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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-522

PABLO IBAR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT, 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

AMENDED REPLY BRIEF OF APPELLANT PABLO IBAR

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I. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR HIS:

A. Failure to Procure a Facial Identification Expert. IB at 41-60.

The record lacks competent, substantial evidence that the defense "consulted" with Falsetti. This finding is vital to the trial court's further (unsupported) conclusion that Morgan made a "tactical" decision not to present such an expert. If Morgan (personally or through Brush) did not consult with Falsetti (*i.e.*, provide the video imagery, pay for review, obtain an assessment of the video imagery, etc.), he could not have made a tactical decision not to present Falsetti's testimony at trial. *See, e.g.*, ***Wiggins v. Smith***, 539 U.S. 510, 521 (2003) (" . . . strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unreasonable"); ***Coleman v. State***, 64 So.3d 1210, 1217-23 (Fla. 2011) (finding counsel ineffective for failure to conduct reasonable investigation).

The state largely ignores the detailed argument Ibar made in his initial brief on this point. IB at 47-50. The most salient, unrebutted evidence is that Morgan never paid Falsetti, never sent him materials, and never spoke with him, (PC14. 2229, 2241, 2287; PC15. 2333);[1] Falsetti never received or reviewed materials,

[1] The legend of abbreviations for the record is in the Initial Brief (IB) at pg. 4, n. 1.

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consulted, nor rendered any opinion regarding the Ibar case for Morgan or Brush, (PC14. 2192-93, 2197-98)[2]; and Brush's only contact with Falsetti was a single, twelve minute telephone call. (PC7. 1111-28, 1117).[3] There is no evidence that Brush "moved for the production of additional photographic evidence for her expert." AB at 16, 31, 41; IB at 48. The order "*authorizing*" fee payment for Falsetti hardly establishes Morgan "obtained funds," AB at 41, or Falsetti was "*secured* for the defense . . . ." AB at 31. While *securing authorization for fees* and listing an expert as a *potential* witness may be the acts of a lawyer who contemplates the *possibility* of consulting with an expert, the failure to provide the expert materials to

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[2] In an effort to weaken Falsetti's testimony, the state suggests it was based on his "lack of memory of 'consulting' with the defense." AB at 17, 32. To clarify, Falsetti testified that he *never* consulted with Morgan *or* Brush about the Ibar case. (PC14. 2193, 2197-98). The absence of any record of consultation among his others from the year 2000 corroborated his unqualified testimony. Beyond this, Falsetti did not recall ever having been contacted by Morgan or Brush. (PC14. 2192-93). He explained that he did not consider a single telephonic inquiry a "consultation" (for which he would have generated a record). (PC14. 2202). This accounted for the possibility that, consistent with having no consultation records, he may have received a brief call from Brush (as her time records indicated).

[3] Given that Morgan had *no* contact with Falsetti, (PC14. 2229), this single call to Falsetti supports the trial court's finding that Brush "had most, if not all, of the contact between the defense team . . . and Dr. Falsetti." (PC9. 1516). The ".2" hour record for Brush's time on this call is the second smallest increment of work she recorded in her 16-page billing record reflecting 603.5 hours of out-of-court time, supporting her Motion for Compensation of $92,470. Clearly, any further contacts with Falsetti, or efforts to secure similar testimony, would have been reflected here. Contrary to the trial court's order, there is no evidence that Brush had "phone calls" or "dealings" with Falsetti. (PC9. 1516).

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review, and obtain an assessment of the materials, in the waning days before a death penalty trial, are more consistent with Morgan being a beleaguered attorney who was physically ill, emotionally debilitated, IB at 26-27, 29-30, and had " . . . put [his] back to the wall." (PC Def. Ex. 16).

The state's assertion that Morgan noted ". . . he had identification experts and that he received a copy of the murder videotape which he was enhancing," AB at 17, 32, is irrelevant to whether he consulted with Falsetti, and misleading. It concerns Ibar's first, joint trial with Penalver, not his 2000 trial at which Ibar claims Morgan was ineffective. (SR7. 79-81). Regarding Morgan's self-serving, unverifiable statement to the trial judge that "he would proffer the testimony of his expert witnesses if their testimony were helpful," AB at 17, 32, the fact that he never made such a proffer despite the current record evidence that at least two experts, Iscan and Evans, opined that such a favorable comparison existed (suggesting Falsetti would have had the same opinion), bolsters the overwhelming evidence that Morgan never consulted with, or secured an opinion from, Falsetti. IB at 51-52. The evidence fails to support a conclusion that Morgan or Brush "consulted" with Falsetti (or any other facial identification expert).

The state urges that the phantom evidence of consultation between the defense and Falsetti supports the trial court's "presumption" that the decision not to call Falsetti "was . . . strategic." AB at 32, 40, 42. But the evidence fails to establish

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that the defense consulted with Falsetti. Further, Morgan testified emphatically that he wanted and needed an expert to challenge the identification from the video and derivative photos, (PC14. 2238, 2242), and that the failure to procure such an expert was neither tactical nor strategic. (PC15. 2316-18). Morgan never testified he "forgot" or was "too tired" to get an expert. AB at 41. Morgan's unequivocal testimony was abundantly supported. IB at 44-45, 49-50. In the face of this unrebutted testimony, any "presumption" was overcome.

The state has failed to address the prohibition against a trial court inventing a strategy by engaging in "a post-hoc rationalization of counsel's conduct" in lieu of relying on "an accurate description of [counsel's] deliberations prior to [trial]." ***Wiggins v. Smith***, 539 U.S. 510, 526-27 (2003); *see, e.g.,* ***Duncan v. Ornoski***, 528 F.3d 1222, 1237 n.7 (9th Cir. 2008). The trial court's conclusion that Morgan strategically omitted presenting the testimony of a facial identification expert is supported by nothing but its impermissible post-hoc rationalization of Morgan's conduct. It is belied by Morgan's "accurate description of [his] deliberations prior to [trial]," that this omission was neither tactical nor strategic. (PC15. 2316.18).

The state emphasizes that at the postconviction proceedings, Falsetti never rendered an opinion comparing Ibar to the un-hatted perpetrator in the video, and the trial court's conclusion that "[w]ithout such an opinion, Defendant is unable to show any deficiency or prejudice . . . ." AB at 33. The state further quotes the trial court's

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reasoning that by "failing to call a forensic anthropologist regarding the issue of identification . . . , defendant has failed to show that a forensic anthropologist . . . would . . . have offered testimony favorable to Defendant." *Id.* at n. 11. Ibar refuted this argument in his initial brief. IB at 52-53.

To repeat, Ibar's claim is not that Morgan was ineffective for failing to consult with, and present the expert opinion of, Falsetti, or even a forensic anthropologist. His claim is broader, that Morgan was ineffective for failing to consult with, and present the expert testimony of, "*some* expert, whether a forensic anthropologist, biometricist, anthropometrist, or facial identification analyst, to provide the same type of opinion he saw Penalver successfully use, to attack the most damning evidence against Ibar. (PC1. 122, 146; PC7. 1077-78)." IB at 53. Ibar did not need to identify the specific expert who Morgan should have secured, or even the particular facial identification science or discipline that such an expert needed to rely upon, to succeed with this claim. *See id.* at 53 n. 15. Given (1) the inter-relationship between the sciences and disciplines of forensic anthropology, biometrics, anthropometry, and facial mapping, (PC14. 2187-97); (2) the evidence regarding Iscan's opinion that there were material discrepancies between the appearance of Ibar and the un-hatted perpetrator in the video, (PC14. 2118-21; PC Def. Ex. 8 at 12-14, 33); and (3) Evans' postconviction hearing testimony that, based on five significant facial discrepancies between Ibar and the un-hatted perpetrator, "its not

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possible to conclude that the perpetrator and Pablo Ibar are the same person," (PC12. 1961-80, 1980), Ibar amply showed prejudice resulting from Morgan's failure to consult with, and present, an appropriate expert.[4]

The state next attempts to defeat Ibar's showing of prejudice by pointing to the trial court's assessment that Morgan "thoroughly cross-examined the identification witnesses and challenged the state's witnesses involved with the video and photo evidence . . . ." AB at 34; IB at 50-51. Even Morgan admitted: "However well a lawyer might cross-examine witnesses and defeat the integrity of their testimony, a lawyer is not going to take the place of this kind of available testimony from an expert." (PC15. 2309). *See also* IB at 51 n. 14 ("cross-examination . . . is not ordinarily . . . a substitute for affirmative evidence that would directly prove the point to be established"). Moreover, no cross-examination could have established

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[4] The trial court questioned whether Evans' scientific discipline was ***Frye***-worthy in 2000. (PC9. 1515). But Ibar argued in his initial brief, and supported with record testimony and academic articles, that facial identification analysis (FIA) was a recognized and accepted scientific discipline in 2000. IB at 54-55, *see* ***Penalver***, 926 So.2d at 1134. He demonstrated that in any event, the relevant time frame for this determination was 2006, when Ibar's direct appeal was decided (by which time FIA was certainly accepted and Evans was a well-recognized expert, IB at 55 & n.18), if not 2009. IB at 56. The state appears to concede the trial court's presumption that FIA was a ***Frye***-worthy science in 2000. AB at 29 n.8. Given the recent amendment to section 90.702 adopting the more liberal admissibility standard of ***Daubert v. Merrill Dow Pharmaceutical Inc.***, 507 U.S. 904 (1993), *see* ***Brim v. State,*** 695 So.2d 268, 271-72 (Fla. 1997), Evans' expert testimony should clearly be deemed admissible. IB at 53-55 & nn. 17 and 18.

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the most important aspect of a facial identification expert's testimony - that material discrepancies in appearance distinguished Ibar from the perpetrator in the video. (PC12. 1879-80; PC14. 2121). *See also* ***Penalver***, 926 So.2d at 1125-26; *cf.* IB at 67-70 & n. 22.

In a further effort to diminish Ibar's showing of prejudice, the state points to the trial court's findings that (1) Evans was comparing "imagery of Defendant from 1994 and 2007," (2) "differences could be the result of lighting conditions, distortion, resolution of the film, and the differing angles," (3) Evans "recognized there were some general similarities" between Ibar and the perpetrator, and, ultimately, (4) Evans was "unable to *conclude* that the perpetrator on the videotape was not Defendant." AB at 36. Indeed, ultimately, Evans opined that based on the five facial discrepancies he identified, (PC12. 1961-79), one could not conclude that the perpetrator and Ibar were the same person. (*Id.* at 1980).

Obviously, Evans' opinion was powerfully exculpatory. It would have been extremely useful to the jury. It fully accounted for the difference in the years of the imagery that Evans was comparing, (PC12. 1956-58)[5]; the possible "discoloration" or "distortion" in the imagery, (PC13. 2088-89); not being able to replicate the angle

[5] In his initial brief, Ibar noted that the state's objection to Evans' use of a photo of Ibar from 2008 for comparison purposes was overruled. IB at 35 n. 12. The next sentence of the footnote should have stated: "Evans explained that Ibar's appearance *had not* changed between 1994 and 2008." (PC12. 1956-58).

and orientation of a known person (Ibar) to an unknown image (the perpetrator), (*id.* at 2091-93); the "general similarities" between Ibar and the perpetrator (which Evans noted as a matter of "fairness" and "balance," (PC13. 2088)); as well as the poor overall quality of the imagery (that Evans opined would have rendered it inadmissible for comparison purposes in the UK). (PC12. 1917-19). Evans' opinion was no less conclusive than the testimony of Iscan that this court quoted and endorsed as evidence giving rise to significant doubt of Penalver's guilt in reversing his conviction. *See* ***Penalver***, 926 So.2d at 1125-26.

Another significant facet of Evans' testimony, one ignored by the state, was his explanation regarding how lay persons are "hard-wired to spot similarities" and, thus, would say that Ibar and the perpetrator "look alike, because of these general similarities." (PC12. 1980-81). He elaborated that based on poor imagery, a lay person observing some resemblance to a known person would be "lulled" into believing the two are one in the same. (PC12. 1918, 1980-81). These facts were vital so the jury could appropriately evaluate the testimony of the lay witnesses who the state claimed (over their own denials) gave police interview statements that the un-hatted perpetrator in the flyer resembled Ibar. Such testimony would have substantially undermined the probity of Scarlett's and Manzella's testimony regarding the resemblance they claimed Casas, Vindel, Peguera, Klimeczko, Milman, Munroe, and San conveyed. The testimony of an expert like Evans was

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essential to demonstrate reasonable doubt in the supposed statements of these third-party identification witnesses, as well as to caution the jurors regarding any resemblance they perceived between Ibar and the video imagery.[6]

Ibar has overwhelmingly demonstrated prejudice by (1) the importance of the video and photographic evidence in the array of proof the state offered against him, IB at 41;[7] (2) Morgan's recognition of the importance of this evidence and the need to neutralize it, *id.* at 33, 40; (3) the opinions of Evans, Iscan, and Birkby that the video imagery was inadequate to positively identify Ibar (or Penalver), *id.* at 45; and (4) Evans' and Iscan's opinions that material discrepancies distinguished the un-hatted perpetrator from Ibar. *Id.* at 24-25 & n. 11, 35-36.

In an effort to counter this showing, the state repeats its list of "other evidence" it introduced against Ibar. AB at 35-36. It must be remembered that ***Strickland*** prejudice is not simply measured by a sufficiency-of-the-untainted-evidence standard. *See, e.g.,* ***Jones v. United States***, 478 Fed. Appx. 536, 541 (11th Cir. 2011). Some deficiencies of counsel single-handedly "alter the entire evidentiary picture . . . ." ***Strickland***, 466 U.S. at 696. This is precisely the nature

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[6] Foy, who testified that the person on the left side of the flyer resembled his bowling friend Justin, (T21. 2835), demonstrated the importance of an expert like Evans regarding the ease with which a lay person can err in matching someone to reproduced imagery bearing only some minimal resemblance.

[7] Ibar has provided a detailed description of the state's reliance upon the video imagery in its closing argument. (PC7.1092-94).

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of Morgan's failure to present the testimony of a facial identification expert. Such an expert would have undermined any reasonable doubt-free belief by the jury that the perpetrator in the video was Ibar. It also would have undermined the other identification testimony, including that of Foy, and the statements of Casas, Vindel, and Peguera. (PC7.1094-96).[8]

The trial court also pointed to "other evidence" to support its no prejudice conclusion. AB at 35-36. Ibar has demonstrated that this evidence failed to refute prejudice. IB at 56-58. In summary, (1) the "family members/friends" purportedly identifying Ibar actually *denied* identifying Ibar or otherwise *discredited the state's claim* that they made such identifications, (T24. 3333-34, 3354 (Ibar's mother Casas); T23. 3156, 3173 (Vindel)); (2) Foy, whose identification of Ibar, based on a fleeting, side angle view, into the sun, through two sets of tinted windows, (T21. 2801-7, 2895; T22. 2950, 2957-9, 2961-5), was demonstrated by postconviction Fisher's affidavit to be highly unreliable, (PC1. 158-59; PC2. 244-61); (3) the record fails to establish that Milman, Munroe, San, or Philips "identified" Ibar as the perpetrator in the still images, (T34. 4437-39 (Milman could not identify the images); T37. 4470 (Munroe could not identify Ibar from the images)); ***Penalver***, 926 So.2d at 1137 ("Munroe . . . could not identify the men in the videotape"); (T40.

[8] Morgan's failure to present the testimony of a facial identification expert single-handedly resets the evidentiary calculus of his trial. But Ibar's plea for reversal is based on *cumulative* ineffectiveness and *cumulative* prejudice. IB at 60 n. 20.

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5394; T43. 5850-51, 5878-79; T44. 5953-54; T45. 6039-45; PC Def. Ex. 5 at R WE/05 (San and Philips, who were not acquainted with Ibar, testifying that companion of Penalver had appearance *different* from Ibar)); and (4) to the extent Casas, Vindel, Peguera, or Klimeczko indicated any identification of Ibar, their testimony was limited to impeachment. ***Ibar***, 938 So.2d at 459-60.

To further challenge Ibar's showing of prejudice, the state lists other ways in which Morgan defended Ibar, noting that he "attacked the conclusion that Ibar was the person depicted on the videotape, challenged whether eyewitness Gary Foy had sufficient time to make an identification, offered that Klimeczko was hostile to Ibar, and again discussed the alibi." AB at 37-39, 41-42. None of this could substitute for eliciting the type of powerfully exculpatory, facial identification expert testimony that Morgan should have introduced. Just because Morgan may have been adequate in certain aspects of Ibar's defense, does not mean he was not constitutionally ineffective in others. The expert testimony Ibar claims Morgan should have elicited was entirely consistent with the alibi. It would have provided the jury more reason to believe the alibi despite the seemingly contradictory videotape (particularly in light of the *unlikely absence* of fingerprint, DNA, blood, and hair evidence connecting Ibar to the crime scene).

The state's theory of prosecution was that Penalver and Ibar were joined at the hip, partners in every way in this home invasion, triple homicide. The hung jury

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following Ibar's joint, 1997 trial, followed by the reversal of Penalver's conviction on direct appeal, illuminates the substantial doubt that has permeated the state's evidence of Ibar's involvement in these crimes. But this court did not fully appreciate this overarching doubt when it found various errors in both defendants' separate trials harmful in Penalver's case (leading to a reversal of his conviction),[9] but harmless in Ibar's case (resulting in affirmance of his conviction and death sentence). This court's perspective on the certainty of evidence supporting a conviction can certainly change from a direct appeal to an appeal from postconviction proceedings. *Cf.* ***State v. Fitzpatrick***, No. SC11-1509, 2013 WL 3214428 *9 (Fla. June 27, 2013)(affirming order granting new trial based on counsel's ineffectiveness in failing to consult with experts to rebut pivotal evidence regarding the time of intercourse between the defendant and victim, but finding on direct appeal that the testimony of the state experts *confirmed* timeline of intercourse strongly supporting the defendant's guilt).

In both cases, witnesses viewed the imagery distilled from the crime video and testified that the perpetrators resembled Penalver and Ibar, respectively. *See* ***Penalver***, 926 at 1125 ("witnesses . . . identified Penalver" as "the individual on the tape . . . [who] had on a hat and sunglasses during the crime"); ***Ibar***, 938 So.2d at

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[9] In December, 2012, following his third trial, co-defendant Penalver was found not guilty of all three homicides and all other charges. AB at 3 n.1.

459-63, (testimony that Peguera, Vindel, Casas, and Klimeczko identified Ibar held erroneously admitted as substantive evidence). In ***Penalver***, this court emphasized that, though Munroe and Klimeczko identified Penalver in out-of-court statements as one of the perpetrators depicted on the tape, at trial they testified "that the videotape was of such poor quality that they could not positively identify the men shown." *Id.* at 1126. By contrast, in ***Ibar***, this court emphasized that Munroe and Milman were "turncoat" witnesses whose prior identification testimony was admissible as inconsistent statements under oath. *Id.* at 462. It highlighted that the identification statements of Klimeczko, Peguera, Vindel, and Casas, though not admissible as substantive evidence, were proper impeachment. *Id.* at 463.

In many ways, nuanced differences in the evidence raised *greater doubt* in Ibar's second trial than in Penalver's. Unlike Penalver, Ibar testified he was innocent. (T50. 6573-87). He presented five alibi witnesses. (T49. 6455-58, 6465-69, 6484-90, 6516-23, 6582). The absence of any fingerprint, DNA, hair, or blood evidence to connect Ibar to the crime scene, (T33. 4383-4419; T35. 4554-86; T39. 5073-5139; T48. 6236-38, 6295-6303; T52. 6767-74, 6891), was uniquely exculpatory: the un-hatted perpetrator (who Ibar was convicted of being) is seen on the crime video touching numerous surfaces where fingerprints of other known and unidentified persons (not Ibar) were lifted; this perpetrator left the DNA and hair laden t-shirt that was wrapped around, and used to wipe, his face, that did not match

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Ibar. (The other perpetrator, wielding the large firearm, is not seen touching any surfaces; Penalver's DNA and hair were never even compared to DNA and hair specimens found on the t-shirt and elsewhere at the crime scene.) *Other damning evidence against Penalver*, including cellmate Bass's testimony that he overheard Penalver tell Ibar, "My lawyer says I got a shot because I didn't take my mask off, you did," ***Penalver***, 926 So.2d at 1126,[10] San's testimony that Penalver "said something to the fact that he had to go and kill somebody to get some money," *id.*, and McMurtry's testimony that she "heard San say that Penalver was involved in the murders," *id.* at 1135, *was never introduced against Ibar*.

The difference in the outcomes of the appeals illuminates the prejudice that resulted from Morgan's failure to consult and present his own expert to explain the unreliability of the video and still imagery, and distinguish Ibar and Penalver from the depicted perpetrators. Ibar implored Morgan to introduce this testimony, (PC14. 2239-40), which Morgan knew Penalver successfully used at the 1997 joint trial. (PC14. 2124, 2130, 2203-04, 2242, 2280). Morgan knew that Penalver's expert, Iscan, opined that Ibar's appearance was even more disparate from the un-hatted perpetrator than Penalver was from the other perpetrator. (PC14. 2121). This court highlighted Iscan's testimony in holding that the errors in Penalver's second trial

[10] The state references Bass's testimony as if it were introduced against Ibar. AB at 60. It was *excluded* from Ibar's trial. (T39. 5177-78).

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required reversal of his conviction, ***Penalver***, 926 So.2d at 1125-26, while affirming Ibar's conviction though his trial was infected by similar and additional errors.[11] Thus Morgan's deficiency was vital to the fairness of Ibar's trial. Given the similarity in the evidence on direct appeal in both ***Ibar*** and ***Penalver***, just as the error in Penalver's trial leading to reversal was harmful, so to was the ineffectiveness of Morgan constitutionally prejudicial.

The common thread between the cases Ibar cited, IB at 42-43 & n. 13, (which the state fails to adequately distinguish, AB at 43), is that these cases granted (or affirmed) habeas corpus relief based on trial counsel's ineffectiveness in failing to present some type of expert testimony. *See, e.g.,* ***Duncan v. Ornoski***, 528 F.3d 1222, 1234-35 (9th Cir. 2008) (failure to consult serology expert); ***Dugas v. Coplan***, 428 F.3d, 317, 327-32 (1st Cir 2005) (failure to consult or present arson expert); ***Gersten v. Senkowski***, 426 F.3d 588, 607-14 (2d Cir. 2005) (failure to consult or present medical expert in child sex abuse case); ***Pavel v. Hollins***, 261 F.3d 210, 220 (2d Cir. 2001) (failure to consult or present medical expert in child sex abuse case),

[11] In both cases, this court found error in the admission of Milman's hearsay testimony that Hernandez, who it was suggested might be one of the perpetrators, said he was going out of town on the weekend of the murders. ***Penalver***, 926 So.2d 1126-28; ***Ibar***, 938 So.2d at 464-66. In ***Penalver*** the court found error in the admission of Penalver's threats of suicide. *Id.* at 1132-34. In Ibar's trial, Munroe also testified that Penalver threatened suicide. (T37. 4760-61). In ***Ibar*** this court held it was error to admit Peguera's, Vindel's, Casas's, and Klimeczko's statements identifying Ibar as substantive evidence. *Id.* at 463.

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(PC1. 151-52); ***Troedel v. Wainwright***, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986) (failure to consult or present ballistics expert), (PC1. 149-51).

In ***State v. Fitzpatrick***, No. SC11-1509, 2013 WL 3214428 (Fla. June 27, 2013), this court affirmed an order granting a new trial based on counsel's ineffectiveness in failing to retain a forensic expert. Shortly before she died, the victim Romines was found walking on the side of the road, nude, bloody, beaten, and with her throat slit. *Id.* at *1. Romines, variably conscious, gave conflicting stories regarding her assailant but at one point identified "Steve" (presumably Kirk) as her attacker. Romines had been staying with Kirk and his girlfriend until the day before. Kirk, a security guard at a motel where Romines was staying, had invited her to move in after Romines was beaten up by her boyfriend. *Id.*

Fitzpatrick, a pizza deliverer, met Romines at a 7-11 the evening before she was found. *Id.* at *2. He gave her a ride to the hotel. A witness from the hotel met Romines, who was looking for a place to stay, and introduced her to a friend, Albert Howard. After talking with Romines for a brief time, Howard took her to his own house. *Id.* Howard and other witnesses established that a pizza delivery person, Fitzpatrick, arrived sometime near midnight, left a free pizza, and drove off with Romines and her belongings. *Id* at *3.

Fitzpatrick was known to carry a knife before the stabbing but was not seen with it after Romines' attack. Id. at *3. He admitted in pre-arrest statements to

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investigators taking Romines from the 7-11 to the motel, but denied seeing her afterwards and any involvement with the crime. Fitzpatrick's live-in girlfriend said Fitzpatrick was home from around the time Howard claimed he picked-up Romines, for the rest of the night. *Id.* at *3. Fitzpatrick denied having sex with Romines until he was confronted with the fact that his DNA was found in Romines. Fitzpatrick now admitted meeting Romines at the motel earlier that day and having intercourse with her on the couch at his house. Fitzpatrick agreed to give investigators a blood sample; it was later discovered that he asked his sister, a nurse, for some vials of blood.

At trial, nurse Hall testified she took swabs from Romines' vagina within one or two hours of Romines being discovered. *Id.* at *9. She found seminal fluid indicating it was deposited within one or two hours. *Id.* She opined based, *inter alia,* on the quantity of fluid, the sexual contact was likely nonconsensual because if a victim is assaulted and walks around for any period of time, "you lose evidence right away." *Id.* Another expert testified that because some of the sperm found inside Romines had tails, they were "motile," indicating the longest they could have been there was 15 hours. *Id.* at *7-*8. (This meant the sperm could not have been deposited as early as Fitzpatrick said he had sex with Romines.) This expert also testified that because she found no semen on Romines' panties, the semen within her

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had to have been deposited within one or two hours of Romines being discovered, and Romines never put her panties on after intercourse. *Id.* at *10.

At the postconviction hearing, the defense presented several experts that effectively challenged the state's evidence bearing on the timing of Romines last sexual encounter. Collectively, they testified that sperm with tails were not necessarily motile, motility had not been tested, and the sperm found within Romines could have been deposited *many hours* before it was collected, one witness opining 24-48 hours before collection and the other opining a minimum of fifteen hours. *Id.* at *8. This testimony fortified Fitzpatrick's statements to police that he had sex with Romines the morning before she was found, between 9 a.m. and noon. An independent test ordered by the court revealed the presence of some sperm consistent with Fitzpatrick on Romines' panties. *Id.* at *10, *13.

Affirming the trial court's order granting a new trial, this court held that defense counsel was ineffective in failing to consult with, or retain, experts regarding "the most important issue of Fitzpatrick's trial, the timing of the alleged sexual encounter between Fitzpatrick and Romines," *id.* at *11, an aspect of the case that was "highly technical and indisputably dispositive . . .." *Id.* at *12. "Despite the scientific evidence that would implicate his client if not refuted, counsel failed to retain any forensic or medical experts." *Id.* at *12. "If counsel had consulted a qualified expert, he would have been able to provide evidence to refute the State's

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case through testimony indicating that the correct science support[ed Fitzpatrick's theory of innocence]." *Id.* This court observed that had defense counsel properly prepared with experts on this vital issue, he "would have been able to convey to the jury that Fitzpatrick's version of the events, as well as his fervent assertions of innocence, were not as farfetched as the State attempted to portray . . .." *Id.* at *13.

Regarding prejudice, this court noted that the state had "repeatedly characterized the strongest evidence of Fitzpatrick's guilt as: (1) the discovery of Fitzpatrick's sperm in Romines; (2) the lack of Fitzpatrick's sperm on Romines' underwear; and (3) the expert testimony that scientifically linked Fitzpatrick's sexual encounter to a timeline consistent with the State's position – that Fitzpatrick raped Romines, [and] slit her throat . . . – and inconsistent with the alternative consensual sex timeline presented by Fitzpatrick." *Id.* at *14. "[T]he State directly told the jury that this evidence was critical to securing a conviction during closing argument." *Id.* This court observed, had counsel not been constitutionally deficient, the state could not have argued that the scientific evidence so convincingly demonstrated Fitzpatrick's guilt. *Id.* at *15. In light of the errors supporting the state's prosecution "and the dispositive nature of this issue," this court held that

> counsel's deficient performance significantly undermines confidence in the outcome of Fitzpatrick's trial." Had he not been ineffective, the jury would have received substantial evidence that supported Fitzpatrick's claim that he had consensual sex with Romines earlier in the day and that he was not the one who attacked Romines." *Id.* at *16.

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The parallels to Ibar's case are striking. As in ***Fitzpatrick***, the facial identification issue about which Morgan was ineffective "was highly technical and indisputably dispositive." Although the video and photographic imagery of the perpetrator implicated Ibar, Morgan failed to retain any appropriate expert. Had he procured an expert like Evans, Iscan, or Falsetti, he would have been able to provide evidence to refute the state's damning evidence that Ibar was depicted in the video. Had he marshaled evidence scientifically distinguishing Ibar from the perpetrator, he would have been able to undermine the state's strongest evidence and bolster all the other evidence of Ibar's innocence, *i.e.*, no fingerprints, no blood, no DNA, no hair, an alibi, etc.

Regarding prejudice, as in ***Fitzpatrick***, the state's "strongest evidence" was the video and photo imagery, that about which Morgan was deficient. The state deluged the jury with this throughout its closing argument. (PC: 1092-94; T52:6827, 6830 (in that videotape you can see the person we claim and allege to be Pablo Ibar, and this establishes it beyond reasonable doubt"), 6848-49, 6854 (evidence proves beyond reasonable doubt that crimes "[c]omitted by the two people in the video tape"), 6858; T53. 7045-46). As in ***Fitzpatrick***, had Morgan not been deficient in failing to marshal an expert to impeach the reliability of the video and photo imagery, and demonstrate the physical discrepancies between Ibar and the depicted perpetrator, the state could not have argued that the imagery proved Ibar's guilt. As

in ***Fitzpatrick,*** this deficiency of counsel, even more so when considered in light of all his others, undermines any reasonable confidence in the outcome of Ibar's trial.

Ibar has demonstrated that the expert testimony he claims should have been presented was not within the common knowledge of lay persons. Such testimony would have corrected the average juror's misunderstanding of this subject. These cases demonstrate that the lower court clearly erred in its denial of this claim.

B. Failure to Procure Mehmet Iscan to Testify. IB at 60-64.

Morgan was ineffective for failing to secure Iscan's testimony that Penalver could not be positively identified from the videotape and most likely was not the second perpetrator. IB at 60-64. To counter, the state argues that (1) Morgan knew Iscan would not be available for Ibar's retrial, (2) Iscan would only have testified that "he could not 'reach a conclusion one way or the other' whether Penalver was the second assailant," and (3) it was "not a foregone conclusion" that Iscan's testimony would have been admitted in Ibar's trial. AB at 44-47.

Regarding Iscan's "unavailability," Morgan could have subpoenaed Iscan while he was testifying for Penalver,[12] arranged to bring him back voluntarily to quickly testify during Ibar's 2000 trial, or offered his 1997 deposition, 1997 trial, or 1999 trial testimony as former testimony of an unavailable declarant. IB at 62. Regarding the testimony Iscan had to offer, it was not merely that he could not reach

[12] Morgan knew how to do this. (T51. 6652-53).

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a conclusion whether Penalver was the second assailant. Instead, it was that discrepancies between the second perpetrator and Penalver, Ibar's supposed partner in crime, "led him to lean to a conclusion that the individual on the tape was not Penalver." ***Penalver***, 926 So.2d at 1126. Regarding admissibility, the state presented abundant testimony at Ibar's trial implicating *Penalver* on the theory that this evidence incriminating Ibar's supposed criminal partner made it more likely that Ibar was the other perpetrator. Given the trial court's admission of this evidence, and the court's admission of Iscan's testimony at the 1997 joint trial and Penalver's 1999 trial, it is unlikely that the trial court would have excluded Iscan's testimony. In any event, competent counsel would have endeavored to secure and introduce the testimony of this important witness who Morgan recognized helped the 1997 trial, offered testimony consistent with Ibar's defense, and offered a uniquely exculpatory opinion that Ibar likely was not in the video.

C. Failure to Procure the Assistance of an Eyewitness Identification Expert. IB at 64-72.

All of the facts asserted in defense expert Fisher's affidavit, highlighting the poor conditions of Foy's observations and the misleading circumstances bearing on his subsequent photographic, live lineup, and in-court identifications of Ibar, that led Fisher to conclude Foy's identification of Ibar was unnecessarily suggestive leading to an unreliable identification of Ibar, (PC2. 244-61), as well as those asserted in Morgan's affidavit that he failed to consult and elicit testimony from an eyewitness

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identification expert though he knew it would be helpful, for no tactical reason, (*id.* at 222), must be taken as true. These facts amply supported Ibar's ineffective counsel claim and are not conclusively refuted by the record. Ibar was entitled to an evidentiary hearing on this issue.

The state urges this court to affirm the trial court's ruling because (1) expert testimony regarding eyewitness identification was inadmissible in Florida, (2) Morgan believed this expert testimony was inadmissible, and (3) Morgan's cross-examination of the witnesses regarding Foy's identification of Ibar rendered such testimony unnecessary. AB at 48-53. These arguments are unsupported by the law and the record and fail to support the trial court's ruling.

As demonstrated in Ibar's initial brief, the state is wrong that expert testimony regarding eyewitness identification was inadmissible at the time of Ibar's 2000 trial. IB at 70-72. Unquestionably, ***McMullen v. State***, 714 So.2d 368 (Fla. 1998), held that the admission of such testimony was left to the sound discretion of the trial judge. *Id.* at 369, 372. The court recognized that, as between the "discretionary," "prohibitory," and "limited admissibility" views, Florida had adopted the "majority," discretionary view. *Id.* at 370-71. *See also* ***Simmons v. State***, 105 So.3d 475, 492 n. 9 (Fla. 2012) (citing ***McMullen*** and reiterating that admission of expert testimony concerning eyewitness identification is within discretion of trial judge); George Vallas, *A Survey of Federal and State Standards for the Admission*

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of Expert Testimony on the Reliability of Eyewitnesses, 39 Am. J. Crim. L. 97, app. B (2011) (placing Florida in the "unlimited discretion" category); *cf.* ***In re: Standard Jury Instructions in Criminal Cases – Report No. 2011 – 05,*** No. SC11-2517, 2012 WL 5869675 (Fla. Nov. 21, 2012) (adopting detailed eyewitness identification jury instructions to alert jurors to the factors tending to undermine the reliability of this eyewitness identification).

The state cites ***Johnson v. State***, 438 So.2d 774 (Fla. 1983), cases cited in ***Johnson***, and ***Jones v. Smith***, 772 F.2d 668 (11th Cir. 1985), to support its assertion that Florida had a *per se* rule of inadmissibility at the time of Ibar's 2000 trial. AB at 50-52. Even ***McMullen***, decided two years before Ibar's trial, characterized ***Johnson*** as *supporting* its rule of discretionary admission. *Id.*, 714 So.2d at 371. Additionally, ***McMullen*** *rejected* the extreme minority, "prohibitory view" of the Eleventh Circuit. *Id.* As the state notes, numerous out-of-state and federal cases have expounded upon the vital role of experts in assisting juries to understand the vagaries of eyewitness identification testimony and the mistaken assumptions upon which jurors tend to rely in evaluating such evidence. IB at 67-70 & n. 22. *See also* ***Minor v. United States***, 57 A.3d 406 (D.C. 2012) (reversing conviction based on erroneous exclusion of expert testimony of Dr. Ronald Fisher concerning unreliability of eyewitness identifications). As Justice Sotomayor emphasized in ***Perry v. New Hampshire***, 132 S.Ct. 716 (2012):

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> The empirical evidence demonstrates that eyewitness identification is "'the single greatest cause of wrongful convictions in this country.'" Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; [and] that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy . . . .

Id. at 738-39 (Sotomayor, J., dissenting) (citations omitted); *see also id.* at 728 (majority acknowledging same concern and citing this portion of dissent).[13]

Our unique facts made it especially likely that an eyewitness identification expert's testimony would have been admitted. These include that (1) Ibar testified he was not at Sucharski's house as claimed by Foy; (2) Ibar had an alibi corroborated by five witnesses; (3) Foy had a very limited opportunity to observe the passenger in the Mercedes; and (4) misleading circumstances, including virtually every conceivable condition that undermines the reliability of eyewitness identification testimony, *e.g.*, distortion by post-event information, a misleading expression of identifier confidence, cross-racial identification, etc., tainted Foy's identification of Ibar. The need for expert testimony was paramount.

The state urges that Morgan admitted "that experts on eyewitness identification reliability are inadmissible in Florida." AB at 49. But Morgan's

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[13] Ibar maintains that Florida's recent adoption of the ***Daubert*** standard for expert testimony changes the equation in favor of admissibility.

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statement reveals that he knew admission of such testimony was *not per se* prohibited and that he was attempting to obtain an expert. (SR7. 79-81). In any event, this assessment was irrelevant. It was made in 1996, *before* Ibar's first joint trial and *before* ***McMullen*** established that the admission of expert testimony regarding eyewitness identification is within the sound discretion of the trial court.

The state urges that Morgan's cross-examination of Foy and the other witnesses regarding Foy's identification of Ibar supplanted the need for an expert. The state failed to identify this cross-examination. (The state's "response to Claim I(1)," AB at 50, concerned a different kind of expert.) Morgan failed to touch upon each of the factors that Fisher opined led to his conclusion that Foy's identification of Ibar was unreliable. IB at 66-67; (PC2. 248-58) (listing 13 factors that led to an unreliable identification). Moreover, cross-examination would not have elicited the science that explained to the jury, contrary to widely-held misperceptions, *why* Foy's identification of Ibar was unreliable. Finally, unlike ***Johnson***, AB at 50-51, Morgan did not request instructions to aid the jury in interpreting the eyewitness identification testimony.

D. Failure to Introduce Testimony of Morgan's Civil Engineer Regarding Height. IB at 72-74.

In response to Ibar's claim that Morgan was ineffective for failing to introduce Mugnier's testimony that the perpetrator was 5'6" to 5'7", at least 2-3 inches shorter than Ibar, the state relies on the trial court's finding that Manzella was cross-

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examined on the relative heights of the victims and Ibar. AB at 53-54. The testimony cited by the trial court and state is Manzella's opinion that "[y]ou couldn't determine height[s] of the perpetrators" but they weren't shorter than 4'2" or taller than 6'6". (T40. 5392-93). This meaningless estimate could not substitute for Mugnier's science-based testimony that the perpetrator was a height at least two to three inches shorter than Ibar. (PC1. 156; PC2. 221, 242-3).

The state argues that because "the video depicted the victims and Ibar together," Mugnier was unnecessary, AB at 54. Substantial evidence indicates that Ibar was *never* at Sucharski's house and was *not* in the videotape.[14] The jury was *never* apprised that the perpetrator was 5'6" to 5'7", 2-3 inches shorter than Ibar. This would have been crucial to consider in determining if Ibar was in the video.

Mugnier's testimony was uniquely exculpatory. It would have bolstered Ibar's other evidence of misidentification and innocence. Morgan did not, and could not, bring these facts out through cross-examination. Accordingly, Morgan was ineffective in failing to introduce Mugnier's testimony.

E. Failure to Effectively Investigate and Prepare Witness to Give Alibi Testimony. IB at 74-79

Ibar's complaint is not with Morgan's decision to present his alibi. It is with

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[14] The state repeatedly states or implies that Ibar is the person in the videotape. AB at 11, 54, 70. This begs the very question at issue throughout trial. Ibar maintains that the man in the video is not him.

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Morgan's failure to investigate, develop, and better present it. Morgan did *nothing* to reconcile the discrepancy between Mimi's recollection of purchasing the telephone calling card from a hotel vending machine and McEvoy's proffered testimony that calling cards were unavailable from hotel vending machines at that time. (PC2. 223) ("I do not recall independently investigating any aspects of the alibi as reported to me by the family.") Based on the calling card discrepancy, the state argued in summation that "the alibi had begun to unravel." (T53. 7032-3).

Investigation would have disclosed evidence that calling cards were widely used and available in Ireland in 1994. (PC2. 269-70, 274-78). It would have produced a Bellsouth incoming call record, (PC2. 268), which is no longer available, to corroborate the "alleged telephone call which was the basis for Ibar's alibi . . . ." AB at 57. *See* ***Beasley v. State***, 18 So.3d 473, 489 (Fla. 2009) ("a delay in commencing an investigation may be unreasonable because it can lead to the destruction of corroborating evidence"). Contrary to the trial court's order, as Ibar's postconviction motion and exhibits establish, better evidence was available. AB a 58. While ***Strickland*** may "frown[] upon second guessing of counsel," AB at 60, it more strongly frowns upon counsel making important litigation decisions that prejudice the defendant without the support of reasonable investigation.[15]

[15] The purpose of the state's reference to Chris Bass's testimony, AB at 60, which was *excluded* from Ibar's trial, (T39. 5177-78), is unclear.

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Ibar's alibi was corroborated by five witnesses: girlfriend Tanya with whom he was in bed (T49. 6516, 6582); Tanya's younger sister, Heather, who entered the room and discovered Pablo with Tanya, (T49. 6465, 6469, 6521, 6523); Tanya's older cousin, Elizabeth, who was caretaking the Quinones sisters while their mother, Alvin, and older sister, Mimi, were in Ireland, (T49. 6451, 6469, 6484); and Alvin, who's presence in Ireland at the time of the incident was confirmed by the June 25, 1994, visa stamp on her passport. (T49. 6458, 6451-53, 6487-90).

Mimi Quinones, called by the state as a rebuttal witness, *corroborated* the alibi. The state knew this from her deposition. (R5. 899-944). She testified that days after June 26, 1994, she was told when she called home that Tanya was caught in bed with Ibar on the morning of Sunday, June 26, 1994. (T49. 6455-57, 6464). The *only reason* the state called Mimi in rebuttal was to elicit that she purchased the telephone card from a hotel vending machine and set-up impeachment of this fact by its next witness, McEvoy. The state openly acknowledged this purpose at trial. (T50. 6562-66, 6647; T51. 6652-58).

The state, as did the trial court, implies that Ibar is arguing that Morgan was ineffective for failing to "assist[] Mimi to change her account of where she purchased the calling card . . . ." AB at 60. But competent counsel who learns before trial of a verifiable fact that directly contradicts the account of an alibi witness must confront that witness with the fact to refresh the witness's recollection and correct any

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mistaken recollection that the witness initially may have had. IB at 77 & n. 26. Effective counsel would have refreshed Mimi's recollection that gave rise to the state's strongest challenge to the alibi.

F, G. Failure to Investigate, Obtain, and Present Exculpatory Information About (1) Foy's Poor Opportunity to Observe the Passenger, (2) the Tec-9 Having Been Sold Before the Murders, and (3) Ibar having been With Natasha McGloria the Night After the Murders. (Restated, combining arguments). IB at 79-84.

Regarding use of an investigator, Ibar's complaint was not that Morgan did not use one, but that he did not conduct certain investigations. He failed to investigate and demonstrate to the jury the poor conditions of Foy's observation of the passenger in Sucharski's car. He failed to develop and introduce evidence confirming Ibar's testimony that Hernandez sold his Tec-9 before the murders, (T50. 6592-94), making it unavailable, contrary to Klimeczko's testimony. (PC1. 172). Morgan failed to elicit that the ballistics for the Tec-9 Hernandez previously owned (which he sold to Anthony Kordich) did *not* match the Sucharski murders. (PC1. 172, 175). He failed to interview Natasha McGloria to corroborate that Ibar spent the night of June 26th with her, *after* the morning of the murders.

The state asserts that the recreation of Foy's observation conditions was unnecessary because Morgan "thoroughly, competently challenged Foy on cross-examination . . . ." AB at 62, 66-68 & nn. 18, 20. To the contrary, affirmatively demonstrating the poor conditions of Foy's fleeting glance of the passenger was

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essential to effectively impeach Foy.

Regarding the Tec-9, the trial evidence was that Hernandez owned and controlled the *only* Tec-9 at the Lee Street house, one like the one depicted in the crime video and used by the killers. (T31. 4153-57; T50. 6592-93). Ibar's defense was that Hernandez's Tec-9 was gone by June 26, 1994, and Klimeczko lied and never witnessed Penalver and him retrieve it from the Lee Street house. Any evidence confirming that Hernandez's Tec-9 (the supposed murder weapon) was sold to Kordich *before* the murders would have impeached Klimeczko's testimony and corroborated Ibar's defense. If, as Ibar testified, Hernandez's Tec-9 was sold to Kordich (as corroborated by the later recovery of the Tec-9 from Kordich), eliciting that the Sucharski crime scene ballistics did *not* match the Tec-9 recovered from Kordich, (PC1. 175), would have corroborated the defense that (1) Klimeczko lied, (2) Ibar and Penalver never obtained a Tec-9 from the Lee Street house, and (3) they were not involved in the Sucharski murders.

Lastly, Ibar told police and testified that he was with McGloria on the night *after* the murders occurred. Confirming this with McGloria would have corroborated Ibar's recollection of that weekend and bolstered his alibi for the time of the murders. The trial court erred in denying this hearing. IB at 83-84.

H(1). Failure to Object to Improper Rebuttal Testimony of Alibi Witness Mimi Quinones. IB at 84-87.

The state lumps Ibar's claim that Morgan was ineffective for failing to object

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to the state calling Mimi in rebuttal, with his claim that Morgan was ineffective for failing to object to the identification testimony of Casas, Vindel, and Peguera. AB at 71-74. These different claims must be considered separately.

Contrary to the state's assertion, on direct appeal, this court never "reached the merits" of Ibar's assertion that Mimi was improperly called by the state in rebuttal. AB at 72.[16] Likewise, this court nowhere "found" that this unpreserved error "did not rise to the level of fundamental error." AB at 73-74.

To reiterate Ibar's claim, (PC1. 176-79), Mimi was improperly called by the state in rebuttal for the express and sole purpose of laying a foundation for the subsequent impeachment testimony of McEvoy. (T50. 6562-6, 6647; T51. 6652-8). Contrary to the trial court's assertion that Morgan "did, in fact, challenge the state's authority to call [Mimi] after Defendant had not utilized her in the defense case-in-chief," (PC9. 1496), close examination of the transcript cited by the trial court, (T51. 6652-59), reveals that Morgan made no such objection. Neither the state nor the trial court addressed this court's decisions that supported an objection to, and exclusion of, Mimi's rebuttal testimony. IB at 85-86.

H(2). Failure to Object to the Identification Testimony of Casas, Vindel, and Peguera, Called by the State Solely to Impeach. IB at 87-88.

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[16] The trial court cited an excerpt of this court's opinion that mentioned *Tanya*, not *Mimi* Quinones. (PC9. 1496). Given that this court never referred to "Mimi" and the basis for the objection to her testimony (improper rebuttal) was different from the missing objection to Peguera, Vindel, and Casas (improper impeachment), clearly this court never reached the rebuttal issue.

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The state and trial court confound the relationships between "harmless error," "fundamental error," and "ineffective counsel." AB at 71-74; (PC9. 1496-98). First, this court, on direct appeal, *never* made a determination that there was no fundamental error. Second, in conducting the harmless error analysis that the state urges foreclosed Ibar's ineffective counsel claim, this court, while acknowledging that the identification testimony of Casas, Vindel, and Peguera was inadmissible as substantive evidence, presumed proper consideration as impeachment. ***Ibar***, 938 So.2d at 463. If Ibar's postconviction claim is correct and meritorious objections would have been sustained, the jury would have been precluded from considering those witnesses' statements as impeachment. IB at 87-88. Lastly, even if this court's harmless error analysis might otherwise have foreclosed a claim of ***Strickland*** prejudice, because Ibar has alleged ineffective counsel regarding most of the evidence this court listed in its harmless error analysis, this prior analysis is inapplicable to review Ibar's present claims.

H(3). Failure to Object to Rebuttal Witness McEvoy. IB at 88-90.

Ibar's claim of a willful, substantial, and prejudicial discovery violation that Morgan failed to object to, is not conclusively refuted by the record. The trial court concluded, without reasoning, that Ibar would have "failed in attempting to prove any . . . discovery violation . . .." The state argues in support that the state's

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disclosure of McEvoy was "prompt" in compliance with Rule 3.220(j). AB at 75-76. It argues "[i]t was not until just after opening statements [26 days after Mimi's disclosure] that the State *was able* to depose [Mimi] . . .." AB at 78. The postconviction court concluded "[i]t was only the month after the State took the deposition of Defendant's alibi witnesses that it *was able* to investigate the alibi and retain witnesses out of Ireland . . .." (PC9. 1499). There was no evidence about what the state *was able* to do. Given the importance of the alibi issue, the critical juncture of the trial court proceedings, and the substantial resources of the state, it was not "prompt" for the state to delay nearly a month after disclosure of Mimi to depose her, and to delay another three weeks to conduct its investigation leading to the discovery of McEvoy. The question whether the state's mid-trial disclosure of McEvoy, after jury selection and openings, some 47 days after the timely, pretrial disclosure of Mimi, constituted "prompt" disclosure was a question of fact that required an evidentiary hearing.

The state and trial court indicated that to succeed, Ibar was required to show a *willful* violation. AB at 77 ("Ibar's burden [was] to prove . . . [trial] court would have . . . found a *willful* violation . . ."); (PC9. 1500) ("this Court finds that the defense would have failed . . . to prove . . . a *willful* discovery violation . . ."). Although Ibar maintains the state's violation was willful, IB at 89, the state and trial court are wrong. An inadvertent discovery violation can require exclusion of

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evidence or reversal of a conviction. *See, e.g.,* ***Casica v. State***, 24 So.3d 1236, 1241 (Fla. 4th DCA 2009).

The state and trial court attempt to minimize the importance of the calling card issue. AB at 78 ("McEvoy's testimony did not *completely* undercut the alibi"); (PC9. 1500) ("a seemingly *collateral* matter to the overall alibi"). The lengths to which the state went - overcoming Morgan's resistance to procuring Mimi's appearance in court, calling Mimi in rebuttal though she primarily *supported* the alibi, and bringing McEvoy to Florida from Ireland - demonstrate this was a "substantial," not "trivial" violation.

The record demonstrates that Ibar was substantively prejudiced by the state's discovery violation. IB at 89-90. By the time the state disclosed McEvoy, Ibar was fully locked into the flawed alibi. Nothing short of exclusion of McEvoy's testimony could cure the discovery violation.

H(4). Failure to Object to Foy's Testimony Identifying Ibar Because the Identification Procedures Were Unnecessarily Suggestive Leading to an Irreparably Mistaken Identification. IB at 90-93.

Both the state and the trial court resorted to a "form over substance" approach. Although neither disputes that the "focus" of Morgan's pre-1997 trial motion to suppress was the right to counsel issue, (SR12. 6-7, 13), and that this was the trial court's *sole basis for denying the motion*, (*id.* at 46), they urge that "*[p]art* of the basis of that motion" was "specifically *grounded around the idea* that the out-of-

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court identifications . . . were unduly suggestive and irreparably tainted Foy's [ ] identifications." AB at 79; (PC9. 1500-01). When Morgan was offered the opportunity to expand the trial court's consideration of the motion beyond the counsel issue, he failed to do so. (SR12. 48). Morgan's isolated questions to which the state alluded, (SR11. 212-13), hardly established that the trial court's ruling, which only referenced the counsel issue, (SR12. 45-48), addressed the unnecessarily suggestive identification procedure issues.

The 1997 trial judge's ruling that, even if he would have suppressed the out-of-court identifications, he would have allowed the in-court identification, has no bearing. AB at 80, 81-82; (PC9. 1501-02). Foy never identified Ibar in court as the person he saw in Sucharski's Mercedes on the morning of June 26, 1994.

H(6). Failure to Request an Instruction Directing the Jury to Cautiously Evaluate All Eyewitness Identification Testimony and Identifying Factors to Consider in Determining Reliability of Identification. IB at 94-95.

If the trial court's denial rested on procedural grounds, it abused its discretion. This claim, based on emerging caselaw regarding a jury's fundamental need for guidance in considering eyewitness identification testimony, was, nonetheless, based on well-settled Florida caselaw regarding theory of defense instructions. Given that (1) this is a death penalty case, (2) this claim was raised before the postconviction court resolved Ibar's other claims, and (3) this issue was closely related to Ibar's other claims, the trial court should have reached the merits.

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Although this court has only recently formally recognized a jury's need for guidance in resolving eyewitness identification issues, *see* ***In re Standard Jury Instruction in Criminal Cases - Report No. 2011-05***, No. SC11-2517, 2012 WL 5866975 (Fla. Nov. 21, 2012), any reasonably competent counsel should have recognized this need long before. That ***State v. Henderson***, 208 N.J. 208, 27 A.3d 872 (2011), was "not binding," AB at 88, and there was "no standard instruction on th[is] issue," AB at 89, does not diminish Ibar's claim. Morgan was prejudicially ineffective in failing to seek instructions to guide the jury's consideration of this confusing but critical evidence.[17]

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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[17] Ibar relies on his initial brief for arguments not addressed in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed with the Clerk of the Supreme Court and sent by United States mail this 16th day of October 2013, to AAG Leslie T. Campbell, Office of the Attorney General, 1515 N. Flagler Dr. Floor 9, West Palm Beach, FL 33401-3428, and emailed to CAPAPP@MyFloridaLegal.com.

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