593). While he testified that Mr. Mendoza reported a history of very significant and frequent drug use (TRT 1576, 1662-3), Dr. Toomer was not provided nor did he obtain any information corroborating this fact (TRT 1560, 1593). Dr. Toomer did not talk to s Mr. Mendoza's parents or ex-wife, and did not look at any records other than jail records (TRT 1592). Furthermore, Dr. Toomer never testified regarding the effects of Mr. Mendoza's substance abuse on his mental health and functioning.

Counsel's basic approach to the penalty and sentencing phase investigation was fundamentally flawed. Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history. It clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the ABA Guidelines which provide that investigations into mitigating evidence "should comprise efforts to discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor". Wiggins, 539 U.S. at 524. As the Wiggins Court further explained, the applicable ABA standards state that "counsel should consider presenting are medical history, educational history, employment and training history, **family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.** Id.

(emphasis in original). Had trial counsel investigated Mr. Mendoza's social history, he would have discovered a wealth of information that would have both been compelling in its own right and have strengthened the testimony of his mental health expert Dr. Jethro Toomer.

Counsel from the start believed that the jury's determination of the facts surrounding the actual incident would be enough to persuade the jury to make a life recommendation. Relying on this belief, counsel failed to conduct a competent investigation into Mr. Mendoza's background and mental health. As a result, the trial court found that trial counsel failed to establish any mitigation whatsoever. Trial counsel Suri candidly admitted he did not pursue a social history of Mr. Mendoza because he didn't think they knew" enough to even go there to think about mitigation in those terms. We didn't have the experience[.] I had never done one. We didn't do that." (PCR3 1690).

Despite the fact that Mr. Mendoza was born and spent his early childhood in Cuba, trial counsel never sought funds to travel to Cuba to investigate his childhood. Despite the fact that Mr. Mendoza lived in squalid and violent conditions in the tent city refugee camp in Lima Peru, trial counsel never sought funds to travel to Peru to investigate this and never attempted to obtain records of the camp. Counsel testified that there was no strategic reason for this omission (PCR3 1693). Furthermore, as Mr. Suri admitted, such mitigation is powerful for a

jury, and said that if he “had really understood it at the time” he would definitely have put it on (PCR3 1695).

At the evidentiary hearing Mr. Mendoza presented the testimony of Beatriz Roman, a social worker based in Lima, Peru. Ms. Roman works for the United Nations High Commission on Refugees. (PCR3 2103). She has been responsible for assisting refugees who arrive in Peru, and has been in this position since 1973 (PCR3 2104). She was responsible for coordinating assistance for the 742 Cuban refugees who had come from the Peruvian Embassy in Havana. She described the camp where the refugees were placed with 150 tents in a park in Lima (PCR3 2105). She specifically remembered the Mendoza family, and although she had more dealings with Mr. Mendoza’s parents, she remembered that Marbel would have been about 13 or 14 years old at the time (PCR3 2107). Ms Roman described the hygiene facilities at the camp as being “very lacking” and “very bad” (PCR3 2107-2108). She recalled seeing the refugees lining up to use the facilities.[22] She described the way in which the refugees were fed. The food was prepared by a government agency and “it was the same food they would take to social places and the jails and the penal institutions” (PCR3 2112). There were fights over the food and some stabbings (PCR3 2114).

[22] This should be viewed in the context of the Lima climate, which Mrs. Roman described as being “cold, humid, no sun” for the majority of the year (PCR3 2104).

Ms. Roman testified that the UN High Commission bought a taxi for Mr. Mendoza Sr. to drive to earn a living. However in 1983 he sold the taxi and left the camp and she had no idea what became of him (PCR3 2117).[23]

Not only would evidence of Mr. Mendoza's social history been compelling in its own right to Mr. Mendoza's penalty phase jury, but it also would have bolstered the testimony of Dr. Toomer which was so savagely ripped apart by the prosecutor Ms. Seff for lack of corroborating factual support. There is more than a reasonable probability that, had this evidence been presented at trial, one of the seven jurors who voted for death, would have voted for life, virtually assuring that the trial court would have imposed a life sentence.

Dr. Toomer testified at the evidentiary hearing that he had not been provided with any kind of records other than jail records, despite the fact that provision of records is an integral component of a complete evaluation. As he explained, there are four components of a complete evaluation of which the face-to-face testing is but one part. In addition to the face-to-face meeting, there should be testing, review of collateral data, and speaking with individuals who knew the subject during the

[23] The testimony of Ms. Roman was further bolstered by the proffered testimony of Dr. Holly Ackerman. Dr. Ackerman, or someone of similar background, because of her extensive knowledge of Cuban history including the refugee crisis in which Mr. Mendoza was caught up, would have been invaluable to assist trial counsel in preparing for the penalty phase, regardless of whether she would have ultimately testified in front of the jury.

formative period. See PCR3 2162.

Dr. Toomer testified that prior to attempting to evaluate Mr. Mendoza he was provided with no collateral information (PCR3 2166), and that after his meetings with Mr. Mendoza he was not provided with any medical, psychological, or school records, no records from the Peruvian refugee camp, and no social history. He further explained that such records are important because of the need for corroboration of the face to face evaluation from multiple sources. Additionally, he was not provided access to any family members or friends of Mr. Mendoza. Dr. Toomer testified that his evaluation of Mr. Mendoza was provisional and incomplete (PCR3 2172). He stated that there was additional testing that should have been done. In particular, he testified that Mr. Mendoza's preliminary test results should have suggested the need for neuropsychological testing and neurological testing. (PCR3 2171).

In addition to the need for neuropsychological testing and a neurological evaluation, Dr. Toomer indicated that he had specific concerns about Mr. Mendoza's possible mental decompensation. This concerned him to the extent that he contacted the jail clinic and "informed them of my concern, with regard to what I considered to be a decompensating level of mental status function"

(PCR3 2168).[24] As Dr. Toomer later stated, this is significant because it is not something that he would automatically or routinely do. However the significance of the seriousness of this situation was apparently lost on trial counsel.

In addition to Dr. Toomer, trial counsel had an evaluation done by another clinical psychologist, Dr. Leonard Haber. Dr Haber had conducted an evaluation of Mr. Mendoza and in his report had indicated that Mr. Mendoza had "a history of psychiatric problems form childhood, his self reporting of substance abuse, past history of paranoid alienations, visual hallucinations, auditory hallucinations" See Defense Exhibit C. However, despite these indications of major mental illness, counsel did not request further experts to investigate Mr. Mendoza's mental illness. He did not request a neurologist or neuropsychologist to evaluate Mr. Mendoza's brain functioning. And while he did move for an addictionologist to further develop Mr. Mendoza's drug history that request was denied by the trial court. Instead counsel took the route of having Mr. Mendoza evaluated for competency.[25]

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[24] Dr. Toomer's report indicates that there appeared to be "some deterioration in the subject's overall mental status functioning as reflected by his increasingly depressed state, disjointed communication, responsiveness to internal stimuli, tearfulness and reports of auditory and visual hallucinations." See Defense Exhibit B.

[25] Mr. Wax admitted that at the time of Mr. Mendoza's trial he utilized the competency evaluation as a substitute for an *ex parte* evaluation to determine if mental health mitigation existed. Clearly this was a decision based on his inexperience of developing mitigation since now he is aware that a mitigation work up is "much more extensive" (PCR3 1781).

At the evidentiary hearing, Mr. Mendoza presented a wealth of evidence supporting mental health mitigation. This was evidence that was reasonably available to trial counsel but which, because trial counsel did not do a constitutionally adequate investigation, was never presented to Mr. Mendoza's sentencing jury. Trial counsel presented no evidence that Mr. Mendoza suffers from frontal lobe dysfunction.

Mr. Mendoza presented the testimony of behavioral neurologist Thomas Hyde, M.D., Ph.D., and neuropsychologist Ricardo Weinstein, Ph.D. Dr. Hyde testified that he asked about Mr. Mendoza's educational history, family history, early life in Cuba, the Peruvian Embassy incident, and the refugee camp in Peru (EH 6/18/08, p.12). Based on Mr. Mendoza's experiences, he formed the opinion that Mr. Mendoza should be evaluated by an expert in Post Traumatic Stress Disorder (PTSD). Dr. Hyde testified that Mr. Mendoza's experiences were "severely stressful experiences" which led him to suspect "things like Post Traumatic Stress Disorder", and that such reports should alert a clinician to "refer somebody, like this, for psychiatric evaluation, with a psychiatrist with particular experiences with Post Traumatic Stress Disorder. (PCR3 2342).[26]

[26] Dr. Hyde was also of the opinion that such a psychiatric evaluation should be conducted by a psychiatrist conversant in the individual's native tongue, in order to put the person at ease and get the most accurate history from them, which he considered particularly pertinent for individuals who may have PTSD. It is

As to Mr. Mendoza's brain function, Dr. Hyde testified that "he did have some behavioral problems, which is part of my neurological history, which made me a little bit suspicious of developmental brain problems, including poor organizational skills, poor problem solving abilities, some attentional problems." This in turn would lead to the probability of frontal lobe problems and attention problems in adulthood as well. (PCR3 2344).

Dr. Hyde was emphatic that Mr. Mendoza should be evaluated in Spanish, by a Spanish-speaking neuropsychologist, with emphasis on frontal and temporal lobe functioning (PCR3 2348).

Dr. Hyde's testimony reflected Dr. Toomer's opinion that further work needed to be done into Mr. Mendoza's brain functioning. At the evidentiary hearing Mr. Mendoza presented the testimony of Dr. Ricardo Weinstein, a Spanish-speaking neuropsychologist. Dr. Weinstein testified that "neuropsychology is the science that studies the relationship between the brain and behavior" (PCR3 1943). Dr. Weinstein testified that he had conducted evaluations of Mr. Mendoza on four separate occasions. The first time he administered testing to Mr. Mendoza was in 2000 (PCR3 1956). The testing and interviews were conducted in Spanish, which is both Dr. Weinstein's and Mr. Mendoza's native

noteworthy that, as Mr. Wax testified, neither Dr. Toomer nor Dr. Haber conducted their evaluations in Spanish, which is Mr. Mendoza's native language.

language. Dr. Weinstein testified that it is important to conduct such testing in the subject's native language "Because it is not only a matter of testing but a matter of observing, of being able to understand and communicate, and if you don't speak the language you're at a disadvantage to do that." (PCR3 1956).[27] From this initial administration he concluded that Mr. Mendoza had "overall brain dysfunction, and I was particularly concerned about his frontal lobe function" (PCR3 1958).

Frontal lobe dysfunction is significant in a case such as Mr. Mendoza's because the frontal lobe ". . . is the last part of the brain to develop, and that's both in terms of how the brain evolves and develops" . . . . children don't have fully-formed frontal lobes at birth. The frontal lobes do not finish developing until the age of 21 and 22. The frontal lobes are responsible for problem solving, spontaneity, memory, language, motivation, judgment, impulse [] control, social and sexual behavior. (PCR3 1951).

Dr. Weinstein next saw Mr. Mendoza in June 2002, at which time he performed tests of Mr. Mendoza's executive functioning. Dr. Weinstein testified that Mr. Mendoza did "very poorly" in the other tests of executive functioning, including the verbal fluency test, with a scale score of 3, which means "99 percent

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[27] Dr. Weinstein noted that the evaluation ordered by trial counsel after Mr. Mendoza's jury recommended the death penalty, and done by Dr. Eisenstein between the penalty phase and the Spencer hearing was compromised because it was done in English.

of the population do better than he does" In the category situation, he also has a scale score of 6 "which is close to two standard deviations below the mean. Similarly in the category fluency, he had a scaled score of 2, which again is two standard deviations." Dr. Weinstein also administered the color word interference test in which Mr. Mendoza obtained the scale score of 5 which is almost two standard deviations below the mean, which means that 95, 97 percent of population does better than he does. Similarly in the Tower test he achieved a score of 7 which is one standard deviation below the mean. (PCR3 1961).

Dr. Weinstein next saw Mr. Mendoza in February 2003. At that time he administered the Batteria (Revised) (a Spanish language academic achievement test which also measures IQ) in which he found Mr. Mendoza's IQ to be "in the neighborhood of 72, and that his academic skills are also limited but not as much" (PCR3 1985), and that this IQ is consistent with the test results obtained back in 2000.

Dr. Weinstein evaluated Mr. Mendoza again in 2007. At this time he repeated the malingering tests he had previously administered. He reported that Mr. Mendoza did "very well" and did not malinger (PCR 1966). Dr. Weinstein also administered further tests of executive functioning and intelligence (PCR3 1967). On the WAIS 3 he obtained a full scale IQ score of 76. When adjusted for the Flynn effect, that would be a full scale IQ score of 73, which is

consistent with the other intelligence testing that had been done. On the Wisconsin Card Sorting test which is one of the most widely used tests for frontal lobe functioning, all of Mr. Mendoza's scores were more than two standard deviations below the mean, significantly lower than two standard deviations below the mean. (PCR3 1987).

Dr. Weinstein noted that Mr. Mendoza's test results over the several administrations of tests to evaluate his functioning is consistent over the years (PCR3 1989). Dr. Weinstein's opinion as a result of his testing is that Mr. Mendoza's frontal lobe functioning has "significant impairment" (PCR3 1989), that is "both "developmental and acquired." In particular, Mr. Mendoza's experiences in Peru were "a very traumatic time in his life" at a "very important time in his life in terms of his brain development, which accounts in part for "his lack of adequate development, particularly in the frontal lobe" The emotional experiences, traumatic experiences, the conduct, constant fear, the constant hyper arousal of the brain, the danger that was present at all times maintain the brain in it's state of over excitement, and that causes brain damage dysfunction. (PCR3 1989-1990) As Dr. Weinstein reiterated, emotional trauma can very significantly affect brain development (PCR3 1971).

Mr. Mendoza's frontal lobe functioning affects his behavior because:

> The frontal lobe controls impulse control, judgment, the ability to foresee consequences of your own actions and behavior, the ability to

> plan and organize your life in a goal-directed way; in other words, being able to see what the long terms of your life will be, impact the behavior, impact the social behavior. I think I mentioned judgment.[28]

(PCR3 1972).

Dr. Weinstein testified that Mr. Mendoza's brain was "compromised and poorly developed" when he first arrived in the United States (PCR3 1973). The damage was further exacerbated by Mr. Mendoza's exposure to drugs during the ongoing developmental period. Dr. Weinstein stated that "Alcohol and cocaine and other stimulants literally kill cells in the brain" (PCR3 1973).

Trial counsel presented no evidence whatsoever during the penalty phase that Mr. Mendoza suffers from any mental illness or from post-traumatic stress disorder. Post-traumatic stress disorder is a recognized mental disorder that necessarily requires the presentation of expert testimony. Cf. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision pp.463-68

At the evidentiary hearing Mr. Mendoza presented the testimony of Dr. Eugenio Rothe, M.D., a psychiatrist who is a native Spanish speaker. In addition to his private clinical practice, Dr. Rothe has "specialized in mental health of immigrants and refugees" and has published extensively on the area

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[28] Dr. Weinstein pointed out that the impairment in Mr. Mendoza's ability to plan was not totally eliminated by his dysfunction and that "there's planning and planning, and there's no question that he has the ability to plan some actions." However, he lacks the ability to see the long term effects of his decisions (PCR3 1972).

(PCR3 1869). Dr. Rothe evaluated Mr. Mendoza through an interview conducted in Spanish in which he "collected background history on his childhood adolescence and adult life" and administered the post-traumatic stress reactive index. He also "observed several aspects of Mr. Mendoza's vocabulary semantics and asked him questions that were related to his mental status." (PCR3 1872).

Dr. Rothe echoed Dr. Hyde's opinion on the importance of conducting such an evaluation in the individual's native language because "there is a vast body of psychiatric literature supporting the expression of a person's thinking being more accurate in the person's native language." (PCR3 1873). Similarly, cultural aspects of the language of evaluation are important, (PCR3 1873). Dr. Rothe did not believe that Mr. Mendoza was malingering because Mr. Mendoza "made several observations, one of them being the history that he gave which coincided with [verifiable] historical events, and he also spoke extensively about his childhood in Cuba." Mr. Mendoza's recollections were consistent with Dr. Rothe's personal knowledge of Havana (PCR3 1874). Dr. Rothe described Mr. Mendoza's psychiatric symptoms as manifesting early in life. He said that Mr. Mendoza was a "high risk child" (PCR3 1875) that he was "hyperactive, that he was aggressive, impulsive, unable to moderate aggression, and that he had frequent temper tantrums and possibly a learning disability." Dr. Rothe testified that these problems appeared before Mr. Mendoza started school, and that additional symptoms

emerged when he entered school (PCR3 1876).

Mr. Mendoza described to Dr. Rothe his experiences on entering the Peruvian Embassy in Havana:

> He told me that there were several thousand people who were crowded into a very small space into the yard, that there was no plumbing, that the human waste began to pile up. People began to get sick. There were mobs jeering at them, throwing stones and fruit and everything at them, and there were mobs protesting the people that were in the yard of the embassy, including Mr. Mendoza and his family, calling them traitors. . .
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> * * *
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> . . . he went through some very uncertain times seeing the chaos that was taking place there, including the fact [that] Cuba's government did not provide enough food for the people who were in the Peruvian Embassy, and so there were fights over food and space and so on and so forth.

(PCR3 1880-81).

Mr. Mendoza also related the conditions of the refugee camp in Peru where he went after leaving the Peruvian Embassy. Dr Rothe testified that "they were eating food from a prison, and that the food was substandard" that the camps became "very overcrowded", that and many of the people who arrived subsequently were criminals. Mr. Mendoza related that he witnessed "knife fights, machete fights, gamble operations, and multiple acts of violence, sexual assaults, and so on, and that he constantly feared for his safety and so did his parents" (PCR3 1882).

Mr. Mendoza described one instance in which he had witnessed “a man with a white shirt soaked in blood running ahead of another man who was chasing him with a knife, and the man who was bleeding from the white shirt had been stabbed several times by the man who was [pursuing] him” This type of occurrence was very common in the camp (PCR3 1873). The tents were “very crowded” and hosted “4 to 5 families” to a tent (PCR3 1873).

As a result of his experiences in the Peruvian camp, Dr. Rothe is of the opinion that Mr. Mendoza’s entire life view was affected in that he came to indentify with the aggressors in life in order to avoid being the pursued.

When Mr. Mendoza came to the United States, he adopted an attitude where he identified with the aggressor (PCR3 1885). Mr. Mendoza “did poorly” in high school in the United States (PCR3 1885.), had difficulty learning English, and was introduced to alcohol, marijuana and cocaine (PCR3 1885-86).

Dr. Rothe opined that even in 2007, when he evaluated Mr. Mendoza, he suffered from post traumatic stress disorder, but that at the time he came to the United States he probably had a moderate to severe post traumatic stress disorder. (PCR3 1886).[29]

Dr. Rothe described the symptoms of post traumatic stress disorder as being

[29] Dr. Rothe explained that many of the symptoms of PTSD usually disappear within 5 years (PCR3 1887).

"characterized by three major groups of symptoms." These are "re-experiencing the events that will be in the form of nightmares, intrusive thoughts that the person cannot fend off or control, that erupts into the person's daily life", hyper arousal, which is associated with "levels of aggression, irritability." So that the person is "more easily provoked would have trouble sleeping and would overreact to provocative situations, in situations." The third group of symptoms is avoidance, which includes avoiding anything that remotely resembles or reminds the person of traumatic events. Dr. Rothe testified that Mr. Mendoza's social history represented "a very complex group of variables that interacted, that influenced some of his behavior" (PCR33 1888).

Dr. Rothe explained how post-traumatic stress disorder affected the domestic difficulties experienced by Marbel's family, as it is known to be associated with domestic violence, because of the hyper arousal and avoidance that are associated with the condition. He also explained that people with post-traumatic stress disorder have an increased propensity for drug use, again as a result of the hyper arousal and the need to "modulate this type of dysfunction of the central nervous system especially [by use of] drugs that are sedating like marijuana and alcohol. (PCR3 1881).

Dr. Rothe opined that Mr. Mendoza suffered from other psychiatric conditions, including depression, (PCR3 1882-83), attention deficit hyperactivity

disorder, poly-substance dependence (in remission at the time of his evaluation in 2007) psychosis not otherwise specified, and a possible learning disability

Dr. Rothe explained the effects of poly-substance dependence as being two fold. “One [effect] is tolerance which means that the person needs higher and higher doses of the drug to obtain the same effect, and the other effect that happens is dependence which means if the person does not have the drug, they start having withdrawals which are usually very uncomfortable.” The other effect is the need to prevent “the unpleasant effect of the withdrawal from that drug, and then they need higher and higher doses in order to obtain the pleasant effect of the drug” (PCR3 1884).

Dr. Rothe described the multiple effects of such drug use on Mr. Mendoza’s behavior which included “diminishing function of the frontal lobe where the capacity to inhibit and to apply common sense is located in the brain,” “an increase in the extended limbic system which is a part of the brain that has to do with instructional behavior”, increased impulsivity, compromised common sense, “and he would have been prone to engaging in more violent out-of-control behavior than somebody who was not using drugs” (PCR3 1885).

Dr. Rothe’s diagnoses of Mr. Mendoza were further corroborated by the opinion of Dr. Deborah Mash, a molecular and cellular neuropharmacologist who

met with Mr. Mendoza in 2007.[30, 31] Dr. Mash was retained to assess the severity of Mr. Mendoza's addition. Dr. Mash learned that Mr. Mendoza started using cannabis and alcohol in his teens and that he started to use cocaine at 18 or 19. (PCR3 2075).

Dr. Mash clarified that Mr. Mendoza's drug habit accelerated to the point that he was "at the point to where he would use as much drugs as he could possibly get his hands on" and "smoking marijuana on a daily basis an[d] alcohol to the point of intoxication. Sometimes, three to five times a week" (PCR3 2076). He would also:

> go four to five days on a heavy cocaine binge and then he would crash" She testified that he "would go without sleep for maybe three, four, five days using as much cocaine as he can then he would stop and crash. He described that he was irritable. Extremely depressed. Extremely paranoid.
>
> * * *
>
> **He did describe that he drank to the point of blackouts**.

(PCR3 2077) (emphasis added).

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[30] As noted *supra*, Mr. Wax testified that he attempted to hire an addictionologist but that his motion for funds was denied by Judge Postman. Through no fault of his own, he was rendered ineffective in this regard.

[31] In addition to conducting her structured interview of Mr. Mendoza, Dr. Mash met with Alex Suarez who testified on proffer as to his knowledge of the frequency and extent. of Mr. Mendoza's drug habit. However the lowers Court did not admit the testimony of either Mr. Suarez or of Dr. Mash as to her conversation with Alex Suarez.

Dr. Mash described the context of Mr. Mendoza's drug usage:

> . . . he used drugs almost always when he was lonely. Almost always when he was anxious or tense. Almost always, when the family was putting pressure on him and he was having a lot of pressure because he was not coping with his family life in any way, shape or form. That he would use the drugs when he had trouble sleeping. When he felt he was unable to express his feelings. So that type of pattern was suggestive to me of . . . self medication.

(PCR3 2080).

Dr. Mash described how Mr. Mendoza and his cohorts would smoke marijuana and crack cocaine together, which made them paranoid, and that this was when his life really took a turn." This in turn escalated his use of cocaine. (PCR3 2082).

Dr. Mash described the effects of marijuana, alcohol and cocaine on the brain: She noted that marijuana binds to a receptor that is lined to opiates which can lead to depressant effects or make people anxious. It tends to stay around a long time and has long term effects on the brain. Alcohol is also a central nervous system depressant and is toxic to the brain. Cocaine is a central nervous psychostimulant which is "one of the most addicting substances on the planet." Dr. Mash explained that the use of alcohol in conjunction with cocaine the liver makes a third substance called cocaethylene. "Which is the homolog in cocaine more potent than cocaine itself and a better reinforcer." According to Dr. Mash this combination addiction is "is [a] very powerful and very severe form of

codependency. People get even more hooked if we can imagine it. More hooked on this combination." (PCR3 2083-85).[32]

> Cocaine hijacks the brain. Cocaine fundamentally rewires the brain. The brain on cocaine is a different brain. Individuals who expose themselves to the drugs and drug combination with alcohol have a brain that is fundamentally different than before they got addicted to drugs and alcohol.

(PCR3 2087).

Dr. Mash opined that Mr. Mendoza's drug use and addiction caused Frontal lobe dysfunction, as evidenced by his perseveration. In her opinion his addiction was "very severe" (PCR3 2091).

Under Wiggins and its progeny, trial counsel clearly rendered deficient performance by failing to investigate Mr. Mendoza's social history. Trial counsel's performance fell short of the standard of reasonableness articulated by the Guidelines and adopted by the Wiggins court. This requirement is further explained by the commentary to the 2003 Guidelines.[33]

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[32] Dr. Mash testified that she was on the research team that discovered cocaethylene back in 1991. (PCR3 2087). Thus the existence of this subject and the scientific knowledge of its extreme toxicity was available to trial counsel had he been able to investigate it properly and present it to the jury.

[33] "Because the sentencer in a capital case may consider in mitigation anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase investigation requires extensive and generally unparalleled investigation into the personal and family history. In the case of the client, this begins with the moment of conception." Commentary to ABA Guideline 10.7 (2003).

The Commentary specifically states that counsel should investigate in detail the client' medical history, family history, educational history, military service, employment and training history, prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education of training and regarding clinical services). Trial Counsel's purported "strategy" to concentrate on the facts of the crime itself is no substitute for a constitutionally adequate investigation. Counsel's failure in this regard cannot be deemed reasonable strategy because counsel's belief that the jury would make a life recommendation based upon the facts of the shooting was not a reasonable basis to curtail their mitigation investigation. Counsel rendered constitutionally deficient performance at Mr. Mendoza's penalty phase.

3. Prejudice

In Mr. Mendoza's case, the prejudice is apparent. See Williams v. Taylor, 529 U.S. 362 (2000), in which the Supreme Court granted relief based on ineffective assistance of counsel because ". . . the graphic description of [Mr. Mendoza's] childhood . . . might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 529 U.S. 362 at 398.

A proper prejudice analysis focuses on the impact the unpresented mitigation, along with that presented at the penalty phase, might have had on **the jury** hearing the case. See Argument IC *supra*, discussing the prejudice in the

context of a Brady violation).

At the closing of Mr. Mendoza's penalty phase, the prosecutor unequivocally argued to the jury at trial that **because** Marbel's self-report of mental illness and substance abuse was a fabrication concocted by Mr. Mendoza in an effort to avoid a death sentence, Dr. Toomer's opinions were not reliable and invalid. As noted, the trial court agreed with the prosecutor's argument and concluded in its sentencing order "that there was no credible evidence of the mitigating factor of Mr. Mendoza's drug use and dependency other than the self-serving statements by the defendant. . ." (R 939). However, had trial counsel conducted a competent investigation and presented **at trial** the evidence presented by post-conviction counsel at the evidentiary hearing, the jury and the trial judge would have **not** rejected the mental health mitigation and, consequently, there is more than a reasonable probability that the outcome of the penalty phase would have been different. See Strickland; Wiggins.

Trial counsel relied on Dr. Toomer's testimony in closing arguments to try and convince the jury that life in prison was the proper sentence (TRT 1669–75). However, the State vigorously attacked the reliability of Dr. Toomer's opinions and argued that any mental health mitigation argued by Mr. Mendoza was simply **a lie concocted by Mr. Mendoza in order to avoid the death penalty**. She characterized this as an "excuse" and went further in suggesting that Dr. Toomer is

“not professional” and that his opinion was “garbage”. (TRT 1653-61)

The trial court agreed with the State’s argument and concluded "**The defendant has failed to establish the existence of any statutory or non-statutory mitigating factors**" (TRT 1735). Because Dr. Toomer’s opinion was based on nothing but Marbel’s own self-reporting, the State convinced both the jury and the sentencing judge to reject Dr. Toomer’s opinion as constituting any mitigation. Obviously, the jury and the judge concluded that Mr. Mendoza’s accounts of his mental health history and substance abuse provided to Dr. Toomer were false.

The prejudice to Mr. Mendoza is clear: The jury recommended death by a mere 7-to-5 margin. Mr. Mendoza missed a life recommendation by a single vote. Furthermore, on direct appeal, this Court specifically relied upon the trial court's rejection of these mitigating circumstances as a basis to conclude that the death penalty was not disproportionate. See Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997). Given the State's argument that Mr. Mendoza's asserted mitigation evidence should not be believed (because "it's garbage") and the trial court's complete rejection of all mitigation related to Mr. Mendoza's background and drug abuse, trial counsel's failure to present the available evidence that would have supported these mitigating circumstances, as well as the resulting denial of Mr. Mendoza’s constitutional right to competent mental health assistance,

prejudiced Mr. Mendoza.

The lower court denied Mr. Mendoza's claim on the grounds that it was cumulative with that which was presented at trial. (PCR3 1470) The lower court did not address the issues which led to the prosecutor attacking Dr. Toomer's testimony as "garbage" or address the qualitative differences between the testimony adduced at the evidentiary hearing and the trial.

This Court should re-visit these findings in light of the Eleventh Circuit's decision in Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008), which bears marked similarities to the instant cause. Williams concerns an Alabama death row inmate, who, like Mr. Mendoza, did not receive a unanimous death recommendation from the jury at sentencing.[34] The evidence at the penalty phase consisted of only one witness: the defendant's mother. During her testimony, she testified in some detail about many beatings that Williams had received at the hands of his father, that her husband was drinking heavily and using marijuana at the time of the physical abuse, and that she was also beaten by her husband in her son's presence. She concluded her testimony by reporting that "her husband was presently incarcerated for molesting and raping the couple's mentally retarded daughter." Id. at 1330. At a subsequent sentencing hearing neither trial counsel nor the state presented any

[34] In fact, Williams is a jury override case where although the jury recommended that he be sentenced to life imprisonment without parole by a vote of 9-3, the lower court sentenced him to death. Id. at 1328.

additional evidence, relying only on a PSI. In sentencing Williams to death, the trial court found only one aggravator: that the murder was committed during the course of a robbery. The trial court found two statutory mitigating circumstances: lack of prior criminal record and age at the time of the offense and one non-statutory mitigating circumstance: that Defendant's father was violent and abusive, but concluded that "it . . . would strain credulity to find that Defendant's background was one of total deprivation." Id.

At a post-conviction evidentiary hearing Williams' mother again testified in addition to three family witnesses who had not testified at trial. Williams also presented testimony of a psychiatrist who reported the results of an extensive investigation into the defendant's background and psychological history. *Id.* 1331. This additional testimony was far more detailed and revealing than what had been presented at the penalty phase. The new family member testimony provided accounts that implicated Williams' mother as both an abuser and absentee mother, that indicated a family history of incest, and that provided accounts of the father's use of weapons as an element of child abuse. The psychiatrist "conducted extensive interviews with Williams and with fourteen other individuals who knew Williams at various points in his life. In addition, he reviewed a variety of documents, including Williams' educational, employment and medical records; police reports compiled after his arrest; and the psychological evaluation reports

prepared prior to trial." Id. 1333. He concluded that Williams experienced "an extreme brutalizing exposure to trauma." Id. He also discussed Williams' history of clinical depression as documented in his Job Corps records. Id. 1334.

The Alabama courts found that the extensive family history presented through the witnesses at the evidentiary hearing had little mitigation value. The ultimate state court holding was that there was no reasonable probability that the presentation of the additional evidence would have resulted in a sentence other than death. Id. at 1335.

The Eleventh Circuit held that Williams' circumstances were governed by the principles of Strickland v. Washington, 466 U.S. 668 (1984) and Wiggins v. Smith, 539 U.S. 510 (2003)_. Trial counsel failed to broaden the scope of their mitigation investigation beyond three basic sources: (a) the work of defense psychologist Dr. Rosen, who had prepared a report sans social history that stated that Williams had an IQ of 83, exhibited signs of a personality disorder and depression and was a suicide risk; (b) a PSI which noted that the defendant's father was an alcoholic abuser and that the defendant had had at least four prior psychological contacts; and (c) an interview with the defendant's mother. Id. 1339. The Court concluded that trial counsel's failure to broaden the scope of the investigation beyond these three sources was unreasonable under the 1989 and 1990 ABA Guidelines and that failure resulted in the presentation of an incomplete

and misleading story of Williams' life history to the finders of fact. Id. 1340. In finding prejudice, the Eleventh Circuit held that the mitigation evidence that trial counsel failed to discover or present "paints a vastly different picture of his background" than what was presented at the penalty phase. *Id.* 1342. The same is true in Petitioner's case. See also Gray v. Branker, 529 F.3d 220, 232 (4th Cir. 2008) ("There is no indication that either [trial counsel] understood that expert mental health evidence could be critical to the jury's decision on sentencing. There is no indication that either understood his duty, in light of the circumstances in Gray's case, to make a thorough investigation into Gray's mental health and to consider introducing expert evidence on that subject.). Reversal is warranted.

B. Trial counsel opened the door to allow the State to present evidence of Mr. Mendoza's pending charges for robbery with a firearm.

Trial counsel was ineffective for "opening the door" during his direct examination of defense expert Dr. Toomer to allow the State to cross-examine Dr. Toomer, and thereafter comment during closing penalty phase arguments, as to Toomer's knowledge of Mr. Mendoza's involvement in other robberies. See Mendoza v. State, 700 So. 2d 670, 675-77 (Fla. 1997). As a result of trial counsel's conduct, the State was able to inform the jury that Mr. Mendoza had allegedly committed "other robberies . . . using a firearm" **in addition** to the single robbery for which Mr. Mendoza had been previously convicted at the time of his trial in the

instant case (the "Street" robbery) and which was presented to the jury in the form of a prior conviction and testimony from the victim in that case, Mr. Street.

ABA Guideline 10.11 G is unequivocal that "In determining what presentation to make concerning penalty, **counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence.**" ABA Guideline 10.11 G. (2003) . Had counsel thought through its presentation of Dr. Toomer, this would never have been allowed to happen. Counsel's error prejudiced Mr. Mendoza, especially when considered in conjunction with counsel's other instances of ineffective assistance in the penalty phase and in light of the fact that this Court held on direct appeal that the trial court erred in overruling counsel's objection to the State's questioning Toomer and comment by the prosecutor during closing argument about Dr. Toomer's knowledge of **pending trials** in the other robberies. Given the 7-5 vote in favor of death and the other penalty phase errors there is more than a reasonable probability that the outcome would have been different absent counsel's mistake.

C. Trial counsel was ineffective for calling Humberto Cuellar as a witness in the Penalty Phase

Trial counsel was ineffective for calling Humberto Cuellar as a witness in the penalty phase. Counsel's direct examination of Humberto did nothing but needlessly prop-up the credibility of Humberto and his version of events that the

intent was to commit a robbery, and further diminish the credibility of Mr. Mendoza and his counsel.

Counsel's only purpose for calling Humberto was to have him tell the jury that they never intended to kill Mr. Calderon. However the State had already conceded that the premeditation theory of the case was off the table, and the conviction was purely for felony murder. The circumstances counsel sought to establish in the guilt-innocence phase were that this was not an attempted robbery and that Mr. Mendoza was not the shooter. Counsel's decision to elicit testimony from Humberto that it **was** a robbery violated the principle of the need to have a consistent theory of the case.[35] See Argument I *supra*. Additionally, counsel failed to limit his direct examination to the evidence sought - that they did not intend to kill the victim. Instead, began his questioning with asking, "[W]hen you and your brother and Marbel Mendoza went to Conrado Calderon's home, **what was your intention**?" This opened the door for Humberto to tell the jury again that their purpose was to rob the victim. Counsel's conduct in this matter was clearly ineffective for each of these reasons.

D. Conclusion

In Mr. Mendoza's case, "counsel's error[s] had a pervasive effect, altering

[35] Counsel could easily have asked Humberto during cross-examination in the guilt-innocence phase whether they intended to kill Mr. Calderon.

the entire evidentiary picture at [the penalty phase]." Coss v. Lackwanna County District Attorney, 204 F. 3d 453, 463 (3d Cir. 2000). That the triers of fact received a wholly inadequate portrayal of Mr. Mendoza's life is established by a comparison of the trial court's sentencing order with what is now known. When postconviction counsel is able to demonstrate through expert testimony "that it is likely that a jury would have been persuaded to recommend a penalty other than death," this Court should bear in mind that "it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive." See Coney v. State, 845 So. 2d 120, 131-132 (Fla. 2003). Had the jury in Mr. Mendoza's case "been confronted with th[e] considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." Wiggins v. Smith, 539 U.S. 510, 536 (2003).

This Court has determined that capital defendants received ineffective assistance of counsel despite the presentation of some mitigation at the time of trial, particularly when the trial courts in those cases found no mitigation to exist, as is the case here. See, e.g., State v. Lara, 581 So. 2d 1288 (Fla. 1991). The evidence presented at Mr. Mendoza's hearing is identical to that which established prejudice in these cases, and Mr. Mendoza is similarly entitled to relief. This Court should grant Mr. Mendoza a new penalty phase.

ARGUMENT III

MR. MENDOZA WAS DENIED A FULL AND FAIR HEARING

A. Judge Tunis improperly failed to disqualify herself

During the evidentiary hearing Mr. Mendoza filed a Motion to disqualify Judge Tunis. See PCR 31077-1082. Judge Tunis denied the motion on June 27, 2008 (PCR3 at 1085). This was error.

One of the issues at the hearing was whether trial counsel for Mr. Mendoza was ineffective for failing to investigate the gunshot residue (GSR) evidence through consulting with an independent GSR expert. This was necessary to determine whether or not to rely on the GSR work performed by Miami-Dade criminalist Rao before deciding to utilize him as a defense witness. See Argument I *supra*. Counsel for Mr. Mendoza elicited the testimony of expert Celia Hartnett as part of its case to prove the prejudice prong of the Strickland test to show ineffective assistance. During Ms. Hartnett's testimony the State made several objections to her testimony and the lower court enquired of counsel for Mr. Mendoza what the purpose of Ms. Hartnett's testimony was. The Court then asserted that trial counsel had made a "strategic decision" to call Rao and that such strategy was reasonable. This was clearly a predetermination of the issue before the hearing was concluded and arguments made. As a result, Mr. Mendoza had a reasonable fear that he would not receive a fair hearing before the lower court

because of the bias and apparent bias against him by the court. This is especially pertinent given the other remarks made by the lower court that suggest predetermination of the issues at bar. See PCR31078-1079. Pursuant to Fla. Code Jud. Conduct Canon 3E (1)a, and Fla. R. Jud. Admin. 2.330 (d) (1), Judge Tunis's denial of Mr. Mendoza's motion constitutes error.

In capital cases, judicial scrutiny must be more stringent than in non-capital cases the impartiality of the judiciary is particularly important in which the defendant's "life is at stake and in which the circuit judge's sentencing decision is so important." Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). In Livingston and Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), this Court concluded that the failure of the trial judge to disqualify himself was error even in post-conviction proceedings The same considerations apply equally in the instant cause.

B. The lower court improperly excluded the testimony of certain witnesses

1. Steven Potolsky Esq.

Mr. Potolsky is an attorney who has specialized in capital defense since approximately 1987-90. See PCR3 1144. He has been consulted on 5-6 occasions in connection with the review of trial counsel's performance during post conviction proceedings in which a claim of ineffective assistance of counsel has been raised. He has testified twice in such proceedings in Miami-Dade County (PCR3 1145). In State v. Riechmann, 777 So. 2d 342 (Fla. 2000), Mr. Potolsky's expert testimony

as to the community standards relating to capital defense work were explicitly relied on by this Court. See Riechmann, 777 So. 2d at 348. The type of testimony elicited in Riechmann is similar to that which would have been adduced at the evidentiary hearing, had Mr. Potolsky been allowed to testify. Mr. Potolsky was called to the stand and subjected to "voir dire"' by the prosecutor. Subsequently on the State's motion, the lower court excluded his testimony. However as Mr. Potolsky noted in his subsequently executed affidavit, the "voir dire" by Ms Seff was totally unrelated to almost all of [the areas he had reviewed and was prepared to testify about] and only marginally related to the remaining areas" PCR3 1147.[36] Had Mr. Potolsky been allowed to testify he would have been able to testify, *inter alia* regarding trial counsel's actions regarding the GSR on Lazaro and Humberto Cuellar, the inconsistent and mutually exclusive defense theories offered by trial counsel, the failure to call Lazaro Cuellar, the failure to investigate mitigation, the "opening the door" to inadmissible and prejudicial evidence in penalty phase, together with counsel's lack of meaningful experience and training and the failure to consult with more experienced counsel. Mr. Potolsky would have testified that in these areas, counsel's performance fell short of the ABA Guidelines, which represented the prevailing standards of representation in Miami-

[36] Apparently confident in her ability to exclude Mr. Potolsky's testimony, Ms. Seff did not ask to depose Mr. Potolsky prior to the hearing.

Dade County in 1994 during the pendency of Mr. Mendoza's trial. This type of testimony is relevant, permissible and appropriate. It was error to exclude it.

2. Holly Ackerman, Ph. D.

The State likewise attempted to exclude the testimony of Holly Ackerman, Ph.D. While Dr. Ackerman was allowed limited testimony, the State objected to most of her testimony, and the lower court ruled in favor of the State. Holly Ackerman has a Ph.D. in International Relations. She is an expert on late twentieth century Cuban history and sociology. She has specialized in the study of the various refugee migrations out of Cuba during the 1980s and 1990s.[37] She has published extensively in this area and has been commissioned by the United Nations High Commission on refugees to author papers on this subject.

The purpose for Dr. Ackerman's testimony below was to show that the experiences of Mr. Mendoza and his family, first in the Peruvian Embassy siege in Havana in 1980, and second in the refugee camp in Lima for the ensuing two years was consistent with established historical fact and with the experiences of other

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[37] The lower Court characterized Dr. Ackerman as not being qualified to testify as an expert at the time of Mr. Mendoza's trial. This is incorrect. First of all, the issue is not whether counsel should have hired Dr. Ackerman to testify, but whether or not they should have utilized someone with her skills in their investigation. Second, there is nothing in Florida law that requires an expert witness to have a graduate degree or any other kind of degree. Dr. Ackerman was well versed in this area in 1994 when Mr. Mendoza's trial took place.

refugees who had been interviewed by Dr. Ackerman.[38] This information would have been available to trial counsel, had they chosen to investigate it, in order to further their understanding of Mr. Mendoza's early life, and to help the jury understand the traumatic experiences he underwent during his teenage years.

As the Wiggins Court explained, the applicable ABA standards state that "[A]mong the topics counsel should consider presenting are . . . **religious and cultural influences**." See ABA Guideline 11.8.6. (1989) (emphasis added).

The 1989 Guidelines specifically state that counsel should consider "expert witnesses to provide medical, psychological **sociological or other explanations** for the offense." ABA Guideline 11.8.3.[39] Dr. Ackerman was prepared to testify precisely as to the sociological, cultural and other aspects of these historical incidents to the court to show what could, would and should have been presented to Mr. Mendoza's penalty phase jury.

Furthermore, the State objected to the testimony of Dr. Ackerman because it claims it would amount to hearsay. This argument again is simply false. As Section 90.704 of the Florida Evidence Code states, facts reasonably relied on by experts in

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[38] The testimony that Dr. Ackerman would have given is summarized in her affidavit. See PCR3 1138-1143.

[39] Furthermore, the 2003 Guidelines state that counsel should consider "Expert and lay witnesses . . . medical psychological, sociological cultural or other insights into the client's mental and/or emotional state and life history."

the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

Dr. Ackerman has a vast underlying knowledge of this particular historical incident which she has analyzed, cross checked and compared with her interview with Mr. Mendoza in order to form an opinion as to the consistency of Mr. Mendoza's experience with historical fact. This is not an attempt to get in hearsay through an expert witness as the State pronounces. Again, taken to its logical conclusion, the state's argument would preclude any mental health expert from relying on interviews and testing conducted on a criminal defendant because it would constitute hearsay. The situation is no different with a cultural, sociological or historical expert. Dr. Ackerman's knowledge of these events is predicated upon her oral histories, research, review of publications and other sources all reasonably relied upon by specialists in this field.

Furthermore, Dr. Ackerman's testimony relates purely to Mr. Mendoza's penalty phase claims. Even if Dr. Ackerman's expert opinion were considered hearsay, hearsay is admissible during the penalty phase. Fla. Stat. §921.141 (1) is clear that in matters relating to the penalty phase, any such evidence may be received **regardless of its admissibility under the exclusionary rules of evidence**. The State had ample opportunity to rebut this evidence through rigorous cross examination of Dr. Ackerman. It could have consulted its own expert in the

field to counter her testimony, but chose not to.

The use of cultural experts is well established in Florida law. In the case of Armstrong v. State, 802 So. 2d 705 (Fla. 2003), Justice Anstead wrote a special concurrence noting with approval the development of mitigation by post conviction counsel concerning Mr. Armstrong's experiences in Jamaica. This mitigation was predicated in large part on the opinion of an expert in Caribbean and Jamaican history.

3. Odalys Rojas

Part of Mr. Mendoza's claim of ineffective assistance of counsel at penalty phase related to the failure to investigate and present mitigating evidence. Mr. Mendoza planned to elicit testimony from Ms. Rojas to demonstrate that trial counsel failed to investigate available mitigating evidence, and failed even to conduct a sufficient preliminary investigation to support a reasonable decision not to investigate further. Ms. Rojas would have testified that she spoke to family members, friends, and teachers who were available at the time of Mr. Mendoza's trial and would have been willing to testify had trial counsel contacted them.[40]

The State objected on the ground that this testimony constituted inadmissible hearsay. However this was not the case. While Ms. Rojas would have related what

[40] A summary of the matters that Ms. Rojas would have testified to is set forth in her affidavit. See PCR3 1124-1134

these individuals told her during her conversations with them, Mr. Mendoza was not offering these out of court statements for the truth of the matter asserted therein, but to demonstrate their easy availability to trial counsel. Hence, any such statements recounted do not constitute hearsay.[41] Her testimony was improperly excluded.

4. Alexander Suarez

The State moved to exclude the testimony of Alexander Suarez because of his refusal to answer certain questions in deposition because he asserted his 5th amendment privilege against questions about his prior criminal activities. The State complained that it could not effectively cross examine Mr. Suarez if he failed to answer such questions. That is not accurate. The credibility of a witness may be attacked by evidence that the witness has been convicted of a crime if the crime was punishable by . . . imprisonment in excess of 1 year. Florida Evidence Code §90.610 (1). It is not proper for the underlying facts of the nature of these felonies to be inquired into on cross-examination. See Rodriguez v. State, 761 So. 2d 381 (Fla. 2d DCA 2000). The simple fact that Mr. Suarez was currently incarcerated on a number of felonies and is serving a 40 year prison sentence, grants the State more

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[41] Additionally, Ms. Rojas would have testified that she is now employed by the ACLU to conduct trainings and consultation with lawyers around the country in the area of mitigation investigation. Her expertise in this field will allow her to opine on the availability of mitigation witnesses and information pertaining to Mr. Mendoza's case at the time of his trial.

than enough opportunity to impeach Mr. Suarez on cross-examination.

Mr. Suarez would have testified as to Mr. Mendoza's extensive drug use.[42] Additionally, Mr. Suarez would have testified to the circumstances surrounding his statement to the police prior to the trial. Since the burden of proof is lower in proving mitigation, it is proper for Mr. Suarez to testify while still asserting his right against self-incrimination as to the underlying facts of his previous convictions.

Courts have already established that striking the entire testimony of a witness should be a last resort, as in if it appears the witness will claim the privilege as to essentially all questions. Gamez v. State, 643 So. 2d 1105, 1106 (Fla. 4th DCA 1994), see also Sule v. State, 968 So. 2d 99 (2007). Mr. Suarez asserted his 5th Amendment privilege in response to certain questions inquiring into the underlying facts of his convictions and other questions that go beyond the scope of direct. He has not asserted the privilege during questions that are material to the purpose of his testimony.

Excluding the testimony of a witness who asserts the 5th Amendment is proper "when cross-examination on material issues raised on direct examination is curtailed because of a witness's valid claim of privilege" Sule v. State, 986 So. 2d 99, 105 (2007) citing Combs v. Commonwealth, 74 S.W.3d 738 (K.Y. 2002). The

[42] Mr. Suarez's testimony was proffered. See PCR31843-1853

Sule court goes further by stating "any action by the court may be inappropriate when a witness invokes the [5th] amendment privilege to avoid cross-examination on purely collateral matters". *Id.* at 105-106. Therefore, since Mr. Suarez's assertion of his 5th Amendment privilege would not have hindered the state's ability to properly cross-examine him, his testimony should not have been excluded.

C. The lower Court erred when it refused to admit items into evidence

1. Evidence relating to expert witnesses

a. QEEG tests

Counsel for Mr. Mendoza called expert witness Ricardo Weinstein, Ph.D. in support of his claim that Mr. Mendoza was afforded constitutionally ineffective assistance at his penalty phase. As part of his neuropsychological evaluation of Mr. Mendoza, Dr. Weinstein performed a Quantitative Electroencephalogram (QEEG). On November 15th 2007, the state filed a Motion to exclude Testimony regarding the QEEG (PCR3 258-273). Counsel for Mr. Mendoza responded on January 31, 2008.9 (PCR3 388-392). Counsel pointed out that the QEEG is simply a refinement of the EEG, which has long been accepted by Florida courts. (PCR3 390). Mr. Mendoza further pointed out that even though the QEEG should be admitted, the correct remedy for evaluating scientific evidence that may not be acceptable is to hold a Frye hearing. However the lower court simply excluded the

testimony without allowing any evidence to be taken on the matter. PCR3 1820-1828). This was error.

b. Materials supplied to expert witnesses

During the evidentiary hearing Mr. Mendoza sought to introduce materials supplied to expert witness Ricardo Weinstein and other expert witnesses through the testimony of Dr. Weinstein. These included background materials marked as defense exhibit (Supp PCR3 392-2123), and videotaped interviews of individuals Angela Gonzales, Inez Reyes and Gonzalo Reyes in Peru.[43] The State objected to the admission of these exhibits on the grounds that they constituted inadmissible hearsay. The court did not admit these exhibits. This was error. Such materials are reasonably relied on by mental health experts in penalty phase and post conviction proceedings. Furthermore since the evidence relates to a penalty phase proceeding and the post conviction evaluation of the adequacy of such proceeding, the hearsay rules are relaxed. See Argument III B. 2. *supra*.

2. Evidence from the trial attorney's files

During the direct examination of the trial attorneys Suri and Wax, Mr. Mendoza sought to introduce a number if documents into evidence in support of his claim that trial counsel were ineffective during Mr. Mendoza's capital trial

[43] Certified translations of these interviews were filed in the court file on April 24, 2008 (PCR3 479-513).

and penalty phase. These documents included inter alia various depositions and trial counsel's bills. The State objected on the grounds that these documents constituted inadmissible hearsay, and the lower court upheld the State's objection. This was error. The depositions were not being introduced for the truth of the content but to show that counsel was aware of the information contained therein. This is not within the scope of the hearsay rule. This Court has condoned the admission of depositions to show what trial counsel was aware of in post conviction evidentiary hearings. See e.g. Evans v. State, 995 So. 2d 933 (Fla. 2008). The hearing was not full and fair.

CONCLUSION

Mr. Mendoza respectfully requests this Court to vacate his convictions and grant him a new trial. But for trial counsel's ineffective assistance during the guilt-innocence phase of his capital trial, there is a reasonable probability that the jury would have found Mr. Mendoza not guilty of first degree felony murder.

Additionally, Mr. Mendoza is entitled to a new penalty phase. But for counsel's ineffectiveness, and in light of the jury's 7-to-5 vote and the trial court's conclusion that counsel failed to establish **any** mitigation whatsoever, there is a reasonable probability that the outcome of the penalty phase would have been different.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on November 13th, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210 (a) (2) of the Florida Rules of Appellate Procedure.

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