IN THE SUPREME COURT OF FLORIDA

PABLO IBAR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-522

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or as "Ibar." Appellee, the State of Florida, the prosecution below, will be referred to as Appellee, prosecution, or State. The following are examples of other references:

The following are examples of other references:

Direct Appeal Record: "ROA-R" in case number SC00-2043;
Direct Appeal Trial Transcripts: "ROA-T" in case number SC00-2043
Postconviction record: "PCR";
Supplemental records: "S" before the record supplemented;
Petition: P

The Record citations will be followed by the volume and page numbers where appropriate.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

OVERVIEW

On December 21, 2012, Ibar filed his initial brief in the instant postconviction appeal challenging the denial of postconviction relief following an evidentiary hearing. Simultaneously with his appellate brief, Ibar filed a Petition for Writ of Habeas Corpus (case number 12-2619) generally challenging this Court's decision in the direct appeal (case

number SC00-2043) affirming his conviction of three counts of first-degree murder and related charges of burglary, robbery, and attempted robbery and the imposition of the death penalty. *See Ibar v. State*, 938 So. 2d 451, 457-58 (Fla. 2006) Ibar also challenges the effectiveness of his appellate counsel on direct appeal. In his related appeal of the denial of postconviction relief, case number SC12-522,

STATEMENT OF THE CASE AND FACTS

As authorized by Fla. R. App. P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

DATE	EVENT
06/26/94	Casmir Sucharski, Sharon Anderson, and Marie Rogers murdered. *See Ibar*, 938 So. 2d, 457-58
08/25/94	Pablo Ibar and Seth Penalver were indicted. (ROA-R.1 2-4)
09/29/94	Corrected Indictment filed (ROA-R.1 5-7)
04/17/00	Jury trial began.(ROA-T.1 1)
04/26/00	Hearing on Reconsideration of Motion to Suppress.(ROA-R.10 1401-88)
06/14/00	Ibar was convicted of first-degree murder of Casmir Sucharski, Sharon Anderson, and Marie Rogers along with the related counts of burglary, robbery, and attempted robbery. (ROA-R.6 1000-05)
07/24/00	Jury recommended death sentence by nine to three vote. (ROA-R.6 1021-23)
08/14/00	*Spencer* hearing. (ROA-R.6 1082)
08/28/00	Judge Daniel True Andrews sentenced Ibar to death. (ROA-R.6 1088-1134)
03/09/06	Opinion on Direct Appeal case number SC00-2043; *Ibar*, 938 So. 2d 451
02/20/07	Denial of Petition for Writ of Certiorari in case number 06-788; *Ibar v. Florida*, 549 U.S. 1208 (2007)
02/19/08	Motion for Postconviction Relief filed
10/30/08	Case Management/*Huff* Hearing held (PCR.11 1667-

DATE	EVENT
	1779)
03/16/09 - 03/19/09	Postconviction evidentiary hearing
12/12/11	Ibar files a Supplemental postconviction relief motion
02/13/12	Order denying postconviction relief (PCR.9 1482-1529)

On August 24, 1994, and then by way of a corrected indictment dated September 29, 1994, Defendant, Pablo Ibar ("Ibar"), and his co-defendant, Seth Penalver ("Penalver")[1] were indicted for the first-degree murders of Casmir Sucharski, Sharon Anderson, and Marie Rogers along with the related counts of burglary, robbery, and attempted robbery. (ROA-R.1 2-7). Initially, the co-defendants were tried together, however, following a hung jury, then a mis-trial during the *voir dire* of the second trial, the cases were severed. Penalver's case continued and Ibar's third trial commenced on April 17, 2000 with a guilty verdict returned on June 14, 2000. (ROA-R.6 998-1005). Following the penalty phase, on July 24, 2000, the jury, by a nine to three vote, recommended that Ibar be sentenced to death for the triple homicide. (ROA-R.6 1021-23). The trial court agreed, and on August 28, 2000, upon finding five aggravators, two statutory

[1] Penalver was also convicted as charged and sentenced to death. On appeal, the Florida Supreme Court reversed. *See Penalver*, 926 So. 2d 1118. Undersigned has been advised that the re-trial ended in an acquittal.

mitigating factors, and nine nonstatutory circumstances, bar was sentenced to death.

Ibar appealed his to this Court raising eight issues[2] This Court affirmed the convictions and sentences. *Ibar*, 938 So. 2d at 476. On February 19, 2008, pursuant to Fla. R. Crim. P. 3.851, Ibar moved for postconviction relief. A three-day evidentiary hearing commenced on March 16, 2009 and on February 13, 2012, the trial court denied relief.[3] (PCR.9 1482-1529). Ibar appealed and on December 21, 2012, he filed his initial

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[2] As provided by this Court, Ibar asserted the following issues on direct appeal:

> Ibar raises eight issues in this appeal: (1) whether certain out-of-court statements were "statements of identification" as contemplated by § 90.801(2)(c) (1995), Fla. Stat. Ann.; (2) whether the trial court erred in admitting witness testimony for purpose of impeaching that testimony; (3) whether the trial court erred in admitting the transcript of testimony given by a deceased witness in a prior trial; (4) whether the trial court erred in allowing the State to introduce hearsay evidence and certain expert testimony; (5) whether the trial court erroneously precluded the admission of evidence regarding third-party motive and animosity and reputation evidence; (6) whether the trial court erred in allowing the admission of evidence regarding a live lineup; (7) whether the integrity of the trial was affected by references to certain evidence denying Ibar due process; (8) whether the death penalty in this case violates the Florida and Federal Constitutions.

Ibar, 938 So. 2d, 459.

[3] The delay was due to DNA and other forensic testing the trial court permitted following the close of the evidentiary hearing.

brief in case number SC12-522 and his petition seeking state habeas relief in the instant case.

The Facts of the Crimes: On direct appeal, this Court found:

> On August 25, 1994, Pablo Ibar and Seth Penalver were charged with three counts of first-degree murder, one count of burglary, one count of robbery, and one count of attempted robbery.FN1 Penalver and Ibar were initially tried together. The first jury trial ended with a hung jury. Ibar and Penalver were eventually tried separately. Both Ibar and Penalver were ultimately convicted and sentenced to death.
>
> FN1. See *Penalver v. State*, 926 So. 2d 1118 (Fla. 2006).
>
> On Sunday, June 26, 1994, a Palm Beach County police officer discovered a Mercedes SL convertible on fire on a road twelve miles south of South Bay. The car was registered to Casmir Sucharski,FN2 owner of a nightclub called Casey's Nickelodeon. The officer who discovered the car notified the Miramar Police Department. A Miramar police officer went to Sucharski's home to tell him that his car had been found. The officer knocked on the door and received no answer. He stuck his card in the door and left.
>
> FN2. Casmir Sucharski was also known as Butch Casey.
>
> The next morning, Monday, June 27, 1994, Marie Rogers' mother reported her missing to the Broward County Sheriff's Department. Rogers had gone to Casey's Nickelodeon on Saturday, June 25, 1994, with her friend, Sharon Anderson, and did not return home. Deputy Christopher Schaub went to Casey's Nickelodeon and learned that Sucharski left the club early Sunday morning with Rogers and Anderson. Schaub then went to Sucharski's residence. Anderson's car was in the driveway but no one answered the door. Schaub found a Miramar Police Department business card in the door and a blue T-shirt on the porch. He peered inside and saw three bodies.
>
> The police identified the individuals found in the residence as Sucharski, Rogers,*458 and Anderson. All

three died of gunshot wounds. Because Sucharski had recently installed a video surveillance camera in his home, there was a videotape of the actual murders. The tape revealed that on Sunday, June 26, 1994, at 7:18 a.m., two men entered through the back sliding door of Sucharski's home. The intruder alleged to be Ibar initially had something covering his face, but he eventually removed it. The other intruder, alleged to be Seth Penalver, wore a cap and sunglasses, which were never removed, and carried a firearm. The videotape showed that one of the intruders had a Tec-9 semiautomatic handgun with him when he entered the home. The other intruder displayed a handgun only after he went into another room and left the camera's view. At one point, the intruder alleged to be Penalver hit Sucharski with a Tec-9 in the face, knocked him to the floor, and beat him on the neck, face, and body. This attack on Sucharski lasted for nearly twenty-two minutes. The man later identified as Ibar shot Sucharski, Rogers, and Anderson in the back of the head. The intruder alleged to be Penalver then shot Anderson and Sucharski in the back.

During this time, the intruders searched Sucharski's home. They rummaged through the home and entered the bedrooms and the garage. Sucharski was searched and his boots removed. Sucharski struggled and was repeatedly hit by both intruders. The intruders were seen putting things in their pockets. The State presented evidence that Sucharski kept ten to twenty thousand dollars in cash, carried a gun, and owned a Cartier watch. The watch was not found and Sucharski's gun holster was empty.

Police took frames from the videotape and produced a flyer that was sent to law enforcement agencies. Three weeks after the murders, the Miramar police received a call from the Metro-Dade Police Department informing them that they had a man in custody on a separate and unrelated charge who resembled the photo on the flyer. The man in custody at the Metro-Dade Police Department was Pablo Ibar. Ibar was interviewed by Miramar investigators. He told police he lived with his mother, and that on the night of the murders he had been out with his girlfriend, whom he called both Latasha and Natasha.

Ibar actually lived with several friends in a rented

> home on Lee Street in Hollywood, Florida. One of his roommates was Jean Klimeczko. Klimeczko initially identified Ibar and Penalver as the men on the videotape. Klimeczko told police that early on the morning of the murders, Ibar and Penalver rushed into the Lee Street home, grabbed a Tec-9 that was kept at the house, and left. At the second trial, however, Klimeczko had no memory of his earlier statements. Other witnesses who had given earlier statements to police that the men in the photo looked like Ibar and Penalver also denied making identifications.

Ibar, 938 So. 2d at 457-58. On June 14, 2000, the jury found Pablo Ibar guilty as charged (ROA-R.6 1000-05).

The Jury Penalty Phase: In the penalty phase the State presented victim impact testimony from family members of Sharon Anderson and Marie Edwards (ROA-T.59 7310-29). The defense called Ibar's family and friends to discuss his character and lack of prior criminal history. The jury recommended death for the murders by a vote of nine to three. (EOA-R.6 1021-23).

***Spencer* Hearing**: Spencer hearing held on August 14, 2000.

Sentencing and Attendant Trial Court Findings: In sentencing Ibar to death for the triple homicide, the trial found aggravation of: (1) prior violent felony, (2) felony murder, (3) avoid arrest, (4) heinous, atrocious or cruel, and (5) cold, calculated, and premeditated (this factor was not given to the jury). (ROA-R.6 1096-1100). In mitigation, the trial court found: (1) no significant prior criminal history (medium weight), (2) age (minimum weight), (3) good/loving family relationship (medium weight), (4) good worker (minimal weight),

(5) rehabilitation/no danger to others in prison (very little weight), (6) good friend to brother and friend (minimal weight, (7) good courtroom behavior (minimal weight), (8) Defendant is religious (minimal weight), (9) family/friends care for Defendant (minimal weight), (10) good family (minimal weight), (11) remorse (minimum weight). The trial court rejected the mitigators of (1) defendant's participation was minor (2) good jail record, (3) lack of father growing up, (4) entered victim's home without intent to kill, (5) defendant did not flee after offense committed, (6) bad peer influence, (7) no time for cool consideration before killing, (8) under influence of alcohol at time of crimes, (9) Defendant is not violent person, (10) Defendant is intelligent (proven but not mitigating), (10) residual doubt (not mitigating factor), (11) extraneous emotional factors, (12) death penalty is not deterrent, (13) family's request for life sentence, (14) cost less for life sentence, (15) innocent people have been sentenced to death. (ROA-R.6 1104-14).

Postconviction proceedings: In his postconviction motion (PCR.1 117-93), Ibar raised claims addressed to guilt phase counsel's effectiveness,[4] a *Brady v. Maryland*, 373 U.S. 83, 87

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[4] Ibar's nine sub-claims challenging guilt phase counsel's effectiveness were that counsel failed to: (A) present an expert

(1963) violation; the failure of the state to maintain surveillance video equipment from crime scene; and that denial of due process based on an alleged lack of time to review photographs obtained in public records litigation. On December 12, 2011, a supplemental motion was filed Raising a *Ring v. Arizona*, 536 U.S. 584, 585 (2002) later with the concession that the matter was procedurally barred. (PCR.8 1339-1448; PCR.9 1475-81, 1509). Ibar also supplemented his motion with a claim that guilt phase counsel was ineffective in not requesting an

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in facial identification to opine that Ibar could not be positively identified on the murder videotape; (B) present a witness to say the perpetrator, identified as Ibar, was shorter than Ibar; (C) present an expert to testify about the reliability of eye-witness testimony; (D) to investigate & counter the State's rebuttal case challenging Ibar's alibi witnesses and their account of where they purchased telephone calling cards in Ireland; (E) obtain a private investigator to testify about: (1) eye-witness, Gary Foy's, obstructed line of sight when observing Ibar leaving the crime scene in Victim Sucharski's Mercedes Benz; (2) that the Tec-9 gun Ibar allegedly sold before the murder was not the murder weapon; and (3) Natasha, the girl with whom Ibar claimed to have spent the Sunday night following the murders; (F) secure identification expert, Iscan, to report that the second person visible on the murder videotape was not Penalver; (G) show the Tec-9 gun recovered in this case was not the murder weapon; (H) object to: (1) the State calling Mimi Quinones solely for impeachment purposes; (2) the State calling Maria Casas, Marlene Vindel, Roxana Pegura solely for impeachment purposes; and (3) the State's alleged late disclosure of rebuttal witness, George McEvoy, as a discovery violation under *Richardson*, 246 So. 2d 771 and (4) Gary Foy's testimony on the grounds the photographic and live line-ups were unduly suggestive; and (I) seek instructions limiting the juror's consideration of the identification witnesses testimony as impeachment only.

instruction for the jury to critically and cautiously evaluate eyewitness identification testimony. An evidentiary hearing was granted on the claims of ineffective assistance of guilt phase counsel for failing to: (A) present an expert in facial identification to opine that Ibar could not be positively identified on the murder videotape and (F) secure identification expert, Dr. Iscan, to report that the second person visible on the murder videotape was not Penalver. Ibar was granted an evidentiary hearing on his *Brady* claim, but, withdrew the claim addressed to a "black t-shirt."

At the evidentiary hearing Ibar presented three witnesses respecting his Claim I(A) that defense counsel, Kayo Morgan ("Morgan") was ineffective because of his "failure to procure assistance of facial identification expert" (PCR.1 145-49); and in Claim I(F), that Morgan was ineffective due to his "failure to subpoena or otherwise procure Mehmet Iscan to testify that [co-defendant] Penalver ... could not be reliably identified in the surveillance video and probably was not the perpetrator depicted with the hat" (PCR.1 174-76). Ibar presented Raymond Evans ("Evans"), Morgan, and Dr. Falsetti. Evans was presented to discuss identification of the person alleged to be Ibar from

the video/photographic evidence. Evans[5] was an artist by training, not a forensic anthropologist, such as Dr. Iscan or Dr. Falsetti. Dr. Falsetti was called, not to evaluate or discuss the videotape, but to report the contact he had with defense counsel, Morgan and/or Barbra Brush ("Brush") in 2000.

The summation of Evans' testimony is that the video/photographic evidence was of such poor quality that he could see some areas which indicated Ibar may not be the person shown on the crime scene video, however, there were other areas that corresponded to Ibar and that Ibar could not be eliminated as the person on the video. Evans attempted to compare still photographs generated from the 1994 videotape of the crime and the 1994 Polaroids of Ibar taken shortly after the crime, with new, recent photographs of Ibar taken sometime in 2007 approximately 13 years after the murders. Evans agreed that a person may look different in different pictures given the passage of time. Further, Evans was forced to admit that the face of the person on the videotape, in this case Ibar, was different in each of the still images set out in "RWE/02" of Evans' report and those admitted at trial as State's exhibits #114, #115, #116, and #139, although each video-still photograph

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[5] State objected as Evans' was not an expert and did not pass the *Frye* test. (PCR.12 1883-86, PCR.13 2080-81).

is of the same person (PCR.12 1935, 1956-581; PCR.13 2044, 2048-49). He also admitted that the color photographs he received from postconviction counsel were not at the same angle as the stills from the video. (PCR.13 2061-62). Likewise, Evans admitted that facial features may be altered based on the emotions of the person at the time. (PCR.13 2064).

Evans found all of the crime scene imagery of poor quality and the still photos generated from them would not meet the standards set in Britain in 2006 for use as a means for making an identification by an "expert" in Britain. (PCR.12 1891, 1893-1900, 1914-19, 1891). These standards were created by Evans and his own Forensic Imagery Analysis Group ("FIAG") group. However, FIAG is merely an association in Britain and is not a regulatory body and the guidelines are not binding on practitioners, although lately they have been accepted in Britain. (PCR.12 1992-94, 2007). Moreover, no definitive scales exist in Britain to describe the likelihood of one person being another. (PCR.13 2050-51)

Nonetheless, Evan noted some differences between Ibar's new 2007 color photographs and the 1994 black and white stills from the videotape respecting the eyebrows, chin, nose and jaw. He stated, with qualifications, that the noted differences could be due to lighting, distortion, poor resolution of the film, and the recent comparison photos were not taken from the same angle

as those generated from the videotape. (PCR.12 1942-45, 1973-74, 1977-78; PCR.13 2046). However, Evans admitted that there are general similarities between Ibar and the person on the video; these are Ibar's asymmetrical eyebrows, cheek bones (PCR.12 1948-49, 1968-71; PCR.13 2045-46). The two images' cheek bone widths were broadly similar (PCR.12 1958-61). Evans claimed that the chin line was different, but, admitted the lighting was so poor that the chin line could not be seen clearly. (PCR.12 1958-67). While Evans tried to point to differences in the mouths of the two images, he again admitted that any differences could be due to the mobile nature of the lips. (PCR.12 1972-73). Evans did not believe the differences in jaw lines were due to lighting conditions (PCR.13 2047) However, he averred that even with the differences he noted, he could not exclude Ibar completely as being the person depicted on the videotape capturing the triple homicide. (PCR.12 1980-81).

Evans agreed that Dr. Birkby, a Board Certified Diplomat in Forensic Anthropology who testified in Penalver's trial, reported that he could not say whether or not Penalver and Ibar were on the videotape and that the still photographs were of insufficient quality to point out the anatomical features necessary for anthropologists to do a morphology. Evans also admitted that Dr. Birkby averred that a lay person familiar with the person depicted in the photograph could opine as to that

individual's identity even where a scientist could not do so under scientific principles. Someone who knows the individual could identify them even if the quality of the materials is not the best. The onus on the scientist is much greater. (PCR.13 2039-43). During his own tests and studies, Evans chooses not to meet the subject of his imagery analysis because he does not "want to be in the position of having recognized the person as the person" in the image to be analyzed. (PCR.13 2087-88).

At the evidentiary hearing, Ibar presented his trial counsel, Morgan, who claimed that domestic problems before the trial and his illness during the trial caused him to rendered deficient performance/representation[6] of Ibar. Morgan also claimed he does not believe in capital punishment and that he is very loyal Ibar. (PCR.14 2138-722183-84, 2209, 2230, 2232-33, 2238, 2247, 2278, 2283-85; PCR.15 2326). Morgan claimed he was ineffective, could not recall why he did not get Dr. Falsetti as a witness, and had no tactical reason not to call Dr. Falsetti (PCR.14 2236-37; PCR.15 2310-12, 2316-17). Morgan again announced his disdain for appellate courts, opposition to the death penalty, and unwavering loyalty to Ibar (PCR.14 2209; PCR.15 2326) However, it was revealed at the evidentiary hearing that the

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[6] In another postconviction case, Morgan has claimed he was ineffective due to his illness, but, the trial court rejected that admission in denying postconviction relief (PCR.15 2298-99)

trial records established that Morgan's trial preparations, cross-examinations, and presentations were extensive, thorough, and professionally reasonable. (PCR.14 2138-72, 2183-84, 2209, 2230, 2232-33, 2236-38, 2247, 2279; R.15 228, 2296)

Morgan had fully prepared and litigated Ibar's case previously resulting in a hung jury while when the co-defendants were tried together. Morgan knew the evidence, witnesses, and the State's case/strategy. By the time of Ibar's 2000 trial, Morgan had been practicing criminal law exclusively for 16 years and had done three or four capital cases. (PCR.13 2138-72, 2183-84, 2209, 2230, 2232-33, 2236-38, 2247, 2279; R.15 2286, 2295). Nonetheless, on January 14, 1999, Barbra Brush ("Brush") was appointed co-counsel on Ibar's case; this was more than a year before the case went to trial. Morgan testified that he trusted Brush and assigned much of the trial preparation work to her. He characterized Brush as very intelligent; Morgan had great respect for her and did not second-guess Brush. Morgan announced that he could set out an objective for Brush, and she would follow it. (PCR.14 2178, 2183, 2211-17, 2219, 2226, 2285-86)

Morgan admitted discussing with Brush the videotape and the relative height of Ibar given objects seen on the video. Brush even went to the crime scene with experts to get height measurements. (PCR.14 2212-20, 2280; Defense E/H Exhibit #17). Morgan testified he originally wanted a forensic anthropologist

for Ibar and had consulted with anthropologists, but could not find any who would work for indigent fees (PCR.14 2286-87). Still wanting a forensic anthropologist, Brush was given the specific task of investigating/securing a forensic anthropologist, as was used by Penalver in the joint trial. (PCR.14 2179-78, 2181-82, 2289-90). In the endeavor to locate a forensic anthropologist, Brush contacted Dr. Falsetti of the University of Florida and upon defense motion in January 2000 moved for his appointment, and in March 2000, secured funding for Dr. Falsetti. (PCR.15 2305-07; ROA-R.3 449-50).

Brush alone dealt with Dr. Falsetti, after which she moved for the production of additional photographic evidence for her expert and for funds to compensate him. According to Morgan, if documents were provided to Dr. Falsetti, they would have come from Brush. Morgan admitted he had two facsimile communications with Brush, both stating that Dr. Falsetti would be their forensic anthropologist expert. Morgan testified that he may have spoken to Dr. Falsetti after Brush developed him as their expert, but he does not have a specific recollection of the conversation. However, Morgan knows the defense pursued Dr. Falsetti, that Brush spoke to the doctor, and that he was secured for the defense based on the order authorizing fee payment as well as Morgan's filing of the list of potential witnesses for the jury to consider during voir dire. Morgan

does not file motions absent a good faith basis. (ROA-R.3 447, 449, 450; ROA-T.9 1348; ROA-T.10 1973; ROA-T.15 2037; PCR.14 2226-29, 2286-89; PCR.15 2310, 2316; Defense Ex. #16, #17, #22)

The trial record reflects Morgan specifically noted for the trial court that he had identification experts and that he received a copy of the murder videotape which he was enhancing. (SROA.7 79-81). Morgan also reported to the trial court that he would proffer the testimony of his expert witnesses if their testimony was helpful. (ROA-T.7 11; SROA.7 86; PCR.15 2313-14) Morgan testified at the evidentiary hearing that he had included Dr. Falsetti's name on the list of additional potential defense witnesses so they could be announced to the potential jurors (SROA. 541; PCR.14 2228-29; Defense Ex. 23)

At the 2009 evidentiary hearing, Ibar presented Dr. Falsetti. It was his testimony that he had no recollection of being contacted by or receiving paperwork from either Morgan or Brush in January or February 2000 and could find no paperwork that he consulted with the defense in this case. However, he averred that he does not record a telephone call as "consulting." For Dr. Falsetti, "[c]onsulting requires receipt and generation of materials to be reviewed." (PCR.14 2192-93, 2197-98, 2201-02).

With respect to the Brady claims on which Ibar was granted an evidentiary hearing, Ibar questioned Morgan regarding his efforts to find other suspects. Morgan explained that he may

have delegated this task to Brush, but does not recall the person named "Sarsour." (PCR.14 2218; Defense Ex. #19). Likewise, Morgan was not familiar with the name John Giancarlo Rabino ("Rabino"), and did not see the name in the discovery documents. (PCR.14 2263-64). With respect to statement made by the Jean Klimeczko's ("Klimeczko") mother that her son had told her "something bad was going to happen," Morgan testified that he did not know of the statement, but would have to rely on the record of his cross-examinations of Klimeczko and Craig Scarlett. (PCR.14 2264-65).

Following the March, 2009 postconviction evidentiary hearing, the court, on February 13, 2012, rendered its order denying relief. Ibar appeals that decision. Simultaneously with the postconviction appeal brief, Ibar filed a Petition for Writ of Habeas Corpus under case number SC12-2619. The State's answer brief to the postconviction appeal follows.

SUMMARY OF ARGUMENT

Claim I - Ibar received constitutionally effective assist from guilt phase counsel who investigated the case, secured witnesses, raised cogent objections, and challenged thoroughly the State's evidence. Ibar failed to show both deficient performance and prejudice arising from counsel's performance as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

Claim II - Ibar has failed to show that an exculpatory

material was suppressed or that the State failed to maintain exculpatory evidence with malice.

ARGUMENT

CLAIM I: THE DENIAL OF IBAR'S CLAIMS OF INEFFECTIVE ASSISTANCE WAS PRORP (IB 40-95, RESTATED)

OVERVIEW.

Ibar asserts guilt phase counsel, Kayo Morgan ("Morgan") rendered ineffective assistance of counsel for failing to: (1) procure a facial identification expert to show Ibar could not be identified positively on the crime video tape; (2) procure Dr. Mehmet Iscan to testify that co-defendant, Penalver, could not be reliable identified on the crime videotape; (3) procure an eyewitness identification expert to demonstrate the unreliability of Foy's identification of Ibar; (4) introduce testimony from a civil engineer to state that the person on the videotape identified as Ibar was shorter than Ibar; (5) investigate and prepare effectively witnesses supporting the alibi defense; (6) procure and utilize a private investigator to: (a) challenge Foy's ability to identify Ibar; (b) challenge the ownership of the Tec-9 weapon; and (c) interview Natasha McGloria; (7) elicit from Detective Manzella that the Tec-9 recovered was not the murder weapon; and (8) interpose all necessary objections to: (a) State calling Mimi Quinones solely for impeachment; (b) identification testimony from Cassas, Vindel, and Peguera; rebuttal witness McEvoy; (d) Foy's

testimony identifying Ibar; (e) jury instruction limiting jury's consideration of out-of-court statements and prior testimony as impeachment; and (f) failing to request a jury instruction advising the jury to evaluate eyewitness identification testimony cautiously and providing the jury with the factors it should consider when determining the reliability of identifications. The trial court granted an evidentiary hearing on the ineffectiveness claims that Morgan failed to procure a facial identification witness and to present Dr. Iscan. The balance of Ibar's postconviction claims of ineffective assistance were denied summarily. The trial court's factual findings and credibility determinations are supported by the record and the legal conclusions are proper. This Court should affirm the denial of relief.

A. Preservation.

This claim was raised in Ibar's motion for postconviction relief, and the trial court, after an evidentiary hearing, denied relief.

B. The Standard of Appellate Review.

In *Florida Nat. Bank of Jacksonville v. Simpson*, 59 So. 2d 751, 763 (Fla. 1952), this Court stated with respect to *Strickland* claims that:

> Because an analysis of a claim of ineffective assistance of counsel presents mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual

findings that are supported by competent, substantial evidence, but reviewing the court's legal conclusions *de novo*. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Rimmer, at 76-77. *See Pagan v. State*, 29 So. 3d 938, 949 (Fla. 2009); *Arbelaez v. State*, 889 So.2d 25, 32 (Fla. 2005); *Davis v. State*, 875 So. 2d 359, 365 (Fla. 2003); *Freeman v. State*, 858 So. 2d 319, 323 (Fla. 2003).

To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89. This Court has discussed the *Strickland* standard stating:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So. 2d 960, 965 (Fla. 2001)(*quoting Strickland*, 466 U.S., 687). In *Valle*, 778 So. 2d 960, we further explained:

> In evaluating whether an attorney's conduct

> is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] '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.'"
>
> *Id.* at 965-966(citations omitted)(*quoting State v. Weaver*, 1999-2177 (La. App. 4 Cir. 12/6/00), 775 So. 2d 613, 628, and *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

Arbelaez v. State, 889 So.2d 25, 31-32 (Fla. 2005). In *Davis*, 875 So. 2d, 365, this Court reiterated that the deficiency prong of *Strickland* required the defendant to prove that the "conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards." (*citing Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). Prejudice under *Strickland* requires proof that "the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Davis*, 875 So. 2d, 365. *See Valle v. Foster v. State*, 778 So. 2d 906 (Fla. 2000).

At all times, the defendant bears the burden of proving not

only that counsel's representation fell below an objective standard of reasonableness and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. *See Orme v. State*, 896 So. 2d 725, 731 (Fla. 2005)(*quoting Strickland*, 466 U.S. at 694 that "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision"); *Gamble v. State*, 877 So. 2d 706, 711 (Fla. 2004); *Johnston v. Singletary*, 162 F.3d 630 (11th Cir. 1998); *Roberts v. Wainwright*, 666 F.2d 517, 519 n.3 (11th Cir. 1982). When considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986).

With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Davis*, 875 So. 2d, 365; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether counsel could have done more;

perfection is not required." *Id.* at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later does not prove deficiency. *See Patton v. State*, 784 So. 2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995); *Rose v. State*, 675 So. 2d 567, 571 (Fla. 1996). From *Williams*, 529 U.S. 362, it is clear the focus is on what efforts were undertaken and why a specific strategy was chosen over another. Additionally, as noted in *Chandler*, 218 F.3d at 1318, "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. *See Strickland*, 466 U.S. 668, [466 U.S. 690-91] ("Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")".

It must be noted that under *Strickland*, it is the defendant's burden to come forward with evidence that counsel was deficient and that such deficiency prejudiced him.

> Strickland specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466

> U.S. at 689. The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," *Pinholster v. Ayers*, 590 F.3d 651, 673 (9th Cir. 2009), but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did," *Id.* at 692(Kozinski, C.J., dissenting). See also *Harrington v. Richter*, 131 S. Ct. 770, 791 (2011)("Strickland ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011). Moreover, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S. at 690(counsel is "strongly presumed" to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

"In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.' *Strickland*, 466 U.S. 668. At all points, '[j]udicial scrutiny of counsel's performance must be highly deferential.' *Strickland*, 466 U.S. 668. *Wong v. Belmontes*, 558 U.S. 15 (2009). As noted in *Harrington*, 131 S. Ct., 787-88:

> With respect to prejudice, a challenger must demonstrate "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." *Strickland*, 466 U.S. 668. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. 668. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. 668.

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, ---- (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689-690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Strickland*, 466 U.S. 668; *see also Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S. at 690.

Harrington, 131 S. Ct. at 787-88.

The United States Supreme Court has reasoned:

The Court of Appeals erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking. Although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer

> neglect." *Yarborough*, 540 U.S., 8(per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Strickland*, 466 U.S. at 688.

Harrington, 131 S. Ct. at 790. Continuing, the Court stated:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See Wong*, 558 U.S., ----(per curiam) (slip op., at 13); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Strickland*, 466 U.S. 668. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Strickland*, 466 U.S. 668. The likelihood of a different result must be substantial, not just conceivable. *Strickland*, 466 U.S. 668.

Harrington, 131 S. Ct. at 791-92.

C. The Trial Judge's Order Denying Postconviction Relief Was Proper.

The State contends that the evidence and the law support the trial court's order denying relief after an evidentiary hearing on two claims and summarily on the balance of the claims was proper. The factual findings are supported by the record and the trial court applied the correct law when denying postconviction relief was proper. Each sub-claim of ineffective assistance will be addressed in turn.

(1) The trial court properly rejected Ibar's claim that counsel was ineffective in not procuring a facial identification expert.

Ibar asserts that the primary piece of evidence against him at trial was a silent, grainy, black and white surveillance videotape of the triple homicide which was played for the jury repeatedly and that counsel was ineffective in not presenting a facial identification expert to establish that Ibar could not be identified on that tape. This claim was given an evidentiary hearing, however, the trial court denied relief. Ibar maintains he is entitled to relief based on Morgan's testimony that Ibar had asked for a facial identification expert, one was not procured and presented, and Morgan offered no tactical reason why he did not present such a witness. (IB at 43-44). In support of his claim, Ibar called Raymond Evans ("Evans"), a British facial identification expert to state that the video and attendant still photographs were of insufficient resolution/quality to allow for an identification opinion. Ibar also called Dr. Falsetti, a forensic anthropologist Morgan via his co-counsel, Brush, contacted and procured funds to hire. Dr. Falsetti averred that he had no recollection of being contacted by or receiving paperwork from either Morgan or Brush in January or February 2000 and could find no paperwork that he consulted with the defense in this case, however, he does not record a telephone call as "consulting." "Consulting requires

receipt and generation of materials to be reviewed." (PCR.14 2192-93, 2197-98, 2201-02).

In denying relief, the trial court first determined that Evans was not an "expert" under the requisite law and that the subject matter about which he testified at the evidentiary hearing was not a "generally accepted scientific field established by the time of Defendant's [2000] trial" under a *Frye*[7] analysis. (PCR.9 1515). The trial court stated:

> Defendant has failed to demonstrate that facial identification testing was in existence and generally accepted by the relevant scientific community at Defendant's 2000 trial.[8] While Mr. Evans claims to have participated in the development of a master program in facial identification in Great Britain, there is no such comparable program in the United States. Mr. Evans conceded that facial identification societies were not in existence in the year 2000 and that all of his appointments came after the year 2004. (PCR.II at 68-80, 83-85, 90). Mr. Evans also testified that formal qualifications for facial photo-identification were not developed until 2009 (PCR.II at 85-86).

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[7] *Frye v. United States*, 293 F. 2013 (D.C. 1923).

[8] Ibar asserts that the relevant time frame under Frye was his 2006 direct appeal decision. However, the issue is whether counsel was ineffective in not procuring a facial identification expert in 2000. As such, the relevant time from is the trial, not what may be available almost a decade later. It is well settled that a high level of deference must be paid to counsel's performance; distortion of hindsight must be limited as the standard is to evaluate performance based on the facts known at time of trial *See Strickland*, 466 U.S. at 688-89. The fact that the trial court determined that facial identification was not a recognized field in 2000 is of no moment for this appeal as the trial court assumed arguendo that such a filed existed in 2000 and analyzed the *Strickland* claim with that in mind. (PCR.9 1515-16)

> While Mr. Evans claimed that facial identification was recognized by the forensic community in 2000, he admitted that it is not recognized in the United States. (PCR.I at 39-41; PCR.II at 97-99). Additionally, based on these facts, as well as the fact that Mr. Evans was not part of any recognized facial imaging group at the time of trial, this Court finds that he did not qualify as an expert in this purported area. Nevertheless, this Court will analyze the instant claim assuming *arguendo* that there was a scientific filed of facial identification at the time of trial and that Evans was shown to be an expert in that field.

(PCR.9 1515-16)[9]

The trail court determined that Ibar did not carry his burden under *Strickland* with regard to procuring a facial identification expert as the record established that the defense team "investigated, obtained funds for, and had contact with Dr. Anthony Falsetti, a forensic anthropologist." (PCR.9 1516). The trial court found:

> Barbara Brush, Mr. Morgan's co-counsel and, by his own admission, the attorney responsible for much of the trial preparation, moved for Dr. Falsetti's appointment in January 2000. In March, 2000, the defense secured funding for his appointment. (PCR.V at 585-87; R.3 at 449-50). It is clear that Ms. Brush did have dealings with Dr. Falsetti; she moved for additional photographic evidence for her expert and funds to compensate him. Additionally, billing records indicate phone calls she had with Dr. Falsetti. However, merely because the witness was not presented at trial does not prove a deficiency on the part of counsel. Rather, after consulting with Dr. Falsetti, counsel may have had reason not to present

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[9] The evidentiary hearing record citations noted by the trial court may be found at PCR.11 1828-30, PCR.12 1855-67, 1870-73, 1877, 1884-86, .

such evidence.

> Ms. Brush was not presented by the defense at the evidentiary hearing. It is Defendant's burden to prove deficiency on counsel's part. It is apparent that it was Ms. Brush who had most, if not all, of the contact between the defense team in this case and Dr. Falsetti. Defendant has failed to come forward with reliable evidence demonstrating that the decision not to call Dr. Falsetti was anything but strategic. He has been unable to overcome the deferential presumption that counsel made all significant decisions in the exercise of reasonable professional judgment.

(PCR.9 1516).

Ibar takes issue with the findings that the defense consulted with and moved for appointment of Dr. Falsetti. However, the court's findings are supported by the record. Brush dealt with Dr. Falsetti at Morgan's direction. After speaking with Dr. Falsetti, Brush moved for the production of additional photographic evidence for her expert and for funds to compensate him. Morgan admitted he had two facsimile communications with Brush, both stating that Dr. Falsetti would be their forensic anthropologist expert. Morgan knows the defense pursued Dr. Falsetti, that Brush spoke to the doctor, and that he was secured for the defense based on the order authorizing fee payment as well as Morgan's filing of the list of potential witnesses for the jury to consider during voir dire. Morgan does not file motions absent a good faith basis. (ROA-R.3 447, 449-50; ROA-T.9 1348; ROA-T.10 1973; ROA-T.15 2037; PCR.14 2226-29, 2286-89; PCR.15 2305-07, 2310, 2316; Defense Ex. #16, #17,

#22). The trial record reflects Morgan specifically noted for the trial court that he had identification experts and that he received a copy of the murder videotape which he was enhancing. (SROA.7 79-81). Morgan also reported to the trial judge he would proffer the testimony of his expert witnesses **if their testimony were helpful**. (ROA-T.7 11; SROA.7 86; PCR.15 2313-14) Morgan testified at the evidentiary hearing that he had included Dr. Falsetti's name on the list of additional potential defense witnesses so they could be announced to the potential jurors (SROA 541; PCR.14 2228-29; Defense Ex. 23)

These facts also support the trail court's determination that Ibar failed to show that the decision not to call Dr. Falsetti was not strategic. While Ibar points to Dr. Falsetti's lack of memory of "consulting" with the defense,[10] Dr. Falsetti's lack of recollection, does not undermine the fact that the defense made efforts and took steps to investigate and consider calling a forensic anthropologist as supported by the court pleadings and arguments made to the trial court in 2000 as outlined above Moreover, Ibar failed to call Brush to refute the record evidence supporting her contact with, consideration of, and funds for hiring Dr. Falsetti and Morgan's testimony that he

[10] According to Dr. Falsetti, "Consulting requires receipt and generation of materials to be reviewed." (PCR.14 2192-93, 2197-98, 2201-02).

would not file frivolous motions and would he would proffer the testimony of his expert witnesses **if their testimony were helpful**. (ROA-T.7 11; SROA.7 86; PCR.15 2313-14).

In the trial court's order denying postconviction relief, the court found it telling that Ibar chose not to have Dr. Falsetti[11] render an opinion for the collateral case regarding the identity of the person on the videotape. The court concluded:

> Without such an opinion, Defendant is unable to show any deficiency or prejudice in counsel's failure to call [Dr. Falsetti]. Furthermore, even if this witness was presented and demonstrated that he could have provided favorable testimony at trial and would have been available to do so, counsel does not render ineffective assistance of counsel automatically by failing to call an expert if cross-examination is used to bring out the weaknesses in the State's case. *See Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990); *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987); *Van Poyck v. State*, 694 So. 2d 686, 697 (Fla. 1997)

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[11] The trial court also reasoned:

> Although Defendant argues that trial counsel was ineffective in failing to present at trial the testimony of a forensic anthropologist (such as Dr. Mehmet Iscan or Dr. Anthony Falsetti), Defendant did not call a forensic anthropologist as a witness at the evidentiary hearing regarding the issue of identification. ... In failing to call a forensic anthropologist regarding the issue of identification when given the opportunity during the evidentiary hearing, Defendant has failed to show that a forensic anthropologist witness was not only available to testify but would also have offered testimony favorable to Defendant.

(PCR.9 1519-20)

> Additionally, the record demonstrates that trial counsel thoroughly cross-examined the identification witnesses and challenged the State's witnesses involved with the video and photo evidence, many on the same or similar issues which Defendant suggests were of note in relation to Mr. Evans' proposed testimony. . . . In analyzing all of this testimony elicited by trial counsel at trial, it is clear that the jury was made aware of Defendant's challenges raised against the videotape and photos.

(PCR.9 1517-18)

Ibar suggests Morgan should have done more than challenge the State's case via cross examination of the video/photograph experts and present an alibi defense as calling a facial identification expert would not conflict with the other defense endeavors. However, "[t]he test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995)(en banc) (citations omitted).

The trial court also determined that Ibar failed to prove *Strickland* prejudice given that counsel "thoroughly cross-examined the identification witnesses, presented alibi witnesses, and elicited testimony from witnesses regarding discrepancies between the perpetrator's appearance on the videotape and Defendant's trial appearance." (PCR.9 1519). Also significant to prejudice analysis and supports the trial court's

determination the there was no reasonable probability of a different outcome is the factual finding that Ibar's postconviction facial identification expert's opinion "that Defendant *could not* be eliminated as being the perpetrator on the video."[12] (emphasis in original)(PCR.9 1519). Additionally, the trial court pointed to other evidence presented at trial establishing Ibar's guilt which further demonstrated to the court "why no resultant prejudice has been proven." (PCR.9 1519). The court referenced: (1) police investigation which resulted in family members/friends identifying Ibar as the person on the video/photos; (2) Foy's positive identification of Ibar as the passenger in victim's Mercedes leaving the crime scene shortly after the triple homicide; (3) identification

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[12] The sum total of Evans' testimony was that the materials were very poor and that while discrepancies were noted, he could not rule Ibar out as the person on the crime scene videotape. This must be coupled with the statements, depositions, and/or testimony of Dr. Birkby and Dr. Iscan that the quality of the videotape/still photographs were of such poor quality that they could not make a reliable comparison. Further, Dr. Birkby stated that the quality of the videotape/stills were not of sufficient quality to allow him to opine whether or not Ibar and Penalver were depicted on them, but someone who knows the subjects may be able to say that it looks the person he knows. (PCR.12 2007; PCR.13 2041-42; Defense Exs. #9 - #13). From this, the best Ibar has shown is that a scientist, using scientific principles could not opine as to the identity of the images on the videotape, but someone who knows Ibar may be able to give a lay opinion. As the trial court concluded and this Court should find, this evidence, does not establish *Strickland* prejudice. Ibar has not shown that had an expert been called, he would have opined that Ibar is not on the videotape.

testimony of Ian Milman, Melissa Munroe, Klimeczko, Kim Sans, David Phillips; and (4) impeachment testimony of Peguera, Vindel, Casas, and Klimeczko. (PCR.9 1519).

With respect to Ibar's offered Evans as his "expert" at the evidentiary hearing, the trial court reasoned that in spite of Evans' testimony that the quality of the videotape and distilled photos was so poor that a reliable identification could not be made, Evans "recognized that there were some general similarities, as well" and Evans "was *unable* to conclude that the perpetrator on the videotape was not Defendant." (PCR.9 1520; PCR.12 1919). The trial court also recognized that Evans was comparing photographs from 1994 with those taken in 2007 and that Evans' testimony supported the finding that "a person may look different with the passage of time, that many of the recent photos he received were not taken at the same angle as the 1994 video stills, and that facial features may be altered based upon the emotions of the individual at the time." (PCR.9 1520-21). It was the court's finding: "even in his comparison of the imagery of Defendant from 1994 and 2007, Evans recognized that differences could be the result of lighting conditions, distortion, resolution of the film, and the differing angles." The court noted Evans' concession "that there existed general similarities between the compared imagery; assymetrical (sic) eyebrows and cheekbones, as well as broadly similar cheekbone

widths." The trial court also noted Evans' assertion that Dr. Iscan and Dr. Birkby (State expert in Penalver's case) agreed the video was too poor to make a positive identification from a scientific perspective, but admitted "a layperson who knows the individual may be able to identify the individual even where the image is not of prime quality, as the onus on the scientist is much greater." (PCR.9 1521).

The record supports the court's findings and conclusions with respect to Morgan's challenge to the eyewitness and identification testimony. *See Ibar*, 938 So. 2d at 459-64, 469-70(setting forth the facts and discussing the identification testimony of Ibar's friends/family and eyewitnesses). The record also establishes that from the beginning of trial, in opening statement, Morgan attacked the conclusion that Ibar was the person depicted on the videotape, challenged whether eye-witness Gary Foy had sufficient time to make an identification, offered that Klimeczko was hostile to Ibar, and again discussed the alibi. (ROA-T. 1609-17, 1621-38, 1639; PCR.15 2267-68, 2281-83) Morgan, quizzed Ron Evans ("Evans"), an FBI agent who enhances video images about the effects of the enhancement process used in this case. During Morgan's cross-examination, Ron Evans admitted that the enhancement process could cause distortions in the hairline configuration of a person depicted on the videotape. Also, he agreed that the transportation of

the image to the video may have caused a distortion. The result would be that there could be a "zig-zag" effect noted on the person's eyebrows and hairline due to the "zooming" effect. In fact, Ron Evans reported seeing a distortion at the hairline because of the clear delineation of Ibar's hair and forehead, but he could not see a distortion at the nose and eyes due to the soft delineation in those areas. This distortion was equated to the effects of using a magnifying glass to look at a newspaper picture. The resulting enlargement causes the individual pixels to be enlarged. Evans did nothing to alter the hair line, eye configuration, jaw, or nostril areas, however, the distortions could make a person look more like someone else. (ROA-T.16 2231-41, 2244).

When questioning Marla Carroll ("Carroll"), another videotape enhancement expert, Morgan was able to get her to point out lighting differences, distortions, unclear areas, and blemishes seen on the videotape and enhanced photographs taken from the video. According to Carroll, replaying a tape numerous times may cause distortion and she could not tell the number of times the murder videotape had been used. While the "minimal wide angle" lens used in the video camera does not cause a tremendous amount of distortion, it does have some distortion, i.e., some arching, bending out of features toward the edges of the image. Carroll pointed out some bending of the hairline of the person

depicted on the video. It was also noted by Carroll that while the pixel arrangement never is changed in the enhancement process, the image could be changed to make it look different than it was in reality. (ROA-T.17 2289-2324).

Similarly, Morgan challenged other State witnesses regarding different aspects of the murder videotape and its creation. Morgan questioned Crime Scene Investigator, Robert Cerat, regarding his knowledge of the videotape and the camera lens used to record the scene. (ROA-T.13 1721-29). During Morgan's cross-examination by the defense, Mark Suchomel ("Suchomel"), admitted that the shirt the person later identified as Ibar wore on his head was darker in color than the shirt the defendant wore. Suchomel also had to agree with Morgan that the shoe laces the identifiable perpetrator wore appeared lighter that his shoes. Further, Suchomel confirmed that the perpetrator wiped his face and head with the shirt that was used to disguise his identity and that the shirt, found outside the front door was sent for DNA testing. (ROA-T.15 2050, 2055-56, 2061-62, 2093-95) Subsequently, the DNA testing done on the shirt was not a match with Ibar. (ROA-T.51 6767-75). Detective Craig Scarlett explained how there came to be still photographs taken from the video, how the fliers were generated, and the election to have the FBI create enhanced still prints from the videotape. (ROA-T.16 2203-10, 2455-57). Given this backdrop, it is not

unreasonable for Morgan to have made the strategic decision to forgo calling a forensic anthropologist.

The trial court correctly resolved the *Strickland* claim against Ibar. In spite of Morgan's protestations[13] that he cannot understand why he did not get Dr. Falsetti and that it was his failure/fault that Dr. Falsetti, this "critical witness," was not presented at trial (PCR.14 2238-39) the record demonstrates that it was a strategic decision, thus, under *Strickland*, Ibar has not carried his burden. *See Yarborough*, 540 U.S. 1. Ibar would have this Court find that Morgan, a seasoned defense counsel, forget to present the expert, after taking significant steps to retain a forensic anthropologist as an defense expert, and just before trial commenced and during voir dire, the defense team was securing funds for that expert and obtaining more evidence for the expert's consideration.

It is more reasonable and supported by the record, that as the trial progressed, a strategic decision was made to forgo Dr. Falsetti's testimony given the extensive, thorough cross-examination of the identification witnesses/evidence, as outlined above, as well as the assessed strength of the alibi

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[13] See *Van Poyck v. Florida Dept. of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002)(rejecting as irrelevant attorney's self-proclaimed deficiency when assessing *Strickland* claim as standard is an objective one)

defense. Clearly, it is unreasonable, based on this record, to conclude counsel was ineffective. In order to draw that conclusion, this Court would have to find that Morgan, 16 year seasoned defense counsel, who just days before trial commenced obtained funds and evidence for Dr. Falsetti, put the doctor's name of the potential witness list, argued vociferously for his client's position, challenged each piece of identification evidence, thoroughly cross-examined the State witnesses regarding identification, offered the testimony of Dr. Nute, an defense forensic scientist (ROA-T. 6382-6418), and put on four alibi witnesses, either somehow "forgot" or was just "too tired" to put on a forensic anthropologist who counsel asserts was "critical" to the defense. Such a conclusion requires this Court to violate *Strickland*'s presumption that counsel act reasonably and ignore the record showing counsel's competency.

Morgan's competency and apparent strategic decision to not call Dr. Falsetti comes from the fact that counsel took steps to secure Dr. Falsetti including funds and evidence for him. Then Morgan spent considerable time during *voir dire* discussing an alibi defense, how it should be treated, and assessing how the jurors selected would react to such a defense. (ROA-T.8 1179-85, 1191-92, 1200, 1205-10, 1215; ROA-T.9 1226, 1238, 1243, 1268, 1285, 1298-1303; ROA-T.11 1510) According to Morgan, he was confident he could attack the State's case with the alibi

defense and he presented a very specific opening statement.[14] (PCR.15 2265, 2267-70).

Morgan's extensive cross-examination of State witnesses regarding the video/photo evidence, the quality of same, and the difficulties in identifying the person in the video/photos, was sufficient to cause Morgan to decide not to call Dr. Falsetti. Ibar has not come forward with reliable evidence that the decision was anything but strategic. Ibar has not overcome the "strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment acted highly deferential strong presumption."

Also, given the extensive and thorough cross-examination of the identification testimony and evidence, ineffectiveness cannot be found. A counsel does not render ineffective assistance automatically by failing to call an expert if cross-examination is used to bring out the weaknesses in the State's case. *See Card*, 911 F.2d, 1507; *Adams*, 816 F.2d 1493(holding defense counsel was not ineffective for failing to obtain expert pathologist where defense counsel cross-examined State expert

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[14] In closing argument, Morgan again challenged the identification testimony and stressed the strength of the alibi witnesses as well as reminded the jury of the lack of forensic evidence such as blood, hair, fibers, and fingerprints. (ROA-ROA-T.52 6900-01; ROA-T.53 6906-23, 6925-41, 6943-52, 6954-69, 6973, 6975-78, 6982-87, 6996, 6998-7003)

and argued weaknesses in testimony to jury in closing argument); *Van Poyck*, 694 So. 2d, 697(finding counsel was not ineffective in his cross-examination of a witness because a thorough examination was conducted even though the witness was not attacked directly).

Ibar points to *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008)(defense based on blood evidence); *Dugas v. Coplan*, 428 F.3d 317, 327-32 (1st Cir. 2005)(arson defense); *Gersten v. Senkowski*, 426 F.3d 588, 607-14 (2d Cir. 2005)(alibi defense); *Pavel v. Hollins*, 261 F.2d 210, 220 (2d Cir. 2001) (alibi defense); *Griffin v. Warden, Maryland Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992)(alibi defense); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986)(defense based on ballistics evidence). Each of these involves a defense needing an alibi witness or an expert in a scientific field that falls outside the common understand of a juror. However, in Ibar's case, identification of another person is a common event, one which each juror does on a daily basis. As such, these cases do not support a finding of deficiency in this case.

Given Morgan's thorough and relentless attack upon the eyewitness/identification testimony, his challenges to the videotape/photographic evidence, and alibi presentation, Ibar has failed to prove that had a facial identification expert been presented the result of the trial would have been different. As

the trial court concluded, neither deficient performance nor Strickland prejudice has been proven by Ibar. Confidence in the trial result has not been undermined and the denial of postconviction relief must be affirmed.

(2) The trial court properly rejected Ibar's claim that counsel was ineffective in not procuring Dr. Iscan to testify the cCo-defendant, Penalver, could not be identified reliably on the videotape.

Ibar asserts that it was error to reject his claim that counsel was ineffective for not securing Dr. Iscan to testify that the other person on the videotape could not be identified reasonably as Penalver and that this would undermine the State's case as such rested on placing Ibar and Penalver together committing the triple homicide. Contrary to Ibar's position, the trial court's rejection of this *Strickland* claim is proper. The factual findings are supported by the record and the trial court applied the law properly.

Following an evidentiary hearing, the trial court found that Ibar conceded that following Penalver's re-trial and conviction, Morgan talked to Dr. Iscan and learned he would be leaving the country and would not be available for Ibar's re-trial. (PCR.9 1523). The trial court found that had Dr. Iscan been available for Ibar's trial, he would have reported his findings regarding the second assailant on the videotape who had not removed his disguise. Dr. Iscan would have testified he could not "reach a conclusion one way or the other" regarding whether Penalver was

the second assailant because that person had not removed his disguise. The trial court concluded that such "testimony would *not* have helped the jury determine whether or not the second assailant was Penalver, a fact which was common sense since the jury observed the video and knew that the second assailant did not remove his disguise." (PCR.9 1523) Moreover, the trial court reasoned that it was not a foregone conclusion that such testimony would have been found relevant and admissible in Ibar's severed trial especially where Ibar was tried separately and had removed his disguise. (PCR.9 1523-24). As further support for its conclusion that Morgan's failure to call Dr. Iscan was not ineffective assistance, the trial court pointed to the balance of the evidence the State presented at trial regarding Ibar's commission of the triple homicide including: the video, placing Penalver and Ibar together with a Tec-9 seen on the crime video, in Sucharski's Mercedes after the murders, and the many identification and eyewitnesses. (PCR.9 1524-25)

The State incorporates is analysis of the prior sub-claim in support of the denial of relief here, and adds that Dr. Iscan's testimony in Ibar's case may have been found irrelevant as the question before the jury was whether Ibar committed the triple murder and related crimes. Penalver had been convicted by the time of Ibar's trial and at best, Dr. Iscan would report that given the problems with the videotape and photographs as well as

the fact the second assailant did not remove his disguise, he could not reach a conclusion, one way or the other, as to whether the person was in fact Penalver. (Penalver's trial record Volume 97, page 12900). *Strickland* deficiency is not established where counsel fails to present inconclusive expert testimony regarding a defendant not on trial. There has been no showing that the information would have assisted the jury in determining whether it was Ibar on the video, and given the other trial testimony; Ibar has failed to show that Dr. Iscan's testimony would have resulted in Ibar's acquittal.

While Dr. Iscan's testimony was admitted in Penalver's trial, such was discretionary with the trial court and may have been deemed relevant in that trial because Penalver's identity was at issue there. Here however, the focus was on Ibar and the State had the video where Ibar removed his disguise along with other witnesses who placed Ibar and Penalver together with a Tec-9 and in the victim's car just after the murders. It has not been established that in light of Penalver's conviction prior to Ibar's trial and the evidence of Ibar's involvement and identification as the person committing the murders, it was ineffective not to inform the jury Penalver's identity could not be determined conclusively as a person depicted on the tape.

Ibar has not shown the failure to call Dr. Iscan to discuss Penalver's image on the videotape would impact in the least the

remaining evidence/testimony from the eye-witness and friends/family members' identification testimonies. While Ibar maintains he has shown "significant discrepancies" in the eyewitness testimony, such information was before the jury and was rejected as evident by the verdict. Moreover, this Court conducted a harmless error analysis regarding the admission of the identification testimony with the result that the following information is left un-assailed: (1) Gary Foy's identification of Ibar as the passenger in the victim's car leaving the crime scene shortly after the time of the murders; (2) the identification testimony from Ian Milman and Melisa Munroe that Ibar was the person on the still photos taken from the videotape; (3) the testimony of Klimeczko, Kimberly San, David Philips, and Ian Milman linking Ibar to the victim's Mercedes-Benz just after the murders; and (4) the impeachment testimony of Roxana Peguera, Marlene Vindel, Maria Casas, Klimeczko indicating Ibar was the person on the videotape. *Ibar*, 938 So.2d 459-64, 469-70. Given the witnesses identifying Ibar as the perpetrator depicted on the videotape and with the victim's car right after the murder, Morgan's decision not to call Dr. Iscan, a witness known to be unavailable for trial, has not been shown to be deficient and prejudicial under *Strickland*. Postconviction relief was denied properly.

(3) The trial court correctly determined that defense counsel's failure to procure an eyewitness identification expert

to opine about Gary Foy's identification testimony was not ineffective assistance as provided by *Strickland*

Ibar maintains the counsel deficiently failed to retain an eyewitness identification expert to challenge Gary Foy's testimony identifying Ibar as the passenger he saw in Sucharski's Mercedes shortly after the murders. The trial court denied this claim summarily finding such expert testimony generally is inadmissible in Florida, thus, counsel cannot be deemed ineffective for not presenting such an expert. Ibar submits such was error because Morgan had no tactical reason to abandon his request for such an expert and other jurisdictions have considered such experts. Contrary to Ibar's position, the law in Florida at the time of Ibar's trial did not provide for the admission of such testimony, thus, the trial court's denial of relief was proper and should be affirmed.

In *Lucas v. State*, 841 So. 2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." *See State v. Coney*, 845 So. 2d 120, 134-35 (Fla. 2003); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a court must either state its rationale in its decision or attach those

specific parts of the record that refute each claim presented in the motion." *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002)(*quoting Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993)).

In denying relief, "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." *See Coney*, 845 So. 2d, 134-35 the trial court pointed to this Court's decision in *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983)(holding "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony"); *McMullen v. State*, 714 So. 2d 368 (Fla. 1998)(holding "Johnson could be interpreted as a per se rule of inadmissibility of [eyewitness identification expert] testimony"); *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006); *Green v. State*, 975 So. 2d 1090, 1108 (Fla. 2008) and found that in Florida eyewitness identification expert testimony generally is inadmissible. (PCR.9 1485-86) For that reason, as well as defense counsel's pre-trial admission that experts on eyewitness identification reliability are inadmissible in Florida (SROA.7 79-81, 185-86),

the trial court summarily denied relief finding Morgan was aware of the state of the law at the time of trial and such precluding deeming him ineffective. (PCR.9 1485-86).

The ruling is supported by the record and case law. Further, the State incorporates its response to Claim I(1) to show the extensive cross-examination and extraordinary lengths Morgan took to challenge the identification testimony. *See Rimmer v. State*, 59 So. 3d 763, 777 (Fla. 2010)(finding "[b]ecause counsel conducted an effective cross-examination of the eyewitnesses and consistently attacked the eyewitness identifications and the process of making those identifications, Rimmer has not demonstrated that he was prejudiced by counsel's failure to obtain an eyewitness identification expert.") The State also adds that given the fact that such testimony is inadmissible, counsel may not be deemed ineffective for not pursuing the appointment of such an expert.

Johnson, 438 So. 2d, 777 provides:

> Johnson attempted to call a professor of psychology as an expert witness in the field of eyewitness identification. According to Johnson, this witness would have explained both the common problems in such identifications and the general factors affecting a witness' accuracy as well as testifying about the suggestiveness of the instant lineup itself. . . . Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Johnson. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the

> aid of expert testimony.FN2 We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification.
>
> FN2. Several other courts have reached the same conclusion about expert testimony in eyewitness identification: *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979); *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (Ark. Ct. App. 1980); *People v. Dixon*, 87 Ill. App. 3d 814, 410 N.E.2d 252 (Ill. App. Ct. 1980); *State v. Helterbridle*, 301 N.W.2d 545 (Minn. 1980); *Nelson v. State*, 362 So. 2d 1017 (Fla. 3d DCA 1978).

Johnson, 438 So. 2d at 777. *See Simmons*, 934 So. 2d 1100; *McMullen*, 714 So. 2d 368; *Pietri v. State*, 935 So. 2d 85 (Fla. 5th DCA 2006).

Based on this, the trial court reasonably concluded counsel was not ineffective. Further support comes from *Green*, 975 So. 2d, 1108 where this Court reasoned:

> Green claims that counsel should have retained an expert witness on cross-race identification, requested a special instruction, and cross-examined Hallock on her ability to identify African-American people. First, the record conclusively shows that Green is not entitled to relief based on his claim that counsel was ineffective for failing to retain an expert witness on cross-race identification. It is unlikely that such testimony would have been admitted. *See Johnson*, 438 So. 2d, 777(holding that trial court did not abuse its discretion in refusing to allow a professor of psychology to testify as an expert witness in the field of eyewitness identification); *see also McMullen*, 714 So. 2d, 372("Johnson could be interpreted as a per se rule of inadmissibility of this type of testimony.").

Green, 975 So. 2d at 1108. *See Rose v. State*, 617 So. 2d 291, 297 (Fla. 1993)(holding counsel was not ineffective for failing

to obtain expert in eyewitness identification when, instead, he pointed out inconsistencies between the eyewitnesses' testimony as well as differences in the trial testimony of each witness and his or her earlier statements); *Jones v. Smith*, 772 F.2d 668, 674 (11th Cir. 1985)(holding counsel's failure to offer opinion of qualified expert as to the unreliability of eyewitness testimony did not constitute ineffective assistance of counsel where counsel pointed out the likelihood of mistaken identification during cross-examination).

In spite of Ibar's recitation of numerous out of state and federal cases (IB at 67-70, n.22) where expert testimony regarding the reliability of eye-witness testimony may be admissible; the law in Florida is well settled as noted above. Counsel cannot be deemed ineffective for not pursuing an action that in all likelihood would be unsuccessful. See *Green*, 975 So. 2d at 1108. In fact, Morgan, in discussing the experts he was contacting regarding facial identification, noted that experts on the reliability of eyewitness identification are not admissible in Florida, and noted that a case was before the Florida Supreme Court at the time.[15] (SROA.7 79-81, 185-86).

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[15] Moreover, Morgan reiterated the state of Florida law during his recent evidentiary hearing testimony, even though he tried to quote from a United States Supreme Court opinion in his closing argument calling into question eye-witness testimony.

Contrary to Ibar's assertion, Morgan made the tactical decision not to pursue a claim with little chance for success given the state of the law at the time of trial. This was not a matter which Morgan overlooked and Ibar has not shown that there has been a change in the law. As such, Morgan cannot be deemed deficient nor to have rendered ineffective assistance as defined in *Strickland*. Summary denial of this matter is appropriate.

(4) The of ineffective assistance of counsel for failing to present civil engineer, Cliff Mugnier, to report the assailant on the videotape was shorter than Ibar.

Here, Ibar challenges the summary denial of his claim Morgan was ineffective for failing to present Cliff Mugnier to testify about the relative heights of the assailants seen on the video. The trial court denied relief summarily. Such was proper.

In denying relief, the trial court noted Morgan's cross-examination of the lead detective, Paul Manzella, regarding the relative heights of the victims and Ibar. (PCR.9 1484). The court credited the jury's viewing of the videotape in addition to the other eyewitness and identification testimony to establish that Morgan was not deficient in his representation of Ibar. (PCR.9 1484). The court also found that even if the civil engineer should have been presented, no prejudice resulted in light of all of the other evidence establishing Ibar committed

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(ROA-T. 6994-95; PCR.14 2241-42, 2246-47, 2251-54)

the homicides. It was the court's conclusion that the expert's testimony would not have led to a reasonable probability of a different outcome at trial. (PCR.9 1484). Such decision is supported by the record and should be affirmed.

The record reflects that the Manzella was cross-examined by Morgan on the relative heights of the victims and Ibar. (ROA-T.40 5392-93). Given that the video depicted the victims and Ibar together, it was within the jury's province to assess the heights of the victims and Ibar. Clearly, the "perpetrator's height," falls within the jury's common experiences of determining a person's identity and the jury was capable of looking at the relative heights of the victims and perpetrators as further assessment of identity. As the trial court co0ncluded, the jury was able to view the videotape and had the testimony from the other eyewitness and identification witnesses as outlined by this Court, *Ibar*, 938 So.2d 459-64, 469-70, and as discussed in sub-claims (1) and (2) above. Ibar asserts that neither the jury's viewing of the video nor testimony could substitute for the expert's testimony estimating the perpetrator to be two to three inches shorter than Ibar. However, the jury was apprised of the relative heights and could use its common sense in viewing the video and in assessing identification testimony which it would have had to do irrespective of the expert's testimony.

Ibar points to *Balmori v. State*, 985 So. 2d 646 (Fla. 2d DCA 2008); *Jackson v. State*, 965 So. 2d 302 (Fla. 1st DCA 2007); and *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001) for the general proposition that an ineffectiveness claim may arise from counsel's failure to call exculpatory fact witnesses. While such is an accurate state of the law, these cases do not further Ibar's argument that relief in his case should have been granted as *Strickland* deficiency and prejudice still must be proven.

Additionally, *Pavel* is distinguishable as there counsel neglected to even investigate the witness or prepare a defense because he felt a motion to dismiss would be granted. As it turned out, a defense, in that case an alibi defense, was necessary and the failure to present it prejudicial. That is not the case we have here. As noted above, Morgan had defended Ibar to a hung jury previously, then thoroughly investigated, added alibi witnesses, and vigorously challenged the State's case on cross-examination including challenging the relevant heights of the victims and Ibar.

Likewise, *Hutchinson v. Hamlet*, 243 Fed. Appx. 238 (9th Cir. 2007), an unpublished opinion, does not demand relief here. In *Hutchinson*, 243 Fed. Appx. 238, the court evaluated counsel's failure to present an expert to testify the defendant was significantly taller that the assailant depicted on the videotape and where there was little reliable evidence presented

against the defendant. Conversely here, counsel brought out to the jury the facts Ibar would have had presented via an expert. Moreover, there were multiple witnesses identifying Ibar on the video and with the victim's Mercedes and a Tec-9 weapon just after the triple homicide. Hence, the court properly found neither *Strickland* deficiency nor prejudice was proven, and denied relief.

Given Morgan's cross-examination of Manzella regarding the relative heights coupled with the jury's acceptance of other evidence/testimony, ineffective assistance was not proven by Ibar. *See Smithers v. State*, 18 So. 3d 460, 470 (Fla. 2009)-71 (Fla. 2009) (concluding counsel's decision to rely solely on cross-examination of State's expert was reasonable since expert's testimony was consistent with the defense's argument); *Belcher v. State*, 961 So. 2d 239, 250 (Fla. 2007)-51 (Fla. 2007) (holding that it was a reasonable strategic decision for trial counsel to decline retaining an expert to rebut the State's expert when at trial, counsel rigorously challenged the State's expert and attempted to confront the evidence not through a defense expert, but by vigorously challenging the State's expert at trial). In *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000), this Court opined: "Counsel is not necessarily ineffective for failing to impeach a witness with a report, if cross-examination is used to bring out the weaknesses in the

witness's testimony. *See Card*, 911 F.2d, 1507. Postconviction relief should be denied.

(5) The Court Properly Concluded Counsel Was Not Ineffective in His Investigation and Preparation of the Alibi Defense.

It is Ibar's position that Morgan failed to investigate or prepare his alibi witnesses for the State's rebuttal witness, George McEvoy, who would testify that telephone calling cards were not available from hotel vending machines in Ireland at the time Mimi Quinones claimed to have purchased such card and used it to telephone home. It was that alleged telephone call which was the basis for Ibar's alibi defense as it was alleged he was with Tanya Quinones at the time of the call, not at the scene of the triple homicide. Ibar takes issue with the summary denial of relief questioning the court's conclusion that Morgan could do nothing "short of assisting Mimi into changing her account of where she purchased the calling card" and for not addressing the allegation Morgan could have, but failed to get BellSouth records in 2000 of the 1994 telephone call to prove such was made. (IB 78-79). The court's summary denial of relief on this point is supported by the record and this Court should affirm.

After setting forth the relevant deposition and trial testimony of the alibi and rebuttal witnesses, the court found:

> However, short of assisting Mimi into changing her account of where she purchased the calling card, trial counsel could not have prepared her much more. Additionally, abandoning an alibi defense would have left Defendant with nothing to counter the videotaped

> murder. . . . Although not perfect [alibi defense], he presented this defense with the best evidence he had available. The decision was made to present as alibi defense, even where a minor discrepancy existed regarding the location where a witness purchased the calling card. . . . Moreover, had trial counsel failed to present this alibi defense due to the discrepancy between the testimonies of Mimi and Mr. McEvoy regarding where she purchased the calling card, there is not a reasonable probability that a different outcome would have resulted.

PCR.9 1488).

As the record reveals, the crimes were committed on the morning of June 26, 1994. When questioned by the police a few months after, Ibar reported he had been with "Latasha" on Sunday. During Ibar's 1997 trial, which ended in a hung jury, he did not present an alibi defense. It was not until the 2000 trial that the alibi was developed (PCR.14 2235-36) based upon Ibar's new in-laws' recollections that he was caught in bed with then 15-year old Tanya Quinones ("Tanya"), who would become his wife sometime before the 2000 trial. The purpose for the defense calling Alvin Quinones ("Alvin") to discuss her trip to Ireland was to show how the alibi came to light and to explain why there were no written billing records supporting the alibi. Before the 2000 re-trial and while viewing some items associated with the Ireland trip, the Quinones family members recalled that it was the morning of June 26th that Tanya and Ibar were alleged

to have been together. The point for the State to present Mimi Quinones ("Mimi") in rebuttal[16] was to challenge that recollection. Apparently, after Tanya had her memory "refreshed," Ibar backed away from his initial report to the police that he had been with "Latasha" at that time and changed it to report he had been with another woman, "Natasha," Sunday night/Monday morning. (ROA-T.49 6433-6639; ROA-T.50 6775-87).

Morgan challenged the State's authority to call Mimi after he had not utilized her in the defense case-in-chief and had released her. (ROA-T.51 6652-59). Ibar takes issue with Morgan's decision to put on the alibi without somehow getting Mimi to change her testimony as to where she purchased the telephone calling card, thus, to conform her testimony to that of George McEvoy. The pith of Ibar's claim is that the alibi failed because Mimi was impeached. Ibar implies that Mimi should have been prepared better to explain away her account for where the calling card was purchased given that calling cards were not available in 1994 at the location she named. He argues further that Mimi's account was a fatal flaw in the alibi and suggests that the alibi should not have been presented.

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[16] Mimi's testimony completed the offered explanation for the lack of billing records for a telephone call to the United States and accounted for the decision to make the overseas call from a public telephone using a pre-paid calling card instead of from the comfort of the hotel room.

Ibar takes issue with the trial court not mentioning Morgan's alleged failure to secure the 1994 Bell South billing records before the 2000 trial. However, Ibar merely alleges that such would show an incoming call from Ireland. (IB 79) That does not answer the question at trial which was whether Ibar was with Tanya at that time or at Casmir Sucharski's home committing a triple homicide and related felonies.

As the trial court concluded, short of assisting Mimi to change her account of where she purchased the calling card, Morgan could not have prepared her any better. Likewise, discarding the alibi altogether, thereby leaving Ibar with nothing to counter the murder videotape depicting his complicity in the triple homicide, would result in the jury drawing the very same conclusion it did with the proposed alibi presented, i.e., guilty as charged. As Chris Bass reported, Penalver told Ibar "[Penalver's] lawyer said he has a shot because he didn't take off his mask. That they got him, being Pablo [Ibar], to the right because he took his mask off." (ROA-T.39 5151). Penalver's exact words to Ibar were: "My lawyer says I got a shot because I didn't take off my mask. You did." (ROA-T.39 5152, 5154) Strickland frowns upon second-guessing of counsel.

Also of note, this Court will recall that when Ibar was tried initially with Penalver, the jury was hung, but did not acquit. It is reasonable for counsel to attempt to add something to the

re-trial in hopes of turning the hung jury into an acquittal. Morgan did that by presenting the best evidence, although not perfect, he had available. It cannot be said that had he not presented the alibi that the jury would have acquitted.

Ibar points to *Workman v. Tate*, 957 F.2d 1339 (6th Cir. 1992); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985); and *Stringer v. State*, 757 So. 2d 1226 (Fla. 4th DCA 2000). However, these cases do not further his position. In *Workman*, 957 F.2d 1339, *Smith v. Navistar Intern. Transp. Corp.*, 957 F.2d 1439, 1445 (7th Cir. 1992) and in *Nealy*, 764 F.2d at 1178 defense counsel completely failed to contact the alibi witnesses their clients alleged were with them at the critical time and could offer alibi testimony. That is not the case here. Counsel investigated and presented the alibi witnesses although the State was able to rebut portions of that defense. Counsel may not be faulted merely because the witness' testimony was subject to impeachment; counsel in not required to coach or provide his witness with answers which would tend to bolster the defense case. In *Stringer*, 757 So. 2d at 1227 for an evidentiary hearing because the record did not refute the defendant's allegation that counsel failed to call an alibi witness even though she had agreed to do so. While Ibar was denied an evidentiary hearing, such was appropriate as the alibi defense was presented and Ibar failed to offer evidence that in

fact Mimi's testimony was inaccurate due to counsel's deficient performance.

(6) and (7) Counsel did not render ineffective assistant with regard to his utilization of a private investigator to look into the case and to testify at trial and in failing to cross-examine Manzella on the fact that the Tec-9 recovered was not the murder weapon.

Appellant asserts Morgan misused his private investigator solely has a conduit for communications with Ibar. Instead, Ibar asserts the investigator should looked into and testified about (a) Foy's obstructed view of the men leaving in the victim's Mercedes-Benz; (b) the sales and ownership history of a Tec-9 handgun recovered from Anthony Kordich ("Kordich") and that it was not the murder weapon; and (c) the woman with whom Ibar claims to have spent the night after the murder, i.e. either "Latasha" or "Natasha." (IB 79-81).

Contrary to Ibar's complaints, Morgan utilized an investigator; although *Strickland* does not require such, only that a reasonable investigation be conducted. Moreover, Morgan thoroughly, competently challenged Foy on cross-examination and pointed out the factors Ibar now claims an investigator should have looked into and been called at trial to report. Also, Morgan acted within professional norms with respect to the discovery of Kordich's Tec-9 found not to be the murder weapon. The fact that the Tec-9 recovered was not the murder weapon renders it irrelevant especially in light of the fact that a

Tec-9 nine is visible on the videotape being used in the commission of the triple homicide. Finally, interviewing McGloria has not been shown to yield potentially relevant information as she was alleged to have spent the night with Ibar **after** the murders. Ibar has failed to prove Strickland prejudice as the trial court so found. The denial of relief was proper and should be affirmed.

The trial court summarily denied relief reasoning:

> This Court first notes that "[T]rial counsel is not absolutely required to hire an investigator under all circumstances. Trial counsel in only required to conduct a reasonable investigation." . . . Furthermore, in the instant case, trial counsel did, in fact, obtain funds for, and did utilize, private investigators . . . [and] was tracking co-defendant Penalver's discovery and investigation and gathering some information in that manner as well. (Tr. At 53; 90).
>
> With respect to the claim regarding witness Foy, the record demonstrates that trial counsel thoroughly cross-examined him. When the defense cross-examines a witness thoroughly to point out discrepancies and difficulties in observation inherent in the witness's testimony, neither an expert nor additionally witnesses need be called to challenge such evidence. . . . The record indicates that trial counsel cross-examined Foy's account on aspects of his observation within the common understanding of the jury. Counsel brought out the fact that he had sent an investigator to talk to him, but the Foy refused to talk without a representative for the State Attorney's Office present. (Tr. 21 at 2870). Counsel questioned Foy on the timing he left his home on the day of the murders, suggesting that Foy was too preoccupied with a bowling tournament to perceive the identity of the individuals driving the victim's car. Counsel pointed out the fact that the person Foy identified as Ibar looked like Foy's friend Justin, and that he was only able to view the vehicle's occupants for mere moments at a

time from the side and rear. It was also discussed that Foy initially selected two photographs as the individual he saw in the passenger seat, and it was suggested that the police contaminated the photograph and live lineup identifications. Trial counsel's cross-examination additionally keyed in on pointing out the difficulty and unlikelihood that Foy got a good enough view of the occupants to make a good or reliable investigation. (Tr.21 at 2836-45, 2847-50, 2858-59, 2867-81, 2885-87, 2895-97, 2905, 2908-19. 2924-32, 2934-38; Tr.22 at 2942-65, 2980-82, 2984-89, 30-21). During his cross-examination, trial counsel put specific emphasis on the areas a jury should consider when assessing the reliability of an eyewitness identification.

Defendant has not established that further discussion or testimony regarding Foy's identification would have assisted the defense or caused a different result at trial. Rather, the record demonstrates that counsel conducted a reasonable investigation into this matter and presented a thorough and comprehensive cross-examination of this witness. Finally, during closing argument, trial counsel again thoroughly keyed the jury in on the weaknesses of Foy's ability to make a reliable identification. (Tr.51 at 6942, 6955-68). Defendant has failed to demonstrate either deficient performance or prejudice based on this claim.

With respect to the claim regarding the Tec-9 . . .

This Court finds no deficiency on the part of counsel in this respect. A Tec-9 firearm was wielded and used by co-defendant Seth Penalver, as observed on the videotape of the instant murders. Because the Tec-9 firearm recovered by police from Kordich, which was alleged to have been sold by Ibar, was tested and determined not to have been used in the commission of the instant offenses, any evidence relating to that weapon would have been irrelevant. As such, Defendant has failed to show any deficient performance on the part of counsel or any resultant prejudice.

Finally, with respect to . . . Natasha McGloria, this Court finds this claim meritless, as well. There was no reason to believe that any information from Ms. McGloria would have led to any exculpatory information. Rather, she is merely the individual who

> Defendant spent the night with after the offenses were committed. What individuals Defendant spent time with after the offenses were committed is irrelevant to the crime. . . .

(PCR.9 1489-92) The trial court also found:

> As discussed earlier, such evidence [Kordich's Tec-9] is irrelevant. The Tec-9 from Anthony Kordich was not used in these murders and the State never made such a claim. Evidence was presented indicating that on the morning of the murders, Ibar and Penalver were seen leaving the Lee Street house with a Tec-9 firearm. Whether or not Ibar previously sold a Tec-9 to Anthony Kordich before this date, as alleged, is immaterial. This is true especially in light of the fact that the supposed Tec-9 Ibar sold to Kordich was not used in the commission of this crime and has no bearing in this matter. Neither deficient performance on the part of trial counsel nor any resultant prejudice has been demonstrated on this claim.

(PCR.9 1493-94)

As Ibar admits and the trial court found, Morgan obtained funds for and utilized private investigators. Further, the record shows that Morgan was "tracking" the Penalver discovery/investigation and was gathering information through that source for economic reasons. (SROA.7 53; 90).[17] As such, it is inaccurate to say that Morgan did not investigate this case. Further, under, *Davis v. State*, 928 So. 2d 1089, 1117 (Fla. 2005), "Trial counsel is not absolutely required to hire an investigator under all circumstances. Trial counsel is only

[17] It was reported at the evidentiary hearing investigatory tasks were given to co-counsel Brush. (PCR.14 2176-78, 2181-83, 2212-13, 2216-20, 2226-27, 2285-868 501-02; PCR.15 2310)

required to conduct a reasonable investigation. *See Freeman*, 858 So. 2d, 325(same).

With respect to Foy, it is well settled that neither an expert nor additional witnesses need be called to challenge the evidence or present cumulative impeachment evidence if defense counsel cross-examines the witness thoroughly to point out discrepancies and difficulties in observation inherent in the witness's testimony. *See Riechmann*, 777 So. 2d, 356(opining "Counsel is not necessarily ineffective for failing to impeach a witness with a report, if cross-examination is used to bring out the weaknesses in the witness's testimony."); *See Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990). *Card*, 911 F.2d, 1507; *Adams*, 816 F.2d 1493(holding counsel was not ineffective for failing to obtain expert pathologist where counsel cross-examined the expert and argued weaknesses in his testimony in closing argument).

Here, Morgan challenged Foy's account[18] on aspects which are

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[18] On cross-examination, Morgan revealed he had sent an investigator to talk to Foy, but Foy refused to talk without someone from the State Attorney's Office present. (ROA-T.21 2870). Morgan questioned Foy on the timing of his leaving his home on the morning of the murders, suggested Foy was too preoccupied with his tournament to perceive the identity of the "kids" driving the victim's Mercedes, challenged Foy with his comment that in fact the person Foy identified as Ibar, actually

within the common understanding the jury and focused on the areas the jury is to consider when assessing eye-witnesses testimony. *See Johnson*, 438 So. 2d at 777(*citing Neil v. Biggers*, 409 U.S. 188 (1972)).[19] Morgan's thorough and pointed cross-examination competently put the issue before the jury and it cannot be said that further discussion or expert testimony would have assisted the defense or resulted in a different outcome at trial. Furthermore, in closing argument, Morgan

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looked like Foy's friend Justin, and pressed that Foy saw the car's occupants for only moments at a time and from the side and rear. Morgan also explored the fact that Foy initially had chosen two photographs as the person he saw in the passenger seat of the Mercedes and Morgan suggested the police contaminated the photo and live line-up identifications. Morgan's cross pointed out how difficult and unlikely it was that Foy got a good enough view of the occupants during their drive while looking through tinted windows, into the sun, and using his rear view mirror to make a good identification. (ROA-T.21 2836-50, 2858-59, 2867-81, 2885-87, 2895-97, 2905-19, 2924-32, 2934-38; ROA-T.22 2942-65, 2980-89, 3018-21).

[19] This Court opined:

> The United States Supreme Court set out the standard for determining the reliability of an identification, on the totality of the circumstances, even though the procedure might have been suggestive in *Neil*, 409 U.S. 188. The Court identified five factors relating to reliability: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil*, 409 U.S. 188.

Johnson, 438 So. 2d, 777

challenged Foy's testimony[20] on his ability to identify Ibar and reminded the jury Foy thought the person in the photograph looked like his friend Justin. This had a two-fold effect of undercutting Foy's identification testimony as well as that of the friends/family members who claimed likewise to have just thought the photograph "looked" like Ibar. Morgan pointed out the area where Foy's account was subject to challenge. Whether he also could have shown that there are sight barriers, such as head-rests or car doorframes, is not the question, but whether pointing out those items which are within the jurors common knowledge would have caused them to acquit. A view of the cross-examination and closing establishes, as the trial court found, that Ibar has shown neither *Strickland* deficiency nor prejudice. Summary denial of the claim was proper. See *Riechmann*, 777 So. 2d at 356.

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[20]Morgan pressed Foy on his time-line of events and his witnessing of two "kids" driving the victim's car. It was inferred that those who, as Foy reported, were making noise and drawing attention to themselves would not be people who recently killed three victims. Most important is the argument Morgan made to indicate Foy did not have a good view of the occupants of the car. Morgan noted that at one point, the Mercedes was not along side, but ahead of Foy so that he could see the occupants from the back and side. The defense questioned the veracity of Foy's claim that Ibar kept staring at him. The final line of argument against believing Foy was centered on the reliability of the photograph and live line-ups given that again, Foy saw the men from the side and back of their heads so that he could not be positive about his identification, even though the police wanted confirmation. (ROA-T.51 6942, 6955-68).

With respect to the Tec-9 and its sale, Ibar is asserting Morgan was ineffective for failing to present evidence that the non-murder weapon was sold to a third party sometime before the murders. Ibar's "new" evidence, that he sold the Tec-9 to Kordich before the murder, even if taken as true, does not impact in the least the trial evidence as the trial court concluded when it found the information irrelevant. As it was disclosed, the Tec-9 recovered was not the murder weapon. However, such does not change the fact that Penalver is seen on the videotape wielding a Tec-9. Clearly there was more than one Tec-9 produced by the manufacturer. Further, the State never claimed that the Tec-9 recovered was the one used to kill the three victims in this case. It introduced the testimony that a Tec-9 had been in the possession of the defendants living at the Lee Street house. As such, under *Strickland*, Ibar failed to carry his burden of proving that but for Morgan's failure to present Ibar's testimony that he sold the Tec-9, which was not the murder weapon, before the murders, the result of the trial would have been different. Not only is the failure to introduce irrelevant evidence not deficient performance, but it does not result in ineffective assistance. This irrelevant information would not have any effect on the trial outcome. The summary denial should be affirmed.

As with the Tec-9 allegedly sold to Kordich, the person with

whom Ibar spent the night after the murders is irrelevant as well. It has no bearing on the elements to be proven for the charged crimes. Counsel was not deficient in not investigating "Latasha" and "Natasha" once it was determined Ibar was referring to an encounter which happened the evening after the murders. While Ibar's activities and encounters with friends after he left the victim's home with the victim's Mercedes Benz, only later to burn the car is relevant, what he did that evening with friends, unless it relates to the crimes is not relevant. Moreover, the "Latasha"/"Natasha" meeting does not undermine the trial evidence captured on the murder videotape, namely, that Ibar is seen on the videotape beating, and killing three victims. Certainly the evidence now offered that Ibar slept with his 15 year-old girlfriend one night and another woman the next would neither further his alibi defense nor undercut the actions portrayed on the videotape. Counsel cannot be deemed deficient for not presenting irrelevant evidence. The fact that the jury was not told of Ibar's encounter with Natasha the night after the murders cannot be said to have prejudice the trial. Under the *Strickland* standard, the result of the trial would not have been different had this irrelevant and arguably compromising evidence been offered. This Court should affirm the summary denial of relief.

(8) Counsel rendered constitutionally professional representation raising all appropriate objections and requesting

all appropriate limiting instructions

As his final challenge to the denial of his claim of ineffective assistance of guilt phase counsel, Ibar maintains counsel ineffectively failed to: (a) object to the State calling Mimi Quinones for the sole purpose of impeaching her; (b) object to the identification testimony of Maria Casas, Vindel, and Peguera; rebuttal witness McEvoy; (d) Foy's testimony identifying Ibar; (e) obtain a jury instruction limiting jury's consideration of out-of-court statements and prior testimony as impeachment; and (f) request a jury instruction advising the jury to evaluate eyewitness identification testimony cautiously and providing the jury with the factors it should consider when determining the reliability of identifications. The trial court's summary rejection of these issues is supported by the record and should be affirmed.

(a) and (b) Objections to the testimony of Mimi Quinones, Roxana Peguera, Marlene Vindel, and Maria Casas

With respect to objections to the testimony of Mimi, Peguera, Vindel, and Casas, the trial court order explained:

> Regarding the prosecution's use of Mimi Quinones . . . the record reflects that trial counsel did, in fact, challenge the State's authority to call her after Defendant had no utilized her in the case-in-chief. (Tr.51 at 6652-59) Additionally, while some of her testimony may have been used for impeachment purposes, Ms. Quinones' testimony additionally completed the offered explanation for the lack of billing records for a phone call to the U.S., and also explained the decision to make the international call from a public telephone with a calling card instead of from her

hotel room.

> Furthermore, in its opinion affirming Defendant's conviction, the Florida Supreme Court did, in fact, find that he claims regarding improper impeachment were not preserved for appellate review. However, the Court nevertheless reached the merits of the claims.
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> . . .
>
> A defendant is not entitled to relief on a claim of ineffective assistance of counsel where there has been an earlier appellate court finding that an unpreserved error did not rise to the level of fundamental error. . . . By reaching the merits or in finding that the testimony was admissible under another theory, the Florida Supreme Court has determined that no fundament error, i.e., no prejudice, arose from counsel's failure to object to these witnesses as the admission of their testimony was either proper on another ground or was not harmful error. Furthermore, counsel cannot be found to have performed deficiently in failing to object to testimony which was admissible for impeachment purposes or admissible on other grounds. The testimony of these witnesses would have come in even if trial counsel had raised an objection based on an "impeachment only" argument.

(PCR.9 1497-98). This ruling is proper and should be affirmed.

On appeal, this Court agreed that the matter was in part unpreserved, but nonetheless, reached the merits. *Ibar*, 938 So. 2d at 459-64.[21] Such precludes a finding of prejudice under

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[21] By reaching the merits or in finding that the testimony was admissible under another theory, the Florida Supreme Court has determined that no fundamental error, i.e., no prejudice arose from counsel's failure to object to these witnesses as the admission of their testimony was either proper on another ground or was not harmful error. Given this ruling, Ibar is unable to prove prejudice arising from Morgan's failure to object on the basis that the witnesses were alleged to have been called for

Strickland. The defendant is not entitled to relief on a claim of ineffective assistance of counsel where there has been an earlier appellate court finding that the unpreserved error did not rise to the level of fundamental error. *See White v. State*, 559 So. 2d 1097, 1099-1100 (Fla. 1990)(rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based upon earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1019 (Fla. 1999)(finding defendant had failed to meet Strickland prejudice on issue that counsel failed to adequately argue case below given the issue was rejected without discussion); *Cherry*, 659 So. 2d at 1072. "[T]here is no reason for a court deciding an ineffective

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impeachment purposes only. In fact, the Florida Supreme Court determined that the witnesses offered more evidence than just impeachment when it found: "Moreover, while parts of these witnesses' testimonies were impeached, there was other evidence gleaned from these witnesses that was not impeached and was used by the State to put together the various pieces of evidence that linked Ibar to these murders." *Ibar*, 938 So. 2d at 463-64. Hence, counsel cannot be deficient for failing to object to testimony which was admissible or at the minimum admissible on other grounds. As such, the testimony of these witnesses would have come in irrespective of the "impeachment only" objection. Counsel cannot be deemed deficient for not have raised an objection which would have been overruled. *See Teffeteller*, 734 So. 2d, 1019-20. (finding no relief is due because "[c]ounsel cannot be deemed ineffective for failing to prevail on a meritless issue")

assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. *See Maxwell*, 490 So. 2d at 932(recognizing "court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied."); *Chandler*, 218 F.3d 1305. This Court should affirm.

(c) Disclosure of McEvoy during trial.

The court rejected Ibar's claim that the State committed a discovery violation when McEvoy's name was disclose during the State's case-in-chief and that counsel was ineffective for failing to object on the grounds of a discovery violation under *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

> During Defendant's first trial in 1997, no alibi defense was raised. It was not until April 7, 2000 that Defendant disclosed that he would be offering and alibi witness in Mimi Quinones. On April 26, 2000, the trial court granted the States permission to depose the alibi witnesses; the depositions were set for May 2, 2000. As a result of and subsequent to Ms. Quinones' deposition, the State conducted further investigation into the alibi defense, and on June 9, 2000, disclosed Mr. McEvoy as a rebuttal witness. (R.3 at 497, 498, 545; R.5 at 899-944; R.11 2946).
>
> . . . After learning of this alibi defense and the information from the witnesses at the May depositions, the State conducted further discovery and investigation which resulted in the June disclosure.
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> . . . It was only the month after the State took the deposition of Defendants' alibi witnesses that it was able to investigate the alibi and retain rebuttal

witnesses out of Ireland, all done while it was in the middle of presenting its case-in-chief in this matter.

> . . .it is Defendant's burden to prove that, but for counsel's failure to raise a discovery violation, the trial court would have held a hearing, found a willful violation, and that the willful violation prejudiced his trial preparation and defense strategy. In consideration of the dates that defense presented its alibi and alibi witnesses, the dates the State took those witnesses' depositions, and the amount of time that it took the State to investigate the alibi and retain an international rebuttal witness, this Court finds that the defense would have failed in attempting to prove any, let alone a willful, discovery violation on the State's part. Additionally, even assuming *arguendo* that the State committed a willful discovery violation, no prejudice would have resulted. The testimony of the State's rebuttal witness, Mr. McEvoy, did not completely undercut Defendant's alibi. Rather, it only called into question Ms. Quinones' recollection of how she completed the call in Ireland to her family in the United States, a seemingly collateral matter to the overall alibi regarding the content of the phone calls and how it attempted to prove Defendant's presence at the family home on a particular date.

(PCR.9 1499-1500).

As the trial court found and the record reflect, these crimes were committed in 1994 and Ibar had been through an entire trial in 1997 without mention of an alibi. Although Morgan later reported the alibi was developing, and they had an alibi defense at the end of the 1997 trial (ROA-T.12 1551-54), it was not until April 7, 2000, some 10 days before trial, that Ibar disclosed he would be offering Mimi Quinones as an alibi witness. On April 26th, the court granted the State permission to depose the alibi witnesses and such depositions were set for

May 2nd. As a result of Mimi's deposition, the State conducted further investigation and on June 9th, disclosed McEvoy as a rebuttal witness. (ROA-R.3 497-98, 545; ROA-R.5 899-944; ROA-R.11 1496). Fla. R. Crim. P. 3.220(j)., requires a party who discovers additional witnesses after compliance with discovery to disclose the witness "promptly." Thirty days to investigate and obtain a rebuttal witness while the prosecutor is in the middle of it case-in-chief of a capital murder case involving a triple homicide clearly is "prompt" and does not constitute a discovery violation. Given this, the trial court correctly determined that there was no discovery violation under Fla. R. Crim. P. 3.220, let alone a willful one.[22]

Moreover, the burden is high to prove a discovery violation serious enough to impose the ultimate sanction of exclusion of a witness. *See McDuffie v. State*, 970 So. 2d 312, 321-22 (Fla. 2007). While at trial and on direct appeal where the Court is reviewing the adequacy of a *Richardson* hearing where a discovery violation was found, the burden is on the State. *See State v. Schopp*, 653 So. 2d 1016 (Fla. 1995), such is not the case for *Strickland* claims.

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[22] Ibar did not present the alibi until the eve of the second trial some six years after the murders and three years after the 1997 trial. The defense caused the State to conduct further investigations resulting in additional discovery disclosure.

Here, the issue is one of ineffective assistance, and it is the defendant's burden to prove both deficiency and prejudice. As the court reasoned, this is a claim of ineffectiveness assistance under *Strickland*, thus, it is Ibar's burden to prove that but for his counsel's failure to raise a discovery violation, the court would have held a hearing, and found a willful violation which prejudiced Ibar's trial preparation/defense strategy, thereby resulting in the exclusion of the witness and a different trial outcome. Ibar failed to show this, as the State promptly disclosed McEvoy.

A trial court has discretion to determine whether a discovery violation would result in harm or prejudice to the defendant. *See Barrett v. State*, 649 So. 2d 219, 222 (Fla. 1994). Ibar has not offered how Morgan would have prepared or planned differently. On this record, it is clear Morgan knew the State had not yet deposed the alibi witnesses or conducted an investigation of the alibi and yet chose to inform the jury of what he expected the defense witnesses to say. Ibar must show that Morgan would not have told the jury or presented the alibi had he known of McEvoy, however, this cannot be done as it was Morgan's disclosure on the eve of trial which caused the State to investigate even after opening statements were given. Ibar has not pled that had McEvoy been known to him he would not have presented the alibi. This cannot be done as it is clear, that

such would have left the jury with the evidence the State presented, namely and most important, the videotape showing Ibar committing the triple homicide. Furthermore, as the court reasoned, McEvoy's testimony did not completely undercut the alibi, but merely called into question Mimi's recollection of how she completed her overseas call and learned of Ibar's alleged visit with her sister. Hence, Ibar is unable to show entitlement to relief and this Court should affirm.

Ibar cites to *Irish v. State*, 889 So. 2d 979, 981 (Fla. 4th DCA 2004); *Acosta v. State*, 856 So. 2d 1143, 1145 (Fla. 4th DCA 2003); and *Thompson v. State*, 796 So. 2d 511, 519 (Fla. 2001), (IB at 90 n. 28 and 29), however none are of assistance in this situation. In *Irish*, the State via its police officers knew of the statement pre-trial, but did not disclose it until just prior to trial. *Irish*, 889 So. 2d at 981. Likewise, in *Acosta*, 856 So. 2d at 1145 and Thomas, 736 So.2d at 519, the State, again through the police or its witness had information before trial commenced. Such is not the case here. It was not until just after opening statements that the State was able to depose the defense alibi witnesses and based upon information revealed there, to conduct further investigation. The results of that investigation were disclosed timely. There was no information suppress, and as such, no discovery violation and no basis for an objection, hence Morgan was not ineffective in failing to

move for a *Richardson* hearing.

(d) The court properly rejected the ineffectiveness claim alleging that Foy's identification should have been challenged on the ground the procedures used were unnecessarily suggestive leading to a mistaken identification.

It is Ibar's position the court erred in rejecting his *Strickland* claim where he alleged Morgan was ineffective because his oral argument for suppression of Foy's identification of Ibar from the photographic and live line-ups focused on the 5th and 6th Amendment issue and not the allegedly suggestive nature of the line-ups. Contrary to Ibar's position, the record refutes the claim; the trial court's factual findings are supported by competent, substantial evidence and the legal conclusion was proper. The summary denial should be affirmed.

Here, the trial court concluded that the record established that Morgan's written motion to exclude Foy's identification of Ibar filed prior to the 1997 trial "was specifically grounded around the idea that the out-of-court identifications of Defendant with law enforcement were unduly suggestive and irreparably tainted by Foy's identifications." The court acknowledged that the oral argument portion on the motion focused mainly on the Fifth and Sixth Amendment right to counsel. (PCR.9 1500-01). The court denied relief for several reasons. First, the court found no deficiency as Morgan "presented the issues surrounding witness Foy's out-of-court identifications to the trial court by written motion. Also,

counsel referenced the suggestibility issue during Foy's testimony at the suppression hearing. (SR.11 at 212)." The trial court also reasoned "the record shows that these issues were raised by trial counsel and thus could not be found to have performed deficiently when the issues were raised." (PCR.9 1501). Having found suppression issue raised and disposed of prior to Ibar's trial, the issue regarding the suggestibility of Foy's out-of-court identifications should have appropriately been raised in Defendant's direct appeal." (PCR.9 1501). The court then reasoned: "even assuming *arguendo* that these issues were not raised prior to trial, Defendant is nevertheless unable to show prejudice." The lack of prejudice was based on the pre-trial ruling at the suppression where the court stated that even if the line-up identification were suppressed, the trial court "would allow in the in-court identification, because I am convinced in my mind this guy made his identification based upon what he saw of your client as the alleged passenger in the Mercedes, okay?." (PCR.9 1501) The trial court found that even had the out-of-court identifications been suppressed, Foy, "nevertheless would have been able to testify at trial before the jury regarding his identification of Defendant as the passenger of the victim's car moments after the murders took place." As s result, the court found prejudice had not been proven. (PCR.9 1502).

These findings and legal conclusions are proper and should be affirmed. Not only did Morgan include in his motion challenges to the line-up on grounds of composition and suggestibility, but he referenced such during Foy's testimony (SROA.11 4-212). At the conclusion of the suppression hearing, Morgan affirmed he was attacking the make-up of the line-ups. (SROA.11 213). Such dove-tails into Morgan' written motion where he claimed the circumstances of the line-ups "further support the natural and reasonable conclusion that he photo array and physical lineup procedures were impermissibly suggestive and that, moreover, the same did create a (presumably) very substantial likelihood of irreparable misidentification of Defendant by Foy." (ROA-R.1 145). Hence, the issue Ibar claims should have been raised, was in fact raised and the record refutes

The record establishes that had counsel emphasized the issue further, the result of the proceedings would not have been different; Ibar would not have prevailed on his request to exclude Foy's identification testimony. When this matter was re-raised during Ibar's 2000 trial, and Morgan argued that Foy's photo line-up identification should be suppressed given how Foy immediately rejected four of the men and was never shown the men from the different angle Foy had requested, the trial court concluded that Foy's testimony was that he knew the person he saw was photograph number five, but that he had concerns about

getting involved. (ROA-T.11 1498-1500). Also, the judge presiding at the suppression hearing would not have excluded Foy's identification testimony. (ROAT.11 1484-85). Foy's testimony regarding his identification of Ibar would be before the jury in some form, irrespective of his identifications at the two line-ups. Hence, the jury would be left with the fact Foy identified Ibar as the man he saw in the passenger seat of the Victim's Mercedes moments after the triple homicide. Ibar failed to prove prejudice under a *Strickland*.

(e) The claim counsel was deficient for failing to request a limiting instruction on the jury's consideration of out-of-court statements and prior testimony was rejected properly.

Ibar asserts that he should have been granted an evidentiary hearing on his claim counsel was ineffective for failing to seek an instruction limiting the identification testimony for impeachment purposes only. (IB 93-94). The court's summary denial of relief was proper and this Court should affirm.

The trial court reasoned:

> . . .the trial court did, in fact, give instructions to the jury limiting its consideration of the witnesses' statements for impeachment only (Tr.30 at 4060; Tr.32 at 4218; Tr.34 at 4447)
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> Additionally, this Court finds that the issue of whether many of the identification witnesses' testimony was properly admitted was raised on direct appeal, as stated earlier herein. Furthermore, the Florida Supreme Court found that the testimony that was improperly admitted was harmless beyond a reasonable doubt. Finally, even if there was some deficient performance in this respect based upon counsel's failure to request such an instruction on

> every possible occasion, Defendant is unable to show prejudice. As the Florida Supreme Court also found in its opinion on direct appeal, there was additional substantial and competent evidence supporting Defendant's conviction. Had counsel requested such an instruction at every possible occasion, and had his request been granted on each occasion, there is not a reasonable probability that the result of the trial would have been different.

(PCR.9 1503-04).

The issue of whether the family/friends identification testimony was admitted properly was resolved on direct appeal. *Ibar*, 938 So. 2d at 459-64. There this Court concluded that some testimony was admitted properly, and the improper testimony was harmless beyond a reasonable doubt. As such, even if counsel were deficient for not raising the proper objection or seeking a limiting instruction, Ibar cannot show ineffectiveness under Strickland because he cannot show that the result of the trial would have been different. *See White*, 559 So. 2d at 1099-1100(rejecting ineffectiveness claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based upon earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); *Teffeteller*, 734 So. 2d at 1019(same); *Cherry*, 659 So. 2d at 1072(same). "[T]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. *See Maxwell*, 490 So. 2d at

932 (recognizing "court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied."); *Chandler*, 218 F.3d 1305.

Even had the proper objection been raised and the testimony limited the jury was left with substantial, competent evidence to support a conviction. As this Court concluded:

> A close examination of the evidence presented in this case, both the properly admitted and the inadmissible evidence, demonstrates the harmlessness of the error in this instance. In addition to the statements of Peguera, Vindel, Casas, and Klimeczko identifying Ibar, which Ibar concedes was proper as impeachment evidence but not substantive evidence, there were other witnesses and items of evidence from which the jury could conclude that Ibar was one of the perpetrators of this triple homicide. First, there was a videotape of the murders. The perpetrator identified as Ibar removed his disguise and his face was visible on the videotape. This videotape was played for the jury. Gary Foy, one of Sucharski's neighbors, testified that he saw two men leaving in Sucharski's Mercedes-Benz. He stated that he did not get a good look at the driver of the car, but he got a good look at the passenger. Foy identified Ibar as the passenger in the Mercedes. Klimeczko testified that at some point both Penalver and Ibar came to the residence on Lee Street in a big, black, shiny new car. Although Milman denied that he had ever positively identified Ibar as the person in the still photograph made from the videotape, he did say that the person in the photograph resembled Ibar. Moreover, the trial judge admitted as substantive evidence Milman's grand jury testimony in which he positively identified Ibar. Munroe's statement placing Ibar and Penalver together during the weekend of the murder was also admitted as substantive evidence. On the issue of identification, the jury also heard evidence from Kimberly San and David Phillips that placed Ibar and Penalver in the Mercedes. Both Peguera and her mother testified that the person in the photograph resembled Ibar. We

> conclude that any error in admitting some of these identification statements as substantive evidence rather than as impeachment evidence was harmless error.

Ibar, 938 So. 2d at 459-64. Given this, *Strickland* prejudice has not been established as the jury would have had the same evidence to consider. The summary denial should be affirmed.

(f) The claim counsel should have requested a jury instruction on the reliability of identification testimony is procedurally barred and meritless.

The evidentiary hearing closed on March 19, 2009 (PCR.15), but additional DNA testing was granted with written closing arguments being filed on May 9, 2011 (PCR.7 1042-1128; PCR.8 1228-1323). Before the court could rule, on December 12, 2011, Ibar filed a "supplement" to his postconviction relief motion. (PCR.8 1339-49) The court found the matter barred, but alternately reached the merits and denied relief. (PCR.9 1508, 1510-11). Ibar asserts he is entitled to an evidentiary hearing on this claim which he admits is a "essentially legal in nature." (IB 94-95).[23] The claim was denied properly.

Initially, the trial court pointed to *Lukehart v. State*, 70 So. 3d 503, 514 (Fla. 2011) in finding the supplemental claim "untimely and successive" as it was filed well after the

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[23] Ibar may not have it both ways. If it is a legal claim, there he is not entitled to further evidentiary development. If it is a factual claim, his has not overcome the bar to the late filing of the issue.

evidentiary hearing was held. (PCR.9 1508). The court also found that the claim was primarily based on *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011), a 2011 **New Jersey Supreme Court** decision which did not amount to "newly discovered evidence," thus there was no basis to overcome the procedural bar. (PCR.9 1508) Nonetheless, "out of an abundance of caution," the trial court reached the merits (PCR.9 1508) and concluded:

> . . . the opinion in *Henderson*, 208 N.J. 208, which was based on the state constitution of New Jersey, has no effect on the binding United States Supreme Court decision of *Manson v. Brathwaite*. This notion is particularly evidence in light of the January, 2012 *Perry* opinion of the United States Supreme Court reaffirming Manson.
>
> Moreover, pursuant to *Strickland*, reviewing courts must avoid the distorting effects of hindsight and counsel cannot be expected to anticipate changes in the law. . . . Defendant has failed to show that his suggested instructions would have been would have been granted even if requested. In fact, during trial, the court sustained a State objection to the defense argument that the jury should disregard the matter of eyewitness testimony. (Tr.53 at 6994-95). Based on the law regarding the matter of eyewitness identification testimony in effect at the time, counsel did not perform ineffectively in this regard.

(PCR.9 1511-2)

As the trial court concluded the supplement, is a successive, untimely, and unauthorized motion *See Lukehart*, 70 So. 3d at 514-15(holding "evidence revealed after the conclusion of an evidentiary hearing is proper in a successive motion for postconviction relief" not a motion to amend). Where a

defendant is not permitted to amend his postconviction motion to conform it to the evidentiary hearing evidence, he may not "supplement" his motion with new claims after the close of evidence. Fla. R. Crim. P. 3.851(f)(4) allows for amendments to a postconviction motion "up to 30 days prior to the evidentiary hearing upon motion and good cause shown." The evidentiary hearing here concluded in March 2009. As such, Ibar attempt to "supplement" his motion was unauthorized rendering the matter barred. Under *Lukehart*, 70 So. 3d at 514-15, for which Ibar has offered no basis under Fla. R. Crim. P. 3.851(d)-(f) to overcome the time bar and pursue piecemeal litigation. *See Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997)(stating defendant may not raise ineffectiveness claims on piecemeal basis by filing successive motions). *See Vining v. State*, 827 So. 2d 201, 213 (Fla. 2002)(holding "Where a previous motion for postconviction relief has raised a claim of ineffective assistance of counsel, the postconviction court may summarily deny a successive motion which raises an additional ground for ineffective assistance of counsel"). Ibar did not plead why this claim could not have been raised in the initial postconviction relief motion.

Moreover, as the trial court concluded, *Henderson*, 208 N.J. 208, is a New Jersey case and not binding in this jurisdiction. Below, Ibar suggested the United States Supreme Court framework for evaluating eyewitness identifications announced in *Manson v.*

Brathwaite, 432 U.S. 98 (1977) is outdated. Yet, the Court in *Henderson*, 208 N.J. 208 specifically stated it had "no authority, of course to modify *Manson*" and that it was basing its decision on its state constitution. *Henderson*, 208 N.J. 208, *Germantown Cab Co. v. Philadelphia Parking Auth.*, 27 A.3d 285, 287 n.10 (Pa. Commw. Ct. 2011). Thus, *Henderson*, 208 N.J. 208 has no effect on *Manson*, or more important, on Florida case law finding the standard jury instructions adequately inform the jury of it duty for deliberation of evidence. *Henderson* is not binding on Florida courts, *Flagg v. State*, 74 So. 3d 138 (Fla. 1st DCA 2011), *quoting, State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976)("Even though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts.").

Henderson does not offer a basis for relief under a *Strickland* analysis; neither deficient performance nor prejudice is shown in light of this Court's decision in *Johnson*, 438 So. 2d at 774(identifying factors relating to reliability of identification testimony). The Court stated "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony" *Id.* at 777. See *Sutton v. State*, 909 So. 2d 292, 293 (Fla. 3d DCA 2004)(holding where witness was questioned about her ability

to perceive and report what she has seen and the standard jury instruction on evidence weighing was given, a special instruction on eyewitness testimony was not required); *Green*, 975 So. 2d, 1108(finding counsel was not ineffective for failing to get a special jury instruction on cross-racial aspects of eyewitness testimony where Florida had no standard instruction on that issue); *Rose*, 617 So. 2d at 297(holding counsel was not ineffective for failing to obtain expert in eyewitness identification when, instead, he pointed out inconsistencies between the eyewitnesses' testimony as well as differences in the trial testimony and the witness' earlier statements). Ibar has not shown that his suggested instruction would have been granted as it would have required the court to comment on the evidence which is impermissible under Florida law and given Morgan's extensive cross-examination, and the evidence remaining against the defendant not based on identification where the witness does not know Ibar. The State reincorporates its arguments presented above supporting the identification evidence developed in this case. Ibar has not carried his burden under *Strickland* and relief was denied properly.

CLAIM II: IBAR HAS FAILED TO CARRY HIS BURDEN OF PROVING A *BRADY* VIOLATION (IB 96-100, RESTATED)

OVERVIEW.

An evidentiary hearing was held on Ibar's *Brady*[24] claim (Claim II below; PCR.1 187-89) related to: (1) a lead pointing to John Giancarlo Rabino ("Rabino") as a possible suspect; (2) information that Klimeczko told his mother "something bad was going to happen;" and (3) information regarding all persons to whom the images of the perpetrators, were shown, but denied the photographs resembled Ibar." An evidentiary hearing was denied on Claim III below alleging a *Brady* violation from the State's failure to maintain the surveillance equipment used to record the homicides. The trial court denied relief on all grounds and Ibar claims here that such was error. The State disagrees.

A. The Standard of Appellate Review.

Waterhouse v. State, 82 So. 3d 84, 106 (Fla. 2012), provides the standard of review for a *Brady* claims:

> *Brady* claims present mixed questions of law and fact. . . . Thus, as to findings of fact, we will defer to the lower court's findings if they are supported by competent, substantial evidence. . . . "[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to

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[24] *Brady*, 373 U.S. 83

> be given to the evidence by the trial court." . . . We review the trial court's application of the law to the facts *de novo*.
>
> *Franqui v. State*, 59 So. 3d 82, 102 (Fla. 2011)(c.o.)

"The *Brady* rule requires that the prosecution not suppress evidence favorable to an accused where that 'evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady*, 373 U.S. at 87." *Boyd v. State*, 910 So. 2d 167, 179 (Fla. 2005). This Court has announced that:

> To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. . . . To meet the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." . . . Giving deference to the trial court on questions of fact, this Court reviews *de novo* the application of the law and independently reviews the cumulative effect of the suppressed evidence.

Pagan, 29 So. 3d, 946-47 (citations omitted) *See Boyd*, 910 So. 2d, 179; *Johnson v. State*, 921 So. 2d 490, 507 (Fla. 2005); *Lightbourne v. State*, 841 So. 2d 431, 437-38 (Fla. 2003); *Stephens v. State*, 748 So. 2d 1028, 1031-32 (Fla. 1999); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Way v. State*, 760 So. 2d

903 (Fla. 2000); *Jones v. State*, 709 So. 2d 512, 519 (Fla. 1998); *Hegwood v. State*, 575 So. 2d 170, 172 (Fla. 1991); *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999);[25] *United States v. Agurs*, 427 U.S. 97, 109-10 (1976); *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000); *United States v. Starrett*, 55 F.3d 1525, 1555 (11th Cir. 1995). Evidence has not been suppressed, and therefore, "'[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.'" *Freeman v. State*, 761 So. 2d 1055, 1061-62 (Fla. 2000)(*quoting Provenzano v, Provenzano v. State*, 616 So. 2d 428 (Fla. 1993)).

B-1. The Trial Judge's Order Following an Evidentiary Hearing. The State contends that the evidence and the law support the trial court's rejection of the *Brady* claims, both after an evidentiary hearing and summarily. After the evidentiary

[25] While *Strickler*, 527 U.S. 263 does not contain that requirement as a separate prong, the "due diligence" requirement remains a part of the standard. In *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000), it was reasoned: "[a]lthough the 'due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *See Pagan*, 29 So. 3d, 952; *Way*, 760 So. 2d 903;*High*, 209 F.3d 1257 *High*, 209 F.3d 1257.

hearing, the trial court concluded:

> First, this Court finds that Defendant has failed to establish that this alleged information regarding Rabino, Klimeczko, and other persons shown still pictures from the videotape was not know about by the defense. ". . .[T]here was no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." . . . As Mr. Morgan admitted at the evidentiary hearing, much of the trial preparation was left up to his co-counsel, Ms. Brush. [Morgan] also testified that he may have delegated the task of looking for other suspects to Ms. Brush. However, despite this burden, and despite Ms. Brush's important role as co-counsel and her investigative duties in this case, Defendant has failed to show that the defense did not possess or was unaware of this allegedly suppressed material.
>
> Moreover, even assuming *arguendo* that Defendant established that these materials were suppressed, he has not demonstrated materiality as required. . . .

(PCR.9 1517).

With respect to the individual items, the trial court found that Ibar had failed "to state which composite picture(s) were shown and whether this alleged suspect Rabino looked like Defendant (or the co-defendant). Defendant also failed to question Mr. Morgan as to how this information would fit into the defense preparation and trial." (PCR.9 1527-28). As a result the trial court concluded Ibar failed to show that there was a reasonable probability that the evidence would have resulted in the jury reaching a different verdict. (PCR.9 1528).

Turning to the comments Klimeczko's mother had related her son had made, the trial court found "that the report also

contains his comment to his mother stating how 'he could not believe that Pablo did that.'" (PCR.9 1528). Again, the court found Ibar failed to prove that had the evidence been disclosed a different verdict would have been reached. (PCR.9 1528).

With respect to the alleged information that other persons were shown the images, but denied the images depicted or resembled Ibar the trial court reasoned the allegation was "purely speculative, as are the allegations that any such list or report exists" and:

> Because it is Defendant's burden to come forward with a document or information that was suppressed, and because he has not done so in anything other than a purely speculative manner, he has not carried his burden under Brady and is not entitled to relief on this sub-claim.

(PCR.9 1528)

B-2. The Trial Judge's Order Summarily Denying Relief.

The court denied an evidentiary hearing on the claim the State's failure to preserve the camera and video surveillance equipment was a due process violation and later reasoned:

> Defendant does not allege any malice on the part of the State in this respect and does not allege how these items would be exculpatory or impeaching. "In order for there to be a denial of due process, where there is no bad faith, the lost evidence must be more than merely potentially useful to the defense." *Felder v. State*, 873 So. 2d 1282, 1283 (Fla. 4th DCA 2004). This claim is legally insufficient and without merit.

(PCR.9 1505)

D. The Trial Court Was Correct.

Turning to the evidentiary hearing claims first, In apparent support of this claim, Ibar questioned Morgan regarding his efforts to find other suspects. Morgan explained that he may have delegated this task to Brush, but does not recall the person named "Sarsour." (PCR.14 2218; Defense Ex. #19). Likewise, Morgan was not familiar with the name John Giancarlo Rabino ("Rabino"), and did not see the name in the discovery documents. (PCR.14 2263-64). With respect to statement made by the mother of Klimeczko that her son had told her "something bad was going to happen," Morgan testified that he did not know of the statement, but would have to rely on the record of his cross-examinations of Klimeczko and Craig Scarlett. (PCR.14 2264-65). This testimony supports the trial court's determination that Ibar failed to prove that the defense was unaware of this information or that it was material.

Ibar's evidentiary presentation of his *Brady* sub-claims is completely lacking. He failed to establish that the reports on Rabino, Klimeczko, and other persons shown stills from the videotape were not known to the defense team as Morgan stated he may have delegated the task of looking for other suspects to Brush and that he relied upon Brush for much of the trial preparation. As this Court will recall, Brush was not presented as a witness at the postconviction evidentiary hearing, thus, Ibar has not shown that the defense team was unaware of the

allegedly suppressed material and/or at least the content of the reports. This basis alone supports the denial of the claim. *See Pagan*, 29 So. 3d at 946-47(rejecting *Brady* claim where defense knew name of person discussed in undisclosed report).

Also, Ibar's evidentiary presentation failed entirely to explain how the police report on Rabino stating someone recognized he was one of the composite pictures was favorable to the defense. For example, Ibar does not address what composite pictures were shown; was Rabino alleged to look like Ibar or Penalver; was Rabino alleged to have been seen in the victim's car just after the murders; and whether Rabino had a weapon similar to that used in the murders. Not only has Ibar failed to present evidence that the information on Rabino is exculpatory/impeaching, but Ibar never asked Morgan how that information would have fit into the defense preparations and investigation. Such deficiencies in Ibar's pleading and evidentiary presentation support the denial of relief.

Moreover, with respect to Klimeczko's comment to his mother sometime after the homicide that "something bad was going to happen," Ibar offered nothing to explain how the statement was *Brady* material. As the Court will recall, at trial, Klimeczko admitted to having had a fight with Ibar and being kicked out of his home on the day of the crime, and that a few days later, his mother's home was struck by gun fire in a drive-by shooting. It

was imperative under *Brady*, to explain how a report by Klimeczko's mother was referring to the homicide and not just the fact that there had been a falling out between Klimeczko and Ibar ending up in a drive-by shooting. Also, Ibar failed to explain how the report which contains Klimeczko's comment that "he could not believe that Pablo did that" was exculpatory.

As his final *Brady* claim, Ibar asserts that the State did not turn over information regarding the people to whom the perpetrator images were shown, but who denied such resembled Ibar. The argument offered in the postconviction motion was that because the State offered "virtually every person to who it showed the distilled images of the perpetrators and who putatively claimed Ibar was, or resembled, the perpetrator," the detective must have shown the images to others who could not identify Ibar. (PCR.1 189). Such an allegation is speculative at best, as the trial court so found, as Ibar fails to aver that such a list/report exists and that it was suppressed. Given the automatic public records disclosure under Fla. R. Crim. P. 3.852, and the dictates of *Brady*, Ibar has the burden to come forward with a document/information that was suppressed. The trial court found Ibar failed to come forward with a suppressed document and the record bears this out. Hence, the trial court's ruling finding Ibar failed to carry his burden is proper and should be affirmed.

Furthermore, while Ibar has not shown suppression of favorable material, which alone supports denial of relief, the State submits the trial court's finding of lack of materiality is supported by the record. Not only was the jury given the videotape of the crime to view and draw their own conclusion as to whether Ibar was the person in the video who removed his shirt, but the jury had the other identification evidence: (1) Gary Foy's identification of Ibar as the passenger in the victim's car leaving the crime scene shortly after the time of the murders; (2) the identification testimony from Ian Milman and Melisa Munroe that Ibar was the person on the still photos taken from the videotape; (3) the testimony of Klimeczko, Kimberly San, David Philips, and Ian Milman linking Ibar to the victim's Mercedes-Benz just after the murders; (4) the impeachment testimony of Roxana Peguera, Marlene Vindel, Maria Casas, Klimeczko indicating Ibar was the person on the videotape; and (5) Klimeczko's admission that he was kicked out of Ibar's home on the day of the murders and two days later his mother's house was hit by gun fire. *Ibar*, 938 So.2d 459-64, 469-70. Ibar has not shown there is a reasonable probability that had the report with information about Rabino been disclosed, "the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "'The mere possibility that an item of undisclosed information might have

helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" *Gorham*, 521 So. 2d at 1069(*quoting Agurs*, 427 U.S. at 109-10). As the trial court concluded, Ibar's evidentiary hearing presentation did not even come close to meeting this standard. This Court should affirm the denial of relief.

Ibar also challenges the denial of his claim that his due process rights were violated by the State's failure to secure and maintain the videotaping surveillance equipment. The trial court's denial of relief was proper and should be affirmed. This Court will agree that the claim is insufficiently plead and meritless. It is well settled that absent allegations and proof of some malice on the part of the State, Ibar cannot support his claim. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Reaves v. State*, 826 So. 2d 932, 942 (Fla. 2002)(finding *Brady* claim legally insufficient and denied properly where defendant failed to allege how evidence was exculpatory or impeaching); *Asay v. State*, 769 So. 2d 974, 982 (Fla. 2000)(holding court does not err in refusing to grant evidentiary hearing as to *Brady* claims which were insufficiently pled).

In *Youngblood*, 488 U.S. 51, a case involving "potentially useful evidence" that was collected but not preserved, the Supreme Court reasoned the defendant would have to prove "bad faith on the part of the police" before relief may be granted.

Youngblood, 488 U.S. at 57-58. This Court, relying upon *Youngblood*, has held that if evidence is lost or totally consumed during testing, the burden is on the defendant to show bad faith by the State in failing to preserve evidence. *See King v. State*, 808 So. 2d 1237, 1242-43 (Fla. 2002). "In order for there to be a denial of due process, where there is no bad faith, the lost evidence must be more than merely potentially useful to the defense." *Felder*, 873 So. 2d, 1283(considering case in which the police both collected bicycle that was later lost and failed to collect tools and tool boxes located at scene).

Here, merely in the heading to the claim (PCR.1 190), Ibar alleged a due process violation for failing to keep the video equipment. As the court found, and the record supports, Ibar has not alleged malice on the part of the State nor has he offered how such would be exonerating.[26] Hence, his claim was denied properly as legally insufficient and meritless.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court affirm the denial of postconviction relief.

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[26] While Ibar suggests the equipment might have been of assistance to allow for analysis, he has not established such would result in exculpatory evidence. Moreover, as noted above, Ibar failed to plead malice. Such are fatal to his claims.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL and E-MAIL on March 4, 2013 to Benjamin S. Waxman, Esq.; Robbins, Tunkey, Ross, Amsel, Rabin, & Waxman, P.A.; 2250 SW Third Avenue, 4th Floor; Miami, FL 33129; benjiwaxman@aol.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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